

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

FRIENDS OF ANIMALS,  
*Plaintiff-Appellant,*

v.

DEB HAALAND, in her official  
capacity as Secretary of the U.S.  
Department of Interior; MARTHA  
WILLIAMS, in her official capacity as  
Principal Deputy Director of the U.S.  
Fish and Wildlife Service; UNITED  
STATES FISH AND WILDLIFE SERVICE,  
*Defendants-Appellees.*

No. 20-35318

D.C. No.  
1:18-cv-00064-  
SPW-TJC

OPINION

Appeal from the United States District Court  
for the District of Montana  
Susan P. Watters, District Judge, Presiding

Argued and Submitted March 1, 2021  
Portland, Oregon

Filed May 17, 2021

Before: Richard A. Paez and Paul J. Watford, Circuit Judges, and John R. Tunheim, \* District Judge.

Opinion by Judge Tunheim

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### SUMMARY\*\*

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#### Environmental Law

The panel reversed the district court’s summary judgment entered in favor of federal officials and the U.S. Fish and Wildlife Service (“FWS”), and remanded to the district court to enter judgment in favor of the Friends of Animals (“Friends”) in an action challenging FWS’s rule, 50 C.F.R. § 424.14(b), which required that affected states receive 30-day notice of an intent to file a petition to list an endangered species.

In 2017, Friends filed a petition requesting that FWS list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the Endangered Species Act (“ESA”). The FWS notified Friends that the submission did not qualify as a petition because it did not include copies of required notification letters or electronic communications to state agencies in affected areas. Friends filed this action seeking a declaration that federal defendants violated the ESA and the

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\* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Administrative Procedure Act by impermissibly requiring that the 30-day notice be made to affected states and refusing to issue a finding on Friends' petition within 90 days, and vacatur of 50 C.F.R. § 424.14(b)'s 30-day notice requirement. The district court concluded that the pre-file notice requirement was a permissible construction of the ESA.

The panel held that the FWS's pre-file notice rule was inconsistent with the statutory scheme of the ESA. Because the pre-file notice rule was enacted through notice-and-comment rulemaking procedures pursuant to 16 U.S.C. § 1533(h), the panel reviewed the agency rulemaking under the two-step *Chevron* framework. The panel held that the pre-file notice rule survived step one – determining whether Congress clearly spoke to the question at issue – because the ESA was silent as to pre-petition procedures and notice requirements. At step two, the panel assessed whether FWS's construction of the rule was reasonable. The panel held that the pre-file notice rule created a procedural hurdle for petitioners that did not comport with the ESA. Here, the FWS used the pre-file notice rule to refuse to consider a petition that was properly submitted, complied with the substantive requirements in all other aspects, and was otherwise entitled to a 90-day finding, while relying on an unreasonable justification that did not accord with the aims of the ESA. The panel concluded that the pre-file notice rule did not survive the second step of the *Chevron* test.

The panel concluded that the FWS's decision to deny Friend's petition because of its non-compliance with the pre-file notice rule could not be sustained.

**COUNSEL**

Michael Ray Harris (argued) and Jennifer Best, Friends of Animals Wildlife Law Program, Centennial, Colorado, for Plaintiff-Appellant.

Robert J. Lundman (argued) and Mark R. Haag, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jonathan D. Brightbill, Principal Deputy Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Linus Y. Chen, Attorney, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

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**OPINION**

TUNHEIM, District Judge:

Plaintiff-Appellant, Friends of Animals (“Friends”), brought this action challenging a Fish and Wildlife Service (“FWS”) rule, 50 C.F.R. § 424.14(b), which requires that affected states receive 30-day notice of an intent to file a petition to list an endangered species. Friends asserts claims under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. Friends alleges that the FWS used the “pre-file notice rule” to improperly reject Friends’s petition to list the Pryor Mountain wild horse as a threatened or endangered distinct population segment, and argues that the rule revision violates the ESA’s requirements for review of petitions and is inconsistent with the APA.

The district court granted summary judgment for Defendants. Friends appeals. We have jurisdiction under

28 U.S.C. § 1291. Because we conclude that the pre-file notice rule is inconsistent with the statutory scheme of the ESA, we reverse the district court’s grant of summary judgment for Defendants and remand to the district court to enter summary judgment in favor of Friends.

## I. BACKGROUND

### A. The Endangered Species Act

The purpose of the ESA is to provide a program for the conservation of endangered and threatened species and to preserve the ecosystems on which these species depend. 16 U.S.C. § 1531(b). The term ‘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). The ESA establishes two methods for identifying and listing species as threatened or endangered: the Secretary of the United States Department of the Interior (“Secretary”) and delegated agencies, the National Marine Fisheries Services and the FWS (collectively, “the Services”) may independently identify species for protection; or, interested persons may petition the Secretary and the Services to list a species as threatened or endangered. 16 U.S.C. §§ 1532(15), 1533(b); 5 U.S.C. § 553(e); 50 C.F.R. §§ 402.01(b), 424.14(a).

Section 4 of the ESA establishes the process for listing, delisting, or modifying the status of a species or habitat by petition:

To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e) of [T]itle 5, to add a species to, or to remove a

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