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## Court Cases Turned Trojan Horse: Examining the Future of the Endangered Species Act and Environmental Protection After Friends of Animals v. Haaland

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COURT CASES TURNED TROJAN HORSE: EXAMINING THE  
FUTURE OF THE ENDANGERED SPECIES ACT AND  
ENVIRONMENTAL PROTECTION AFTER  
*FRIENDS OF ANIMALS V. HAALAND*

I. THE ENDANGERED SPECIES ACT AND ADMINISTRATIVE  
RULEMAKING: AN INTRODUCTION

The landscape of environmental regulation has changed within the past six years.<sup>1</sup> De-regulation has altered environmental law, causing negative effects on the planet.<sup>2</sup> Many attempts at de-regulation occurred during the Trump Administration, including the Trump Administration's successful modification of the Endangered Species Act (ESA).<sup>3</sup> The ESA is an important and effective tool for protecting endangered and threatened wildlife.<sup>4</sup> Currently, the ESA protects over 1,300 listed species of plants and ani-

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1. See Juliet Eilperin, Brady Dennis & John Muyskens, *Trump Rolled Back More Than 125 Environmental Safeguards. Here's How.*, WASH. POST (Oct. 30, 2020), <https://www.washingtonpost.com/graphics/2020/climate-environment/trump-climate-environment-protections/> (identifying changes Trump Administration made to environmental regulations).

2. See *id.* (noting Trump Administration's desire to roll back federal constraints on industry). The Trump Administration's rollbacks on the worsening climate crisis concerned many environmental activists. *Id.* (claiming some attempted rollbacks pushed back compliance deadlines and industry start dates). Despite President Biden's promise to restore environmental regulations and promulgate new action on climate change, many environmental experts worry de-regulation has cost valuable time. *Id.* (expressing severity of climate crisis by mentioning current environmental catastrophes). Any time spent returning the Endangered Species Act to the pre-Trump Administration status quo inevitably delays the promulgation of new, potentially beneficial rules. *Id.* (lamenting that President Biden needs to spend early years of presidency reinstating rules promulgated under Obama Administration).

3. See *id.* (acknowledging major changes to federal environmental statutes); see also Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> (listing various changes to ESA and other environmental statutes).

4. See Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (describing purpose of ESA as protection and conservation of plants and animals); see also *The Endangered Species Act: A Wild Success*, CTR. FOR BIOLOGICAL DIVERSITY, [https://www.biologicaldiversity.org/campaigns/esa\\_wild\\_success/#:~:text=the%20Act%20has%20been%20more,the%20law's%20passage%20in%201973](https://www.biologicaldiversity.org/campaigns/esa_wild_success/#:~:text=the%20Act%20has%20been%20more,the%20law's%20passage%20in%201973) (last visited Dec. 29, 2022) (discussing positive impacts of ESA). The Center for Biological Diversity noted the ESA has been over ninety-nine percent successful at preventing extinction for listed species, and without the ESA, at least 227 species would have gone extinct. *Id.* (mentioning ESA achieves its purpose when used to its fullest extent under law).

mals.<sup>5</sup> Limitations to the ESA, whether statutory or regulatory, can pose extreme threats to endangered and threatened species and hinder their chances at recovery.<sup>6</sup>

Under the Trump Administration, de-regulation and rule promulgation took many forms: (1) a new definition of “habitat” in the determination of critical habitat designation,<sup>7</sup> (2) a new process for considering whether to exclude certain areas from critical habitat designation,<sup>8</sup> (3) the removal of the phrase “without reference to possible economic or other impacts of such determination” in reference to listing determinations,<sup>9</sup> and (4) the removal of the blanket rule.<sup>10</sup> Some of these rules did not remain in place, however, as the Biden Administration brought de-regulation to a screeching halt.<sup>11</sup> On January 2021, President Biden issued an Executive Order arranging the immediate review of any agency actions the Trump Administration undertook.<sup>12</sup>

Pursuant to President Biden’s Executive Order, the United States Fish and Wildlife Service (FWS) rescinded the Trump Administration’s definition of “habitat” because it was inconsistent with the purpose of the ESA.<sup>13</sup> FWS also rescinded the rule revising

5. *Endangered Species: Species Information (Factsheets)*, EPA (June 14, 2022), <https://www.epa.gov/endangered-species/endangered-species-species-information-factsheets> (expressing breadth of ESA protection).

6. See Daniel J. Rohlf, *The Endangered Species Act at Forty: The Good, the Bad, and the Ugly*, 20 LEWIS & CLARK ANIMAL L. REV. 251, 262-64 (2014) (discussing detrimental effects to wildlife after legislative or administrative decision making).

7. 85 Fed. Reg. 81411 (Dec. 16, 2020) (modifying definition of “habitat” to apply to all critical designations instead of previous method of defining habitat on case-by-case basis for each species).

8. 85 Fed. Reg. 82376 (Dec. 18, 2020) (allowing exclusion of habitat areas that are not currently necessary for species growth).

9. 84 Fed. Reg. 45020 (Aug. 27, 2019) (allowing consideration of economic factors in listing determinations).

10. 84 Fed. Reg. 44753 (Aug. 27, 2019) (explaining blanket rule automatically grants same protections for threatened species as those for endangered species). This modification, which no longer distinguished different protection methods for endangered versus threatened species, aimed to reduce the use of unnecessary time and expenses relating to the listing process. *Id.* (noting revision does not apply to species already listed as threatened); see also *Endangered Species Act Regulation Revisions*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/project/endangered-species-act-regulation-revisions> (last visited Dec. 29, 2022) (outlining ESA revisions and their current statuses).

11. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037-38 (2021) (advising agencies to repeal, halt, or amend certain Trump Administration agency action).

12. *Id.* (emphasizing nation’s commitment to promoting and protecting environment).

13. 87 Fed. Reg. 37757 (June 24, 2022) (rescinding prior definition of “habitat”); see also *Rescind Regulatory Definition of “Habitat” Under the Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (June 23, 2022), <https://www.fws.gov/press-release/2022-06/rescind-regulatory-definition-habitat-under-endangered-species->

the process for considering exclusions from habitat designations because the rule did not support scientific considerations of habitat designations or citizen participation.<sup>14</sup> Additional regulatory revisions move slowly, and FWS estimated the review of the Trump Administration's rules could take many years to complete.<sup>15</sup>

In the absence of additional rulemaking from the Biden Administration, environmentalists turned to the courts to effectuate change.<sup>16</sup> The District Court for the Northern District of California rewarded their efforts when it vacated multiple ESA rules the Trump Administration promulgated, including removal of the blanket rule and the revisions made to the listing process.<sup>17</sup> Their efforts did not last, however, as the Ninth Circuit reversed the district court's vacation of those Trump-era rules.<sup>18</sup>

With the ESA almost restored to its pre-Trump Administration status quo, environmentalists are urging the Biden Administration to take more action in safeguarding endangered and threatened species.<sup>19</sup> Environmentalists contend that to strengthen environ-

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act#:~:text=the%20ESA%20recognizes%20that%20areas,their%20designation%20as%20critical%20habitat (depicting confusion surrounding previous habitat definition).

14. 87 Fed. Reg. 43433 (July 21, 2022) (allowing designation of critical habitat necessary for future growth not currently used by species); *Service Rescinds Endangered Species Act Critical Habitat Exclusion Regulations*, U.S. FISH & WILDLIFE SERV. (July 20, 2022), <https://www.fws.gov/press-release/2022-07/service-rescinds-endangered-species-act-critical-habitat-exclusion> (explaining FWS will consider other factors). These past factors include consideration of an economic analysis, tribal land considerations, national security zones, and conservation concerns in the designation of critical habitats both currently used and not used. *See id.* (listing factors).

15. *See* Matthew Daly, *Federal Judge in California Throws Out Trump-Era Rollbacks on Endangered Species*, L.A. TIMES (July 5, 2022), <https://www.latimes.com/environment/story/2022-07-05/judge-throws-out-trump-era-rollbacks-on-endangered-species> (mentioning various regulations under review by Biden Administration).

16. *See* Ctr. For Biological Diversity v. Haaland, No. 19-cv-05206-JST, 2022 WL 2444455, at \*2 (N.D. Cal. July 5, 2022) (acknowledging activist group's use of judicial review to challenge Trump Administration rules).

17. *Id.* at \*5 (agreeing with agency concerns about harmfulness of rules but denying plaintiff's motion to remand without vacatur).

18. *In re* Washington Cattlemen's Ass'n, No. 22-70194, 2022 WL 4393033, at \*1 (9th Cir. Sept. 21, 2022) (vacating for lack of legal invalidity of 2019 ESA rules).

19. *See* *Defenders of Wildlife Applauds Removal of Trump-era Barrier to Protecting Threatened and Endangered Species*, DEFENDERS OF WILDLIFE (July 20, 2022), <https://defenders.org/newsroom/defenders-of-wildlife-applauds-removal-of-trump-era-barrier-protecting-threatened-and> (arguing Biden Administration needs to continue developing law responsible for saving wildlife); *see also* *Biden Administration Repeals Second Trump Rule Limiting Habitat Protections for Imperiled Species*, CTR. FOR BIOLOGICAL DIVERSITY (July 20, 2022), <https://biologicaldiversity.org/w/news/press-releases/biden-administration-repeals-second-trump-rule-limiting-habitat-protections-for-imperiled-species-2022-07-20/> (urging President Biden and agencies to create greater regulatory protections).

mental law responsible for protecting biodiversity, the Biden Administration must promulgate new rules under the ESA or vacate current, harmful regulations.<sup>20</sup> In the interim, environmentalists are utilizing the courts to solve ESA issues while hoping the Biden Administration will help further their conservation efforts.<sup>21</sup>

In *Friends of Animals v. Haaland*,<sup>22</sup> the Ninth Circuit faced an environmental group that challenged FWS's rulemaking under the ESA.<sup>23</sup> On appeal, Friends of Animals (Friends) challenged FWS's denial of its petition to list the Pryor Mountain wild horses as a threatened or endangered distinct population segment.<sup>24</sup> After analyzing the rule under *Chevron's* two-step framework, the Ninth Circuit held the rule violated the ESA and remanded the case to the district court.<sup>25</sup> The Ninth Circuit, however, declined to vacate the rule despite finding it inconsistent with the ESA.<sup>26</sup>

This Note examines the Ninth Circuit's opinion and holding in *Friends of Animals*, the court's lack of vacation, and the role of courts in protecting endangered and threatened species under the ESA.<sup>27</sup> Part II of this Note outlines the facts, procedural history, and the parties' legal arguments.<sup>28</sup> Part III provides relevant background information for the case.<sup>29</sup> Part IV then discusses the Ninth Circuit's legal analysis.<sup>30</sup> A critical analysis of the Ninth Circuit's opin-

20. DEFENDERS OF WILDLIFE, *supra* note 19 (stating Biden Administration should take all necessary steps to secure laws protecting biodiversity).

21. See *Who We Are, What We Do*, FRIENDS OF ANIMALS, <https://friendsofanimals.org/what-we-do/> (last visited Dec. 29, 2022) (discussing Friends of Animals' legal advocacy projects); see also *Defenders Work*, DEFENDERS OF WILDLIFE, <https://defenders.org/our-work> (last visited Dec. 29, 2022) (noting organization's commitment to wildlife and natural resource litigation since 1947).

22. 997 F.3d 1010, 1012 (9th Cir. 2021) (introducing subject of this Note).

23. See *id.* at 1012-13 (contextualizing main issue of this Note).

24. *Id.* (acknowledging Friends' challenge of rule). Specifically, Friends alleged that FWS improperly denied its petition to list the Pryor Mountain horse because of a procedural error in Friends' petition. *Id.* (describing Friends' challenge).

25. See *id.* at 1015-18 (reversing district court's grant of summary judgment). For a discussion of the *Chevron* framework, see *supra* notes 106-123 and accompanying text.

26. See *id.* at 1014, 1018 (showing Friends initially motioned for summary judgment and vacatur of rule and Ninth Circuit did not vacate).

27. See generally *Friends of Animals*, 997 F.3d at 1015-18 (discussing issues of this Note).

28. For a discussion of the facts and procedural history of *Friends of Animals*, see *infra* notes 33-83 and accompanying text.

29. For a discussion of the legal background of the Ninth Circuit's decision in *Friends of Animals*, see *infra* notes 84-123 and accompanying text.

30. For a discussion of the legal analysis of *Friends of Animals*, see *infra* notes 139-68 and accompanying text.

ion follows in Part V.<sup>31</sup> Finally, Part VI discusses the potential legal and environmental impact of the Ninth Circuit's decision.<sup>32</sup>

## II. FWS, GET OFF YOUR HIGH HORSE: THE FACTS OF *FRIENDS OF ANIMALS V. HAALAND*

In 2017, Friends – an environmental advocacy organization – petitioned FWS to list the Pryor Mountain wild horse as a threatened or endangered species under the ESA.<sup>33</sup> Friends' primary argument asserted that the lack of regulatory protection for wild horse habitats and recent politically-motivated reduction efforts decreased the Pryor Mountain wild horse population to an alarmingly low number.<sup>34</sup> Friends argued it used the best scientific and commercial evidence available to support its claims.<sup>35</sup>

FWS, however, denied Friends' petition by claiming Friends did not satisfy the ESA's pre-file notification requirement.<sup>36</sup> The notification requirement (Notice Rule) is a FWS-created rule that required Friends to notify affected state agencies of their intent to file a petition to list the Pryor Mountain wild horse as endangered or threatened.<sup>37</sup> FWS advised Friends to resubmit its petition after notifying the state agencies in the affected states and to provide copies of those notices in the new submission.<sup>38</sup> Instead, Friends

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31. For a critical analysis of the Ninth Circuit's opinion in *Friends of Animals*, see *infra* notes 169-87 and accompanying text.

32. For a discussion of the impacts of *Friends of Animals*, see *infra* notes 188-206 and accompanying text.

33. See Appellant's Opening Brief, *Friends of Animals v. Bernhardt*, 997 F.3d 1010 (9th Cir. 2021) (No. 20-35318), 2020 WL 4228662, at \*1 (noting citizen's petition filed pursuant to ESA).

34. *Id.* (mentioning population's threatened survival and critical nature of wild horse population).

35. *Id.* (claiming petition's proffered evidence survives agency scrutiny). Friends' evidence showed that the Pryor Mountain wild horse population was necessary to conserve the "Old World Spanish genetic lineage of wild horses." *Id.* (stressing species as "essential"). Further, the evidence suggested that the population's small size posed risks to the population's survival and could result in a "genetic bottleneck" that could lead to extinction. *Id.* (explaining merits of petition).

36. *Id.* (noting petition's deficiencies).

37. 50 C.F.R. § 424.14(b) (2016) (establishing Notice Rule); 81 Fed. Reg. 66462 (Sept. 27, 2016) (to be codified at 50 C.F.R. pt. 424) (introducing Notice Rule as final under Federal Register).

38. Appellant's Opening Brief, *supra* note 33, at 1 (explaining FSW's failure to consider merits). For a discussion on the meaning of affected states, see *infra* note 97 and accompanying text.

filed suit in federal court against FWS and its Secretary and Director (Defendants).<sup>39</sup>

A United States Magistrate Judge found that the Notice Rule was inconsistent with the ESA and recommended remanding the petition to FWS for the ninety-day petition consideration.<sup>40</sup> Furthermore, the Magistrate underscored the court's supervisory role in ensuring the administrative record supported the agency's conclusion rather than serving as a factfinder in the administrative action.<sup>41</sup> Following this standard, the Magistrate held FWS's Notice Rule violated the ESA because it allowed FWS to consider state-provided information during the initial petition process instead of only reviewing information provided by the petitioner.<sup>42</sup> The Magistrate reasoned that the Notice Rule, by not only inviting but encouraging states to submit information, allowed FWS to solicit outside information for consideration during the petition review.<sup>43</sup>

In the district court, both parties moved for summary judgment on the matter and Friends motioned for vacatur.<sup>44</sup> Friends alleged that the Notice Rule and denial of its petition under the Notice Rule violated the ESA and were contrary to the Administrative Procedure Act's (APA) purpose.<sup>45</sup> In turn, Defendants argued the Notice Rule was consistent with the ESA because the statute directed FWS to cooperate with states during the listing or delisting of threatened or endangered species.<sup>46</sup> The district court, taking the Magistrate's findings into consideration, granted summary judgment in favor of the Defendants.<sup>47</sup> The district court deferred to

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39. *Id.* at 8 (noting Friends filed suit in federal district court). For a discussion on the ninety-day petition consideration, see *infra* notes 89-90 and accompanying text.

40. *Friends of Animals v. Bernhardt*, No. CV-18-64-BLG-SPW-TJC, 2020 WL 1466422, at \*8 (D. Mont. Jan. 21, 2020) (finding FWS's reliance on Notice Rule in rejecting Friends' petition was "arbitrary, capricious, and contrary" to ESA).

41. *Id.* at \*3 (outlining scope of court's review).

42. *Id.* at \*8 (determining Notice Rule allowed FWS to obtain targeted information about petitioned species).

43. *Id.* (observing Notice Rule would cause State to provide information).

44. *See Friends of Animals v. Bernhardt*, No. CV-18-064-BLG-SPW-TJC, 2020 WL 1466422, at \*1 (D. Mont. Mar. 26, 2020) (acknowledging summary judgment motions).

45. *Friends of Animals v. Bernhardt*, No. CV-18-64-BLG-SPW-TJC, 2020 WL 375884, at \*2 (D. Mont. Jan. 21, 2020) (specifying Friends' arguments).

46. *Friends of Animals*, 2020 WL 1466422 at \*1 (noting Defendants' objections to Magistrate's findings). Defendants argued the Notice Rule furthered the ESA's interests in efficiency and effectiveness and noted that the Notice Rule does not require state action but merely gives notice to state agencies. *Id.* (adding Friends did not file response).

47. *Id.* at \*3-4 (detailing reasons behind district court's findings).

FWS's denial of the petition and interpretation of the ESA.<sup>48</sup> Friends subsequently appealed the district court's decision to the Ninth Circuit.<sup>49</sup>

#### A. Stop Horsing Around: Friends Argues Before the Ninth Circuit

Friends argued several issues on appeal.<sup>50</sup> First, Friends claimed the Notice Rule did not pass step one of the *Chevron* test.<sup>51</sup> Friends alleged the Notice Rule failed step one of the inquiry because, under § 4 of the ESA, the rule was “contrary to the express intent of Congress.”<sup>52</sup> Further, Friends argued that the Notice Rule's effect went beyond congressional intent to notify states and changed some of the standards the ESA established, such as timeliness and procedures for notices.<sup>53</sup> Friends also stated the ESA spoke on the issue at hand in the detailed notice and comment provisions; thus, any rules inconsistent with Congress's express intent should be invalid.<sup>54</sup>

Second, Friends argued that if the Notice Rule passed *Chevron*'s first step, then the Notice Rule failed the second step because the rule was not a “permissible construction” of the ESA.<sup>55</sup> Agreeing with the Magistrate's findings, Friends contended the Notice Rule invalidly allowed FWS to consider information outside of the interested person's petition.<sup>56</sup> Friends asserted the ESA expressly directed FWS to base its ninety-day finding on whether “*the petition*” alleges substantial information to warrant an endangered or threatened species review.<sup>57</sup> As a result, the Notice Rule's require-

48. *Id.* at \*3 (holding Notice Rule is not contrary to ESA).

49. *Friends of Animals v. Haaland*, 997 F.3d 1010, 1013 (9th Cir. 2021) (noting Friends' appeal to Ninth Circuit).

50. *See* Appellant's Opening Brief, *supra* note 33, at 10-13 (summarizing arguments).

51. For a discussion of step one of the *Chevron* inquiry, see *infra* notes 106-23 and accompanying text.

52. Appellant's Opening Brief, *supra* note 33, at 13-15 (summarizing Friends' argument that Notice Rule fails step one of *Chevron*).

53. *Id.* at 15 (describing how Notice Rule differs from § 4 of ESA).

54. *See id.* (explaining inconsistency with Congress lies in rule's “intent” and “effect”).

55. *Id.* at 25-26 (acknowledging Magistrate's finding that Notice Rule failed step two of *Chevron* analysis).

56. *Id.* at 10-11 (emphasizing that review must focus on merits of petition and not outside information).

57. Appellant's Opening Brief, *supra* note 33, at 10-11 (citing Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A)) (mandating review of petition). Section 1533(b)(3)(A) of the ESA states the Secretary shall make a finding “as to whether the petition presents substantial scientific or commercial information indicating



ment to notify states, which allows states to submit information during the ninety-day review, is an impermissible construction of the ESA because it allows the agency to consider information outside the petition.<sup>58</sup> Friends conceded the ESA carved out a place for state involvement in the conservation of threatened and endangered wildlife; however, Friends contended that a state's conservation role occurred after the initial ninety-day finding.<sup>59</sup> Consequently, according to Friends, the Notice Rule was improper because it required petitioners to notify states and allowed states to submit information with the petition.<sup>60</sup>

Furthermore, Friends claimed the thirty-day waiting period prior to submitting the petition violated the ESA by removing Friends' "statutory right to choose when to file a petition . . . ."<sup>61</sup> Congressional amendments to the ESA petition process expressed concern for timeliness in petition procedures and altered the process so species were not left "languishing for years in status reviews."<sup>62</sup> These amendments provided explicit, mandatory deadlines under which the Secretary must act.<sup>63</sup> Friends argued this delay in the petition process was contrary to the purpose and intent of the ESA; therefore, the Notice Rule was improper.<sup>64</sup>

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that the petitioned action may be warranted." Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A) (establishing guidelines for Secretary's decision on petition's merits).

58. Appellant's Opening Brief, *supra* note 33, at 25 (emphasizing improper requirement to solicit outside information).

59. *Id.* at 23-24 (noting Congress's designation for state involvement was explicit).

60. Appellant's Opening Brief, *supra* note 33, at 10-11 (citing *Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp. 2d 1137, 1142-43 (D. Colo. 2004)) (holding consideration of information outside petition improper). The *Morgenweck* court held that FWS's consideration of information outside the interested party's petition was "overinclusive" of the information the ESA allows FWS to review at this stage. *Morgenweck*, 351 F.Supp. at 1142-43 (emphasizing FWS's contemplation of outside information during petition process was similar to targeted information gathering usually seen during twelve-month review).

61. Appellant's Opening Brief, *supra* note 33, at 12, 23 (describing Notice Rule adding thirty-day period before petition can be filed).

62. *Id.* at 23 (claiming delay in petition process could affect extinction and species decline rates).

63. *Id.* at 11-12 (citing *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 839-40 (9th Cir. 2011)) (clarifying amendment's intent was to force review of petitions).

64. *Id.* at 12 (arguing unnecessary delays are contrary to ESA's purpose of conserving wildlife).

Friends concluded by requesting the court vacate the Notice Rule and FWS's denial of Friends' petition.<sup>65</sup> Citing *Desert Survivors v. United States Department of Interior*,<sup>66</sup> Friends contended that a court should vacate any ESA agency action the court finds illegal.<sup>67</sup> Friends also noted § 706(2)(A) of the APA, which charges a court to hold unlawful and set aside agency actions the court finds arbitrary and capricious.<sup>68</sup>

#### B. Straight from the Horse's Mouth: Defendants' Reply

In response to these claims, Defendants argued the Notice Rule passed step one of the *Chevron* test because Congress never spoke directly on this issue.<sup>69</sup> Defendants contended that because the ESA does not directly address pre-petition or notification procedures, Congress left an explicit statutory gap for Defendants to fill.<sup>70</sup> Defendants additionally argued the ESA did not limit state involvement to after the initial ninety-day finding.<sup>71</sup> Defendants noted that, when deciding whether to list a species, the ESA requires FWS to consider the state's efforts in conserving the species.<sup>72</sup> According to Defendants, the Notice Rule passed step one of the *Chevron* test because of FWS's broad statutory authority to promulgate rules and establish agency guidelines under the ESA.<sup>73</sup>

Defendants next argued that the Notice Rule passed step two of the *Chevron* inquiry.<sup>74</sup> They claimed the Notice Rule was a permissible interpretation of the ESA because it included state involve-

65. *Id.* at 30 (citing *Desert Survivors v. U.S. Dep't of Int.*, 336 F. Supp. 3d 1131, 1136-37 (N.D. Cal. 2018)) (finding vacatur as usual remedy for invalid ESA policy).

66. 336 F. Supp. 3d 1131, 1136-37 (finding remedy for illegal ESA policies is vacatur of policy and accompanying decision).

67. Appellant's Opening Brief, *supra* note 33, at 30-31 (arguing for vacatur of decision to deny petition and rule as whole).

68. *Id.* (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A)) (providing "arbitrary and capricious" standard).

69. Appellees' Answering Brief, *Friends of Animals v. Bernhardt*, 997 F.3d 1010 (9th Cir. 2021) (No. 20-35318), 2020 WL 5659190, at \*13 (narrowing issue to pre-petition notice instead of petition process in general).

70. *Id.* at 14-15 (identifying provisions that must be included in petition rules but noting such rules were not limited to only those inclusions).

71. *Id.* at 16 (alluding to broad authority in determining time for state involvement).

72. *Id.* (citing Endangered Species Act, 16 U.S.C. § 1533(b)(1)(A)) (considering state efforts to conserve species).

73. *Id.* at 14-15 (describing ESA provisions for petition guidelines but noting ESA did not provide provisions).

74. For a discussion of step two of the *Chevron* inquiry, see *infra* notes 106-23 and accompanying text.

ment in the petition process, which the ESA requires to the “maximum extent practicable.”<sup>75</sup> Defendants further justified FWS’s interpretation of the ESA by arguing the state-supplied information allowed FWS to look at the petition more broadly and disregard petitions that appeared “superficially . . . meritorious.”<sup>76</sup> Additionally, since states were not required to provide information, Defendants argued states would only add information when it would significantly contribute to the petition decision.<sup>77</sup>

Finally, Defendants contended that the Notice Rule was permissible because it did not violate the APA.<sup>78</sup> Section 553(e) of the APA guarantees interested persons the right to petition; however, Defendants argued the petition process itself is up to the agency’s discretion.<sup>79</sup> Thus, in conjunction with the *Chevron* test, the APA mandates courts to defer to FWS’s interpretations of the ESA and FWS’s implementation of the Notice Rule.<sup>80</sup>

On appeal, the Ninth Circuit held FWS’s denial of Friends’ petition was arbitrary and that the Notice Rule did not survive the two-step *Chevron* test.<sup>81</sup> The Ninth Circuit reversed the district court’s decision and remanded to the district court to enter summary judgment in favor of Friends.<sup>82</sup> The Ninth Circuit did not, however, vacate the Notice Rule.<sup>83</sup>

### III. SADDLE UP: THE BACKGROUND OF AGENCY RULEMAKING AND JUDICIAL REVIEW OF AGENCY ACTION

Congress has power under the Constitution to create statutes, which can form executive agencies.<sup>84</sup> By creating governing stat-

75. Appellees’ Answering Brief, *supra* note 69, at 25 (quoting Endangered Species Act, 16 U.S.C. § 1535(a)).

76. *Id.* at 25-26 (quoting Notice Rule, 81 Fed. Reg. 66462, 66477 (Sept. 27, 2016) (to be codified at 50 C.F.R. pt. 424)).

77. *Id.* at 28 (noting states can support or oppose action and need not be adversarial every time).

78. For a discussion of the APA’s requirements, see *infra* notes 103-05 and accompanying text.

79. Appellees’ Answering Brief, *supra* note 69, at 24-25 (citing Conservation Cong. v. U.S. Forest Serv., 720 F.3d 1048, 1055-56 (9th Cir. 2013)) (holding courts must defer to agency-created procedural implementations).

80. *Id.* at 24, 29-30 (summarizing argument that consistency with ESA and APA validates Notice Rule).

81. For a discussion of the Ninth Circuit’s legal analysis in *Friends of Animals*, see *infra* notes 139-68 and accompanying text.

82. *Friends of Animals v. Haaland*, 997 F.3d 1010, 1013 (9th Cir. 2021) (giving final decision of Ninth Circuit).

83. *See id.* (lacking mention of vacatur).

84. *See* U.S. CONST. art. I, § 8, cl. 18 (vesting legislative branch with power to create laws which are “necessary and proper”); *see also* Elizabeth Slattery, *Who Will*

utes, Congress gives agencies the authority to create rules that have the force and effect of law.<sup>85</sup> The APA and judicial review help keep agencies in conformity with the purposes and goals of their governing statutes.<sup>86</sup>

#### A. Wildlife Conservation's Stallion: The Endangered Species Act

The purpose of the ESA is to conserve and protect endangered species of plants and animals through agency action and rulemaking.<sup>87</sup> Under the ESA, interested persons may petition FWS to list a species as threatened or endangered; a granted petition allows FWS to designate critical habitats to preserve the species.<sup>88</sup> After an interested party submits a petition for review, FWS has ninety days to determine if the petition presents sufficient scientific and commercial information to warrant the petitioner's requested action.<sup>89</sup> During this ninety-day determination period, FWS may also consider readily available information about the species.<sup>90</sup>

If FWS determines the petition warrants action, the agency undergoes a twelve-month review of the species to determine if the

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*Regulate Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, HERITAGE FOUND. (May 7, 2015), <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and> (describing administrative agencies as fourth branch of government); *see generally* Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2190 (2011) (discussing constitutionality of agencies, rulemaking, and rules).

85. *See* MAEVE P. CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS 1 (2021) (explaining agencies must follow governing statute when creating rules); *see, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1533 (governing FWS and rules FWS creates).

86. For a discussion of how APA provisions monitor the legality of agencies' actions, *see infra* notes 103-05 and accompanying text.

87. Endangered Species Act, 16 U.S.C. §§ 1531-1533 (providing means to conserve ecosystems and endangered or threatened species). Under the ESA, a species includes "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id.* § 1532(16) (defining species under ESA).

88. *Id.* § 1533(b)(3)(A) (outlining timeline for petitions); Administrative Procedure Act, 5 U.S.C. § 553(e) (establishing right of interested parties to petition agency rules).

89. Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A) (noting petition can be to add or remove species from endangered or threatened species list).

90. *See* U.S. FISH AND WILDLIFE SERV., U.S. DEP'T OF THE INTERIOR, OMB CONTROL NO. 1018-0165, PUBLIC ADVISORY: INFORMATION TO CONSIDER WHEN SUBMITTING A PETITION UNDER THE ENDANGERED SPECIES ACT 3 (2019) (explaining that readily available information provides context for FWS to evaluate species). Such information is used to determine whether the petition's information is "timely" and "up-to-date." *Id.* (explaining purpose of "readily available information").

species' needs meet critical habitat designation requirements.<sup>91</sup> During the twelve-month review, FWS gathers and solicits information on the species to consider in its determination.<sup>92</sup> FWS considers five factors in evaluating whether a species is endangered or threatened: (1) damage or destruction of a species' habitat, (2) overutilization of the species, (3) disease or predation, (4) lack or inadequacy of existing protection, and (5) other factors that affect the existence of the species.<sup>93</sup> Furthermore, the ESA grants the Secretary of the Interior (Secretary) authority to promulgate agency rules and guidelines to further the ESA's purposes.<sup>94</sup>

### B. Riding for a Fall: The Notice Rule

In 2016, the Secretary exercised its rulemaking authority by promulgating the Notice Rule.<sup>95</sup> In addition to outlining the general petition requirements, the Notice Rule revised the petition process for listing a species under the ESA and required petitioners provide the state agency responsible for the species' conservation at least thirty days' notice of their intent to file a petition.<sup>96</sup> The Notice Rule allowed affected states to "submit data and information" to FWS within the thirty-day period before the interested party's petition submission.<sup>97</sup> The Notice Rule did not require states to submit information on the species, but it allowed states the oppor-

91. Endangered Species Act, 16 U.S.C. § 1533(b)(3)(B) (requiring Secretary to review species' status). Upon conclusion of the twelve-month review, the agency will determine whether listing the species is warranted, not warranted, or warranted but precluded. *Id.* (noting that listing species on endangered or threatened species list will result in habitat designation). Warranted action can be whatever action the petitioner is seeking under the petition, such as the listing of a species, de-listing of a species, or designating a critical habitat for a species. *Id.* § 1533(a)(3)(A) (outlining actions available to petitioners). If the Secretary reviews all relevant information on the species and agrees with the petitioner's claims that the agency should implement a particular action, the petition warrants action. *Id.* § 1533(b)(3)(B)(i)-(iii) (outlining Secretary's actions after reviewing petition).

92. 50 C.F.R. § 424.15 (2016) (allowing solicitation of information during twelve-month review if information is insufficient to make determination).

93. *Listing and Classification*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/program/listing-and-classification/what-we-do> (last visited Dec. 29, 2022) (outlining listing process and factors considered during evaluation).

94. Endangered Species Act, 16 U.S.C. § 1533(h) (establishing Secretary's rulemaking commitments).

95. 50 C.F.R. § 424.14 (2016) (introducing Notice Rule).

96. *Id.* § (b) (specifying petitioner's notice requirements).

97. Notice Rule, 81 Fed. Reg. 66462, 66465 (Sept. 27, 2016) (to be codified at 50 C.F.R. pt. 424) (allowing states to influence FWS's decision during initial ninety-day review after petition submission). Affected states are those whose state agencies are responsible for conserving wildlife resources used by the petitioned species. 50 C.F.R. § 424.14(b) (identifying relevant parties in petition process).

tunity to do so.<sup>98</sup> The Notice Rule also gave FWS authority to reject petitions without considering the content if the request did not meet the regulation's requirements.<sup>99</sup>

FWS claimed the Notice Rule would increase the efficiency and accuracy of the petition review process by supplying the agency with petitioner and state-supplied information.<sup>100</sup> The agency also noted it did not expect the Notice Rule to change the outcome of any species determinations or petition decisions.<sup>101</sup> FWS recognized that the Notice Rule deviated from prior practice, but FWS contended that the revision was consistent with the ESA's statutory purposes.<sup>102</sup>

### C. Keeping Agencies on a Short Rein: The Administrative Procedure Act (APA)

The APA entitles any individuals subject to agency action the right to judicial review of such action.<sup>103</sup> The APA requires courts to set aside and hold unlawful agency rulemaking that is "arbitrary and capricious" and "not in accordance with the law."<sup>104</sup> Agency action is arbitrary and capricious if the agency has relied on information outside the scope of Congress's intent, has not considered an essential part of the problem, has provided conflicting explanations and evidence, or has come to a conclusion "so implausible" that it is outside the scope of agency expertise.<sup>105</sup>

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98. Notice Rule, 81 Fed. Reg. 66462, 66465 (acknowledging special role of states in listing and delisting decisions).

99. 50 C.F.R. § 424.14(f)(1) (noting FWS retains authority to consider petition and produce finding if petition substantially complied with requirements).

100. Notice Rule, 81 Fed. Reg. 66462, 66464 (noting FWS will generally reject petition if requirements are unmet).

101. *Id.* at 66484 (arguing rule will not change outcome of any petition review).

102. *See id.* at 66465 (promoting interaction between petitioners and state agencies).

103. *See* Administrative Procedure Act, 5 U.S.C. § 702 (identifying statutory authority allowing judicial review of agency actions).

104. *Friends of Animals v. Haaland*, 997 F.3d 1010, 1015 (9th Cir. 2021) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)). When evaluating agency action under the arbitrary and capricious standard, a court's scope of review is "deferential and narrow." *Id.* (emphasizing courts are not to replace agency judgment with court's judgment). A court will not substitute its judgment for the agency's interpretation under a narrow and deferential scope of review. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (explaining standard of review).

105. *See Turtle Island Restoration Network v. U.S. Dep't of Com.*, 878 F.3d 725, 732-33 (9th Cir. 2017) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (requiring agency provide "satisfactory explanation" for its action).

#### D. Send in the Cavalry: The *Chevron* Inquiry

FWS promulgated the Notice Rule through the traditional notice-and-comment rulemaking process.<sup>106</sup> Under this form of rulemaking, courts review agency action under the two-step *Chevron* inquiry.<sup>107</sup> Courts follow the *Chevron* framework when the agency action involves an agency's interpretation of a statute, and that interpretation has the force and effect of law.<sup>108</sup>

##### 1. Step One of the *Chevron* Test

When applying the *Chevron* test, the court must first determine whether Congress has "directly spoken to the precise question at issue."<sup>109</sup> If Congress's intent is clear, then the courts and agencies must defer to Congress's express intent.<sup>110</sup> When arguing the scope of Congress's intent, parties often look to the legislation's history, text, and structure.<sup>111</sup> Conversely, if the statute is silent or ambiguous on the issue, the court moves to step two of the *Chevron* inquiry.<sup>112</sup> Importantly, congressional intent must apply to a specific, narrow issue, while general remarks made without reference to the specific issue cannot establish intent.<sup>113</sup>

##### 2. Step Two of the *Chevron* Test

If the court finds that the statute is silent or ambiguous on the specific issue, step two of the *Chevron* inquiry requires courts apply a reasonableness test to assess whether the agency's action is

106. Endangered Species Act, 16 U.S.C. § 1533(h) (outlining Secretary's obligation to provide public comment period).

107. See *Friends of Animals v. Haaland*, 997 F.3d 1010, 1015 (9th Cir. 2021) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)) (establishing two-step framework).

108. See *Alaska Wilderness League v. EPA*, 727 F.3d 934, 937 (9th Cir. 2013) (explaining when *Chevron* deference is applicable in judicial review of agency action).

109. *Friends of Animals*, 997 F.3d at 1015 (quoting *Chevron*, 467 U.S. at 842-43) (identifying first question in inquiry).

110. See *Friends of Animals*, 997 F.3d at 1015 (citing *Chevron*, 467 U.S. at 842-43) (ending matter if Congress had clear intent). *Chevron* maintained that the court, in the absence of Congress's express intent, must not impose its own intent and construction of the statute. *Chevron*, 467 U.S. at 843 (requiring interpretation of congressional intent, not judicial activism).

111. See *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1222 (9th Cir. 2015) (using statute's legislative history to determine congressional intent).

112. *Friends of Animals*, 997 F.3d at 1016 (citing *Chevron*, 467 U.S. at 842-43) (showing progression of analysis).

113. See *Chevron*, 467 U.S. at 862 (specifying that defendants cannot use general remarks to demonstrate express congressional intent).

grounded in a “permissible construction of the statute.”<sup>114</sup> Under this reasonableness test, courts defer to an administrative interpretation of a statute unless it is clear that Congress would not have authorized such an interpretation.<sup>115</sup> One contributing factor to the determination of congressional intent is Congress’s delegation of authority to agencies.<sup>116</sup> Congress grants agencies the authority to enact rules and policies under statutes to fill statutory gaps left by Congress.<sup>117</sup> Statutory gaps may be either explicit or implicit.<sup>118</sup> Explicit statutory gaps grant agencies more authority in the rulemaking process and allow courts to afford greater deference to an agency’s statutory interpretations.<sup>119</sup> Implicit statutory gaps, while delegating less authority, still require the judiciary to refrain from replacing an agency decision with its own interpretation of the statute.<sup>120</sup>

Courts will use traditional tools of statutory construction when determining whether an agency’s action was a permissible construction of the statute.<sup>121</sup> In interpreting a statute, a court should ensure that “no clause, sentence, or word shall be superfluous, void, or insignificant.”<sup>122</sup> Courts must also construe an agency’s interpretation of a statute to avoid serious constitutional problems, while not running afoul of Congress’s intent.<sup>123</sup>

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114. *Id.* at 843 (concluding court is not always bound to accept agency’s construction of statute). The agency’s statutory construction does not have to be the same conclusion the court would have reached if the issue first arose in a judicial proceeding. *Id.* at 843 n.11 (permitting deference to agency’s rule construction).

115. *See id.* at 844-45 (affirming agency action unless legislative history or statute would not have “sanctioned” it).

116. *Id.* at 843-44 (acknowledging weight courts afford to agency’s statutory construction because of role agencies play in administering statutes).

117. *Id.* (recognizing “express delegation” of agency authority to create policies and programs to fill explicit statutory gaps).

118. *Chevron*, 467 U.S. at 843 (explaining Congress’s delegation of authority).

119. *Id.* at 843-44 (stating explicit statutory gap gives controlling weight to regulation unless arbitrary and capricious).

120. *Id.* at 843-44, 865 (noting higher agency deference when issue is “complex” and depends upon more than “ordinary knowledge”).

121. *See* *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 903 (9th Cir. 2012) (addressing core principles of statutory construction). Traditional tools of statutory interpretation dictate that an agency interpretation should not make a clause, sentence, or other word void or insignificant. *Id.* (describing specific canon of statutory interpretation).

122. *See id.* (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (clarifying considerations for courts when engaging in statutory construction analysis).

123. *See* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (directing courts to construe constitutionally problematic statute to avoid constitutional problems).



E. You Can Lead a Horse to Water, but You Can't Make It Drink: Remand Without Vacatur

Remand without vacatur is the judicial practice of allowing an agency action to remain in full effect after it has been remanded to the agency for reconsideration.<sup>124</sup> Remand without vacatur occurs regularly in the Ninth Circuit and other circuit courts.<sup>125</sup> Additionally, the Ninth Circuit stated that courts remand without vacatur in “limited circumstances.”<sup>126</sup>

In the Court of Appeals for the D.C. Circuit case *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*,<sup>127</sup> the court discussed circumstances under which a decision should be vacated.<sup>128</sup> To vacate, courts look at two factors: (1) the seriousness of the agency's error, and (2) the consequences of vacating.<sup>129</sup> In analyzing the seriousness of an agency's error, courts consider whether the agency could adopt the same rule on remand.<sup>130</sup> Additionally, when considering the consequences of vacating a rule, the court may choose not to vacate if it would cause “serious” and “irremediable” harm.<sup>131</sup> The Ninth Circuit also stated that courts may leave invalid rules in place while agencies internally correct their procedures only “when equity demands.”<sup>132</sup>

Within the Ninth Circuit, the District Court for the Northern District of California proactively vacated rules promulgated under

124. See STEPHANIE J. TATHAM, ADMIN. CONFERENCE OF U.S., THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 1 (2014) (introducing remand without vacatur).

125. See Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 307 (2017) (explaining emergence of remand without vacatur in D.C. Circuit, followed by First, Third, Fifth, Eighth, Ninth, Tenth, and Federal Circuits).

126. *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (justifying remand without vacatur because of economic costs).

127. 988 F.2d 146 (D.C. Cir. 1993) (introducing case).

128. *Id.* at 150-51 (describing remand without vacatur and when it may be warranted).

129. *Id.* (outlining factors for vacation).

130. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (stating vacatur is appropriate where “fundamental flaws” would prevent agency from adopting same rule upon remand).

131. *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (noting harms need to outweigh agency error). The court may also consider environmental harms when determining whether to vacate. *Pollinator Stewardship Council*, 806 F.3d at 532 (noting court will leave rule in place if vacation risks environmental harm).

132. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (allowing rule to list snail species as endangered despite agency's procedural error because of risk of extinction and “significant expenditure” of public money spent on snail studies indicating listing status was necessary).

the ESA.<sup>133</sup> In *Center for Biological Diversity v. Haaland*,<sup>134</sup> the district court vacated two ESA rules promulgated under the Trump Administration.<sup>135</sup> The court held that neither of the *Allied-Signal* factors weighed against vacatur; therefore, remand without vacatur was inappropriate.<sup>136</sup> The vacated rules went up on appeal, and the Ninth Circuit reversed the district court's vacations and held that the district court erred in vacating the Trump Administration rules "without ruling on [the rules'] legal validity."<sup>137</sup> The Ninth Circuit considered the foregoing doctrines during its judicial review of the Notice Rule in *Friends of Animals*.<sup>138</sup>

#### IV. A HORSE OF A DIFFERENT COLOR: A NARRATIVE ANALYSIS OF THE NINTH CIRCUIT'S DECISION

On appeal, the Ninth Circuit reviewed the district court's decision and addressed two issues: (1) whether the Notice Rule was invalid under the ESA, and (2) whether FWS wrongfully denied Friends' petition.<sup>139</sup> The Ninth Circuit determined the appropriate scope of review was "deferential and narrow" pursuant to § 706 of the APA's arbitrary and capricious standard.<sup>140</sup> The court's review began with a *Chevron* analysis because FWS promulgated the Notice Rule through notice-and-comment rulemaking.<sup>141</sup>

In addressing step one of the *Chevron* analysis, the Ninth Circuit considered the parties' arguments and determined the Notice

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133. For a discussion of the recently vacated agency rules under the ESA, see *supra* notes 16-19 and accompanying text.

134. No. 19-cv-05206-JST, 2022 WL 2444455, at \*4-5 (N.D. Cal. July 5, 2022) (introducing case).

135. For a discussion of the district court's vacation of the 2019 ESA rules, see *supra* notes 16-19 and accompanying text.

136. *Ctr. for Biological Diversity*, No. 19-cv-05206-JST, 2022 WL 2444455, at \*4-5 (discussing reasons for vacating rules). The court considered the potential confusion and disruption that could occur during the interim change in procedure. *Id.* at \*5 (holding that keeping rules in place will result in more confusion than if rules were vacated).

137. *In re Wash. Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033, at \*1 (9th Cir. Sept. 21, 2022) (vacating district court's negative treatment of rules).

138. For a discussion of the Ninth Circuit's analysis in *Friends of Animals*, see *infra* notes 139-68 and accompanying text.

139. See *Friends of Animals v. Haaland*, 997 F.3d 1010, 1012-13, 1015 (9th Cir. 2021) (discussing Ninth Circuit's analysis).

140. *Id.* at 1015 (reiterating court must hold unlawful and set aside agency rules it finds arbitrary and capricious). For a discussion on the scope of a deferential and narrow standard of review, see *supra* note 104 and accompanying text.

141. *Id.* (describing agency's rulemaking authority and court's method of reviewing agency authority).

Rule passed this step.<sup>142</sup> Pursuant to step one, the Ninth Circuit held the ESA was silent as to any pre-petition procedures or notification requirements.<sup>143</sup> The court further noted that, while the ESA provides some general guidance on state involvement and the petition process, the ESA neither expressly prohibits state involvement nor provides explicit petition procedures.<sup>144</sup> For these reasons, the court determined the Notice Rule passed step one of the *Chevron* inquiry and moved to step two.<sup>145</sup>

Under *Chevron* step two, the Ninth Circuit considered whether the Notice Rule was a permissible construction of the ESA.<sup>146</sup> The court first discussed FWS's characterization of the Notice Rule, observing the agency deemed the rule a "mechanism to increase efficiency" during petition review.<sup>147</sup> FWS claimed the Notice Rule increased efficiency by providing notice to the states, which allowed states to begin preparing materials for the twelve-month petition review.<sup>148</sup> The Ninth Circuit reasoned that the intent and effect of the Notice Rule was to urge states to submit information to FWS for use during the Secretary's ninety-day finding.<sup>149</sup> The Ninth Circuit observed that other courts have historically chastised FWS for soliciting and considering information outside of the interested party's petition during the ninety-day finding.<sup>150</sup> The court agreed with Friends that the only information FWS should consider during the initial petition review is information the interested party supplies, as the agency must make its finding based only on the merits of the petition.<sup>151</sup>

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142. For a discussion of Friends' and Defendants' arguments, see *supra* notes 50-83 and accompanying text.

143. *Friends of Animals*, 997 F.3d at 1016 (finding Congress's intent regarding state involvement in pre-petition process was unclear).

144. *Id.* (reiterating Defendants' arguments).

145. *Id.* (shifting analysis to reasonableness of agency action).

146. For a discussion of step two of the *Chevron* inquiry, see *supra* notes 106-123 and accompanying text.

147. *Friends of Animals*, 997 F.3d at 1016 (citing Appellees' Answering Brief, *supra* note 69, at 5) (explaining FWS's purpose in promulgating Notice Rule).

148. *Id.* (contrasting FWS's characterization of Notice Rule in briefs with actual intent and effect of Notice Rule).

149. *Id.* (citing Notice Rule, 81 Fed. Reg. 66462, 66463-67, 67474-76 (Sept. 27, 2016) (to be codified at 50 C.F.R. pt. 424)) (encouraging states to submit information and allowing FWS to deny petitions lacking state-supplied information).

150. *Id.* (citing *Ctr. for Biological Diversity v. Morgenweck*, 351 F.Supp. 2d 1137, 1142-44 (D. Colo. 2004)) (holding denial of petition for lack of state notification was arbitrary and capricious).

151. *Id.* at 1017 (finding solicitation of outside information to be contrary to ESA's purpose).

Additionally, under the second step of the *Chevron* inquiry, the Ninth Circuit discussed FWS's rejection of Friends' petition.<sup>152</sup> The court agreed that FWS had authority under the ESA and APA to promulgate rules governing the petition process and deny petitions accordingly.<sup>153</sup> The court added that the only petition requirements FWS should make are those providing necessary information and assistance to expedite wildlife species conservation.<sup>154</sup> The Ninth Circuit concluded the Notice Rule did not fall within any of the categories of acceptable petition requirements, which contributed to the Notice Rule failing to pass *Chevron*'s second step.<sup>155</sup>

The Ninth Circuit further concluded the Notice Rule failed step two after looking at Congress's intent regarding ESA petitions.<sup>156</sup> The court determined the purpose of the petition process was to "require immediate review" of potentially endangered or threatened species.<sup>157</sup> The opinion stated the Notice Rule disrupted an interested party's ability to receive immediate review of their petition because the rule required individuals to notify affected states thirty days before petition submission.<sup>158</sup> The court referred to the Notice Rule as "a procedural hurdle for petitioners" and held the rule was contrary to Congress's intent.<sup>159</sup>

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152. *Id.* (explaining issue of petition denial).

153. *Friends of Animals*, 997 F.3d at 1017 (identifying FWS's rights under ESA to establish petition requirements). The court identified FWS rules that dictate what information must be included in the petition, such as "the scientific and common names of a species, a clear indication of the administrative action sought, a narrative justifying the action sought and analysis of the information presented . . . and information related to species' distinction and historical range." *Id.* (showing examples of petition requirements relating to species). The court also identified requirements relating to the petition process which govern the technical form and content of the petition, including "verifiable cites to literature [and] electronic or hard copies of supporting materials." *Id.* (showing examples of information requirements similar to Notice Rule that are unrelated to species).

154. *See id.* (setting criteria for valid rule).

155. *Id.* (holding Notice Rule does not advance goals of FWS-created rules governing petition process).

156. *See id.* (specifying purpose of ESA § 4).

157. *Friends of Animals*, 997 F.3d at 1017 (quoting H.R. REP. NO. 95-1625, pt. 1, at 5 (1978)) (indicating priority system for endangered or threatened species); *see also* *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 839-40 (9th Cir. 2001) (reviewing congressional hearing to determine congressional intent for ESA); *see also* H.R. REP. NO. 95-1625, pt. 1, at 5 (1978) (explaining that interested party's petition interrupts FWS's priority system).

158. *Friends of Animals*, 997 F.3d at 1017 (holding Notice Rule hindered ability to immediately interrupt FWS's priority system).

159. *Id.* (identifying Notice Rule as burden to petitioners and petitioning process).

The Ninth Circuit also relied on the statute's plain language to conclude the Notice Rule did not pass *Chevron's* second step.<sup>160</sup> The court reiterated the ESA states "the Secretary *shall*" prepare a finding to determine whether "the *petition* presents substantial scientific or commercial information" without reference to information outside of the petition.<sup>161</sup> The court also referenced congressional reports emphasizing the Secretary is "*required*" to review the species' needs after the interested party submits a petition.<sup>162</sup> Based on these findings, the court held FWS cannot promulgate rules that "frustrate the ESA by arbitrarily" deterring petitioners or impeding FWS's obligation to review petitions.<sup>163</sup> Consequently, the court held the Notice Rule was inconsistent with the language of the ESA and, therefore, the rule did not pass step two of the *Chevron* inquiry.<sup>164</sup>

The Ninth Circuit did not defer to FWS's interpretation of the ESA in its promulgation of the Notice Rule because the rule did not pass the *Chevron* test.<sup>165</sup> In holding the Notice Rule was an improper construction of the ESA, the Ninth Circuit held Defendants' refusal to review Friends' petition based on lack of notice to affected states was improper and unlawful.<sup>166</sup> The court stated that denying the petition based upon an improper rule made FWS's rejection "arbitrary and in excess of statutory jurisdiction"; thus, FWS must reverse the rejection.<sup>167</sup> The Ninth Circuit reversed the district court's grant of summary judgment in favor of Defendants and remanded the case with instructions to grant summary judgment to Friends.<sup>168</sup>

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160. *Id.* (noting additional support for invalidity of Notice Rule).

161. *Id.* (emphasizing requirement of FWS to make finding only on merits of petition); *see generally* Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A) (outlining petition process).

162. *Friends of Animals*, 997 F.3d at 1017 (providing additional background on purpose of ESA); *see generally* H.R. REP. NO. 95-1625, pt. 1, at 5 (1978) (clarifying intent of ESA).

163. *Friends of Animals*, 997 F.3d at 1017 (limiting FWS's authority to promulgate rules).

164. *Id.* at 1018 (stating Notice Rule was contrary to ESA's "statutory scheme").

165. *See id.* at 1016 (rejecting agency deference if against congressional intent for ESA).

166. *See id.* at 1017-18 (announcing court's final holding).

167. *See id.* (providing justification for holding).

168. *Friends of Animals*, 997 F.3d at 1018 (describing court's disposition).

V. THE NINTH CIRCUIT, A ONE TRICK PONY?: A CRITICAL ANALYSIS  
OF *FRIENDS OF ANIMALS*

In reaching its conclusion in *Friends of Animals*, the Ninth Circuit provided an accurate analysis of the law applicable to judicial review of agency rulemaking; however, the Ninth Circuit failed to vacate the Notice Rule and did not discuss the merits of vacatur.<sup>169</sup> While the court's decision to reject the Notice Rule sets a strong precedent for petitions denied by FWS for lack of state notification, the Notice Rule's effect may continue to burden petitioners.<sup>170</sup> Thus, the Ninth Circuit missed an opportunity to vacate the Notice Rule, discuss vacating the Notice Rule, or direct the district court to vacate.<sup>171</sup>

If the Ninth Circuit analyzed the merits of vacation, it would have first evaluated the Notice Rule under the two *Allied-Signal* factors.<sup>172</sup> In analyzing these two factors – the seriousness of the agency's error and the consequences of vacating – the Ninth Circuit likely should have vacated the Notice Rule or instructed the district court to do so.<sup>173</sup> First, when evaluating the seriousness of FWS's error, the court would consider whether FWS could adopt the same rule on remand.<sup>174</sup> Here, FWS cannot adopt the same Notice Rule on remand because the rule has fundamental flaws that resulted in the Ninth Circuit invalidating it under the ESA.<sup>175</sup>

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169. For a discussion of remand without vacatur, see *supra* notes 124-37 and accompanying text.

170. See *id.* at 1016-17 (rejecting Defendants' argument that Notice Rule is "small burden" on petitioners); see also Tatham, *supra* note 124, at 5 (reporting prevalence and use of remand without vacatur).

171. See *Friends of Animals*, 997 F.3d at 1018 (remanding without vacating Notice Rule). Notably, the Ninth Circuit did not instruct the district court against vacating, but instead, gave no direction on vacation. See *id.* (indicating lack of instruction regarding vacation of Notice Rule). Consequently, the district court could vacate the Notice Rule on remand. See *id.* (remanding to district court).

172. For a discussion of the *Allied-Signal* factors, see *supra* notes 127-32 and accompanying text.

173. See generally *Allied-Signal, Inc. v. U. S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (describing factors used to determine vacation).

174. See generally *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (applying *Allied-Signal* test). For a discussion on the seriousness of an agency's error analysis under *Allied-Signal*, see *supra* note 130 and accompanying text.

175. See *Pollinator Stewardship Council*, 806 F.3d at 532 (finding no fundamental flaw in agency's decision); see also *Friends of Animals*, 997 F.3d at 1018 (holding Notice Rule fails *Chevron* test).

Thus, the inability of FWS to adopt the same rule on remand supports vacation of the Notice Rule.<sup>176</sup>

Second, when evaluating the consequences of vacating the Notice Rule, the court would consider the potential harms of vacation, namely environmental harms.<sup>177</sup> The Ninth Circuit likely could have determined that vacating the Notice Rule would not cause serious and irreparable harm that outweighs FWS's error in promulgating the regulation.<sup>178</sup> Instead, the court would likely find that vacating the Notice Rule may remedy harms the Notice Rule caused.<sup>179</sup> Specifically, the rule's dissolution would eliminate the burden it caused the petitioners in *Friends of Animals*.<sup>180</sup> The court might also consider whether equity should keep the rule in place while FWS corrects the errors the Notice Rule caused.<sup>181</sup> Equity does not require the court to keep the Notice Rule in place because the rule is a hurdle for petitioners and its removal is not a detriment to the petition process.<sup>182</sup> Thus, it is unlikely the Notice Rule falls within one of the limited circumstances under which remand without vacatur is appropriate.<sup>183</sup>

In contrast to *Center for Biological Diversity* — where the Ninth Circuit reversed vacation of ESA rules because the district court did not rule on their validity — the Ninth Circuit in *Friends of Animals* held the Notice Rule was invalid under the ESA.<sup>184</sup> As a result, the

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176. See generally *Pollinator Stewardship Council*, 806 F.3d at 532 (vacating rule because different result could be reached upon remand); see also *Friends of Animals*, 997 F.3d at 1017 (finding Notice Rule invalid under ESA).

177. For a discussion of the consequences of vacating rules, see *supra* note 131 and accompanying text.

178. See Appellant's Opening Brief, *supra* note 33, at 7 (noting Pryor Mountain wild horse's threatened survival). For a discussion of the background of remand without vacatur, see *supra* notes 125–138 and accompanying text.

179. See *Friends of Animals*, 997 F.3d at 1013, 1017 (holding Notice Rule goes against ESA's purpose to conserve endangered and threatened species).

180. See *id.* at 1017 (discussing how Notice Rule frustrates petition process); see also *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) (weighing agency's errors against consequences of vacation).

181. For a discussion of when equity prevents vacation of a regulation, see *supra* note 132 and accompanying text.

182. See *Friends of Animals*, 997 F.3d at 1017 (mentioning Notice Rule was merely addition to petition process); see also *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (comparing risk of extinction to loss of public investment).

183. For a general discussion of remand without vacatur, see *supra* notes 124-37 and accompanying text.

184. See *Friends of Animals*, 997 F.3d at 1018 (9th Cir. 2021) (determining legal invalidity of Notice Rule). For a discussion of *Center for Biological Diversity*, see *supra* notes 133-137 and accompanying text.

Ninth Circuit should have vacated the Notice Rule or instructed the district court to do so.<sup>185</sup> The Ninth Circuit's opinion only instructed the district court "to enter summary judgment in favor of Plaintiff" without providing guidance on the Notice Rule's vacation.<sup>186</sup> While the Ninth Circuit did not explicitly limit the district court from ruling on vacation, an analysis of vacation or directions to vacate the Notice Rule would have provided greater protection against the rule's potential harms in the future.<sup>187</sup>

#### VI. NOT LOOKING THE GIFT HORSE IN THE MOUTH: *FRIENDS OF ANIMALS*'S IMPACT ON THE ESA AND THE ENVIRONMENT

*Friends of Animals* will have a lasting impact on the ESA's petition process despite the lack of vacatur.<sup>188</sup> If the district court vacates the rule, petitioners will no longer need to notify states of their intent to file a petition, allowing them to exercise their statutory right to petition at any time.<sup>189</sup> Furthermore, FWS will assess future petitions on their merits instead of considering any outside information submitted by the states.<sup>190</sup>

While the impact of this decision on the Pryor Mountain wild horse population is not yet known, the FWS will assess *Friends*' petition exclusively on its merits.<sup>191</sup> A petition review based solely on its merits will help insulate the petition from outside forces looking to

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185. See *In re Washington Cattlemen's Ass'n*, No. 22-70194, 2022 WL 4393033, at \*1 (9th Cir. Sept. 21, 2022) (holding lack of invalidity bars vacating 2019 ESA rules); see generally Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 278 (2005) (proposing two options for courts upon finding rule is invalid).

186. *Friends of Animals*, 997 F.3d at 1018 (remanding petition back to district court).

187. For an analysis of the vacation of the Notice Rule, see *supra* notes 173-87 and accompanying text.

188. For a discussion of the petition process under the ESA, see *supra* notes 95-102 and accompanying text.

189. For a discussion of the outcome of *Friends of Animals*, see *supra* notes 139-68 and accompanying text.

190. For a discussion of the Ninth Circuit's remand to the district court, see *supra* notes 166-68 and accompanying text.

191. See *Friends of Animals*, 997 F.3d at 1018 (noting FWS's previous denial to review petition's merits). A review of the petition on its merits could result in a finding that the petition alleges sufficient information to warrant a twelve-month review of the species. See *id.* at 1012-13 (acknowledging petitioners' desire to evaluate petition on merits). After the twelve-month review, FWS may list the Pryor Mountain wild horse population as an endangered or threatened species under the ESA, which will allow FWS to issue protections for the species, including critical habitat designation. See *id.* at 1014 (noting petitioners' desire to list species for protection).



influence FWS's decision-making.<sup>192</sup> Invalidating the Notice Rule will ensure FWS is not allowed to consider outside motives during the initial ninety-day review and permit FWS to only review the risks to the endangered or threatened species and their needs.<sup>193</sup> Thus, without the Notice Rule, it is less likely that petitions will be “prematurely denied before FWS conducts [an inclusive] review . . . .”<sup>194</sup>

Invalidation of the Notice Rule brings environmental activists one step closer to enhancing the protection of threatened and endangered species under the ESA.<sup>195</sup> Protection is enhanced because FWS will need to review petitions based on the merits without potential political intervention from the states.<sup>196</sup> The decision in *Friends of Animals* also ensures FWS follows the ESA's intent and purpose.<sup>197</sup> Vacation of the Notice Rule by FWS or the district court, based on the Ninth Circuit's findings, is likely to be the type of action many environmentalists are looking for under the Biden Administration.<sup>198</sup> This decision is especially important amidst the planet's “intensifying biodiversity crisis” leaving millions of species

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192. See generally Appellant's Opening Brief, *supra* note 33, at 1, 7 (discussing Pryor Mountain wild horses' depletion in population through removal by Bureau of Land Management). Friends alleged the information submitted by states during the ninety-day review “might be biased, or at least slanted toward denying the petition.” *Id.* at 1 (advancing argument that affected states sometimes oppose petitions from start). State-supplied information is appropriate during the twelve-month review process where FWS conducts a full review that includes information from “states, scientists, and the public.” *Id.* (noting information FWS uses in its full, twelve-month review after initial ninety-day finding).

193. See generally *id.* at 2 (arguing petition on merits is more likely to warrant twelve-month review).

194. *Id.* (outlining Notice Rule's intended result).

195. See generally Catrin Einhorn, *Biden Administration Tosses Trump Definition of 'Habitat' for Endangered Species*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/climate/biden-endangered-species-habitat.html> (arguing every step toward conservation is beneficial).

196. See Appellant's Opening Brief, *supra* note 33, at 1-2 (lamenting that Notice Rule allows outside interests into initial ninety-day review). Under the ESA, states may properly supply outside information during the twelve-month review, however, the Notice Rule improperly gives states earlier access to the petition process. See *id.* (claiming purpose of ESA was to evade petition reviewing duties). Previously, FWS might deny petitions during an initial ninety-day review based on state-supplied information, but elimination of the Notice Rule will ensure FWS will only receive state-supplied information during its twelve-month review of the petition. See *id.* (acknowledging full review of petition during twelve-month review). This comprehensive twelve-month review includes solicited information from scientists, the state, and the public. See *id.* (discussing when solicitation of information is appropriate).

197. See *Friends of Animals v. Haaland*, 997 F.3d 1010, 1017 (9th Cir. 2021) (holding Notice Rule must comply with ESA's goals).

198. See generally Einhorn, *supra* note 195 (stating agencies are waiting for court decisions on current rules before creating new ones).

at risk of extinction.<sup>199</sup> The continuing elimination of plant and animal species will have far-reaching implications on the planet.<sup>200</sup>

A recent report from the World Wildlife Fund (WWF) noted the future of the planet is “critically dependent on biodiversity.”<sup>201</sup> The report found a sixty-nine percent decline in wildlife around the world from 1970 to 2018.<sup>202</sup> The report urges a “transformational [and global] change” in our approach to consumption and the economy whereby protection of biodiversity slows the harmful impacts of climate change.<sup>203</sup> The WWF reports that one million plants and animals are currently threatened with extinction and “1-2.5% of birds, mammals, amphibians, reptiles[,] and fish have already gone extinct,” in large part due to habitat loss.<sup>204</sup> Thus, any modification to the ESA and rules under it that provides more protection for endangered and threatened species contributes to the fight against the loss of biodiversity.<sup>205</sup> As one individual at FWS commented, “we need every tool in the toolbox” to protect the planet’s rapidly declining biodiversity and fight the effects of climate change.<sup>206</sup>

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199. *Id.* (associating species extinction crisis with habitat loss and climate change).

200. See WORLD WILDLIFE FUND, *Living Planet Report 2022: Building a Nature-Positive Society* 16 (Rosamunde Almond, Monique Grooten, Diego Juffe Bignoli, Tanya Petersen, Barney Jeffries, Evan Jeffries, Katie Gough, & Eleanor O’Leary eds., 2022) (discussing effects of biodiversity elimination on planet and human species). The WWF report discusses the need for a “net-positive” goal to restore nature instead of a goal to merely halt nature’s current losses. *Id.* at 7 (highlighting nature’s ability to rebuild after damage). There needs to be more biodiversity at the end of the decade than there was at the beginning to ensure a safer, more sustainable planet for future humanity. *Id.* (outlining benefits of more biodiversity).

201. *Id.* at 4, 5, 16 (listing ways humans depend on biodiversity).

202. *Id.* at 4 (discussing speed and scale of changes in biodiversity).

203. *Id.* at 5 (advocating for system-wide change).

204. *Id.* at 16 (attributing biodiversity loss to changes in land and sea use).

205. For a discussion of the impact of the Notice Rule’s invalidity, see *supra* notes 188-93 and accompanying text.

206. Einhorn, *supra* note 195 (quoting FWS division chief for conservation and classification).

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