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Subdelegation of Authority under the Endangered Species Act: Secretarial Authority to Subdelegate His Duties to a Citizen Management Committee as Proposed for the Selway-Bitterroot Wilderness Grizzly Bear Reintroduction

Brenda Lindlief Hall*

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I. INTRODUCTION

In 1997, the Secretary of Interior (Secretary), Bruce Babbitt, proposed reintroducing grizzly bears into the Selway-Bitterroot Wilderness as a nonessential,[1] experimental[2] population under the Endangered Species Act

*. J.D. 1998, University of Montana School of Law, Missoula, MT. This article began as a memorandum for my former boss, Thomas M. France, Senior Legal Counsel for the National Wildlife Federation in the Missoula, Montana office. I owe Tom a sincere and special thanks for his contributions to this article, including his editorial comments and support. A very special thanks is also owed to Professor Rick Bales who edited this article and encouraged me submit it for publication. Professor Bales is now teaching at Chase Law School, Northern Kentucky University, Highland Heights, Kentucky. Thanks also to the interns at the National Wildlife Federation office in Missoula for their initial research contributions, and to everyone else who edited and commented on this article.

1. *See* 16 U.S.C. § 1539(j)(2)(B) (1994) (providing that before the Secretary may authorize the release of an experimental population of a threatened or endangered species, he shall by regulation identify the population and determine, based on the best information available, whether or not such experimental population is "essential to the continued existence" of such threatened or endangered species).

2. *See* 16 U.S.C. § 1539(j)(1) (1994) (providing that an "experimental population" means any

(ESA)[3]. Grizzly bears were listed as a "threatened"[4] species under the ESA in 1975.[5] The grizzly's range once stretched from Canada to Mexico. An estimated 50,000 grizzlies roamed the American west before European settlement[6]. Today, grizzlies occupy only about 2% of their original range, and only about 800 to 1,000 grizzlies are left in a few isolated populations in Montana, Idaho, Wyoming and Washington.[7] To reverse this trend, the Secretary has proposed reintroducing grizzlies to reestablish a viable grizzly population in the Bitterroot ecosystem that spans the Idaho-Montana border.[8] Under his proposal, a Citizen Management Committee (CMC) would be appointed to oversee the reintroduction effort.[9]

The proposed reintroduction of grizzlies is extremely controversial because grizzlies are perceived by some as being dangerous to humans and as posing a threat to livestock and, therefore, the welfare of the ranching and agricultural communities.[10] The use of a CMC to oversee the reintroduction of grizzlies into the Selway-Bitterroot has also come under heavy fire.[11] Representative Helen Chenoweth (R-Idaho), Idaho Governor Phil Batt, other Idaho congressional delegates, and Idaho state and local government officials expressed concern as to whether the Secretary has the legal authority under the ESA to delegate his management responsibilities to a Citizen Management Committee.[12] However, a close look at the ESA and its legislative history indicates that using tools such as a CMC are indeed sanctioned by Congress. While there have been no cases directly construing the establishment of a CMC under the ESA, applicable precedent on the subdelegation of authority by agencies supports the regulation

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population authorized for release under subsection (2) which is located in a completely separate geographical area from any nonexperimental populations, that is, it must be outside the current range of the nonexperimental population).

3. Endangered and Threatened Wildlife and Plants: Proposed Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area of Idaho and Montana, 62 Fed. Reg. 35,762 (1997) (to be codified at 50 C.F.R. § 17) (proposed July 2, 1997).

4. *See* 16 U.S.C. § 1532(20) (1994) (defining "threatened species" as any species likely to become endangered within the foreseeable future throughout all or a major part of its range. Endangered" means that a species is in danger of extinction throughout all or a significant portion of its range).

5. Under 16 U.S.C. §1533(d), the Secretary "shall issue such regulations as he deems necessary" to provide for the conservation of threatened species; he may propose the same prohibitions set forth for endangered species under 16 U.S.C. §1538(a)(1).

6. 62 Fed. Reg. 35,763.

7. *Id.* at 35,763.

8. *Id.* at 35,764-765.

9. *Id.* at 35,766.

10. *See, e.g.*, Dan Whipple, *Grizzly Details: Local Management of Bear Reintroduction Draws Fire*, IDAHO FALLS POST REGISTER, Dec. 11, 1997, at B1.

11. *Id.*

12. *See, e.g.*, Fredreka Schouten, *Idaho Officials Tell Congress: No Grizzlies!*, IDAHO STATESMAN, June 13, 1997, at A1.

developed by the Department of Interior.[13]

The question of whether the use of a Citizen Management Committee to oversee the grizzly reintroduction effort is a proper exercise of the Secretary of the Interior's authority under the ESA turns on an analysis of the extent of the Secretary's discretion under the ESA and an application of the subdelegation doctrine. Part II of this article provides a general background discussion of the Citizen Management Committee and how Committee fits into the overall statutory scheme of the ESA. Part III sets out the subdelegation doctrine and discusses cases applying the doctrine. Part IV applies case law construing the subdelegation doctrine to the Citizen Management Committee proposal. Finally, this article concludes that use of a Citizen Management Committee by the Secretary is entirely consistent with the ESA, and is a proper subdelegation of authority from the Secretary to an eligible private-public entity.

II. THE ENDANGERED SPECIES ACT AND THE ADDITION OF SECTION 10(J) AS A FLEXIBLE CONSERVATION TOOL

Under the ESA, Congress charged the Secretary of Interior with the duty to conserve endangered and threatened species, and granted the Secretary expansive powers to achieve this goal.[14] The ESA defines "conservation" as the use of "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided" under the ESA are no longer needed.[15] As the U.S. Supreme Court has observed, an "examination of the language, history and structure" of the ESA "indicates beyond doubt, that Congress intended endangered species to be afforded the highest of priorities."[16]

The Secretary's powers are defined by several specific provisions found in the ESA. Section 7(a)(1) requires the Secretary to use his authority to carry out programs for the "conservation" of listed species.[17] The ESA expressly provides that "conservation" includes transplantation as a means of promoting species recovery.[18] The above provisions complement the section 10(j) experimental population provision, and provide the Secretary with extensive powers to reintroduce species under circumstanc-

13. *See, e.g.*, Pistachio Group of the Ass'n of Food Industries v. United States, 671 F. Supp. 31, 36 (Ct. Int'l Trade 1987).

14. *See* 16 U.S.C. § 1533(d) (1994).

15. 16 U.S.C. § 1532(3) (1994).

16. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978). In addition to the ESA, the Secretary has ample authority under other statutes to import and relocate species. *See, e.g.*, 16 U.S.C. § 742f(a)(4) (1994) (listing general powers of Secretaries of Interior and Commerce); 16 U.S.C. § 661 (1994) (authorizing Secretary of Interior to protect and preserve fish and wildlife in general).

17. 16 U.S.C. § 1536(a)(1) (1994).

18. § 1532(3).

es that, in the expert judgment of the Secretary, are considered best for the species.

A. *The Addition of Section 10(j)*

In 1982, Congress amended the ESA to include Section 10(j), the experimental population provision.[19] As the legislative history behind this amendment reveals, Congress recognized that reintroduction programs were a valuable wildlife management tool and sought to encourage their use in recovering threatened and endangered species.[20] As an incentive for reintroduction efforts, Congress directed that nonessential experimental populations be treated as "threatened species," with no requirement that federal agencies consult with the U.S. Fish and Wildlife Service (USFWS) under section 7, and no requirement that USFWS designate critical habitat under section 4.[21] In exempting nonessential, experimental populations from the Section 7 consultation and "no jeopardy"[22] provisions and from the Section 4 requirement to designate critical habitat for threatened and endangered species, Congress hoped to "make the ESA a more efficient conservation tool."[23]

B. *The Citizen Management Committee Proposal*

Under the authority of the ESA, Section 10(j), Secretary Babbitt proposed the reintroduction of grizzly bears into the Selway-Bitterroot Wilderness as a nonessential, experimental population.[24] Section 10(a) of the ESA empowers the Secretary to write specific regulations explaining how reintroduced populations will be managed.[25] For grizzly bear reintroduction into the Selway-Bitterroot Wilderness, the Secretary proposes to establish a fifteen-member Citizen Management Committee (CMC), which is to be appointed after receiving recommendations from the Governors of

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19. *See* Endangered Species Act Amendments of 1982, Pub. L. No. 97-304 (1982).

20. H.R. REP. NO. 567, 97th Cong., 2d Sess., at 33 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2808.

21. *See* 16 U.S.C. § 1539(j)(2)(C) (1994); *cf.* 16 U.S.C. §§ 1533(b)(2), 1536(a) (1994). Section 4 requires designation of critical habitat concurrent with the listing of any species as threatened or endangered, while Section 7 requires interagency consultation on all federal projects where there is reason to believe that threatened or endangered species may be present in the proposed project area and where the proposed action is likely to affect such species.

22. Pursuant to § 7(a)(2), all federal agencies are required to insure that any action "authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any" endangered or threatened species "or result in the destruction or adverse modification of habitat of such species which is . . . determined to be critical . . . ."
16 U.S.C. § 1536(a)(2) (1994).

23. H.R. REP. NO. 567, at 8.

24. 62 Fed. Reg. 35,762.

25. 16 U.S.C. § 1539(a)(1)(A) (1994).

Montana and Idaho and affected Indian tribes.[26] The Secretary of Agriculture and the Secretary of Interior would also each appoint a member.[27]

Once appointed, the CMC would have the authority to develop management plans, oversee the activities of the state fish and wildlife agencies working on the grizzly program, and otherwise exercise power and authority on behalf of the Secretary for the grizzly reintroduction effort.[28] The proposed rule expressly provides that all decisions must lead toward recovery of the grizzly, be in accordance with the ESA, be based on the best scientific and commercial data available, and minimize social and economic impacts.[29] The proposed rule also provides that the Secretary shall review a two-year work plan submitted by the committee outlining the CMC's policy direction for the reintroduction effort.[30] Moreover, the Secretary can reassume management authority if the Secretary finds that the decisions of the committee are not leading to grizzly recovery.[31] As discussed below, Section 10, when combined with other provisions of the ESA, strongly supports the Secretary's use of the CMC.

C. *How Section 10(j) Fits Into the Overall ESA Scheme*

Section 10(j) does not speak to whether a citizen management committee may oversee an experimental population program.[32] However, when Section 10 (j) is coupled with the Secretary's broad powers under the ESA and the congressional intention that the Secretary develop special programs to address the "particular" needs of reintroduced populations, it creates a strong presumption that Congress granted the Secretary sufficient discretion to establish such a management scheme.[33] This presumption is buttressed by how Section 10(j) works within the context of the entire ESA.

Under Section 10(j), experimental populations are treated as threatened species.[34] While the ESA contains many prescriptive requirements for the management of endangered species, the law vests the Secretary with broad authority to conserve threatened species stating: "[T]he Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species."[35] The Secretary may use

26. 62 Fed. Reg. 35,770.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 35,772.
31. *Id.*.
32. *See* 16 U.S.C. § 1539(j) (1994).
33. *See* §§ 1531-1539; H. R. REP. No. 567, at 8.
34. 16 U.S.C. § 1539(j)(2)(C) (1994).
35. § 1533(d).

"all methods and procedures" necessary to conserve both threatened species and nonessential experimental populations. The establishment of a citizen management committee is certainly a "method" for conserving grizzly bears in the Selway-Bitterroot Wilderness.

The use of a CMC for grizzly bear recovery in the Selway-Bitterroot is further bolstered by the latitude given the Secretary for protecting "threatened" species under Section 4(d).

D. *ESA Section 4 Rules for Protecting Threatened Species*

As discussed above, Section 10(j) provides that experimental populations are treated as "threatened" species. Section 4(d) is the ESA provision providing protection for "threatened" species, and allows the Secretary great flexibility in protecting them.[36] Nothing in Section 4 bars the Secretary from delegating authority to others, and in fact several examples exist in which the Secretary has delegated to states the authority to establish the rules applicable to the taking of threatened species.[37] Using a CMC to oversee the Selway-Bitterroot grizzly reintroduction program is not substantially different from giving states oversight of conservation programs, especially where, as here, the affected states and Indian tribes would be appointing most of the CMC members. Therefore, use of a CMC most likely is a valid method for overseeing the Selway-Bitterroot Grizzly reintroduction.

Moreover, Section 4 contains other provisions that further empower the Secretary. Beyond the ESA's experimental population provision and broad grant of authority to the Secretary, Congress, through Section 4(f), explicitly authorized the Secretary to utilize individuals and organizations outside of the Department of Interior in implementing the law.[38] Section 4(f)(2) states that the Secretary, "in developing and implementing recovery plans, may procure the services of appropriate public and private agencies, institutions, and other qualified persons."[39] Delegation of primary oversight responsibility to a CMC for recovering the Selway-Bitterroot grizzly population seems to fall well within the Secretary's authority under Section 4. Given that Section 4 expressly contemplates the use of qualified public and private entities and persons in recovering threatened and endangered species, the use of a CMC is a logical proposal.

However, because the grizzly reintroduction effort is controversial, and use of a CMC has been attacked by various opponents of the reintro-

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36. § 1533(d) (1994).

37. *See, e.g.*, 50 C.F.R. § 17.40(g) (1998) (providing that Utah prairie dogs, a threatened species, may be taken on private lands in accordance with Utah state laws).

38. § 1533(f)(2) (1994).

39. § 1533(f)(2).

duction effort,[40] a legal challenge to the validity of the Secretary's conclusion that the use of a CMC would achieve the goal of grizzly conservation is possible.[41] However, because the relevant provisions of the ESA confer extensive authority upon the Secretary to conserve and recover endangered and threatened species, there have been very few challenges to rules promulgated under Section 4(d). Not only is the Secretary commanded to conserve threatened and endangered species, Congress provided the Secretary with the discretion to write specific regulations for the management of reintroduced populations. The Secretary is empowered to issue "necessary and advisable" regulations for protecting "threatened" species, and may procure the services of appropriate public and private entities in recovering threatened species. Taken together, the provisions of the ESA create a presumption that the Secretary has the discretion to employ a CMC for the Selway-Bitterroot grizzly reintroduction program.

III. SUBDELEGATION OF AUTHORITY AND THE USE OF A CMC

In addition to involving the issues discussed above, the use of a Citizen Management Committee implicates the doctrine of subdelegation of authority, which is a subset of the nondelegation doctrine. The nondelegation doctrine arises out of Article 1, sec. 1 of the United States Constitution, providing that only Congress, not the executive or judicial branches of government, is vested with legislative power.[42] Essentially, the doctrine embraces the concept of the separation of powers. The U.S. Supreme Court fleshed out the issue in 1892 when it proclaimed that Congress cannot delegate legislative power to the executive branch because doing so would undermine the structural integrity of our system of government as set forth in the Constitution.[43]

It follows then, that Congress may not delegate legislative power to an executive branch agency head; Congress does, however, routinely delegate to an agency head the power to administer and carry out laws. The question then becomes whether an agency head may properly "subdelegate" to subordinates the authority given him or her by Congress without over-stepping that authority and invoking separation of powers concerns.[44] Certainly, vesting management authority in a CMC would be a subdelegation of authority by the Secretary of the Interior. As discussed

40. *See, e.g.*, Whipple, *supra* note 10, at B1.

41. *See generally* 16 U.S.C. § 1533 (1994). Section 4(d) rules issued for threatened species must be based upon an administrative record.

42. RONALD A. CASS ET AL., ADMINISTRATIVE LAW 19 (2d ed. 1994).

43. *Id., citing* Field v. Clark, 143 U.S. 649, 692 (1892)).

44. "Subdelegation" is the transmission of authority by agency heads to subordinates. K. DAVIS, ADMINISTRATIVE LAW TEXT § 9.01 (3d ed. 1972)

infra, however, case law clearly indicates that in many instances the subdelegation of authority is proper.

No specific cases exist with which to evaluate use of the CMC by the Secretary under the proposed regulations. In similar situations, however, both Congress and the courts have recognized the need for agency and department heads to subdelegate some of their duties, especially where, as here, the agency oversees a complex regulatory scheme. In fact, unless subdelegation by an agency or department head is specifically forbidden by statute, it is typically upheld by courts.

Courts apply two criteria in evaluating the validity of agency subdelegation. First the subdelegation of authority must be consistent with the statute; second, the delegating authority must retain oversight. Subdelegation to both public and private entities is generally sanctioned by courts where oversight or final approval is retained by the agency head.[45] In other words, the subdelegating agency head cannot surrender totally his or her authority to a public or private entity.[46] Courts may even find that no subdelegation occurred at all where a delegating agency retains oversight authority, where guidance standards exist, and where there are no conflicts of interest.[47]

The following cases illustrate how courts determine whether subdelegation is proper. Courts have generally focused on whether power was being delegated to a public agency, a public-private agency or a fully private entity. While courts have limited the authority to subdelegate depending on whether the subdelegation was to a public, private or public-private entity, the key, as mentioned above, is the level of oversight retained by the delegating agency and the review available.

A. *Subdelegation to Public Entities*

When an agency subdelegates authority within the agency itself or to another public agency and that subdelegation is expressly authorized in the statute, it is presumed legitimate. Moreover, courts have held that express statutory authority for subdelegation is not necessary where it is not specifically prohibited by Congress. Courts have recognized the weighty reality of administering statutes such as the ESA and allowed for subdelegation when it was consistent with the statute.

For example, in *Inland Empire Public Lands Council v. Glickman*,[48]

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45. *See, e.g., Pistachio*, 671 F.Supp. 31; Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697 (9th Cir. 1996); Atlantic Terminal Urban Renewal Area Coalition v. New York City, 697 F.Supp. 666 (S.D.N.Y. 1988).

46. *See* cases cited *supra* note 45.

47. *See infra* Part III(D).

48. 88 F.3d 697, 702 (9th Cir. 1996)

the Ninth Circuit Court of Appeals concluded that delegation in general does not have to be expressly provided for in the statute.[49] Moreover, the court noted that delegations which are not inconsistent with the purpose of the statute are generally allowed.[50] *Inland Empire* addressed, among other issues, the issue of whether the Secretary of Agriculture needed to personally authorize salvage timber sales in the Kootenai National Forest, or whether he could delegate such authority to the Forest Service.[51] The court stated that where Congress did not expressly authorize a subdelegation, the purpose of the statute must be examined to set its parameters.[52] The court recognized that requiring the Secretary to personally authorize every timber sale would contradict the Rescissions Act, the goal of which was to expedite salvage timber sales.[53] Accordingly, the court held that the Secretary did not have to personally authorize each timber sale, but that he could properly subdelegate such authority to the Forest Service.[54]

Similarly, in *Atlantic Terminal Urban Renewal Area Coalition v. New York City*,[55] the U.S. District Court for the Southern District of New York determined that the Department of Housing and Urban Development (HUD) had the authority to delegate certain duties under the Clean Air Act to New York City for a downtown Brooklyn revitalization project.[56] In making its determination, the court looked to Title I of the Housing and Community Development Act of 1974,[57] which states in relevant part that:

> In order to assure that the policies of the National Environmental Policy Act of 1969 and other provisions of law which further the purposes of such Act (as specified in the regulations issued by the Secretary) are most effectively implemented . . . and to assure to the public undiminished protection of the environment, the Secretary, in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to recipients of assistance under this chapter who assume all of the responsibilities for environmental review, decision-making, and action pursuant to such Act. . . . [58]

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49. *Id.* at 702 (quoting Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1128 (9th Cir. 1983)).
50. *Id.* (quoting National Ass'n of Psychiatric Treatment Centers for Children v. Mendez, 857 F.Supp. 85, 91 (D.D.C. 1994)).
51. *Id.*
52. *Id.* (citing Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 795 (9th Cir. 1986)).
53. *Id.* at 702.
54. *Id.* at 703.
55. 697 F. Supp. 666 (S.D.N.Y. 1988)
56. *Id.* at 671-72.
57. 42 U.S.C. § 5304 (1994).
58. 42 U.S.C. § 5304(g)(1).

The court stated that:

> Although HUD's authority to delegate under § 104(f) has consistently been upheld despite challenges that such delegation frustrates Congressional intent in passing environmental statutes . . . no court appears to have considered whether the affirmative responsibilities of federal agencies articulated in § 176(c) of the Clean Air Act can be delegated. However, based on the legislative history of § 5304, regulations subsequently adopted, and the reasoning of case law upholding HUD's delegation of other environmental responsibilities, it appears that the duties of § 176(c) are delegable.[59]

The court found that the Congressional Conference Report and the regulations adopted reflected a clear intent "to enable HUD to delegate responsibilities arising under the Clean Air Act."[60] The court also noted that HUD's authority to delegate was not without limitation.[61] However, because the court was deciding a motion to dismiss, the court did not reach the issue of the extent or nature of HUD's authority to delegate. *Atlantic Terminal* does illustrate that agencies, when authorized by Congress, may properly delegate authority to other public agencies. However, such subdelegations to public entities must not be prohibited by, and must be consistent with, the statute.

B. *Subdelegation to Private/Public Entities*

Courts have also upheld subdelegations of authority to public/private entities. The Court of International Trade, in deciding *Pistachio Group of the Ass'n of Food Industries v. United States,* observed that subdelegations of authority within agencies have been readily accepted.[62] At issue in *Pistachio* was not whether the International Trade Administration (ITA) had the authority to subdelegate *some* of its duties, but whether the ITA could delegate *all* of its authority to the New York Federal Reserve Bank (NY Fed.) to determine the appropriate exchange rate to be applied in carrying out anti-dumping laws.[63] The *Pistachio* court acknowledged that the ITA had the authority to subdelegate some of its authority to the NY Fed., but only if the NY Fed. were ultimately subject to some form of scrutiny from the ITA.[64] The court further recognized that the ITA's reliance on the NY Fed. reduced the administrative burden on the ITA and

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59. *Atlantic Terminal*, 697 F. Supp. at 671.
60. *Id.* at 672.
61. *Id.*
62. *Pistachio*, 671 F. Supp at 35.
63. *Id.*
64. *Pistachio*, 671 F. Supp. at 38.

that, therefore, the ITA regulation authorizing the use of the NY Fed., generally, was reasonable.[65]

However, the *Pistachio* court noted that a potential problem existed in the case before it, that problem being the fact that the ITA relied completely on the NY Fed. to determine anti-dumping exchange rates. The NY Fed. is not a wholly public agency, even though the NY Fed. board members are appointed by the President upon the advice and consent of the Senate for fixed terms.[66] The *Pistachio* court observed that:

> The New York Fed is part of the national Federal Reserve System and subject to supervision by the Board of Governors of the Federal Reserve System, but it is also a private corporation whose stock is owned by the member commercial banks within its district.[67]

In short, the NY Fed is a public-private entity.

The court stated that even though authority to delegate was not explicitly granted in any statute, courts have "generally upheld similar delegations particularly where, as here, the agency is charged with the administration of a complex regulatory program."[68] The court concluded, however, that subdelegations of significant functions require some form of review, be it by the agency itself or ultimately by the courts.[69]

In discussing the frequency of approval of intra-agency subdelegations, the *Pistachio* court noted that there is an expanding sense "that agencies should be given broader authority to develop procedures and standards necessary for their proper functioning."[70] The court further observed that in cases of statutory delegations, there has been an increase in administrative and judicial controls on administrative behavior, and that "comparable measures provide an appropriate check on transferred powers in the area of subdelegation."[71]

The *Pistachio* court concluded that the ITA could subdelegate authority to the NY Fed., a public-private entity, to help determine what exchange rate should be applied in carrying out anti-dumping laws, but that the ITA erred in failing to even consider what that exchange rate should be.[72] Thus, the ITA impermissibly subdelegated its authority to the NY

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65. *Id.* at 37.

66. *Id.* at 35 n.4. Officers of the N.Y. Fed. are appointed through a combination of actions by the Federal Reserve Board and the member Banks. *Id.*

67. *Id.* at 35.

68. *Id.* at 34.

69. *Id.* at 36.

70. *Id.* at 40 n.8.

71. *Id.*

72. *Id.* at 36.

Fed.[73] The ITA *was* permitted to subdelegate authority to a public-private entity, but only so long as it retained oversight authority.

Following similar logic, where final decision-making power did remain with the delegating agency, a subdelegation to a private entity by a quasi-public body has been upheld. In *Simon v. Cameron*, the court upheld the subdelegation of authority to a private, voluntary health planning agency by the Health Planning Council, a governmental entity.[74] The Health Planning Council was characterized by the court as being a:

> [Q]uasi-public body, created by the legislature, whose members are appointed by and serve at the pleasure of the Governor, the Chairman of the Senate Rules Committee, and the Speaker of the Assembly. Thus, final decision making authority is vested in this quasi-public body, not in the local planning body.[75]

The court upheld the subdelegation to the voluntary planning agency, because final decision-making authority rested with the Health Planning Council.[76]

The above cases indicate that subdelegation of authority by an agency to a public-private entity such as the CMC may be valid if appropriate procedures are followed.

C. *Subdelegation to Private Entities*

The existence of guidance standards set by the delegating agency is a significant factor in determining whether a subdelegation to a private entity is proper. Generally, where courts find subdelegation improper, it is for lack of oversight and review. Where an agency subdelegates public duties to private entities, the potential for conflicts of interest exists. In cases of subdelegation to private entities, therefore, courts generally scrutinize the subdelegation more carefully.

Although *Sierra Club v. Sigler* states that agencies may not delegate all of their authority to a private entity, the case illustrates that administrative agencies may delegate some duties to private entities, as long as the objectivity of those private entities may not be questioned on the grounds of a conflict of interest.[77] In *Sierra Club*, an EIS was prepared primarily by a private consulting firm that had a stake in a proposed project to extend and deepen the channel connecting Galveston Bay with the Gulf of

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73. *Id.*
74. 337 F. Supp. 1380, 1381 (C.D. Cal. 1970).
75. *Id.*
76. *Id.*; *accord* United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).
77. Sierra Club v. Sigler, 695 F.2d 957, 962, 963 n.3 (5th Cir. 1983).

Mexico on the Texas Gulf Coast.[78] The purpose of the project was to allow supertankers transporting oil to navigate further up the channel, and the proposed project included construction of an oil terminal to off-load supertankers.[79] The Army Corps of Engineers was charged with permitting the project prior to commencement of any dredging or construction.[80] EIS preparation regulations required the Corps to independently evaluate the information submitted regarding the EIS and to be responsible for its accuracy.[81] The Sierra Club and other plaintiffs filed suit challenging the adequacy of the Final Environmental Impact Statement (FEIS) and the permits issued by the Corps on the grounds that the Corps' decision-making process violated the National Environmental Policy Act (NEPA) and other statutes.[82] Based upon the record regarding preparation of the FEIS, the Court of Appeals determined that most of the FEIS preparation had been done by a private consulting firm hired by the applicants.[83] Particularly troubling to the court was the fact that the private consulting firm had a financial stake in the project.[84]

In recognition of the fact that the preparation of an EIS is a "mammoth task," NEPA regulations allow private contractors and consultants to participate in EIS preparation.[85] However, the regulations require contractors participating in EIS preparation to execute a disclosure statement verifying that they had no financial interest in the outcome of the project.[86] This disclosure statement was designed to minimize conflicts of interest.[87] The court stated that although conflicts of interest were not of themselves illegal, the Corp's "rubber-stamping of a consultant-prepared FEIS" would be unacceptable.[88]

Despite the problems it found with the FEIS in question, the *Sierra Club* court appreciated that NEPA regulations recognized "the reality that private consultants play an important, if sometimes troubling, role in modern government."[89] Furthermore, noted the court, administrative agencies

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78. *Id.* at 961-62.
79. *Id.*
80. *Id.* at 962 n.1.
81. *Id.* at 962 n.3.
82. *Id.* at 963-64.
83. *Id.* at 963 n.3.
84. *Id.*
85. *Id.* at 962 n.3.
86. 33 C.F.R. § 1506.500.
87. *Id.*
88. *Id.* (citing Sierra Club v. Lynn, 502 F.2d 43, 58-59 (5th Cir. 1974) (permitting a "financially interested private contractor" to participate in EIS preparation, but barring agency abdication of its duties by "reflexively rubber-stamping a statement prepared by others") (citations omitted).
89. *Id.*

do have discretion in performing their duties.[90]

The court, although it sent the FEIS back to the agency, did not reach the question of whether the Corps had improperly rubber-stamped the FEIS, as that was not an issue on appeal, but the court did counsel caution in the future.[91] The court held that the Corps "must rework the FEIS to correct the deficiencies . . . and must reconsider its permit decision in light of the rewritten FEIS."[92] *Sigler* illustrates that partial subdelegations to private entities can be valid so long as the agency does not delegate away its duties under a particular statute by "rubber-stamping" what a private entity has done and so long as caution is used where potential conflicts of interest may arise.

D. *Cases in Which Courts Have Found no Subdelegation Has Occurred*

Some courts may conclude that no subdelegation has occurred because of the availability of judicial and administrative review.[93] The *Pistachio* court illuminated the difficult issues with which courts must grapple in deciding subdelegation cases by stating:

> [C]ourts may avoid answering difficult separation of powers and related questions or objections to the degree of power transferred. Regardless of whether the easier or more difficult analytical course is followed, the court's conclusion ultimately must depend, in part, on the type of review provided.[94]

In *Perot v. Federal Election Commission*,[95] the Federal Court of Appeals found that the Federal Election Commission (FEC) did not delegate any of its authority to sponsor candidate debates in permitting nonprofit organizations to stage such debates.[96] In *Perot*, Ross Perot and other candidates who were not invited to participate in televised presidential debates sponsored by the Commission on Presidential Debates, a non-profit organization, sought to enjoin the debates or require the FEC to take action regarding their complaints.[97] Perot asserted that the FEC unlawfully delegated legislative authority to a private, nonprofit corporation in violation

90. *Id.*
91. *Id.*
92. *Id.* at 984.
93. *Pistachio*, 671 F. Supp. at 39.
94. *Id.*; *see also* E.E.O.C. v. Exchange Security Bank, 529 F.2d 1214 (5th Cir. 1976) (finding no subdelegation occurred where the agency retained ultimate decision-making authority under its regulations).
95. Perot v. Federal Election Commission, 97 F.3d 553 (D.C. Cir. 1996).
96. *Id.* at 559.
97. *Id.* at 555.

of the U.S. Constitution.[98] Perot's argument rested on wording in a Federal Election Campaign Act (FECA) implementing regulation which provided that nonprofit organizations were allowed to stage candidate debates so long as "pre-established objective criteria" were employed in determining who could participate in candidate debates.[99]

The court characterized Perot's argument as being one of subdelegation of authority "since the claim is that Congress has delegated authority to the FEC, which in turn has delegated some portion of that authority to CPD."[100] The court initially observed that, "when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor . . . ."[101] Ultimately, however, the court found that this was not a case of subdelegation of authority because "preestablished objective criteria," as required by the FECA regulation, were employed in determining who could participate in the debates.[102]

Other courts, as noted above, have taken the opposite analytical course and found that a proper subdelegation occurred.[103] Depending upon the court, then, use of the CMC may or may not be deemed a subdelegation. In either event, case law illustrates that transferring authority to private entities is proper so long as the agency head retains oversight, establishes guidance standards, and no conflicts of interest exist. The critical elements in an application of the subdelegation doctrine to the CMC then are whether subdelegation to the CMC is consistent with the goals of the ESA, whether the Secretary retains sufficient review and oversight and provides guidance standards, and whether conflicts of interest exist.[104]

IV. APPLICATION OF THE SUBDELEGATION DOCTRINE TO THE PROPOSED GRIZZLY REINTRODUCTION PROGRAM

Under current law, the CMC provisions would survive attack from all angles because: (1) subdelegation of authority is lawful; (2) the goals and duties of the CMC are not inconsistent with the goals of the ESA; (3) the oversight provisions and guidance standards are more than adequate to survive judicial scrutiny; and (4) the CMC is organized to avoid conflicts

98. *Id.*
99. *Id.* at 559-560.
100. *Id.* at 559.
101. *Id.*
102. *Id.*
103. *See, e.g., Inland Empire,* 88 F.3d at 702-703; *Atlantic Terminal,* 697 F. Supp. at 672; *Simon v. Cameron,* 337 F. Supp. 1380, 1383 (D. Cal. 1970).
104. *See generally Pistachio,* 671 F. Supp. at 31; *Simon,* 337 F.Supp. at 1380; *Sierra Club,* 695 F.2d at 957.

of interest.

First, subdelegation of authority to a public entity, public-private entity, or fully private entity is lawful. The CMC is an appointed entity serving set terms, yet comprised in part of private individuals with varying interests.[105] Therefore, it is probably best characterized as a quasi-public entity. However, characterization of the CMC probably is not critical in light of case law upholding subdelegation to all three of the above-mentioned types of entities.

Second, subdelegation to the CMC is not inconsistent with the ESA because the goals of the CMC are to "[d]evelop management plans and policies, as necessary for the management of grizzly bears in the Experimental Area" so that "[s]uch management plans and policies will be in accordance with applicable state and federal laws."[106] Moreover, the ESA does not expressly forbid subdelegation of responsibilities in furthering the goals of the Act.[107] *Inland Empire, Atlantic Terminal* and related cases, as discussed above, indicate that where subdelegation is not inconsistent with a statute, subdelegation may be appropriate. Furthermore, where an agency, such as the Department of the Interior, is charged with the administration of a complex regulatory program, such as the ESA, courts recognize that subdelegation may be necessary.[108]

Third, the proposed rule provides for ample oversight of the CMC's activities by the Secretary of the Interior.[109] *Pistachio* and related cases indicate that subdelegation to an eligible private or private-public entity may be proper where oversight is retained by the subdelegating agency. Here, the proposed rule states that the Secretary will retain final responsibility for the grizzly reintroduction effort and may reassume responsibility if he finds that the CMC actions are not leading to recovery of the grizzly bear.[110] Thus, the Secretary's subdelegation to the CMC most likely is proper.

Additionally, the *Perot* court concluded that the FEC did not subdelegate its authority at all where the agency did nothing more than permit eligible private entities to use their own discretion in determining how best to comply with the agency's regulations.[111] Here Section 17.84(j)(12)(ii)

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105. *See* 62 Fed. Reg. 35,766.

106. *Id.* at 35,771.

107. 16 U.S.C. §§ 1531-1544 (1994).

108. *See Pistachio*, 671 F. Supp. at 36 n.8 (noting "the increasing frequency with which intra-agency subdelegations of authority have been approved" and that the development reflects "a growing sense that agencies should be given broader authority to develop procedures and standards necessary for their proper functioning.")

109. *See* 62 Fed. Reg. 35,763-68.

110. *Id.* at 35,766.

111. *Perot*, 97 F.3d at 559 (finding acceptable regulation that allowed eligible non-profits to develop their own "preestablished objective criteria" in determining who might participate in Presiden-

of the proposed rule sets forth detailed standards with which the CMC must comply in exercising its authority.[112] As such, the proposed rule satisfies the oversight and guidance criteria set forth in case law and should be seen as a proper subdelegation of authority from the Secretary to the CMC, or no subdelegation at all. The fact that the CMC has some discretion to determine how it must comply with those standards does not necessarily suggest, as stated in *Perot*, that a subdelegation has in fact actually occurred.

Lastly, the CMC is organized to allow people with a broad spectrum of interests to have a voice in the reintroduction management effort, thereby minimizing conflicts of interest.[113] The proposed rule provides that the CMC shall be composed of members who are nominated by the governors of Idaho, Montana, the Nez Perce Tribe, the U.S. Forest Service, the U.S. Fish and Wildlife Service and state fish and wildlife agencies.[114] Additional safeguards are built in which call for, among other things, public participation in the form of review and comment on CMC decisions, the requirement that the CMC give full consideration to comments and opinions from the various federal and state agencies and the Nez Perce Tribe.[115] All of these provisions show that the CMC will be well-balanced and protected from conflicts of interest. In sum, the CMC provisions of the proposed rule should easily survive judicial scrutiny.

IV. CONCLUSION

The proposed rule and its CMC provisions are entirely consistent with congressional intent set forth in the ESA: to conserve endangered and threatened species and to pursue avenues for their recovery. The use of a CMC will aid the Secretary in the huge task of implementing the ESA. However, the Secretary will retain ultimate authority and responsibility. At a time when government expenditures are being increasingly scrutinized, the innovative use of an uncompensated, highly motivated group of individuals to develop and implement the recovery of the grizzly bear is not only consistent with the ESA and existing case law, but is also logical and sound.

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tial debates),

112. 62 Fed. Reg. 35,766-68.

113. *Id.*

114. *Id.* at 35,766.

115. *Id.*