No. 17-35572

IN THE UNITED STATES COURTS OF APPEALS

FOR THE NINTH CIRCUIT

FRIENDS OF THE WILD SWAN, INC., et al.,

Plaintiffs-Appellants,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
(Hon. Michael W. Mosman)

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL

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Amici Hope Babcock, Jamison Colburn, Holly Doremus, William Funk, Oliver Houck, Justin Pidot, Zygmunt Plater, Stephanie Tai, and Sandra Zellmer are law professors and scholars of administrative and environmental law with particular expertise on the Endangered Species Act (ESA) and Administrative Procedure Act (APA).[1] *Amici* have an interest in informing the court of their views on the role of recovery planning under the ESA and the role of the courts in reviewing Recovery Plans that have been challenged as not meeting the standards established by Congress. In short, *Amici* believe that the lower court misconstrued the law that applies here and the decision to dismiss the complaint should be reversed. The Appendix to this brief contains *Amici*'s individual biographical information.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), these *amici* state that no party's counsel authored this brief in any part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and that no person other than these amici contributed money that was intended to fund the preparation or submission of this brief. *Amici* have obtained consent of all parties for the filing of this brief.

INTRODUCTION

Recovery Plans are critical to ensuring the survival and recovery of threatened and endangered species under the ESA. Congress not only directed that the Secretary "shall develop and implement" a Recovery Plan for each listed species, it spelled out the elements that such plans must contain and ordered the Secretary to provide an opportunity for public review and comment before plans are revised. Given the central importance of Recovery Plans to the conservation of the nation's most imperiled species it is inconceivable that Congress intended to insulate legally deficient plans from judicial review. Implementation of a flawed plan could at a minimum delay recovery or, worse, doom a species to extinction.

There are two potential avenues for such review. One is pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(1)(C), authorizing courts to compel the Secretary to perform any act under §1533 that is not discretionary. That section not only mandates that Recovery Plans must be developed and implemented, it specifies what they must contain. Appellants argue that the lower court erred in concluding that that §1540(g)(1)(C) did not authorize review of the asserted flaws in the Recovery Plan for the bull trout in this case. Alternatively, appellants argue that Recovery Plans are reviewable under the Administrative Procedure Act (APA). Should this Court decide that the citizen suit provision does apply it would be unnecessary to reach the APA issue. In the event that the Court

decides that §1540(g)(1)(C) does not apply *amici* submit this brief in support of appellants' position that the Recovery Plans must be reviewable under the APA.

SUMMARY OF THE ARGUMENT

In 1973, Congress passed the ESA to address the pressing problem of species extinction. S. Rep. No. 93-307 (1973). In *Tennessee Valley Authority v. Hill*, 437 U.S. 154, 173 (1978), the Supreme Court noted that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" and demonstrates that "Congress intended Endangered Species to be afforded the highest of priorities." To achieve the goal of protecting endangered species, the ESA directs the Secretary of the Interior to consider whether a species is endangered. 16 U.S.C. § 1533(a). If the Secretary determines that a species is endangered, the ESA requires the Secretary to develop and implement a recovery plan. 16 U.S.C. § 1533(f). The ESA requires that these plans incorporate (1) site specific management actions; (2) objective, measurable criteria which would result in a delisting determination; and (3) estimates of the time required to meet the goals outlined in the Recovery Plan. *Id.* Recovery Plans specify the actions that must be taken to conserve species under the ESA and set the standards for when the special protections of the Act are no longer required and the species can be delisted.

The APA creates a strong presumption that final agency action is subject to judicial review. It outlines only two narrow exceptions to reviewability: (1) when there is "clear and convincing evidence" that Congress intended to preclude review, or (2) when statutes are drawn in such broad terms that there is no "law to apply" and the action is deemed committed to agency discretion by law. Neither exception applies here. There is no evidence that Congress intended to preclude review of Recovery Plans and § 1533(f) provides very specific standards, i.e. "law to apply" to judge the adequacy of such plans. Accordingly, Recovery Plans are reviewable as final agency actions under § 701 of the APA.

The District Court erred in concluding that Recovery Plans were not final agency actions because they are not "legally binding." In so doing, the District Court misconstrued Supreme Court jurisprudence on what constitutes final agency action. The Supreme Court has firmly established a flexible, pragmatic approach to determining finality that takes into account both the practical and legal effects of agency actions like Recovery Plans. Instead, the District Court adopted a rigid formulaic test that essentially renders Recovery Plans unreviewable, contrary to Congress' express command that such plans must contain specific criteria to guide recovery efforts by many federal agencies and be developed with public input. The District Court also misconstrued the Supreme Court decision in *Bennett v. Spear* by conflating its "legal consequences" test with whether an agency action is

"legally binding." In fact Recovery Plans have "direct and appreciable legal consequences" and are therefore reviewable under the APA.

ARGUMENT

I. THE ADMINISTRATIVE PROCEDURE ACT CREATES A STRONG PRESUMPTION OF JUDICIAL REVIEW OF FINAL AGENCY ACTIONS SUCH AS RECOVERY PLANS UNDER THE ENDANGERED SPECIES ACT.

Congress passed the APA to give federal courts authority to review "a broad spectrum of administrative actions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review . . . ."). The Court underscored the presumption of reviewability in *Citizens to Preserve Overton Park v. Volpe* (*Overton Park*), 401 U.S. 402, 410 (1971): "Section 701 of the Administrative Procedure Act, provides that the action of 'each authority of the Government of the United States'. . . is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'" *Id.* (citation omitted) (quoting 5 U.S.C. § 701). "[J]udicial review . . . of administrative action is the rule, and nonreviewability an exception which must be demonstrated." *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

The strong presumption of judicial review of agency action is based on the judiciary's constitutional duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial review serves as an important check on

agency decision-making, ensuring that "agency action . . . has not departed from congressional intent," *Thomas v. Union Carbide Agric. Products Co*., 473 U.S. 568, 601 n.4 (1985) (Brennan, J., concurring), and that federal agencies will be held "accountable to the public." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

While the presumption of review applies only to *final* agency actions, it provides an important doctrinal principle when examining whether an action meets the various tests for finality that the Supreme Court has adopted. When coupled with the *Abbott Labs* "flexible, pragmatic" approach to finality it means that courts should not set too high a bar to judicial review of actions that may have direct and appreciable legal and practical consequences.

A. Neither of the Exceptions to the Presumption of Review Applies to Recovery Plans under the ESA.

Agency action is reviewable unless (1) there is a "statutory prohibition" or (2) the action is "committed to agency discretion by law." *Overton Park*, 401 U.S. at 410 (quoting 5 U.S.C. § 701 (2011)). Neither exception applies to Recovery Plans.

First, there must be "clear and convincing evidence of congressional intent to preclude review . . . ." *Rothman v. Hospital Serv. of S. Cal.*, 510 F.2d 956, 958 (1975). "[T]he 'clear and convincing evidence' standard is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the

congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

Here, there is no indication, let alone "clear and convincing evidence," that Congress meant to preclude review of Recovery Plans. Indeed, in *Bennett v. Spear*, 520 U.S. 154, 175 (1997), the Supreme Court held that Biological Opinions that, like Recovery Plans, are not legally binding are nonetheless reviewable. The Court observed that: "[n]othing in the ESA's citizen-suit provision expressly precludes review under the APA, [and] . . . [nothing] in the statutory scheme suggest[s] a purpose to do so." *Id.* Courts have reviewed a variety of non-binding agency actions under the ESA. *See, e.g.*, *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 605–07 (D.C. Cir. 2017) (Definition of Significant Portion of the Range); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1117–19 (9th Cir. 2012) (Candidate Conservation Agreements); *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 44–46 (D.D.C. 2007) (No Surprises Policy); *Sw. Ctr. for Biological Diversity v. Babbitt*, 980 F. Supp. 1080, 1085 (D. Ariz. 1997) (Distinct Population Segments Policy).

Second, Recovery Plans are not "committed to agency discretion by law." *Overton Park*, 401 U.S. at 410 (quoting 5 U.S.C. § 701). Agency action is committed by law to the discretion of the agency "where 'statutes are drawn in

such broad terms that in a given case there is no law to apply.'" *Id.* Further, "[t]he general exception to reviewability provided by [the APA] for action 'committed to agency discretion' remains a narrow one." *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

Here, there is ample "law to apply." Section 1533(f) provides that "[t]he secretary shall develop *and implement* plans. . . ." 16 U.S.C. § 1533(f)(1) (emphasis added). In *Center for Biological Diversity v. Bureau of Land Management*, 35 F. Supp. 3d 1137, 1151 (N.D. Cal. 2014), the court interpreted this language as imposing a non-discretionary duty to issue Recovery Plans in a timely fashion unless the Secretary determines that a plan would not promote the recovery of the species. The court ultimately found that the FWS's unreasonable delay in issuing a Recovery Plan violated the APA and ordered the FWS to complete a Recovery Plan unless it determined that the plan would not promote the conservation of the species. *Id.*

Section 1533(f) also provides that Recovery Plans "shall, to the maximum extent practicable" incorporate (1) "site-specific management actions as may be necessary" to achieve the goal of recovery; (2) "objective, measurable criteria which, when met" may lead to the species' delisting; and (3) "estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal . . . ." 16 U.S.C. § 1533(f)(1)(B)(i)–(iii). "The word 'shall' is an imperative

denoting a definite obligation." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 111 (D.D.C. 1995). In *Fund for Animals*, plaintiffs alleged that the FWS failed to incorporate the required "site specific management actions" and "objective, measurable criteria" in the grizzly bear recovery plan. *Id.* at 107–08, 110. The court found that § 1533(f) provided ample "law to apply" in reviewing the grizzly bear recovery plan: "[T]he phrase 'to the maximum extent practicable' indicates a strong congressional preference that the agency fulfill its obligation to the extent that it is possible or feasible." *Id* at 111.

In *Southwest Center for Biological Diversity v. Babbitt*, the court ruled that Recovery Plans were reviewable under the ESA citizen suit provision: "Since it is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking, this Court has jurisdiction to review this claim pursuant to ESA's citizen-suit provision. No. 98-372 TUC JMR, 1999 WL 33438081, at *6 (D. Ariz. Sept. 3, 1999) (citing *Bennett*, 520 U.S. at 172); *see also Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d at 135 ("[D]efendants have failed to incorporate into the Plan objective measurable criteria for the delisting of the pronghorn, and estimates of the time required to carry out those measures needed to achieve the plan's goal and intermediate steps toward that goal.").

Additionally, § 1533(f)(4) requires the Secretary to solicit and consider public comments before approving a recovery plan. 16 U.S.C. § 1533(f)(4) ("The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment . . . . The Secretary shall consider all information presented during the public comment period prior to approval of the plan."). These mandatory procedural requirements provide a reviewing court with law to apply. *Cf. Cook Inletkeeper v. EPA*, 400 F.App'x 239, 241 (9th Cir. 2010) (finding that the public participation requirements of the Clean Water Act imposed a mandatory duty on EPA to ensure that state of Alaska provided a meaningful opportunity for public comment on discharge permits); *Nat'l Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1519 (9th Cir. 1985) (finding that an agency's public comment regulations provided law to apply). Congress would not have mandated public input on Recovery Plans without giving courts the authority to enforce it.

The 1988 amendments to the ESA provide further evidence that Congress did not intend to leave recovery planning entirely to the Secretary's discretion. The legislative history of the 1988 amendments makes it clear that Congress was concerned "that the agencies charged with doing [recovery] were not doing it adequately." Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 Ecology L.Q. 1, 39 (1996). None of the

mandatory requirements included under § 1533(f)(1)(B) and (f)(1)(4) were originally included in the ESA. The 1988 Amendments specifically added the requirements for public comment; site-specific management actions; objective, measure, criteria; and estimates of time and cost into the recovery planning process. Endangered Species Act Amendments of 1988, § 1003, Pub. L. No. 100–478, 102 Stat. 2306 (1988).

B. The District Court Erred by Adopting a Per Se Rule that Agency Actions Are Not Reviewable Unless They Are Legally Binding.

The District Court misread the Supreme Court's jurisprudence on finality as limiting judicial review to agency actions that impose binding obligations. *See Friends of the Wild Swan, Inc. v. Thorson*, No. 3:16-CV-00681-AC, 2017 WL 2399572, at *4 (D. Or. June 1, 2017). As a general proposition, courts have ruled that Recovery Plans do not impose mandatory duties. *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1114 n.8 (9th Cir. 2015) ("It is undisputed that, generally, FWS Recovery Plans are not mandatory."). However, Recovery Plans have had the effect of guiding efforts by other agencies to comply with their affirmative conservation duties under § 7(a)(1) of the Act. *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998) ("[W]e find that § 7(a)(1) contains a clear statutory directive . . . requiring the federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to the statute."); *Fla. Key Deer v. Paulison*, 552 F.3d 1133 (11th

Cir. 2008) ("[S]ection 7(a)(1) imposes a judicially reviewable obligation upon all agencies to carry out programs for the conservation of endangered and threatened species.").

According to the District Court's reasoning, Recovery Plans can never be considered "final," and are therefore, precluded from judicial review. *Friends of the Wild Swan*, 2017 WL 2399572, at *4. By this logic, Biological Opinions, which are also not enforceable, would not be reviewable. *See Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988) ("The agency is not required to adopt the alternatives suggested in the biological opinion . . . ."). This flies directly in the face of the Supreme Court's holding in *Bennett* that Biological Opinions are subject to judicial review under the APA. *Bennett*, 520 U.S. at 178–79; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1033–34 (9th Cir. 2001).

II. THE DISTRICT COURT MISAPPLIED THE SUPREME COURT'S *ABBOTT LABS* PRAGMATIC APPROACH TO FINALITY.

The Supreme Court has long held that courts must use a pragmatic approach to determine whether an action is "final" for purposes of judicial review under 5 U.S.C. § 704. The District Court framed the issue as whether an agency action "has the *status of law or comparable legal force*, and whether immediate compliance with its terms it expected." *Friends of the Wild Swan*, 2017 WL

2399572, at *4 (emphasis in original) (quoting *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 987 (2006)).

The District Court misapplied the pragmatic reviewability approach set forth in the Supreme Court's seminal decision in *Abbott Laboratories v. Gardner*. 387 U.S. 136, 149 (1967). In *Abbott*, drug companies challenged the authority of the Secretary of Health, Education, and Welfare and Commissioner of Food and Drugs to issue regulations requiring them to comply with certain labeling requirements for prescription drugs. *Id.* at 139–39. The *Abbott* Court held that the regulations were subject to judicial review based on the fact that prior cases "dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Id.* at 149. The Court explained that the regulations are subject to judicial review because they "purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies." *Id.* at 152. The Court's focus was on the practical effects of the agency action, emphasizing that the regulations have "the status of law" and "immediate compliance with their terms was expected" and that "[i]f petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies." *Id.* *Abbott* emphasizes that

finality is a pragmatic approach that considers the practical effects of agency action.

The Supreme Court has repeatedly taken this same approach to finality both before and after *Abbott*. For example, in *Columbia Broadcast Systems v. United States*, 316 U.S. 407, 408, 420 (1942), the Court held that regulations issued by the Federal Communications Commission were final because they adversely "affect. . . appellant's contractual relations with broadcasting stations and impair its ability to carry on its business in maintaining and operating its nationwide broadcasting network." Similarly, in *Frozen Food Express v. United States*, 351 U.S. 40, 43–44 (1956), the Court held that agency action is subject to review because "[t]he determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well." The order in question did not change the law but instead merely stated the agency's reading of the law. Still, the order had substantial practical impact given that it warned carriers that violated its terms that they risked the danger that the agency would initiate enforcement actions that could lead to criminal penalties.

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980), the Court held that an Environmental Protection Agency's (EPA) determination concerning the applicability of the new source performance standards to the respondent's power

facility was a final agency action. The Court reasoned that "short of an enforcement action, EPA has rendered its last word on the matter." *Id.*

In *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), the Court stated: "An agency action is not final if it is only 'the ruling of a subordinate official,' or 'tentative.' The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will 'directly affect the parties.'"

More recently the Court has applied this pragmatic approach to finality in *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012). In *Sackett*, the EPA issued a compliance order under the Clean Water Act asserting that the Sacketts had illegally filled a protected wetland without a permit and ordered immediate restoration. *Id.* at 124–25. The Sacketts challenged EPA's determination that their property was subject to the Clean Water Act. *Id.* at 125. The Court held that the compliance order was a final agency action in large part because it created an indefinite cloud over the Sacketts' property forcing them to either incur the substantial costs of complying with the order or risk severe penalties at some point for noncompliance. *Id*. at 127.

Similarly, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807, 1814 (2016), the Supreme Court employed the same "pragmatic approach the Court has long taken to finality" to determine that an affirmative jurisdictional

determination (JD) under the Clean Water Act was final. Even though affirmative JDs do not mandate immediate compliance, or impose liability for penalties as in *Sackett*, the Court ruled that they nonetheless have legal consequences because "[t]hey represent the denial of the safe harbor that negative JDs afford." [2] *Id.* at 1814. The *Hawkes* Court emphasized that the affirmative JD presented the respondents with only two choices: "discharge fill material without a permit, risking an EPA enforcement action during which they can argue that no permit was required, or apply for a permit and seek judicial review if dissatisfied with the results." *Id.* The Court found neither alternative acceptable because "respondents need not assume such risks while waiting for EPA to 'drop the hammer' in order to have their day in court." *Id.*

Chief Justice Roberts' opinion goes to considerable lengths explaining the practical consequences of the JD suggesting that even without the safe harbor assurance the Court would have considered it final. *See* William Funk, *Final Agency Action after Hawkes*, 11 N.Y.U. J. L. & Liberty, 285, 290 (2017). In her concurring opinion Justice Ginsburg found that the practical effects of the JD alone make it final. *Hawkes*, 136 S.Ct. at 1817–18 ("But the JD at issue is 'definitive,'

[2] "A 'negative' JD—*i.e.,* an approved JD stating that property does not contain jurisdictional waters—creates a five-year safe harbor from civil enforcement proceedings brought by the Government and limits the potential liability a property owner faces for violating the Clean Water Act." *Hawkes*, 136 S.Ct. at 1810 (internal citation omitted).

not 'informal' or 'tentative,' and has "an immediate and practical impact. Accordingly, I agree with the Court that the JD is final." (Ginsburg, J., concurring) (internal citations omitted)); *see also Columbia Riverkeeper v. U.S. Coast Guard*, 761 F.3d 1084, 1094–95 (2014) ("Courts consider whether the practical effects of an agency's decision make it a final agency action.").

III. THE DISTRICT COURT MISCONSTRUED *BENNETT'S* "DIRECT AND APPRECIABLE LEGAL CONSEQUENCES" TEST.

The District Court relied on the *Bennett* decision in ruling that the Bull Trout Recovery Plan was not a final agency action. *Friends of the Wild Swan,* 2017 WL 2399572, at *4. The District Court equated *Bennett*'s "direct and appreciable legal consequences" test with whether an agency action is "legally binding." *See id.* But, *Bennett* clearly differentiates between these two concepts.

In *Bennett*, the Court stated that an agency action is final if it (1) "mark[s] the 'consummation' of the agency's decision making process," and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (internal citations omitted). The question in *Bennett* was whether a Biological Opinion issued by the FWS under the ESA met these tests. *Id.* The Court determined that the first prong was clearly met. *Id*. Then the Court found that the second prong was met because the Biological Opinion had "direct and appreciable legal consequences." *Id.* But

Biological Opinions are clearly not binding legal authorities. *Westlands Water Dist. v. U.S. Dep't of Interior*, 850 F. Supp. 1388, 1422 (1994) ("Biological opinions are not binding on the Secretary. . . ."). Thus, the *Bennett* Court found that even a non-binding agency action has legal consequences.

Instead of focusing on whether the Biological Opinion was legally binding, the *Bennett* Court focused on its "powerful coercive effect" on the Bureau of Reclamation. *Bennett*, 520 U.S. at 179. The Court noted that the practical and legal consequence of failing to comply with the Opinion would expose the Bureau to potential liability for violating the strict protections of the ESA: "The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to substantial civil and criminal penalties . . . ." *Id.* at 170. The Biological Opinion had legal consequences because it authorized, through an incidental take statement, the Bureau to engage in an otherwise illegal activity. *See id.* The *Bennett* Court concluded that, unlike actions that were merely "advisory," Biological Opinions have "direct and appreciable legal consequences." *Id.* at 178. In fact, the Biological Opinion did not determine any rights or obligations, and any legal consequences were significantly attenuated. Indeed, the Court seemed to be as

concerned with the practical effects of the agency action as with its legal effects. As discussed below, Recovery Plans have similar practical and coercive effects.

IV. RECOVERY PLANS HAVE DIRECT AND APPRECIABLE LEGAL AND PRACTICAL CONSEQUENCES.

Rescuing species from the brink of extinction and putting them on the road to recovery is the principal purpose of the ESA, and Recovery Plans are the primary means by which to achieve the conservation goals of the statute. Recovery Plans also determine at what point the special protections of the law are no longer required and species can be safely delisted. 16 U.S.C. § 1531 (b), § 1532 (3). The ESA regulations define "recovery" as "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02 (2016). Recovery and delisting are integral to fulfilling the purpose of the statute: "The plain intent of Congress in enacting this statute [ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (emphasis added).

Recovery Plans are the linchpin of the recovery and delisting process. Congress directed the Secretary to both develop and implement Recovery Plans based on the best available scientific data that include "objective and measurable criteria," timetables, cost estimates, and other factors that the agencies use to determine when species have recovered to the point they can be delisted. 16

U.S.C. § 1533(f). Agency guidance states that Recovery Plans are "one of the most important tools to ensure sound scientific and logistical decision-making throughout the recovery process." Nat'l Marine Fisheries Serv. & U.S. Fish & Wildlife Serv., *Interim Endangered and Threatened Species Recovery Planning Guidance Version 1.3* 1.1-1 (2010). Though agencies have claimed that Recovery Plans are not binding, the FWS has called them "the central organizing tool" for each species' recovery. *Id.*; *see also* 134 Cong. Rec. S9752-01 (1988) (statement of Sen. Mitchell, chairman of the Subcommittee on Environmental Protection) ("Incorporation of [descriptions of site-specific management actions, delisting criteria, and time frames and estimates of costs to carry out the recovery] will ensure that plans are as explicit as possible in describing the steps to be taken in the recovery of a species and will provide a means by which to judge the progress being made toward recovery.").

Delisting decisions illustrate the importance of Recovery Plans to the agencies' decision-making process. In *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1019–20, 1021 (9th Cir. 2011), FWS delisted the Yellowstone grizzly bear (a threatened distinct population segment) after it achieved the "demographic- and habitat-based recovery criteria" described in its Recovery Plan. Though the court ultimately vacated the delisting decision because FWS did not rationally explain why whitebark pine declines did not threaten the

species, the agency's decision to delist the species based on criteria set forth in the Recovery Plan demonstrates the plan's strong influence on agencies. *Id.* at 1032. A court also overturned the Gray Wolf delisting decision in *Defenders of Wildlife v. Salazar*, 729 F.Supp.2d 1207 (2010), because it was inconsistent with the science-based objectives and strategies set out in the Recovery Plan. The court held, "Even if the Service's solution is pragmatic, or even practical, it is at its heart a political solution that does not comply with the ESA. The northern Rocky Mountain DPS must be listed, or delisted, as a distinct population and protected accordingly." *Id.* at 1228.

Similarly, agencies have denied delisting petitions when the recovery strategies in the Recovery Plan were not achieved. The Snake River fall-run Chinook salmon recovery plan included viability criteria and alternative recovery strategies for the salmon. Endangered and Threatened Wildlife and Plants; Notice of 12-Month Finding on a Petition to Delist the Snake River Fall-Run Chinook Salmon Evolutionary Significant Unit Under Endangered Species Act (ESA), 81 Fed. Reg. 33,469, 33473 (May 26, 2016). In this petition, the National Marine Fisheries Service analyzed the salmon's viability using multiple alternatives and denied the delisting petition because, "[b]ased on our review of the species' viability, the five [delisting] factors, and efforts being made to protect the species, we conclude that the Snake River fall-run Chinook ESU is likely to become an

endangered species throughout all or a significant portion of its range in the foreseeable future." *Id.* at 33,480. The FWS also denied delisting of the Preble's meadow jumping mouse (PMJM) because it relied on a draft recovery plan to determine that the PMJM is still endangered. Endangered and Threatened Wildlife and Plants; 12-Month Finding on Two Petitions to Delist the Preble's Meadow Jumping Mouse, 78 Fed. Reg. 31,679 (May 24, 2016) (codified at 50 C.F.R. pt. 17). The FWS found that local regulatory mechanisms were inadequate because "existing protections on these lands do not fulfill preliminary draft recovery plan objectives, nor do they assure the future viability of these PMJM populations." *Id.* at 31,703.

The powerful effect of Recovery Plans is also seen in the Federal Register notices announcing the delisting of the bald eagle, white-haired goldenrod, and Oregon chub. The FWS justified its decision to delist the bald eagle in the lower 48 states by asserting that the numeric goals set forth in the bald eagle Recovery Plans had been achieved. Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 37,346, 37,347 (July 9, 2007) (codified at 50 C.F.R. pt. 17). The agency explained that the Recovery Plans provided guidance to FWS, states, and partners on "methods to minimize and reduce the threats to the bald eagle and to provide measurable criteria that would be used to help

determine" when threats were so reduced that the species could be delisted. *Id.* Likewise, FWS based its decision to delist the white-haired goldenrod and Oregon chub in part on the achievement of criteria specified in the Recovery Plan. Endangered and Threatened Wildlife and Plants; Removal of *Solidago albopilosa* (White-haired Goldenrod) from the Federal List of Endangered and Threatened Plants, 81 Fed. Reg. 70,043, 70,044, 70,047 (Oct. 11, 2016) (codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Removing the Oregon Chub from the Federal List of Endangered and Threatened Wildlife, 80 Fed. Reg. 9,126, 9,129 (Feb. 19, 2015) (codified at 50 C.F.R. pt. 17).

The FWS has also noted the importance of Recovery Plans in meeting other requirements of the ESA. For example, in its recently promulgated rule revising the definition of "adverse modification of critical habitat" under § 7(a)(2) it stated "criteria, goals, and programs for recovery that are established in these [recovery] plans may be used in our evaluation of whether, with implementation of the proposed action, critical habitat would retain its value for the conservation of the species." Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214, 7,223 (Feb. 11, 2016) (codified at 50 C.F.R. pt. 402). Section 7(a)(2) requires that federal agencies "insure" that their actions are not likely to jeopardize the continued existence of any threatened or endangered species or result in the

destruction or adverse modification of any designated critical habitat. 16 U.S.C. §1536(a)(2). Thus, like the Biological Opinions in *Bennett*, Recovery Plans have the coercive effect of exposing agencies to potential lawsuits for failure to "insure" no adverse modification of critical habitat.

Agencies have also relied on and incorporated provisions of Recovery Plans to satisfy their obligations under other statutes such as the National Forest Management Act (NFMA). The NFMA requires the Forest Service to develop land and resource management plans (forest plans) for each national forest to guide natural resource management activities, and to set standards, management area goals and objectives, and monitoring and evaluation requirements. 16 U.S.C. § 1604. In *Conservation Congress v. United States Forest Service*, Civ. No. 2:15-00249 WBS AC, 2016 WL 727272, at *10 (E.D. Cal. Feb. 24, 2016), the court noted that the forest plan for the Shasta-Trinity National Forest incorporated Recovery Plans by providing that the Forest Service must manage habitat for listed species consistent with the plans. Likewise, the forest plan discussed in *Minnesota Center for Environmental Advocacy v. United States Forest Service*, 914 F.Supp.2d 957, 967 (D. Minn. 2012), provided that "[m]anagement activities for the gray wolf will be governed by [the] Recovery Plan for Eastern Timber Wolf . . . ." Last, in *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 803 (11th Cir. 1993), the Recovery Plan for red cockaded

woodpeckers was incorporated into forest plans for "each of the national forests in the Southern Region with a Woodpecker population" and was incorporated into the Forest Service's Wildlife Habitat Management Handbook.

Recovery Plans are the blueprints that determine whether endangered species survive and recover, or languish and perish. Congress has provided clear direction for what Recovery Plans must contain and how they are to be judged. It is essential that judicial review be available to ensure that Congress' directives are followed to the letter of the law and that the prescriptions for recovery are based on the best available scientific evidence.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed and the case remanded with instructions to proceed to review the Bull Trout Recovery Plan on the merits.

Dated this 27th day of November, 2017.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35572

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Signature of Attorney or Unrepresented Litigant: s/ Patrick A. Parenteau

Date: Nov 27, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on November 27, 2017.

/s/ Patrick A. Parenteau

Appendix – Biographies of *Amici*

Hope Babcock is a Professor of Law at Georgetown Law School and Director of the Institute for Public Representation Environmental Law Clinic. Prior to teaching, she spent ten years at the National Audubon Society, serving as both general counsel and deputy general counsel. She is the author of many publications on the Endangered Species Act including *The Sad Story of the Northern Rocky Mountain Gray Wolf Reintroduction Program*, 24 Fordham Envtl. L. Rev. 25-62 (2013).

Jamison Colburn is the Joseph H. Goldstein Faculty Scholar at Penn State Law School, where he teaches environmental and administrative law. Colburn has published widely on habitat and species conservation and the administrative law of environmental assessment. Some of his articles include: *Permits, Property, and Planning in the 21st Century: Habitat as Survival and Beyond*, *in* Rebuilding the Ark: New Perspective on ESA Reform (Jonathon H. Adler ed., 2011); *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 Ariz. St. L.J. 145 (2007); and *The Indignity of Federal Wildlife Habitat Law*, 57 Ala. L. Rev. 417 (2005). Prior to teaching, Colburn served as an enforcement litigator for the Environmental Protection Agency.

Holly Doremus is the James H. House and Hiram H. Hurd Professor of Environmental Regulation at University of California's Berkeley Law School and

Co-Faculty Director of the Center for Law, Energy, & the Environment. She has written numerous books and articles on environmental law, including: *Environmental Policy Law: Problems, Cases and Readings* (Foundation Press, 6th ed. 2012) (with Lin and Rosenberg); *The Endangered Species Act: Static Law Meets Dynamic World*, 32 Wash. U.J.L. & Polly 175 (2010); *Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example*, 25 Ecology L.Q. 707 (1999).

William Funk is the Lewis & Clark Distinguished Professor of Law Emeritus at Lewis & Clark Law School. He is the co-author of several administrative law casebooks, including: Administrative Procedure and Practice: Problems and Cases, (West, 4th ed. Group 2010); Administrative Law: Examples & Explanations (Aspen Publishers, 3d ed. 2009); The Federal Administrative Procedure Sourcebook (ABA Press, 4th ed. 2008). Funk was also a Senior Fulbright Scholar at the University of Heidelberg, where he taught American constitutional law and environmental law. Prior to teaching, Funk was assistant general counsel at the U.S. Department of Energy, earning a citation for exceptional performance from the Secretary of Energy.

Oliver A. Houck has been a Professor of Law at Tulane University Law School for over 30 years, where he specializes in environmental and natural resources law. He is the author of numerous articles on the Endangered Species

Act, including: *Reflections on the Endangered Species Act*, 25 ENT. L. 689 (1995); *reprinted in* Land Use and ENT. L. Rev. (1996) and *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277 (1993). Prior to teaching, Houck served as General Counsel for the National Wildlife Federation.

Justin Pidot is Associate Professor at the University of Denver's Sturm College of Law, where his scholarship and teaching focuses on environmental law, natural resources law, and federal courts. Professor Pidot served as Deputy Solicitor for Land Resources for the Department of the Interior during the Obama Administration. Prior to teaching, he was an appellate litigator with the Environment and Natural Resources Division of the Department of Justice, where he presented arguments in more than a dozen federal appellate cases and acted as the staff attorney on two cases before the United States Supreme Court.

Zygmunt Plater is Professor of Law at Boston College Law School where he teaches and researches in the areas of environmental, property, land use, and administrative agency law. He is the lead author of *Environmental Law and Policy: Nature, Law, and Society* (Aspen Publishers, 4th ed. 2010). In 2011, the Boston College Public Interest Law Foundation named him the Public Interest Law Professor of the Year. He served as lead counsel on the litigation over the Tennessee Valley Authority's Tellico Dam Project.

Stephanie Tai is Associate Professor at the University of Wisconsin School of Law, where her scholarship examines the interactions between environmental and health sciences and administrative law. Prior to teaching, Tai worked as an attorney with the Environment and Natural Resources Division of the Department of Justice. She is the author of many publications on law and science including *Uncertainty about Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 University of Pennsylvania J of Const. Law No. 671 (2008).

Sandra Zellmer is the Robert. B. Daugherty Professor of Law at the Nebraska College of Law, where her scholarship focuses on natural resources, water, public lands, wildlife, and environmental law. She is the co-author of several casebooks, including: Natural Resources Law (West, 2d ed. 2012) (with J. Laitos & M. Wood) and Principles of Natural Resources Law: A Concise Hornbook (West 2012) (with J. Laitos). Prior to teaching, Zellmer was a trial attorney with the Environment and Natural Resources Division of the Department of Justice, litigating public lands and wildlife issues for various federal agencies, including the National Forest Service, National Park Service, and the U.S. Fish and Wildlife Service.