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California Land Use & Development Law Report

Ninth Circuit Invalidates Rule Requiring Notice to States Prior to Filing a Listing Petition Under the Endangered Species Act

fected der the Section 4(b)(3) of the Endangered Species Act allows interested persons to petition the Fish and Wildlife Service or the National Marine Fisheries Service to list a species as threatened or endangered. To the maximum extent practicable, within 90 days after receiving a listing petition, the Services must "make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." If the Services find that listing may be warranted based on the petition, the Services must then undertake a 12-month review to determine whether listing of the species is warranted. In 2016, the Services adopted a rule (codified at 50 CFR 424.14) requiring petitioners to provide notice to state fish and wildlife agencies in each state where the species occurs. The notice must be provided at least 30 days prior to submitting a listing petition to the Services. The preamble to the final rule explained that the rule would allow states to submit data and information to the Services during the 30-day period before a petition is filed, and the Services could then consider this state-supplied information in making the 90-day finding on the listing petition. This case arose from a petition filed by Friends of Animals to list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment. The Fish and Wildlife Service denied the petition in 2017 because the petition did not include proof that Friends of Animals had notified state fish and wildlife agencies at least 30 days prior to submitting the petition to the Fish and Wildlife Service. The U.S. District Court for the District of Montana upheld the 30-day notice rule as well as the Service's rejection of the listing petition. Friends of Animals appealed to the Ninth Circuit. The Ninth Circuit evaluated the 30-day notice rule under the two-step framework for "*Chevron* deference." First, the court considered whether Congress directly spoke to the precise question at issue. The court found that the ESA was silent as to pre-petition procedures and notice requirements. Next, the court considered whether the agency's interpretation of the statute was reasonable. The court held that the 30-day notice rule was not a permissible interpretation of the ESA because it was inconsistent with the statute. The court explained that the plain language of the ESA requires the Services to make a 90-day finding

based only on the contents of the listing petition. As such, it would violate the ESA for the Services to solicit and consider outside information, including information from affected states, when making a 90-day finding. The court acknowledged that the ESA permits the Services to establish requirements for the content and procedure of listing petitions. But here, the court explained, the 30-day notice rule created a procedural hurdle that frustrated the purposes of the ESA and "arbitrarily imped[ed] petitioners' ability to submit—or the Services' obligation to review—meritorious petitions."

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