

Billing Code 4310-55

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-HQ-ES-2012-0077]

[4500030115]

**Endangered and Threatened Wildlife and Plants; 90-Day Findings on Petitions to Delist
U.S. Captive Populations of the Scimitar-horned Oryx, Dama Gazelle, and Addax**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition findings and initiation of status review.

SUMMARY: We, the U.S. Fish and Wildlife Service (“Service”), announce 90-day findings on two petitions to remove the U.S. captive-bred and U.S. captive populations of three antelope species, the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*), from the List of Endangered and Threatened Wildlife as determined

under the Endangered Species Act of 1973, as amended (Act or ESA). Based on our review, we find that the petitions present substantial information indicating that delisting the U.S. captive animals or U.S. captive-bred members of these species may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the U.S. captive members of these species to determine if delisting the U.S. captive specimens is warranted. Based on the status review, we will issue a 12-month finding on these two petitions, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: The findings announced in this document were made on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: These findings are available on the Internet at <http://www.regulations.gov> at Docket Number FWS-HQ-ES-2012-0077. Supporting documentation we used in preparing these findings is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203. Please submit any new information, materials, comments, or questions concerning these findings to the above street address.

FOR FURTHER INFORMATION CONTACT: Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2171. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition, and publish our notice of the finding promptly in the **Federal Register**.

Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted” (50 CFR 424.14(b)). If we find that substantial scientific or commercial information was presented, we are required to promptly conduct a species status review, which we subsequently summarize in our 12-month finding.

Petition History

On June 29, 2010, we received two petitions, one dated June 29, 2010, from Nancie

Marzulla, submitted on behalf of the Exotic Wildlife Association (EWA), and one dated June 28, 2010, from Anna M. Seidman submitted on behalf of Safari Club International and Safari Club International Foundation (SCI). The SCI petitioner requested that the “U.S. captive populations” of three antelope species, the scimitar-horned oryx (*Oryx dammah*), dama gazelle (*Gazella dama*), and addax (*Addax nasomaculatus*), be removed from the Federal List of Endangered and Threatened Wildlife (List) under the Act. The SCI petitioner also requested that we “correct the Endangered Species Act listing of scimitar-horned oryx, dama gazelle, and addax to specify that only the populations in the portion of their range outside of the United States are classified as endangered.” The EWA petitioner requested that the “U.S. captive-bred populations” of these same three species be removed from the List. Both petitions indicated that removal or delisting of the U.S. captive or U.S. captive-bred individuals of these species was warranted pursuant to 50 CFR 424.11(d)(3) because the Service’s interpretation of the original data that these species are endangered in their entirety was in error. EWA’s petition contained an additional ground for recommending delisting of the “U.S. captive-bred populations” of these species on the basis that these “populations” have recovered pursuant to 50 CFR 424.11(d)(2). Both petitions clearly identified themselves as such and included the requisite identification information for the petitioners, as required by 50 CFR 424.14(a).

Previous Federal Action(s)

Two subspecies of the dama gazelle, the Mhorr gazelle (*Gazella dama mhorr*) and Rio de Oro dama gazelle (*G. d. lozanoi*) were listed as endangered in their entirety, i.e. wherever found, on June 2, 1970 (35 FR 8491). On November 5, 1991, we published in the **Federal Register** (56

FR 56491) a proposed rule to list the scimitar-horned oryx, addax, and dama gazelle as endangered in their entireties. We re-opened the comment period on the proposed rule to request information and comments from the public on June 8, 1992 (57 FR 24220), July 24, 2003 (68 FR 43706), and again on November 26, 2003 (68 FR 66395).

On February 1, 2005 (70 FR 5117), we announced a proposed rule and notice of availability of a draft environmental assessment to add new regulations under the Act to govern certain activities with U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle, should they become listed as endangered. The proposed rule covered U.S. captive-bred live animals, including embryos and gametes, and sport-hunted trophies, and would authorize, under certain conditions, certain otherwise prohibited activities that enhance the propagation or survival of the species. The “otherwise prohibited activities” were take; export or re-import; delivery, receipt, carrying, transport, or shipment in interstate or foreign commerce, in the course of a commercial activity; or sale or offering for sale in interstate or foreign commerce. In the proposed rule, we found that the scimitar-horned oryx, addax, and dama gazelle are dependent on captive breeding and activities associated with captive breeding for their conservation, and that activities associated with captive breeding within the United States enhance the propagation or survival of these species. We accepted comments on this proposed rule until April 4, 2005.

On September 2, 2005, we published a final rule listing the scimitar-horned oryx, addax, and dama gazelle as endangered in their entirety (70 FR 52319). On September 2, 2005, we also added a new regulation (70 FR 52310) at 50 CFR 17.21(h) that excluded the U.S. captive-bred animals of these three species, as described above, from certain prohibitions under the Act. The

promulgation of the regulation at 50 CFR 17.21(h) was challenged as violating section 10 of the Act and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), first in both the U.S. District Court for the Northern District of California and the U.S. District Court for the District of Columbia, but then transferred and consolidated in the U.S. District Court for the District of Columbia (*see Friends of Animals v. Ken Salazar* and *Cary v. Gould*, 626 F. Supp. 2d 102 (D.D.C. 2009)). The Court found that the rule for the three antelope species violated section 10(c) of the Act by not providing the public notice of and an opportunity to comment on activities being carried out with U.S. captive specimens of these three antelope species. On June 22, 2009, the Court remanded the rule to the Service for action consistent with its opinion. To comply with the Court's order, we published a proposed rule on July 7, 2011 (76 FR 39804), to remove the regulation at 50 CFR 17.21(h), thus eliminating the exclusion for U.S. captive-bred scimitar-horned oryx, addax, and dama gazelle from certain prohibitions under the Act. Under the proposed rule, any person who intended to conduct an otherwise prohibited activity with U.S. captive-bred scimitar-horned oryx, addax, or dama gazelle would need to qualify for an exemption or obtain authorization for such activity under the Act and applicable regulations. On January 5, 2012, we published a final rule (77 FR 431) removing the regulation at 50 CFR 17.21(h).

Species Information

The scimitar-horned oryx, dama gazelle, and addax are each native to several countries in northern Africa. Although previously widespread in the region, populations have been greatly reduced primarily as a result of habitat loss, uncontrolled killing, and the inadequacy of

regulatory mechanisms (70 FR 52319). Estimated numbers of individuals in the wild are extremely low. The oryx is believed to be extirpated in the wild, the addax numbers fewer than 300, and the dama gazelle numbers fewer than 500. All three species are listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The International Union for Conservation of Nature (IUCN) Red List categorizes the oryx as “extinct in the wild,” and the dama gazelle and addax as “critically endangered” (IUCN Species Survival Commission (SSC) Antelope Specialist Group 2008; Newby and Wachter 2008 in IUCN Redlist 2012; Newby *et al.* 2008 in IUCN Redlist 2012). All three species are listed under the Act as endangered in their entireties (see 50 CFR 17.11(h)).

The Sahara Sahel Interest Group (SSIG) estimates that there are approximately 4,000 to 5,000 scimitar-horned oryx, 1,500 addax, and 750 dama gazelle in captivity worldwide (70 FR 52319). These include at least 1,550 scimitar-horned oryx and 600 addax held in managed breeding programs in several countries around the world. We are unaware of information indicating numbers of dama gazelle currently held in managed breeding programs. In addition to individuals of these species held in managed breeding programs, captive individuals are held in private collections and on private game farms and ranches in the United States and the Middle East (IUCN SSC Antelope Specialist Group 2008; Newby and Wachter 2008 in IUCN Redlist 2012; Newby *et al.* 2008 in IUCN Redlist 2012; 70 FR 52310).

As part of planned reintroduction projects, captive-bred individuals of the three antelope species have been released into fenced, protected areas in Tunisia, Morocco, and Senegal. These animals may be released into the wild when adequately protected habitat is available. However,

continued habitat loss and wanton killing have made reintroduction nonviable in most cases (70 FR 52319).

For more information on the scimitar-horned oryx, dama gazelle, and addax, see our final listing rule for these species (70 FR 52319; September 2, 2005).

Standards for Evaluating Information in the Petitions

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations at 50 CFR Part 424 set forth the procedures for adding a species to, or removing a species from, the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

We must consider these same five factors in delisting a species as they relate to the definitions of endangered and threatened species. We may delist a species according to 50 CFR

424.11(d) only if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons:

- (1) The species is extinct;
- (2) The species has recovered and is no longer endangered or threatened; or
- (3) The best scientific or commercial data available at the time the species was classified, or the interpretation of such data, were in error.

In considering a petition under section 4(b)(3) of the Act, we generally evaluate the information presented in the petition, along with information available in our files, on threats to the species. But in this instance, first we must evaluate whether SCI and EWA have submitted valid petitions to add, remove, or reclassify a “species” as that term is defined in the Act. Our evaluation is presented below.

Evaluation of the Information in the SCI and EWA Petitions

As previously mentioned, SCI requests delisting of the “U.S. captive populations” of the three antelope species based on the assertion that the Service committed “errors” in the interpretation of the best scientific and commercial data available at the time of the 2005 determination to list the scimitar-horned oryx, dama gazelle, and addax as endangered in their entirety. SCI also requests that we “correct the Endangered Species Act listing of scimitar-horned oryx, dama gazelle, and addax to specify that only the populations in the portion of their range outside of the United States are classified as endangered.” EWA requests delisting of the

U.S. captive-bred populations of the three antelope species on the basis that the Service's interpretation of the original data for the listings was also in error, and in addition asserts that captive-bred animals of the three species that are held in the United States are recovered. Essentially, both petitioners request separate designation, or legal status, under the Act for captive animals held within the United States from that of members of the same taxonomic species located in the wild or held in captivity elsewhere around the world.

The Service completed its listing determination for the three antelope species in 2005. In that rulemaking process, the Service found that a differentiation in the listing status of captive U.S. specimens of these antelopes was not appropriate (70 F.R. 52319). While the Service does not have an absolute policy or practice with respect to whether it can differentiate the listing status of captive and wild specimens of the same species, we generally have included wild and captive animals together when listing species. Nevertheless, petitioners assert that the treatment by the Service of chimpanzees in 1992 warrants similar treatment now for these antelope species. In that 1992 rulemaking, the Service uplisted chimpanzees in the wild to endangered, while retaining the prior status of threatened for those in captivity. That 1992 action preceded the adoption by the Service and the National Marine Fisheries Service of the Distinct Population Segment (DPS) Policy (61 FR 4722, February 7, 1996) and case law that has developed under the DPS Policy, such as the decision in *Alesea Valley v. Evans* (161F. Supp. 2d 1154 (D.OR)). Nonetheless, because the Service has no absolute policy or practice as to whether it can differentiate the listing status of wild and captive specimens of the same species, a reasonable person could conclude that the petitioned action may be warranted.

Finding

We find that the two petitions contain substantial information that the petitioned action may be warranted. It is important to note that the “substantial information” standard for a 90-day finding is in contrast to the Act’s “best scientific and commercial data” standard that applies to a 12-month finding as to whether a petitioned action is warranted. A 90-day finding is not a status assessment of the species and does not constitute a status review under the Act. Our final determination as to whether a petitioned action is warranted is not made until we have completed a thorough status review of the captive antelopes covered by these petitions, which is conducted following a 90-day finding that a petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted (“substantial 90-day finding”). Because the Act’s standards for 90-day and 12-month findings are different, as described above, a substantial 90-day finding does not necessarily mean that the 12-month finding will conclude that the Service has the discretion to treat such specimens differently, or that the petitioned action is warranted. It does, however, mean that the Service will be able to consider this question in more depth and detail. In addition, the Service will be able to consider the question of the appropriate status of U.S. captive members of the three antelope species at the same time as it considers the status of captive chimpanzees in completing a separate 12-month finding on a petition to eliminate the separate ESA classification of captive and wild chimpanzees. The substantial 90-day finding on the chimpanzee petition was published September 1, 2011 (76 FR 54423), and a document to reopen the comment period was published November 1, 2011 (76 FR 67401).

With this substantial 90-day finding, we are initiating a rangewide status review of the captive antelopes covered by the petitions, and, once it is completed, we will make a finding on whether delisting the U.S. captive specimens of any of these species is warranted. This finding fulfills any obligation under 16 U.S.C. 1533(b)(3)(A) and the regulations at 50 CFR 424.14(b).

References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> and upon request from the Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT**).

Author


The primary authors of this notice are the staff of the Branch of Foreign Species (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

SEP 12 2012

Dated: _____



Director, U.S. Fish and Wildlife Service

~~{Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition to Delist the U.S. Captive Populations of the Scimitar-horned Oryx, Dama Gazelle, and Addax}~~