

**IN THE UNITED STATES COURT
FOR THE DISTRICT OF COLUMBIA**

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)
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WILD SHEEP FOUNDATION)
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)
NASEER TAREEN)
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Quetta, Balochistan, Pakistan)
)
SOCIETY FOR TORGHAR ENVIRONMENTAL)
PROTECTION (STEP))
7 Regal Plaza)
Circular Road)
Quetta, Balochistan, Pakistan)
)
Plaintiffs,)
)
v.)
)
KEN SALAZAR, Secretary of Interior, in his)
official capacity; DAN ASHE, Director of the U.S.)
Fish and Wildlife Service, in his official capacity;)
and U.S. FISH AND WILDLIFE SERVICE)
1849 C Street, NW)
Washington, D.C. 20240)
)
Defendants.)
)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. This civil action for declaratory and injunctive relief is brought under the Citizen Suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g)(1)(C), for violations of the ESA (16 U.S.C. §1533) and the Administrative Procedure Act (“APA”) (5 U.S.C. §701 *et seq.*).

2. The primary purpose of this suit is the conservation of the Suleiman markhor in the Torghar region of Pakistan.

3. The downlisting of those markhor is in the best conservation interest of the species and

the delay is depriving the conservation program of needed revenue to operate and incentivize the conservation strategy.

4. The Parties to CITES have created a special quota to facilitate the necessary trade of trophies that fund and incentivize the conservation program, but the ESA “endangered” listing has prevented the participation of U.S. hunters and the higher operating and management revenue their participation would produce.

5. The Plaintiffs/petitioners are primarily non-profit conservation organizations deeply committed to the restoration and perpetuation of the markhor, which is also the goal and purpose of the ESA.

6. Plaintiffs Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, The Conklin Foundation, Grand Slam Club/Ovis, Wild Sheep Foundation, Jerry Brenner, Steve Hornady, Alan Sackman, Barbara Sackman, Naseer Tareen and the Society for Torghar Environmental Protection challenge the failure of Defendants U.S. Fish and Wildlife Service (“the Service”) and Secretary of the Interior Ken Salazar (“the Secretary”) to issue the 12-month finding on Plaintiffs’ Petition to Downlist the Torghar Hills population of straight-horned markhor, as well as Defendants’ failure to timely conduct the mandatory 5-year review of the species listing.

7. On August 17, 2010, Plaintiffs (all but two) submitted an ESA petition to the Secretary and the Service to downlist the Torghar Hills population of straight-horned markhor from “endangered” to “threatened.”

8. On June 2, 2011, the Service issued a positive “90-day” finding on the petition, finding that the downlisting may be warranted.

9. Over fourteen months have passed since the Secretary and the Service received the

petition, yet the Secretary and the Service have failed to issue the 12-month finding (as to whether the requested action *is* warranted) that the ESA mandates.

10. Similarly, the Secretary and the Service have failed to conduct the mandatory 5-year review of the species, which is also required by the ESA.

11. Plaintiffs seek a declaration that the Secretary and the Service violated Section 4(b)(3)(B) of the ESA (16 U.S.C. §1533(b)(3)(B)) by failing to timely make the required determination as to whether the downlisting requested by Plaintiffs is warranted; that the Secretary and the Service violated Section 4(c)(2) of the ESA (16 U.S.C. §1533(c)(2)) by failing to conduct the mandatory 5-year review of the species; and that these failures constitute agency action unlawfully withheld and/or unreasonably delayed under the APA (5 U.S.C. §706(1)). Plaintiffs further seek an injunction ordering the Service to complete and publish these mandatory findings.

II. JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to the ESA citizen suit provision, 16 U.S.C. §1540(g)(1). Alternatively, the Court has jurisdiction pursuant to 28 U.S.C. §1331 (federal question jurisdiction) and 5 U.S.C. §701 *et seq.* (APA). The requested relief is proper under 16 U.S.C. §1540(g)(1) and 28 U.S.C. §§ 2201-02 (declaratory judgment and injunctive relief).

13. Pursuant to 16 U.S.C. §1540(g)(2), on September 12, 2011, *via* both email and Federal Express, Plaintiffs furnished Defendants with written notice of their intent to file suit. More than 60 days has passed since the notice of intent to sue was submitted. The violations noted therein are continuing and have not been remedied. Defendants have not even made a

courtesy response to the Notice or suggested when the finding will be made.

14. Venue is proper in this district pursuant to 28 U.S.C. §1391(e) because this is an action against an agency of the United States as well as an officer of the United States acting in his official capacity and because Defendants are situated in and conduct their operations in the District of Columbia.

15. There exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§2201-02.

III. PARTIES

16. Plaintiff **Conservation Force** files in its own capacity and as a representative of its many constituent hunters, supporting organizations, and Pakistani conservation partners. Conservation Force was a petitioner responsible for submitting the August 17, 2010, downlisting petition as well as a named participant in the Notice of Intent to Sue that has been ignored. Conservation Force is a non-profit 501(c)(3) public, charitable foundation formed for the purpose of wildlife conservation. It is dedicated to the conservation of wildlife and preservation of wildlife habitat through sustainable use strategies that generate operational revenue and create incentives for conservation. Its name represents the fact that the sustainable use of wildlife, most particularly in this instance, tourist recreational hunting, has been the foremost force for wildlife and habitat conservation for over a century. No one contributes more than sportsmen and women for the conservation of wildlife and habitat, nor has anyone contributed more to the conservation of the markhor in Pakistan, which today is at record high numbers. Conservation Force has wildlife conservation projects around the world to conserve, manage, and protect ESA- and CITES-listed species, including markhor projects in Pakistan. Its leaders and officers have been participants in the ESA and CITES process since the inception of those bodies of law. Its

supporting organizations are committed to the proper implementation of the ESA and/or CITES, and many have invested heavily in markhor conservation. Conservation Force is committed to and is directly participating in the conservation of straight-horned markhor, the markhor at issue. Its officers, particularly founding Board member Dr. Bart O’Gara, pioneered the Torghar Markhor project in Pakistan, especially the core concept of “conservation hunts,” which has been the principle incentive and source of funding for markhor management and conservation in Pakistan. Conservation Force has many members that have participated in the markhor STEP program or would like to if it were downlisted.

All other Plaintiffs herein are supporting members of Conservation Force (with the exception of Naseer A. Tareen and STEP). The individual permit-applicant plaintiffs are members of Conservation Force and Conservation Force represents other members, including outdoor writer Craig Boddington and Renee Snider, who both participated in conservation hunts of these straight-horned markhor in the past year.

Conservation Force’s purpose, membership and support depend upon establishing and maintaining tourist hunting as a force for conservation of species and related habitat through tribal or communal-based natural resource management (CBNRM) strategies. The markhor project at issue is one of the foremost and best recognized projects of that kind. The ESA listing status of the markhor, the past refusal to process import permits for the trophies the project wholly depends upon, and the illegal denial of trophy import permits has cost the project millions of dollars in lost income, devalued the conservation value of markhor and caused membership loss of confidence in Conservation Force and support for Conservation Force.

17. Plaintiff **Steve D. Hornady** is a U.S. citizen from Grand Island, Nebraska. Plaintiff Hornady cares genuinely as a sportsman and conservationist about the Suleiman

markhor and the tribal people of the Torghar Hills, and has participated in the STEP program. Plaintiff Hornady petitioned Defendants to downlist the straight-horned markhor because he is greatly concerned that the markhor's "endangered" listing has severely harmed, not helped, the species. He is a supporting member of Conservation Force, was a named person in the downlisting petition and Notice of Intent to Sue, and has taken one of the markhor at issue that will be importable when downlisting is granted.

18. Plaintiff **Barbara Sackman**, a citizen of the U.S. domiciled in the State of New York, participated in the STEP Project and lawfully took a straight-horned markhor in March 2008. Plaintiff B. Sackman petitioned Defendants to downlist the straight-horned markhor because she is concerned that the markhor's "endangered" listing has severely harmed, not helped, the species. She is a supporting member of Conservation Force, was a named person in the downlisting petition and Notice of Intent to Sue, and has taken one of the markhor at issue that will be importable when downlisting is granted.

19. Plaintiff **Alan Sackman**, a citizen of the U.S. domiciled in the State of New York, participated in the STEP project and lawfully took a straight-horned markhor in March 2008. Plaintiff A. Sackman petitioned Defendants to downlist the straight-horned markhor because he is concerned that the markhor's "endangered" listing has severely harmed, not helped, the species. He is a supporting member of Conservation Force, was a named person in the downlisting petition and Notice of Intent to Sue, and has taken one of the markhor at issue that will be importable when downlisting is granted.

20. Plaintiff **Jerry Brenner**, a citizen of the U.S. domiciled in the state of Michigan, participated in the STEP program and lawfully took a straight-horned markhor in March 2009. Plaintiff Brenner petitioned Defendants to downlist the straight-horned markhor because he is

greatly concerned that the markhor's "endangered" listing has severely harmed, not helped, the species. He is a supporting member of Conservation Force, was a named person in the downlisting petition and Notice of Intent to Sue, and has taken one of the markhor at issue that will be importable when downlisting is granted.

21. Plaintiff **Dallas Safari Club** ("DSC") is a nonprofit volunteer membership corporation in Dallas, Texas, that works to preserve hunters' rights and to conserve wildlife, particularly straight-horned markhor. DSC was one of the petitioners responsible for submitting the August 17, 2010, downlisting petition and the Notice of Intent to sue. The mission of the Dallas Safari Club includes the conservation of wildlife through the proper administration of the ESA and CITES, and the promotion and protection of the rights and interests of hunters worldwide. DSC appears on its own behalf and as the representative of its members that have participated and/or plan to participate in the STEP program. DSC is also a supporting member of Conservation Force and has helped to fund Conservation Force's efforts to conserve the straight-horned markhor at issue. DSC also cares deeply about the markhor's tribal stewards, the people of Pakistan. DSC is concerned that the markhor's "endangered" listing has severely harmed, not helped, the species and the downlisting is important to ensure its survival and availability for hunting by its members.

22. Plaintiff **Houston Safari Club** ("HSC") is a non-profit volunteer membership organization that preserves the sport of hunting, supports wildlife and markhor conservation, and educates the public on hunting and conservation issues. HSC was one of the petitioners responsible for submitting the August 17, 2010, downlisting petition and the 60-day Notice of Intent to Sue. HSC maintains that "hunting is conservation," as hunting is the leading force to conserve wildlife and its habitat. Over the course of three and a half decades, HSC has grown

into a large and influential group of hunters and outdoor enthusiasts, enjoying fun and fellowship while spending over \$1.7 million toward protecting hunters' rights and furthering the agenda of conserving game and habitat through conservation hunting programs. HSC has partnered on markhor conservation and its members have participated in the STEP program. But for Defendants' illegal conduct, HSC could and would generate conservation revenue for itself and its mission through the auctioning of markhor hunts and conservation revenue from hunting operators. It appears in both its representative capacity and on its own standing. HSC is concerned that the markhor's "endangered" listing has harmed, not helped the markhor, and the downlisting is important to ensure its survival and availability for hunting by its members. HSC is also a supporting member of Conservation Force and its markhor initiatives.

23. Plaintiff **African Safari Club of Florida, Inc.**, is a nonprofit volunteer membership organization devoted to wildlife conservation and the education of present and future hunters, and was one of the named petitioners responsible for submitting the August 17, 2010, downlisting petition and the subsequent Notice of Intent to Sue. Its mission is to ensure the protection of animal resources throughout the world, including the markhor. That includes these markhor as renewable, huntable resources forever. It is greatly concerned that the "endangered" listing has harmed, not helped the markhor. African Safari Club of Florida is a supporting member of Conservation Force and has funded Conservation Force's Markhor Initiative. It has members who have participated in markhor conservation hunts and others who wish to participate if the markhor were downlisted. African Safari Club of Florida is concerned that the markhor's "endangered" listing has severely harmed, not helped, the species and the downlisting is important to ensure its survival and availability for hunting by its members.

24. Plaintiff **The Conklin Foundation** is a non-profit 501(c)(3) conservation

organization and was one of the petitioners in the August 17, 2010, downlisting petition and the Notice of Intent to Sue. It financially assists several guide/outfitter associations with the necessary funds to carry out their important “grass roots” conservation initiatives. The emblem of the Conklin Foundation is the straight-horned markhor, and the *Conklin* conservation award that it gives out annually is a statue of the straight-horned markhor. The Conklin Foundation and its members are in the best position to save the markhor species, and the Service’s failure to act on the downlisting petition harms the Conklin Foundation’s ability to contribute to markhor conservation. But for Defendants’ illegal conduct, the Foundation could generate more revenue for markhor conservation and for itself at its annual convention and auction. The Conklin Foundation petitioned Defendants to downlist the straight-horned markhor because it is concerned that the markhor’s “endangered” listing has severely harmed, not helped, the species.

25. Plaintiff **Grand Slam Club/Ovis** (“GSCO”) is a non-profit 501(c)(3) membership organization of hunter/conservationists dedicated to improving and perpetuating populations of wild sheep and goats worldwide and was one of the petitioners in the August 17, 2010, downlisting petition and Notice of Intent to Sue when the mandatory timeline expired. GSCO is the established records-keeping organization for certain hunting achievements involving wild sheep and goats, both in North America and world-wide. Its purpose and objectives are to encourage the use of legally issued permits, tags, and/or licenses and to educate people of the world about wild mountain sheep and goats. Its financial resources received from membership dues, donations, and fund-raising events benefit wild mountain sheep and goats by contributing to established game and wildlife agencies and other non-profit wildlife conservation organizations such as Conservation Force, of which it is a supporting member. With more than 5,000 members worldwide, GSCO is in the best position to conserve the markhor. Defendants’

failure to downlist the species significantly harms this initiative. GSCO has members who have participated in markhor hunts (each of the named individual petitioners), and additional members who would participate if the markhor were downlisted. It has lost revenue and membership due to the “endangered” listing. Grand Slam Club/Ovis is concerned that the markhor’s “endangered” listing has severely harmed, not helped, the species and the downlisting is important to ensure its survival and availability for hunting by its members.

26. Plaintiff **Wild Sheep Foundation** has been a 501(c) (3) non-profit charitable conservation corporation since September 14, 1977, and was one of the petitioners in the August 17, 2010, downlisting petition and subsequent Notice of Intent to Sue when the mandatory 12-month timeline expired. Its mission is to enhance wild sheep and goat populations, promote professional wildlife management programs (particularly the Torghar Community Project/STEP Program), and educate the public about wild sheep and the conservation benefits of hunting. These objectives, while instrumental in saving the markhor, are significantly harmed by Defendants’ failure to downlist the markhor, which would permit the importation of the trophies. Plaintiff Wild Sheep Foundation has members who have participated in markhor hunts (including all the named individual petitioners herein) and additional members who wish to participate if the markhor were downlisted, and thus importable trophies.

27. Plaintiff **Sardar Naseer Tareen**, as the head of the IUCN Central Asia Sustainable Use Specialist Group and the head of the Society for Torghar Environmental Protection (STEP), submitted to the Service *in February of 1999* a petition to downlist the Torghar Hills population of straight-horned markhor from “endangered” to “threatened.” On September 16, 1999, the Service made a 90-day finding that (1) the population at issue qualified as a distinct vertebrate population segment under the Service’s policy of February 7, 1996 (61 F.R. 4722), and that (2)

substantial information indicated that the downlisting may be warranted. This was communicated to Plaintiff Tareen in a letter dated October 6, 1999. The letter explained that the Service had initiated a comprehensive status review of the entire species *Capra falconeri* under the ESA and that, upon completion of this status review, the Service was required to determine whether or not the action *was* warranted. The Service further explained that it had twelve months from the date of reception of Plaintiff Tareen's petition to make this decision, also known as the "twelve-month finding." While the Service did not timely issue the twelve-month finding, Plaintiff Tareen continued to meet several times with officials from the Division of Scientific Authority through the Summer of 2004, when he attended such a meeting with Dr. Michael D. Kreger. At all such meetings, Plaintiff Tareen was assured and was led to believe that, despite the Service's delay in making a 12-month finding, (1) the Defendants continued the comprehensive status review of the entire species *Capra falconeri* as an ongoing matter, (2) the Defendants were convinced that downlisting the straight-horned markhor population of the Torghar region was warranted, and (3) Defendants recognized and were sympathetic to the petition and quest to enhance survival of this population through controlled sport hunting. Plaintiff Tareen was not a petitioner on the 2010 downlisting petition, but, as the individual who has been chiefly responsible for the recovery of the straight-horned markhor thus far, he remains an interested party. Plaintiff Tareen has taken on the recovery of the markhor as his life-long project, and the sound sustainable-use hunting program that he helped to implement has enabled the population to recover. The success of his project has been and continues to be compromised by Defendants' failure to complete the downlisting and failure to conduct the mandatory five-year review, as well as their related misbehavior of ignoring and improperly denying import permit applications.

28. Plaintiff **Society for Torghar Environmental Protection (STEP)** is a society formed under the laws of Pakistan as part of the National Conservation Strategy with the objective of conservation, particularly conservation of the straight-horned markhor. Its Tribal Council, comprised of elders from all tribal groups of Torghar, implements all policies, selects and supervises game guards, and oversees surveying and other responsibilities for the markhor. STEP operates the renowned sustainable-use hunting program in the Torghar Hills that is responsible for the straight-horned markhor's recovery, and was a named petitioner on the 1999 downlisting petition. Because of Defendants' illegal and irresponsible behavior, the price of markhor hunts, and therefore the revenue derived from the markhor and spent on the markhor, is greatly less than it could and should be. No one has a greater interest in the species or has suffered a greater loss due to Defendants' misconduct.

29. Defendant **Ken Salazar**, United States Secretary of the Interior, is the highest ranking official within the Department of Interior. In that capacity, Defendant Salazar has ultimate responsibility for the administration and implementation of the ESA with regard to the markhor, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

30. Defendant **Dan Ashe** is the Director of the United States Fish and Wildlife Service. He is responsible for the administration and implementation of the ESA, including the downlisting of the markhor. He is sued in his official capacity.

31. Defendant the **United States Fish and Wildlife Service** is a federal agency within the Department of Interior authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing the ESA. The Service has been delegated authority by the Secretary of Interior to implement the ESA and

CITES for the markhor, including the responsibility for making decisions and promulgating regulations, including the processing of downlisting petitions. The Service has failed to timely make and publish a 12-month finding regarding the downlisting of the straight-horned markhor, as requested by Plaintiff/Petitioners on August 17, 2010. The Service has also failed to conduct the mandatory five-year review of the species, as required by 16 U.S.C. §1533(c)(2). That neglect and delay is contrary to the goals and purpose of the ESA and CITES and is harming the subspecies.

IV. LEGAL BACKGROUND

32. The ESA provides a system of “listing,” “downlisting” and “delisting” species, wherein certain species are designated as “threatened” or “endangered,” with appropriate levels of protection corresponding to each designation. *See* 16 U.S.C. §1533.

33. The principal goal of the ESA is to return species to a point at which listing is no longer required: “[T]he purposes of [the ESA] are to . . . provide a program for the **conservation** of . . . endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of [CITES].” 16 U.S.C. §1531(b) (emphasis added). Further, it is “the policy of Congress that all Federal departments and agencies shall seek to **conserve** endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the ESA].” 16 U.S.C. §1531(c) (emphasis added). Therefore, both the purpose and policy of the ESA center on **conservation** of listed species. To “conserve” means “to use and the use of all methods and procedures which are necessary to **bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.**” 16 U.S.C. §1532(3) (emphasis added). In short, the goal of the ESA is to return listed species to a point at which they no longer require listing, and the corresponding duty

of Defendants is to take all actions necessary to get such species to that point. The petitioned downlisting would do that in and of itself.

34. Any interested person can request a change in a species' listing designation by submitting a petition to the Secretary (16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a); 5 U.S.C. §553(e)) as the petitioners herein did more than 14 months ago.

35. The ESA provides mandatory deadlines for the Service to respond to such petitions. 16 U.S.C. §1533(b)(3).

36. Upon receipt of a petition to list, delist or downlist a species, the Secretary has 90 days "to the maximum extent practicable," to make a finding as to whether the petition "presents substantial scientific or commercial information indicating that the petitioned action *may* be warranted." 16 U.S.C § 1533 (b)(3)(A) (emphasis added); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial information indicating that the listing may be warranted, the Secretary then publishes in the Federal Register a "90 day finding and commencement of status review." 16 U.S.C. § 1533(b)(3)(A); 50 C.F.R. § 424.14 (b)(1).

37. If the Secretary makes a positive 90-day finding, the Secretary must then determine whether the petitioned action *is* warranted; this determination must be made within 12 months of receiving the petition. 16 U.S.C. §1533(b)(3)(B); 50 C.F.R. §424.14(b)(3). This 12-month determination must also be promptly published in the Federal Register. 16 U.S.C. §1533(b)(3)(B); 50 C.F.R. §424.14(b)(3). This is mandatory, not discretionary. Defendants have failed to meet this deadline.

38. When considering a listing or downlisting petition, Defendants shall take into account "those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect [a potentially endangered or threatened] species." 16 U.S.C. §

1533(b)(1)(A). This is mandatory, not discretionary.

39. The ESA also mandates the Secretary to conduct, at least once every five years, a review of every listed species to determine whether such species' listing status should be changed (*i.e.*, delisted or reclassified). 16 U.S.C. §1533(c)(2); 50 C.F.R. §424.21. This is mandatory, not discretionary. This the Defendants have failed to do.

40. The ESA requires that the Service base its listing decisions on the best scientific data available. 16 U.S.C. §1533(b)(1)(A).

V. FACTUAL BACKGROUND: THE STRAIGHT-HORNED MARKHOR

41. Markhor is a wild goat species that lives in rugged, arid mountain habitats in Afghanistan, India, Pakistan, Tajikistan, Turkmenistan, and Uzbekistan. 64 F.R. 51499 (Sept. 23, 1999).

42. The markhor subspecies at issue is the straight-horned markhor that inhabits the Torghar Hills of the Balochistan Province of Pakistan, often referred to as the "Suleiman markhor." It is listed as "endangered" on the ESA and on Appendix I of CITES, but the CITES Parties have established a special quota for export of trophies from Pakistan because of the very markhor program at issue. *See* Res. Conf. 10.15 (Rev. CoP14). That quota was increased by CITES so that other regions could follow the example of the successful model.

43. The Torghar Hills population of markhor has increased substantially from 100 animals in mid-1980 to more than 3,000 today.

44. The vitality of the population is attributed to the Torghar Conservation Project (TCP), now run by the Society for Torghar Environmental Protection (STEP). The TCP was initiated in early 1985 through the efforts of the local Pathan tribal chieftain, the late Nawab Taimur Shah Jogezei, and Sardar Naseer Tareen, in consultation with professional wildlife

biologists from the United States, particularly Dr. Bart O’Gara, founding member of petitioner Conservation Force.

45. The TCP is a legitimate private conservation program whereby local tribal peoples are appointed to enforce a total ban on all hunting by locals, the military, and outsiders. The TCP has been entirely self-sufficient since its inception, depending solely on revenues derived from trophy hunting fees from international hunters. That conservation revenue is artificially much lower than it would be if Americans were able to import their trophies. Americans are unwilling to pay full price to hunt if they are unable bring their trophies home. Hunts for other, less desirable markhor subspecies that are not listed, thus are importable, are marketed for up to three times more with the attendant greater benefits for the species.

46. The TCP is the foremost international sustainable use model in the conservation world. It is recognized by the Convention on Biological Diversity as the “best case example” of sustainable use, has won numerous awards, and is cited as an example for others around the world to follow. *See, e.g.,* Luc Bellon, *A Treasure in My Backyard: Suleiman Markhor* (2008); Michael R. Frisina & Sardar Naseer A Tareen, *Exploitation Prevents Extinction: Case Study of Endangered Himalayan Sheep and Goats, in Recreational Hunting, Conservation, and Rural Livelihoods* (Barney Dickson, Jon Hutton, & William M. Adams ed., 2009); *Lessons Learned: Case Studies in Sustainable Use: Conservation of Sulaiman Markhor and Afghan Urial by Local Tribesman in Torghar, Pakistan*, www.cbd.int/doc/case-studies/suse/cs-suse-iucn-thorgar.pdf; *Biodiversity, Development, and Poverty Alleviation: Recognizing the Role of Biodiversity for Human Well-Being*, www.cbd.int/doc/bioday/2010/idb-2010-booklet-en.pdf.

47. As further recognition of the TCP, the 178 Parties to CITES have authorized and established a special trade quota for Pakistan of 12 markhor annually, to facilitate exporting and

importing of the hunting trophies in recognition of the enhancement that the limited tourist hunting provides the species. *See* Res. Conf. 10.15 (Rev. CoP14).

48. The TCP has had one serious handicap: The Service's International Affairs Division has failed and neglected to timely process or approve trophy import permits or downlist the population (which would make the permitting unnecessary).

49. Because American hunters are the largest tourist hunting market and pay the highest prices when they can bring their trophies home, the U.S. practice of failing to make timely downlisting determinations (as well as unreasonably delaying, then arbitrarily denying import permits) has devalued the trophies and obstructed the conservation effort. While other subspecies of markhor that are importable are marketed to American hunters for \$150,000 per hunt, straight-horned markhor hunts can only be sold for \$45,000, if at all. This disparity in program revenue is a quantified measure of the harm that the continued listing has done to the conservation of the species. In some years the entire quota cannot be sold to hunters due to the ESA listing.

50. The quota established at the CITES Conference of the Parties is too low to be of any negative biological consequence, and the enhancement of the species due to tourist hunting cannot be rationally disputed.

51. The Service's failure to make and publish the required finding is contrary to law and regulation, and is not in the best interest of the full recovery of the species.

52. Defendants' actions and/or omissions are also contrary to the ESA goal and purpose of recovering species, the ESA requirement that Defendants shall encourage and cooperate with foreign nations' programs for the conservation of listed species, the Defendants'

obligation to consider the negative consequences of its actions and programs, and the ESA requirement that foreign nations' programs be taken into consideration in the de-listing process.

53. Defendants' practices are irrational and illegal, interfere with and obstruct Pakistan's program, and deprive Americans of their lawfully acquired trophies without an offsetting benefit or rationale.

54. The failure to review the listing and downlist the species holds the Torghar Conservation Program hostage while undermining the promising program.

VI. PLAINTIFFS' PETITION AND HISTORY

55. In early 1999, Sardar Naseer Tareen submitted a downlisting petition ("the 1999 Petition), requesting and recommending that the straight-horned markhor of the Torghar Hills be downlisted from endangered to threatened. On September 23, 1999, the Service published its "90-day finding" that the 1999 Petition "presented substantial information indicating that the action may be warranted." 64 F.R. 51499 (Sept. 23, 1999). Defendants have failed to take any further action on the 1999 Petition.

56. Over the subsequent decade, relying on promises by Defendants that the straight-horned markhor would be downlisted and/or enhancement permits would be granted, the individual Plaintiffs each participated in the STEP program and lawfully took a markhor in conjunction therewith. Despite Defendants' representations, Plaintiffs' properly-completed import permit applications were unreasonably delayed and eventually denied when suit was filed to compel processing, and the 1999 Petition was not processed. Two suits were filed regarding those failures. *See Conservation Force v. Salazar*, Case No. 1:09-cv-00495-BJR; *Conservation Force v. Salazar*, Case No. 1:10-cv-1262-BJR. The first suit has been dismissed

and is being appealed.

57. Once made aware that Defendants were taking the position that the previously-submitted petition was no longer enforceable, and eager to support and encourage recovery of the markhor, Plaintiff/Petitioners Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, The Conklin Foundation, Grand Slam Club/Ovis, Wild Sheep Foundation, Jerry Brenner, Steve Hornady, Alan Sackman, and Barbara Sackman submitted a new, separate petition to downlist the Torghar Hills population of the straight-horned markhor. The 1999 and 2010 Petitions are separate and distinct: the 2010 Petition is not an amendment to the 1999 Petition and none of the petitioners in the 2010 petition were petitioners in the 1999 petition.

58. The new petition, at issue in this suit, was submitted to the Service on August 17, 2010, by Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, The Conklin Foundation, Grand Slam Club/Ovis, Wild Sheep Foundation, Jerry Brenner, Steve Hornady, Alan Sackman, and Barbara Sackman. The petition requested that the straight-horned markhor of the Torghar Hills of Pakistan be downlisted from “endangered” to “threatened.” The Service received the petition on August 18, 2010.

59. Plaintiffs’ petition is based on the best scientific data available and illustrates the recovery of the Torghar Hills population of straight-horned markhor due to the success of the Torghar Conservation Program.

60. On June 2, 2011, the Service issued a positive “90-day” finding on the petition, finding that the downlisting may be warranted. 76 F.R. 31903. In accordance with law, the Service initiated a status review of the species and requested public comment (“scientific and

commercial data and other information regarding the straight horned markhor or the Torghar Hills population”). *Id.*

61. The comment period on the 90-day finding ended on August 1, 2011. *Id.* There were no substantive comments in opposition to the downlisting of the markhor. In fact, the foremost experts in the world filed comments *favoring* the downlisting, acknowledging the recovered status of the population and agreeing with the expected benefits from the petitioned downlisting. For example, the IUCN Caprinae Specialist Group stated that the Torghar Project “is a very rare example of “Conservation hunting” of mountain ungulates in Asia that actually lives up to its name. It is supported by the local population, based on scientific principles, including regular surveys of the population, and has provided tangible benefits for conservation of markhor, urial, and their habitat.” Doc. FWS-R9-ES-2011-0003-0003; tracking no. 80e61077, as published on www.regulations.gov. Similarly, Michael Frisina, the principal foreign scientist on the project since 1997, stated that “Scientific monitoring has been ongoing and the success of the sustainable use hunting program being the major factor in bringing the population back from the brink of extinction is well documented in peer reviewed publications. ... Thanks to the sustainable use hunting program[,] the population is currently the largest straight horned markhor population in existence.” Doc. FWS-R9-ES-2011-0003-0004; tracking no. 80eb7637, as published on www.regulations.gov. It is a well-known success story.

62. In sum, this 12-month finding is relatively simple and uncontroversial.

63. The delay is more than a violation of the Congressional mandated timeline. The delay is retarding the program from reaching its full potential and capacity and disincentivizing others to follow the model.

64. The continued listing is the greatest threat to the sustained recovery of the markhor.

65. Defendants' neglect is contrary to the aspirations, goals and purpose of the ESA for recovery of foreign species.

66. Defendants have a prior, nearly decade-long history of neglecting the 12-month mandate. Defendants are repeating what they did in the prior 1999 petition filed by two of the Plaintiffs herein.

67. This is the *second* petition to downlist these markhor that Defendants have neglected. This petition was filed when, upon being sued for failure to process the 1999 petition, Defendants raised the legal defense that suit to compel that 12-month downlisting finding was time barred because of the passage of more than six years. The downlisting petitioners in the 1999 downlisting petition did not join in the current downlisting petition to avoid the perception that the second was merely an amendment to the first. This petition was filed because of Defendants' representation that the first was unenforceable due to suit being time barred.

VII. CLAIMS FOR RELIEF

FIRST CLAIM ***(Failure to make timely 12-month finding)***

68. Plaintiffs re-allege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

69. Defendants are violating and unlawfully withholding compliance with 16 U.S.C. §1533(b)(3)(B) and 50 C.F.R. §424.14(b)(3). Defendants have failed to meet the deadline for

making the 12-month determination regarding downlisting the straight-horned markhor. That failure constitutes a violation of a mandatory, non-discretionary duty under the ESA, 16 U.S.C. §1533(b)(3)(B), and an agency action unlawfully withheld under the APA, 5 U.S.C. §706(1).

70. The relief prayed for would remedy this violation and further the goals and purpose of the ESA.

SECOND CLAIM
(Failure to conduct timely 5-year review)

71. Plaintiffs re-allege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

72. Defendants are violating and unlawfully withholding compliance with 16 U.S.C. §1533(c)(2); 50 C.F.R. §424.21. Defendants have failed to meet the deadline for conducting the 5-year review regarding the straight-horned markhor. That failure constitutes a violation of a mandatory, non-discretionary duty under the ESA, 16 U.S.C. §1533(c)(2), and an agency action unlawfully withheld under the APA, 5 U.S.C. §706(1).

73. The relief prayed for would remedy this violation and further the goals and purpose of the ESA.

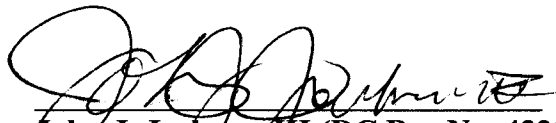
REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

- (1) Declare that Defendants are violating the ESA by failing to timely make a 12-month finding on Plaintiffs' petition to downlist the straight-horned markhor of the Torghar Hills from "endangered" to "threatened."
- (2) Declare that Defendants' failure to timely make the 12-month finding constitutes action

- unlawfully withheld and/or unreasonably delayed under the APA.
- (3) Declare that Defendants are violating the ESA by failing to timely conduct a 5-year review of the straight-horned markhor.
 - (4) Declare that Defendants' failure to timely conduct the 5-year review constitutes action unlawfully withheld and/or unreasonably delayed under the APA.
 - (5) Order Defendants to promptly make and publish a 12-month finding on Plaintiffs' Petition within 30 days of the Court Order.
 - (6) Award Plaintiffs their costs of litigation, including reasonable expert witness fees and attorney's fees, pursuant to the citizen suit provision of the ESA, 16 U.S.C. §1540(g)(4), or alternatively, the Equal Access to Justice Act, 28 U.S.C. §2412, and/or any other applicable provisions of law; and
 - (7) Grant Plaintiffs any such relief as may be necessary and appropriate or as the Court deems equitable, just and proper.

Respectfully submitted this 8th day of November, 2011.



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