ORAL ARGUMENT NOT YET SCHEDULED

No. 11-5316

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSERVATION FORCE, DALLAS SAFARI CLUB, HOUSTON SAFARI CLUB, AFRICAN SAFARI CLUB OF FLORIDA, INC., WILD SHEEP FOUNDATION, GRAND SLAM CLUB/OVIS, CONKLIN FOUNDATION, BARBARA LEE SACKMAN, ALAN SACKMAN, JERRY BRENNER, STEVE HORNADY, SARDAR NASEER A. TAREEN and THE SOCIETY FOR TORGHAR ENVIRONMENTAL PROTECTION (STEP),
Plaintiffs-Appellants,

v.

KEN SALAZAR, in his official capacity as Secretary of the United States Department of the Interior; DANIEL ASHE, in his official capacity as Director of the United States Fish and Wildlife Service; and the UNITED STATES FISH & WILDLIFE SERVICE,
Federal Defendants-Appellees

De Novo Review of Administrative ESA Permitting and Downlisting

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*.

Plaintiffs-Appellants in the above-captioned matter are: Conservation Force (3240 S. I-10 Service Rd. W, Suite 200, Metairie, LA 70001), Dallas Safari Club (6390 LBJ Freeway #108, Dallas, TX 75240), Houston Safari Club (4615 Southwest Freeway #805, Houston, TX 77027), African Safari Club of Florida, Inc. (6550 N. Federal Highway, Ste. 330, Ft. Lauderdale, FL 33308-1400), Wild Sheep Foundation (720 Allen Avenue, Cody, WY 82414), and Grand Slam Club/Ovis (P.O. Box 310727, Birmingham, AL 35231), Conklin Foundation (207 Orchard Court, Jefferson Hills, PA 15025), Barbara Lee Sackman (35 Barkers Point Road, Sands Point, NY 11050), Alan Sackman (35 Barkers Point Road, Sands Point, NY 11050), Jerry Brenner (12948 Quincy St., Holland, MI 49422-2367), Steve Hornady (2323 W. John, Grand Island, NE 68803), Sardar Naseer A. Tareen (94 Regal Plaza, 3rd Floor, Circular Road, Quetta, Balochistan, Pakistan), and the Society for the Torghar Environmental Protection (STEP) (7 Regal Plaza, Circular Road, Quetta, Balochistan, Pakistan).

Defendants-Appellees in the above-captioned matter are: United States of America; Kenneth Salazar, Secretary of Interior, in his official capacity; Daniel M. Ashe, Acting Director of U.S. Fish and Wildlife Service, in his official capacity;

and U.S. Fish and Wildlife Service (1849 C Street, N.W., Washington, D.C. 20240).

No *amici* appeared before the district court.

(B) Rulings Under Review.

This is an appeal of the Order of Judge Barbara Jacobs Rothstein of the United States District Court for the District of Columbia signed September 1, 2011 and filed September 2, 2011(Document 33), in Case No. 09-495, reported as *Conservation Force v. Salazar*, 811 F. Supp. 2d (D.D.C. 2011). The Order granted Defendants' Motion to Dismiss.

(C) Related Cases.

This case has not previously been before this Court.

There are three pending cases involving similar issues or facts:

(1) Conservation Force, et al. v. Salazar, et al., Case No. 1:10-cv-1262-BJR (D.D.C., 2010) ("Conservation Force II"/"Markhor II"). That case is between the same parties. Whereas the first claim, Markhor I, the subject of this appeal, was filed to compel the processing of the permits, Markhor II challenges the denials of those same permits.

(2) Conservation Force, et al. v. Salazar, et al., Case No. 1:11-cv-2008-BJR (D.D.C., 2011) ("Markhor III"), is between the same parties and is to enforce a second, subsequent petition, downlisting petition II. On November 16, 2011,

Appellants filed suit under the ESA and APA for failure of Appellees Ken Salazar, Dan Ashe, and FWS to complete a 12-month finding on a second, more recent downlisting of the Torghar Hills population of straight-horned markhor may be warranted. The suit also alleged Appellees' failure to conduct a five-year review. That suit has been settled on the condition that Appellees complete the late 12-month finding on the second petition to downlist before July 31, 2012.

(3) Wood Bison No. 1, Conservation Force, et al. v Salazar, et al., Case No. 1:09-cv-00496-JDB (D.D.C., 2009) ("Wood Bison I"), was dismissed but not appealed. It was filed to compel the processing of a downlisting petition and/or trophy import permits. The District Court dismissed the claim to compel the permit processing for nearly a decade as moot when Defendants completed the processing and the Court dismissed the claim to compel the petitioned downlisting as not being properly noticed.

(4) A similar case is Conservation Force, et al. v Salazar, et al., Case No. 1:10-cv-01057-JDB (D.D.C., 2010) ("Wood Bison II"). Wood Bison II includes claims to compel downlisting of the wood bison in Canada and challenging the denial of the trophy import permits. After suit, Defendants made a positive 12-month finding and issued a proposal to downlist the wood bison from endangered to threatened, which also served as their five-year review. 76 F.R. 6734 6754 (February 8, 2011). The District Court remanded the permit denials and dismissed

the other claims that were mooted because of Appellees' actions taken after the suit was filed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and the Federal Rules of Appellate Procedure Rule 26.1, counsel certify that Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, Inc., Wild Sheep Foundation, Grand Slam/Ovis, Conklin Foundation, and the Society for Torghar Environmental Protection, are nonprofit organizations that directly participate in the conservation of endangered and threatened species; and are not a parent, subsidiary, or affiliate of any publicly-held company.

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GLOSSARY OF ABBREVIATIONS

APA –	Administrative Procedure Act
CBNRM –	Community-Based Natural Resource Management
CITES –	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CoP –	CITES Conference of the Parties
DSA –	United States Fish and Wildlife Division of Scientific Authority
DMA –	United States Fish and Wildlife Division of Management Authority
ESA –	Endangered Species Act
FWS –	United States Fish and Wildlife Service
IUCN –	International Union for Conservation of Nature
STEP –	Society for Torghar Environmental Protection
TCP –	Torghar Conservation Projec

JURISDICTIONAL STATEMENT

I. Basis for the District Court's Subject-Matter Jurisdiction

The district court had subject matter jurisdiction under the Administrative Procedure Act (APA) 5 U.S.C. §706 (actions unlawfully withheld); and 28 U.S.C. §1331 (federal question jurisdiction). The Court can grant declaratory relief under 27 U.S.C. §1361 (mandamus), 28 U.S.C. §2201, 28 U.S.C. §2202, and 5 U.S.C. §706. The judicial review provision of the APA and ESA waives Defendants' sovereign immunity. 5 U.S.C. §702, 706; 16 U.S.C. §1540(g)(3)(A).

II. Basis for the Court of Appeals' Jurisdiction

The United States Court of Appeals for the District of Columbia has jurisdiction for this appeal pursuant to 28 U.S.C § 1291 (Review of District Court Final Judgments) and Article III Section 1 and 2 of the United States Constitution.

III. Timeliness of Appeal

The district court's order granting Defendants' Motion to Dismiss and striking Plaintiffs' Motion for Summary Judgment was issued on September 2, 2011. Pursuant to Fed R. App. P. 4(a)(1)(b), Plaintiffs-Appellants' Notice of Appeal was filed timely on November 1, 2011.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should the District Court have dismissed Plaintiffs' claim to compel the processing of the downlisting petition as time-barred under 28 U.S.C. § 2401(a) without considering the extension of the limitations period based on equitable considerations?

2. Should the District Court have applied the equitable doctrines of continuing violations, equitable tolling, or lulling and found Plaintiffs' downlisting claims were not time-barred?

3. Even if a right of action expires due to the running of a statute of limitations, does the cause of action as to an agency's unlawful conduct still remain? (Claim IV)

4. Was it reasonable and lawful for Defendants to abandon the review of Plaintiffs' downlisting petition without informing the original petitioners or the public?

5. Did Plaintiffs state a viable claim that Defendants violated Plaintiff-applicants' rights to procedural due process under the 5th Amendment?

6. Was it reasonable and lawful for Defendants to delay processing permits for six years?

7. Because the organizational Plaintiffs have members who will participate in future straight-horned markhor hunts and file trophy import permits for these hunts, does a live controversy exist regarding permit processing?

8. Considering Defendants' ongoing policy and treatment of permits in this and other cases, is Defendants' behavior capable of repetition yet evading review?

9. Did Defendants' established practice and policy of ignoring applications for enhancement permits to import legally sport-hunted trophies of endangered species violate the ESA, the APA, and Defendants' own regulations?

10. Following their lengthy refusal to process permits (in violation of the ESA and their own regulations), does Defendants' eventual processing of those permits constitute voluntary cessation of illegal conduct?

STATUTES AND REGULATIONS

Pursuant to Cir. R. 28(5), the statutes and regulations cited herein are set forth in the accompanying Addendum.

STATEMENT OF THE CASE

The Torghar Program is one of the most celebrated and renowned conservation successes in the world. It is wholly dependent upon revenue and

incentives from tourist hunters taking a nominal quota of animals. The more than 170 National Parties of CITES have established a nominal harvest quota, but the Program has not reached the potential envisioned because the markhor have not been importable into the United States due to the failure to downlist the species and/or the failure to process and approve the import permits. This suit arose from those two failures.

After a decade of promises, Plaintiffs were informed by Defendants that the permits were not to be processed or the imports otherwise permitted. Plaintiffs immediately filed a Notice of Intent to sue and then filed suit for failure to process the permit applications and failure to make the 12-month downlisting determination. Then Defendants processed and denied Plaintiffs' permit applications and raised the defenses that the permit claims were moot and that it was too late because of the passage of six years to enforce the downlisting petition. The District Court granted Defendants' motion to dismiss all claims and struck Plaintiffs' Motion for Summary Judgment.

STATEMENT OF THE FACTS

In the mid-1980's, the Torghar markhor had dwindled to a low point of less than 100 animals, but the population has since grown to over 3,100. This dramatic increase is due to the community-based conservation program known as the Torghar Conservation Project ("TCP"). *See* Dkt. 33 at 4. It was purposely

designed to save the species, not to further sport-hunting. The TCP is now one of the most successful conservation programs in the world.

In the words of the district court:

> TCP provides an incentive to conserve markhor and its habitat by providing economic benefit to the local community. Specifically, TCP limits the number of permits available for sport-hunted markhor trophies; the purchase of the permits provides significant economic benefit to the local community. In addition, TCP employs local Pathan tribesmen as game guards to protect the Straight-horned markhor from unauthorized hunting in the project area (an area of approximately 1,500 square kilometers). Many of the game guards are former hunters who stopped killing markhor at the behest of the local Pathan tribal chieftain. The game guards have virtually eliminated unauthorized hunting within the project area. TCP is entirely self-sufficient, depending solely on revenues derived from trophy hunting fees from international hunters.

Dkt. 33 at 4. (internal citations omitted).

The hunters who participate make significant financial contributions to the program and obtain emotionally and financially significant trophies for their own use.

Notably, Defendants have recognized the program's success:

> [T]he Torghar Hills region of Pakistan has a **successful** community-based management program that has **significantly enhanced** the conservation of local markhor populations. […] **Allowing a limited number of U. S. hunters an opportunity to import trophies taken from this population** could provide a **significant increase in funds available for conservation** and **would provide a nexus to encourage continuation and expansion of the project into other areas**.

68 F.R. 49515 (Aug. 18, 2003) (emphasis added).

Defendants have recognized that the importation of trophies taken as part of the established conservation program will "further promote and advance the conservation of the species" within the range country. *Id*. at 49512.

Primarily because of the TCP's success, CITES created a special export quota for sport-hunted markhor trophies from Pakistan. CITES Res. Conf. 10.15 (1997). That quota has since been increased. Res. Conf. 10.15 (Rev. CoP14). It is a model for others to follow, particularly if imports into the United States were allowed.

On March 4, 1999, at the suggestion of Defendants, Plaintiff Naseer Tareen petitioned Defendants to downlist the markhor of the Torghar Hills from "endangered" to "threatened." On September 16, 1999, Defendants published a positive "90-day" finding but failed to ever make a 12-month finding.

The import permits date back to that of Clint Heiber, PRT 007657 (March 25, 1999). See petition parag. 10, pg. 6. They were not processed until suit was filed.

Plaintiffs and Defendants maintained communication regarding the status of the Markhor since the petition to downlist was filed, including multiple meetings between Plaintiff Tareen and officials from The Division of Scientific Authority at which Plaintiff Tareen

> was **assured and was lead 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.

Dkt. 10, para. 21(a)(emphasis added). Defendants repeatedly promised Plaintiffs that they would either process and issue import permits of the Markhor or downlist it. In the case of Plaintiff Hornady, no action was taken on his permit for over five years (yet, once suit was filed, it was "processed" and denied within five months).

Only in December 2008 did the Director of the FWS finally tell Plaintiffs that he did not believe that the import permits or 12-month finding would be forthcoming.

More recently, when Plaintiff Bremer asked about import of his trophies, he was dissuaded by FWS staff from even filing for an application. Initially, Defendants indicated that the reason they had failed to process the permits or the downlisting petition was that they were understaffed and that permits were a low priority. Ultimately, Defendants confessed that it was too controversial even though in the best interest of the markhor population's recovery and survival.

The Secretary and FWS blatantly ignored their own regulations requiring them to proceed with the downlisting petition within a specified time frame and have undeniably failed to process Plaintiffs' applications for enhancement import

permits. The downlisting and the import permits are inextricably linked: the objective of both is to get American hunters to participate in the markhor conservation program to strengthen the program and continue the markhor's recovery.

Plaintiffs and their colleagues have spent almost thirteen years pursuing two specific avenues to achieve the importation of markhor trophies by American hunters: the attempted issuance of enhancement permits and the downlisting of the Torghar population, which in itself would permit the imports. Those efforts are intertwined, and Defendants have treated them as a single, continuing subject in its communications with Plaintiffs. It is important to note that Plaintiffs filed a Notice of Intent to sue immediately within weeks of first being informed that the permits would not be processed and filed suit when that time ran.

The primary consequence of the markhor's "endangered" status is that trophy imports are prohibited without an import permit. The constructive denial of the permits is denial of the benefits or enhancement.

By the date Plaintiffs filed this action, Defendants' 12-month determination on the 1999 downlisting petition was more than nine years late. Enhancement import permit applications had been pending just as long. Both of these failures retarded the conservation of the markhor. The decade of delay was contrary to the

recovery purpose of the ESA and its "enhancement provision." It was constructive denial of enhancement.

Programs like the TCP depend wholly on the infusion of money into range nations by hunters willing to pay significant fees for the privilege of hunting. American hunters form the largest percentage of these individuals. While importable markhor command up to $150,000 per hunt, American hunters are not willing to pay more than $45,000 when they are not allowed to bring their trophies home. Dkt 10, Para. 58 - 59. This is a revenue opportunity enhancement loss of $105,000.00 per markhor.

When Defendants finally admitted an impasse, Plaintiffs notified Defendants of their intent to sue and, without any further delay, filed suit for Defendants' failure to issue a 12-month finding regarding the downlisting petition of 1999 and Defendants' failure to process Plaintiffs' import permit applications. *See* Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief (March 16, 2009)(Dkt 1), (last amended June 22, 2009 at Dkt. 10).

SUMMARY OF THE ARGUMENT

This case challenges the Service's failure to make a 12-month finding on a petition to downlist the straight-horned markhor of the Torghar Hills population of Pakistan, as well as the Service's failure to process trophy import permits for those markhor taken as part of the conservation strategy devised by the world's foremost

experts and wildlife authorities. The arguments on appeal concern the statute of limitations in 28 U.S.C. § 2401(a), procedural and substantive due process under the 5th Amendment, and the application of mootness doctrines.

First, the District Court misconstrued the controlling law on the applicability of equitable doctrines to § 2401(a). The District Court incorrectly assumed its finding that § 2401(a) is jurisdictional necessarily prevented any equitable doctrine from tolling or otherwise affecting the limitations period. Furthermore, the District Court failed to interpret § 2401(a) in light of the Supreme Court's rule of interpretation for statutes of limitations affecting claims against the government, which creates a rebuttable presumption that equitable exceptions apply as they traditionally have in cases against private parties. Had the District Court properly interpreted § 2401(a), it could not have rejected Plaintiffs' equitable arguments without reaching the merits.

Additionally, the District Court incorrectly assumed that all of Plaintiffs' downlisting claims accrued sixty days after the deadline for the 12-month finding. Because the aspects of Claim III based upon Defendants' refusal to review the downlisting petition do not depend on a precise statutory deadline, they did not accrue until Plaintiffs should have known Defendants' conduct was violating their substantive duties under the ESA. Thus, the District Court erred by dismissing the

downlisting claims under Claim III without making an independent determination as to when Plaintiffs' right of action accrued.

The District Court's dismissal of Plaintiffs' due process claims was based upon several significant legal errors. First, the District Court misunderstood the nature and source of Plaintiffs' property interest in the trophies, which they legally obtained and may lawfully possess outside of the U.S.. Second, it relied on an incorrect understanding of how the ESA and its related regulations affect Plaintiffs' rights in the trophies. These errors led the District Court to erroneously conclude that Plaintiffs' interest in possession of the trophies in the U.S. derives solely from, and is contingent upon, an import permit issued by the FWS.

Plaintiffs' interest in possessing their lawfully acquired property in the U.S. actually stems from the common law of property, which provides that possession is an essential aspect of ownership. As ownership is the quintessential type of interest in property, every right or interest included therein is clearly protected under the 5th Amendment. The fact that Plaintiffs own the trophies means their protected property interests are not a result of federal law. Thus, any action by the U.S. government that prevents Plaintiffs from enjoying possession of their trophies is necessarily a deprivation of a protected property interest. Because the ESA's prohibition of importing endangered species is categorically subject to a mandatory permitting process, Plaintiffs maintained their possessory interest in the trophies

until the FWS' constructively denied the permit applications by refusing to consider their applications. Therefore, the 5th Amendment required Defendants' conduct, with respect to Plaintiffs' permit applications, to comport with both procedural and substantive due process.

Despite the District Court's inability to distinguish Plaintiffs' arguments regarding substantive and procedural due process, Claim II clearly set out a distinct claim based upon each theory. Plaintiffs' procedural argument was straightforward and clearly valid, for Defendants deprived Plaintiffs of their property by failing to act in spite of a legally required procedure for determining whether or not to conclusively deprive an applicant of the right to import an endangered species. Furthermore, Plaintiffs' substantive due process arguments is more properly understood as an alternative theory; if for some reason, due process did not require Defendants to use any sort of procedure, their conduct violates substantive due process because refusing to consider whether issuing the permits would enhance the survival of the species is not a narrowly tailored method of protecting endangered species, nor is it even rationally related to that government interest.

Although Defendants did eventually process Plaintiffs' permit applications, Plaintiffs' claims regarding permit processing are not moot because the parties are still adverse, a substantial controversy exists between them, and Plaintiffs continue to have a stake in the outcome. Plaintiffs have challenged Defendants' practice

and policy of ignoring enhancement permit applications for years, then quickly denying them when faced with legal action. Not only is Defendants' behavior capable of repetition, it is actually being repeated, as evidenced by the many recent, similar cases in which Defendants have exhibited the same pattern of behavior. Plaintiffs are not seeking broad, programmatic relief, but relief from a specific practice and policy, which is precisely the type of relief available under the APA. In the alternative, Defendants' processing of Plaintiffs' permits constitutes cessation of illegal conduct. For these reasons, Plaintiffs' claims regarding permit processing are not moot.

STANDING

Plaintiffs challenge Defendants' violations of both the Endangered Species Act (ESA) and the Administrative Procedure Act (APA). *See Bennett v. Spear*, 520 U.S. 154 (1997). *See also Fed. of Fly Fishers v. Daley*, 200 F. Supp. 2d 1181, 1186 (N. D. Cal. 2002) (emphasizing the *Bennett* stance that "suits may be brought under [the ESA citizen suit provision] to challenge decisions that ignore the required procedures of decision making"). The individual Plaintiffs meet the requirements for both constitutional and prudential standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Plaintiffs Conservation Force, Dallas Safari Club, Houston Safari

Club, African Safari Club of Florida, Inc., Wild Sheep Foundation, Grand Slam Club/Ovis, Conklin Foundation, and STEP have associational standing: An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 181 (U.S. 2000), citing *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

ARGUMENT

Standard of Review:

The District court dismissed Plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) and 12(b)(6); therefore, the District Court's ruling is subject to de novo review on appeal. *Felter v. Kempthorne*, 473 F.3d 1255, 1259 (D.C. Cir. 2007) (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006)). Furthermore, the reviewing court should "assume that the facts alleged in plaintiffs' complaint are true." *Id.* at 1257 (quoting *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395, 397 (D.C. Cir. 2005) (regarding motion to dismiss for failure to state a claim), and citing *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d

1249, 1253 (D.C. Cir. 2005) (regarding motion to dismiss for lack of subject matter jurisdiction)).

A complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim unless, taking as true the facts alleged in the complaint, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This is the standard because "the issue presented by a motion to dismiss is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998)

Additionally, on questions of subject matter jurisdiction, "a court is not limited to the allegations set forth in the complaint, 'but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case.'" Dkt. 33, p. 10 (quoting *Alliance for Democracy v. FEC*, 362 F.Supp.2d 138, 142 (D.D.C. 2005)) (also citing *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197 (D.C.Cir.1992)).

I. The District Court Erred When it Dismissed as Time-Barred Plaintiffs' Downlisting Petition Claim

The District Court held that Claim I and Claim IV, "[t]o the extent [it is] based on the 12-month finding," were time-barred. Dkt. 33, p.20. Applying, "28

U.S.C §2401(a), the general six-year statute of limitations for civil actions against the federal government, [as] the applicable limitations period," it found the six-year period began to run on May 4, 2000.[1] *Id.* at pp.11, 12. Thus, it concluded the failure to process the downlisting claims was time-barred because Plaintiffs did not file the instant suit until "March 3, 2009, nearly nine years after the claim accrued." *Id.* at p.12.

The District Court then briefly addressed Plaintiffs' arguments regarding tolling of the statute of limitations. It began with this Circuit's precedent describing § 2401(a) as "a jurisdictional condition attached to the government's waiver of sovereign immunity." Dkt. 33, p.11. The District Court also quoted two cases from the D.C. District for the proposition that a jurisdictional statute of limitations "cannot be overcome by the application of judicially recognized exceptions such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, and the continuing violations doctrine." Dkt. 33, p.11 (internal citations omitted).

[1] The District Court determined this date was the earliest date that "plaintiffs could have maintained their suit," assuming they gave the statutorily required notice of intent to sue on "the statutory deadline for publishing the 12-month finding on the downlist petition," which the District Court found was March 4, 2000. Dkt. 33, p.12; s*ee also*, 16 U.S.C. § 1540(g)(2)(C) ("No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary").

In a footnote, the District Court recognized that *The Wilderness Society v. Norton*, 434 F. 3d 584 (D.C. Cir. 2006) potentially contradicted its reasoning by "appear[ing] to contemplate that the doctrine of continuing violations could reset the § 2401 limitation period." Dkt. 33, p. 13, n.4. However, the court quickly rejected this belief, explaining that the subsequent decisions by the Supreme Court and D.C. Circuit in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) and *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (affirming the D.C. Cir. precedent that § 2401(a) is jurisdictional), have since "compelled" D.C. District courts to refrain from applying any equitable doctrines to the statute of limitations in § 2401(a). Dkt. 33, p.13, n.4. Based on this understanding of binding precedent in the D.C. Circuit, the District Court rejected the possibility of tolling or otherwise extending the statute of limitations before it reached the substance of Plaintiffs' arguments. *Id*. at pp. 12-13.

The District Court misconstrued the controlling law on the applicability of equitable doctrines to § 2401(a). First, the District Court incorrectly assumed its finding that § 2401(a) is jurisdictional necessarily prevented any equitable doctrine from tolling or otherwise affecting the limitations period. Furthermore, the District Court failed to interpret § 2401(a) in light of the Supreme Court's rule of interpretation for statutes of limitations affecting claims against the government,

which creates a rebuttable presumption that equitable exceptions apply as they traditionally have to in cases against private parties.

Had the District Court properly interpreted § 2401(a), it could not have rejected Plaintiffs' equitable arguments without reaching the merits.

Additionally, the District Court incorrectly assumed that all of Plaintiffs' downlisting claims accrued sixty days after the deadline for the 12-month finding. Because the aspects of Claim III based upon Defendants' refusal to review the downlisting petition do not depend on a precise statutory deadline, they did not accrue until Plaintiffs should have known Defendants' conduct was violating their substantive duties under the ESA. Thus, the District Court erred by dismissing the downlisting claims under Claim III without making an independent determination as to when Plaintiffs' right of action accrued.

A. The District Court wrongly concluded that the jurisdictional nature of 8 U.S.C. § 2401(a) necessarily precludes the application of equitable exceptions.

The District Court's error stems primarily from its acceptance of the proposition that "a jurisdictional statute of limitations 'cannot be overcome by the application of judicially recognized exceptions such as waiver, estoppel, equitable tolling, fraudulent concealment, the discovery rule, and the continuing violations doctrine.'" Dkt. 33, p.12 (citing 540 F.Supp.2d at 138; 412 F.Supp.2d at 122). No decision of the Supreme Court or the D.C. Circuit requires this finding. In fact, the

recent Supreme Court cases dealing with this issue support the opposite conclusion, that whether a statute is jurisdictional is a separate inquiry from the applicability of equitable doctrines.

The authority relied on by the District Court does not support its legal conclusion. Certainly, this Circuit has long held that the time limitation in § 2401(a) is jurisdictional, beginning with *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987), and including *P & V Enters.*, 516 F.3d at 1026; *Felter v. Kempthorne*, 473 F.3d at 1260; and *Kendall v. Army Bd. for Corr. of Military Records*, 996 F.2d 362, 366 (D.C.Cir. 1993). However, none of these cases determine whether a jurisdictional statute of limitations, such as § 2401(a), is necessarily not subject to traditional equitable doctrines. In fact, this Circuit expressly avoided ruling on the question in two of the cases cited by the District Court. *P & V Enters.*, 516 F.3d at 1026-27 (because neither party "challenged this circuit's precedent [regarding the jurisdictional nature of § 2401(a)]," finding "no occasion to address potential implications of recent Supreme Court decisions); *Felter*, 473 F.3d at 1260 ("We need not resolve this issue [of whether the continuing violation and equitable tolling doctrines apply to § 2401(a)], for Felter's claims fail even if these doctrines apply to section 2401(a).")

Similarly, *Spannaus* does not hold that § 2401(a) is not subject to equitable doctrines traditionally applied to statutes of limitations. At most, it stands for the

proposition that courts may not use novel or unrecognized equitable principles to exempt certain types of actions or claims from the jurisdictional condition imposed by § 2401(a). 824 F.2d at 55-56 (relying on the limitation's jurisdictional nature in finding that "policy reasons" do not justify "engraft[ing] into § 2401(a)'s categorical language a special FOIA exception"). More important, the *Spannaus* court did not apply the same reasoning to reject appellant's argument for tolling the statute of limitations during his permissive administrative appeal, choosing instead to base its ruling on the fact that tolling the requested period still would not make the claim timely. *Id*. at 56, 59-60 ("we need not resolve . . . whether [an agency's untimely denial of an FOIA request] suspends or cuts off the right to sue. Nor need we decide . . . whether, if so, the statute of limitations would toll for the brief period during which such an appeal would be mandatory). The *Spannaus* court's reluctance to categorically reject a tolling argument belies any suggestion that this Circuit's precedent has always treated "jurisdictional" statutes of limitations as not subject to tolling and other traditional equitable doctrines.

The Supreme Court's decision in *John R. Sand & Gravel Co.* does not support the District Court's analysis. There, the Supreme Court considered "whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue," and held that "the special statute of limitations governing the Court of Federal Claims [28 U.S.C.

§ 2501] requires that *sua sponte* consideration." 552 U.S. at 132. Notably, the court only considered whether the government could waive application of the time limits in § 2501, not whether they were subject to doctrines such as equitable tolling or continuing violations.

Furthermore, the *John R. Sand & Gravel* court did not ever state that all jurisdictional time limits are never subject to the traditional equitable exceptions. Rather, it generally described a group of statutory time limits, which "[a]s convenient shorthand, the Court has sometimes referred to . . . as 'jurisdictional.'" 552 U.S. at 134. Speaking in the past tense, the court explained that it "has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Id*. at 133. This statement does not describe attributes that necessarily apply to every statute classified as "jurisdictional," but examples of the various, atypical legal effects that have arisen from courts' application of statutory time limits with purposes not confined to the traditional aim of "protect[ing] defendants against stale or unduly delayed claims." *Id*. The *John R. Sand & Gravel* court merely states these effects as historical facts; it does not expressly condone or justify them.

The Court's language acknowledges that, historically, courts have not consistently given the same effects to statutes of limitations classified as either

jurisdictional or nonjurisdictional. *Id*. at 133-34 (using "typically," "often," and "say" to describe courts' treatment of statutory time limits). Furthermore, the opinion leaves open the possibility that a "jurisdictional" time limit may be "absolute" in only some respects, just as non-jurisdictional statutes may not be subject to all of the traditional equitable doctrines. The Court did not reach the issue, concluding that the particular statute at issue, 28 U.S.C. § 2501, provides an "absolute" limitations period that is not subject to waiver or equitable tolling. *Id*. at 134.

Nor does this holding justify the District Court's reliance upon the similarity between § 2501 and § 2401(a). While the statutes use very similar language to describe the generally applicable limitations period, such similarity is not sufficient, in this case, to result in similar interpretations. In *John R. Sand & Gravel*, the court clearly confirmed that the "general prospective rule" announced in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (U.S. 1990) continues to govern the interpretation of "Government-related statute[s] of limitations." 552 U.S. at 137-38. The *John R. Sand & Gravel* court stated "*Irwin* adopted a "*rebuttable* presumption" of equitable tolling," which "seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances where it enacted a Government-related statute of limitations." *Id*. at 137. The Supreme Court went on to explain that the *Irwin*

presumption may rebutted by either "[s]pecific statutory language" demonstrating contrary Congressional intent or "a definitive earlier interpretation of the statute, finding a similar congressional intent." *Id*. at 137-38.

The opinion further indicates that a "definitive interpretation" of a statute must come from the Supreme Court: "[the statute at issue in *Irwin*], while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation. *Id*. at 136. This statement also shows that the "definitive earlier interpretation" of § 2501 frustrates any attempt to interpret similarly worded provisions by analogy. As the Court recognized, earlier interpretations will reflect "a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests," and may result in "different interpretations of different, but similarly worded, statutes." *Id*. at 139.

Considering these legal principles, it is clear the District Court entirely failed to follow the interpretive rules and principles required by the Supreme Court. The District Court failed to heed the Supreme Court's instruction that "the law now requires courts, when they interpret statutes setting forth limitations periods in respect to actions against the Government, to place greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds." 522

U.S. at 138. Furthemore, it completely ignored the general principle behind the *Irwin* presumption, that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (U.S. 2002) (quoting *Irwin*, 498 U.S. at 95).

Instead of considering the effect of Circuit precedent designating the § 2401(a) limitations period as "jurisdictional," the District Court should have undertaken the rebuttable presumption analysis described in *John R. Sand & Gravel*. In doing so, it would have discovered no "definitive earlier interpretation" or "specific statutory language" to rebut the presumption that the limitations period is subject to equitable tolling and the continuing violations doctrine. Thus, § 2401(a) is susceptible to traditionally recognized equitable doctrines, and the District Court erred by refusing to consider the merits of Plaintiffs' equitable arguments.

The decisions of the Supreme Court since *Irwin* further demonstrate the error inherent District Court's interpretation of § 2401(a). Since the Supreme Court decided *Irwin* in 1993, , it has consistently applied the *Irwin* presumption to government related statutes of limitations without regard to whether the limitation at issue is jurisdictional. In both *United States v. Beggerly*, 524 U.S. 38 (U.S. 1998) and *United States v. Brockamp*, 519 U.S. 347 (U.S. 1997), the Court found

the *Irwin* presumption had been rebutted without attempting to determine whether the conditions imposed were jurisdictional. In *Franconia Assocs. v. United States*, 536 U.S. 129 (U.S. 2002), the Court relied on *Irwin* in finding that 28 U.S.C. § 2501, the same statute later deemed jurisdictional in *John R. Sand & Gravel*, does not "create[] a special accrual rule for suits against the United States." *Id*. at 145. Notably, *John R. Sand & Gravel* did not overrule *Franconia*. *See* 552 U.S. at 138 (finding only that *Franconia* did not overrule the Court's precedent refusing to apply equitable tolling or waiver principles to § 2501).

Moreover, in *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (U.S. 2002), the Supreme Court explicitly recognized that "[i]n suits against the United States, however, there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity." *Id*. at 543 (declining to extend the *Irwin* presumption to a State's waiver of its sovereign immunity). To any extent that *Irwin* was not clear about the applicability of the rebuttable presumption to jurisdictional statutes of limitations, the Court's statement in *Raygor* clarifies that it applies to all conditions and limitations Congress has placed upon the various waivers of its sovereign immunity.

Furthermore, the Supreme Court's recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (U.S. 2010), does not condone the District Court's erroneous interpretation of § 2401(a). In *Holland*, the Court held that "the timeliness

provision in the federal habeas corpus statute is subject to equitable tolling." *Id*. at 2552. Although the Court's decision ultimately relied on its conclusion that "neither AEDPA's textual characteristics nor the statute's basic purposes 'rebut' the basic presumption set forth in *Irwin*," its reasoning also included a determination that "the AEDPA 'statute of limitations defense . . . is not jurisdictional'". *Id*. at 2560, 2562.

First, the fact that a statute is clearly nonjurisdictional may be relevant to the *Irwin* analysis without the necessitating the same conclusion for the inverse. At most, *Holland* suggests that whether statute of limitations is jurisdictional or not may be considered as one factor in the analysis. Certainly, it does not justify the District Court's utter disregard for the rebuttable presumption. Otherwise, *Holland* would have effectively overruled *Irwin*, and the subsequent line of cases, a reading which *John R. Sand & Gravel* strongly counsels against. *See* 552 U.S. at 138-39 (discussing why *Irwin* and *Franconia* did not implicitly overrule *Soriano v. United States*, 352 U.S. 270 (1957) and other potentially conflicting cases).

In light of this significant line of Supreme Court precedent demonstrating that the *Irwin* presumption applies equally to jurisdictional and nonjurisdictional statutes of limitations, the District Court's ruling cannot be saved by non-essential statements in prior decisions by the D.C. Circuit. In *Chung v. U.S. DOJ*, 333 F.3d 273 (D.C. Cir. 2003) and *Menominee Indian Tribe of Wis. v. United States*, 614

F.3d 519 (D.C. Cir. 2010), the D.C. Circuit erroneously treats the *Irwin* analysis as equivalent to a determination of whether or not a statute of limitations is jurisdictional. 333 F.3d at 278, n.*(overruling previous holding that the statute at issue was jurisdictional, based on the court's current determination that the *Irwin* presumption applied); 614 F.3d at 525(stating *Irwin* "established a 'general rule' that time limits for suing the government are presumptively subject to equitable tolling, and therefore nonjurisdictional.") (internal citations omitted).

Interestingly, in neither case did the court find the time limit at issue to be jurisdictional, and therefore did not have the opportunity to rule as the District Court did in this case. In fact, the holdings in *Chung* and *Menominee* are both consistent with the understanding of *Irwin* and its progeny advocated by Plaintiffs. Thus, finding for Plaintiffs on this issue would not require this court to rule contrary to either case in its entirety, but only those statements based on the assumption that equitable tolling may only apply to nonjurisdictional statutes of limitations.

Finally, *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006), a decision heavily relied upon by Defendants in the proceedings below, does not support the District Court's categorical rejection of the continuing violations doctrine. In *Hamilton*, the 11th Circuit refused to "extend" application of the continuing violations doctrine to cases in which the only violations alleged are

daily failures of a government agency to comply with a statutory deadline that first passed outside the statute of limitations. *Id*. at 1334-36. However, it also tacitly recognized the continuing violation doctrine would apply to claims subject to § 2401(a) under circumstances falling within the "narrowly limited scope" of the doctrine as it is recognized in the 11th Circuit. *Id*. (stating that "[the 11th] circuit distinguishes between the present consequence of a one time violation, which does not extend the limitations period, and the continuation of that violation into the present, which does" and that "we have limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred.")

The District Court clearly erred in concluding that equitable doctrines do not apply to the statute of limitations in § 2401(a) purely because it is a jurisdictional condition upon the government's waiver of sovereign immunity.

A correct analysis under *Irwin* further demonstrates that 28 U.S.C. § 2401(a) is subject to traditional equitable doctrines extending the limitations period. § 2401(a) is clearly a statute of limitations that applies to causes of action against the government. Such doctrines are therefore presumed to apply to the same extent as in cases against private parties, unless the text of the statute or a previous definitive interpretation clearly rebut that presumption.

Considering the Supreme Court's decisions in *Brockamp*, *Beggerly*, and *John R. Sand & Gravel*, neither avenue of rebuttal is sufficient to prove that Congress intended § 2401(a) would not be subject to equitable doctrines typically applied to statutes of limiations. First, the Supreme Court has never issued a definitive interpretation on this aspect of § 2401(a). Nor does the statute's text contain any of the characteristics relied upon by the Supreme Court in *Brockamp* and *Beggerly*. The time limitation is not set forth "in unusually emphatic form." 519 U.S. at 350. The language in § 2401(a) is even less emphatic than that of 28 U.S.C. § 2401(b), which provides that untimely tort actions against the federal government are "forever barred," whereas the former uses only "barred." The text is also "fairly simple," and thus may "easily be read as containing implicit exceptions." *Id*. at 352.

These textual features correspond to the function of § 2401(a) as a general limitations period applicable actions involving varied procedures and subject matter. *See id*. at 352-53 (relying on the specific subject matter of the claims to which the statute of limitations applied to support the textual analysis), and *Beggerly*, 524 U.S. at 48-49 (relying on the fact that limitations period applied to claims under an act that "deals with ownership of land," and finding that "[i]t is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge").

For these reasons, the District Court clearly erred in concluding that the limitations period in § 2401(a) is not subject to extension by traditional equitable doctrines, such as the continuing violations doctrine and equitable tolling. Therefore, the District Court's dismissal of Claim I and the downlisting aspects of Claim IV as time-barred should be reversed. As the District Court did not reach the merits of plaintiffs' equitable arguments, the resolution of which involves factual determinations, these claims should be remanded with instructions for the District Court to determine whether Defendants' conduct after the 12-month finding deadline warrants extension of the limitations period under any equitable doctrine traditionally applied to statutes of limitations in the D.C. Circuit.[2] *See Holland v. Florida*, 130 S. Ct. at 2565 (Remanding "because . . . no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief," and further recognizing "the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance.' *Gonzalez v. Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting)); *Felter*, 473 F.3d at 1261 (Remanding for determination by the District Court of a

[2] Because Plaintiffs' believe reversal of the District Court's ruling requires remand to the District Court for initial consideration of Plaintiffs' equitable arguments, and in consideration of the Court's size restrictions on appellate briefs, this brief does not attempt to set out these arguments in detail. If this Court determines it may properly review the merits of the equitable arguments summarily rejected by the District Court, Plaintiffs' will provide a supplemental brief upon request.

legal question it "had no opportunity to consider" on its first consideration); *Menominee Indian Tribe of Wis.*, 614 F.3d at 531-32 ("Because the parties dispute facts relevant to application of the equitable tolling doctrine, we remand for the district court to determine whether tolling is appropriate under the circumstances of this case." Remanding a separate claim for reconsideration of factual and equitable arguments the District Court originally declined to consider).

B. Additionally, to the extent Claim IV is based on Defendants' refusal to process the petition, rather than unreasonable delay, Plaintiffs' right of action accrued less than six years before Plaintiffs filed suit.

Thus, the District Court erroneously failed to differentiate the downlisting claims included in Claim IV from Claim I for the purpose of determining when they accrue. The legal basis of the these are not the procedural requirement providing for a final determination of downlisting petitions within a particular time, but more general statutory duties imposed by the ESA. These duties include encouraging and assisting foreign conservation efforts under 16 U.S.C. § 1537(b) and ensuring the agency's actions do not jeopardize an endangered species' continued existence 16 U.S.C. § 1536(a)(2). Dkt. 10, pp. 31-34.

This claim alleges Defendants violated the above-referenced substantive provisions of the ESA by essentially refusing to continue reviewing the downlisting petition or make a final determination (which is colloquially referred

to as a "12-month finding) thereon. The district court erroneously assumed these claims accrued on the same day as the claim alleging violation of the procedural 12-month time limit. However, these substantive claims are not inextricably bound to the statutory deadline in § 1533. The claims at issue did not accrue until it became clear to Plaintiffs that Defendants were completely ignoring the downlisting petition, rather than simply running late because, ultimately, it is the utter refusal to complete the review process which Plaintiffs allege violated the substantive ESA duties at issue.

At the earliest, the downlisting claims in Claim IV first accrued after Plaintiff Tareen's last meeting with the FWS in 2004, although Plaintiffs contend they reasonably did not realize the FWS's intentions until much later. At the 2004 meeting, Plaintiffs were assured downlisting petition was being processed. Even using the 2004 accrual date, Plaintiffs' claims were timely filed on March 16, 2009. Thus, the dismissal of Plaintiffs' downlisting claims in Claim IV should be reversed.

II. The District Court Erred in Dismissing Plaintiffs' Procedural and Substantive Due Process Claims. [3]

The District Court dismissed Claim II "because plaintiffs are unable to demonstrate either a fundamental right to or a constitutionally-protected interest in the markhor trophies."[4] Dkt. 33, p.14. Describing the alleged property interest and right as "a fundamental property right to the markhor trophies, and by extension, a fundamental right to possess the trophies in the United States," the District Court found that Plaintiffs did not "state how these rights are deeply rooted in the country's history or tradition." *Id.* at p.15. It further found that, "in the context of importing endangered species, the elementary issue is not whether a party has a property interest in the specimen, but whether the party has a legal right to possess the specimen in the United States." *Id.* (citing *B-West Imports v. United States*, 880 F.Supp. 853, 863 (CIT 1995), *aff'd*, 75 F.3d 633 (Fed. Cir. 1996)).

Although it recognized that Plaintiffs were not claiming a protected property interest in import permits themselves, *Id.*, at p.16, n.8, the District Court found it relevant that, "even if plaintiffs had received the requested permits, the permits

[3] Throughout Part II of this brief, the word "Plaintiffs" refers only to the named Plaintiffs-Appellants who applied to the FWS for permits to import their markhor trophies into the U.S..

[4] The District Court also rejected Defendants' argument that Claim II involved "independent constitutionally-based claim[s]," recognizing that "Plaintiffs have alleged a violation of the 5th amendment only because it is essential to name the constitutional violation in order to legitimate a claim under section 706(2)(b) [of the APA]." *Id.* at p.14, n.7 (internal quotation marks omitted). Plaintiffs do not dispute this aspect of the District Court's decision.

convey only a revocable right to possess the specimen in the United States." *Id.*, at 15. It went on to find that "the government retains the authority to modify, suspend, or revoke the permit at any time" -- *Id.* (citing *Conti v. United States*, 291 F.3d 1334, 1342 (Fed. Cir. 2002); *United States v. Fuller*, 409 U.S. 488, 493 (1973); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed.Cir. 1998)) -- and that such revocation would mean "plaintiffs would no longer be entitled to possess the trophies in the United States, and therefore, no longer have a cognizable property interest in the specimens." *Id.*, at p.15. From these propositions, it reasoned that "at most, plaintiffs could have acquired a right to possess the trophies, but no fundamental right or constitutionally-protected property interest in the actual specimen." *Id.* at pp.15-16.

Finally, the District Court noted that the government has "a compelling interest in protecting endangered species," citing *TVA v. Hill*, 437 U.S. 153, 194 (1978), and found that "[t]he strict permitting requirements of CITES and the ESA are the least restrictive means to promote this compelling interest." *Id.* (citing *Conservation Force v. Salazar* ("*Snow Lepard*"), 677 F.Supp.2d 1203, 1211 (N.D. Cal. 2009); *United States v. Adeyemo*, 624 F.Supp.2d 1081, 1090 (N.D.Cal. 2008)).

The District Court's decision to dismiss Claim II is based upon several significant legal errors. First, the District Court misunderstood the nature and source of Plaintiffs' property interest in the trophies, which they legally obtained

and may lawfully possess outside of the U.S.. Second, it relied on an incorrect understanding of how the ESA and its related regulations affect Plaintiffs' rights in the trophies. These errors lead the District Court to wrongly conclude that Plaintiffs' interest in possession of the trophies in the U.S. derives solely from, and is contingent upon, an import permit issued by the FWS.

Plaintiffs' interest in possessing their lawfully acquired property in the U.S. actually stems from the common law of property, which provides that possession is an essential aspect of ownership. As ownership is the quintessential type of interest in property, every right or interest included therein is clearly protected under the 5th Amendment. Furthermore, the fact that Plaintiffs own the trophies[5] means their protected property interests are not a result of federal law. Thus, any action by the U.S. government that prevents Plaintiffs from enjoying possession of their trophies is necessarily a deprivation of a protected property interest. Plaintiffs argue that because the ESA's prohibition of importing endangered species is categorically subject to a mandatory permitting process, Plaintiffs' maintained their possessory interest in the trophies until the FWS' constructively denied them permits by refusing to consider their applications. Therefore, the 5th Amendment required Defendants' conduct, with respect to Plaintiffs' permit applications, to comport with both procedural and substantive due process.

[5] The District Court did not find that Plaintiffs do not own their respective trophies, nor have Defendants contested this fact.

Despite the District Court's inability to distinguish Plaintiffs' arguments regarding substantive and procedural due process, Claim II clearly sets out a distinct claim based upon each theory. Plaintiffs' procedural argument is straightforward, for Defendants' deprived Plaintiffs' of their property by failing to act in spite of a legally required procedure for determining whether or not to conclusively deprive an applicant of the right to import an endangered species. Plaintiffs' substantive due process arguments are more properly understood as an alternative theory; if for some reason, due process did not require Defendants to use any sort of procedure, their conduct violates substantive due process because refusing to consider whether issuing the permits would enhance the survival of the species is not a narrowly tailored method of protecting endangered species, nor is it even rationally related to that government interest. As Defendants have not contested the validity of Claim II on any grounds not considered by the District Court, the District Court's error clearly requires reversal of the judgment and reinstatement of Claim II.

A. Defendants' refusal to process and act upon Plaintiffs' permit applications for an unreasonable time deprived Plaintiffs' of their protected property interest in possessing their lawfully owned property.

The District Court's principal error is conflating the preliminary issue of whether Plaintiffs had a legal right to possess the trophy in the U.S. with the

subsequent issue of whether Defendants' failure to act deprived them of this right without due process. By assuming that any possessory interests Plaintiffs could have in their trophies are created through the issuance of a permit, the District Court fundamentally misconstrues the nature of ownership and property law. "'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Cleveland Bd. Of Educ. V. Loudermill,* 470 U.S. 532, 541-42 (1985) (ruling that procedures defined by the Board for termination did not also define the property interest in employment.)

Basic property interests, such as those deriving from ownership, typically exist independent of federal law. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Perry v. Sinderman*, 408 U.S. 593, 577 (1972). Because the property interest at issue was not created by federal law, the federal government cannot define the rights inherent in ownership, through legislation or otherwise.

Traditionally, property rights "in a physical thing have been described as the rights 'to possess, use, and dispose of it'". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In every state and at common law generally, the right to possession is a fundamental aspect of ownership; neither the District Court nor Defendants have denied this.

Furthermore, in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552(1972), the Supreme Court stated:

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, OF CIVIL GOVERNMENT 82-85 (1924); J. Adams, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA, in F. Coker, DEMOCRACY, LIBERTY, AND PROPERTY 121-132 (1942); 1 W. Blackstone, Commentaries *138-140.

The 5th Amendment clearly protects any right inherent in ownership, including the right to freely possess and enjoy the subject property. Therefore, Plaintiffs' undisputed ownership of their trophies granted them a protected property interest in freely possessing them.

Neither the fact that the trophies are outside of the U.S., nor the fact that Plaintiffs first gained ownership outside of the country inherently changes Plaintiffs' rights as an owner. The due process clause makes no distinction between types of property. *North George Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 608 (1975); *Fuentes v. Sheven,* 407 U.S. 67 (1972). Furthermore, the Supreme Court has acknowledged that the existence of a legal property right under foreign law affects the US government's treatment of property brought into the United States. *See, Pasquantino v. United States*, 544 U.S. 349 (2005).

Additionally, the protected nature of property rights established legitimately outside of the United States is demonstrated by the fact that the Takings Clause of the 5th Amendment applies to foreign property taken to serve government interests. *See, Zoltek Corp. v. United States*, 58 Fed. Cl. 688 (2003). Put simply, the government may not ignore the 5th Amendment simply because the property at issue is situated outside of the United States. The Supreme Court has clearly stated that "[the legislature] may not constitutionally authorize the deprivation of [a property] interest, once conferred, without appropriate procedural safeguards." *Arnett v. Kennedy*, 416 U.S. 134, 167 (U.S. 1974).

The District Court also erred to the extent it assumed the ESA prevented Plaintiffs from ever acquiring the contested property interest. To the contrary, the ESA does not conclusively deprive anyone of the right to import an endangered species into the country, for the law provides a required mechanism for reviewing individual cases to determine whether or not to apply the conduct generally prohibited by the ESA. Although the "import [of] any [endangered species] into, or export [of] any such species from the United States" is included in a list of prohibited acts in 16 U.S.C. § 1538(a), 15 U.S.C. § 1539 makes a general exception to this prohibition. It authorizes the Secretary to "permit, under such terms and conditions as he shall prescribe . . . any act otherwise prohibited by [§

1538] for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(A)(1)(a).

By including § 1539 in the ESA, Congress clearly indicated its belief that, in at least some cases, the activity described in § 1538 should not be prohibited when it would enhance the propagation or survival of an endangered species. However, it also declined the opportunity to make categorical judgments about these cases, instead delegating to the Secretary the responsibility for making case-by-case determinations about when the § 1538 prohibitions should or should not apply.

Moreover, the FWS has codified specific procedures and substantive standards to govern the implementation of § 1539. *See* 50 C.F.R. § 13 *et seq.*, 17 *et seq.*. These procedures have the force of law. *See* 16 U.S.C. § 1539(1) (authorizing the Secretary to grant permits "under such terms and conditions as he shall prescribe"). First, the FWS's permit procedures are mandatory; 50 C.F.R. § 13.21(a) states that, upon receipt of a permit application in the proper form, "the Director **shall** issue the appropriate permit" unless he determines that one or more disqualifying condition is present. § 13.21(a)(1)-(5) (emphasis added). Since the Secretary must grant a permit unless he finds that a disqualifying condition exists, the Secretary must make determinations on all permit applications. Moreover, 50 C.F.R. 17.22(b)(2) provides that "the Director will decide whether or not a permit should be issued" in any case where the FWS has received a proper application for

a § 1539 permit. 50 C.F.R. § 13.11(c) provides that "[t]he Service will process all applications as quickly as possible."

Both the FWS's own regulations and the APA also provide substantive limitations on the Secretary's discretion to deny § 1539 permits. Among other conditions not particularly relevant here, the Director may deny a permit if he finds "the applicant has failed to demonstrate a valid justification for the permit and a showing of responsibility." 50 C.F.R. § 13.21(a)(3). Specifically regarding § 1539 permits, 50 C.F.R. § 17.22(b)(2)(a) provides a list of "issuance criteria," which the Secretary "shall consider" in deciding whether to issue such a permit:

> (i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;
>
> (ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;
>
> (iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;

> (iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;
>
> (v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and
>
> (vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

Furthermore, the APA provides that all final action by the FWS on a permit application meet the general standards required of all federal agencies. Decisions on permit applications may not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," nor "without observance of procedure required by law," nor "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (1),(2)(a),(2)(d). Thus, although the Secretary has the discretion to grant or deny the "right to possess" a foreign endangered species specimen within the United States, such discretion is substantially constrained.

Together, these procedures and standards show that § 1538 does not conclusively prohibit the importation of endangered species, for it is possible,

under the right circumstances, that the Secretary would be required to go grant a permit application. The general provisions in the ESA, without an accompanying permit denial, did not unequivocally eliminate the possibility of Plaintiffs' possessing their trophies in the U.S.. The permit application and determination process, not the ESA, is ultimately what deprives (or not) import permit applicants, such as Plaintiffs, of the right to possess their property in the U.S.. Thus, Plaintiffs' protected ownership interests in their trophies remained intact when Defendants constructively denied their import permits.

Because Plaintiffs' due process claims concern a constitutionally-protected property interest, the District Court erred in dismissing Claim II.

III. The District Court Erred When it Dismissed as Moot Claim III, Failure to Process Trophy import Permit Applications.

A. Plaintiffs' "failure to process" claims was not moot, because Plaintiffs and Defendants are still adverse, and a substantial controversy exists between them.

Courts have widely accepted one standard for determining whether an issue has become moot: "'the question . . . is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment.'" *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975)) (emphasis omitted);

see also Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). "'Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Larsen v. United States Navy*, 525 F.3d 1, 3 (D.C. Cir. 2008), quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). "A case is not moot if a court can provide an effective remedy." *Larsen*, 525 F.3d at 4.

Plaintiffs have requested declaratory and injunctive relief. *See* Plaintiffs' Second Amended Complaint for Declaratory Judgment and Injunctive Relief, Dkt 10 at 1, 30, 35-36. The district court stated that Plaintiffs claims for injunctive relief were moot, because the individual Plaintiffs' permits had been processed. Order Granting Defendants' Motion to Dismiss, Dkt. 33 at 7. First, the cases on which the district court relies are distinguishable and/or inapplicable here, and, since the policy employed by Defendants is ongoing, Plaintiffs' claims for injunctive relief are not moot; second, even if the requests for injunctive relief *were* moot, Plaintiffs' requests for declaratory relief are still ripe for review.[6]

[6] It is important to note that while the APA only permits review of "final agency actions" (5 U.S.C. §704), this *includes inaction*, when a particular action is required by law. *Norton v. Southwest Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). Here, since Defendants are required to process import permits, failure to do so constitutes final agency action for purposes of the APA, and those failures are ripe for review.

1. The cases upon which the district court relied to "moot" Plaintiffs' claims for injunctive relief were inapplicable.

a. This case is distinguishable from the Wood Bison case.

Conservation Force v. Salazar, 715 F.Supp.2d 99 (D.D.C. June 7, 2010) ("*Wood Bison*") (case no. 1:09-CV-00496-JDB), referenced in the district court's opinion (Dkt. 33 at 17), is somewhat similar to the case at bar, yet sufficiently distinguishable so as to warrant a different outcome. In that case, the plaintiffs brought an action against Defendants for, among other things, failure to process trophy import permit applications that had been sitting unaddressed for almost a decade. *Wood Bison* at 102. There, as here, following commencement of the suit, the defendants denied all of the permit applications simultaneously. *Id*. Following the denials, the court declared that the plaintiffs' permit-related claims were moot. *Id*. at 107. In its Memorandum Opinion, the Court noted that there was insufficient evidence that the individual plaintiffs or the members of the organizational plaintiffs would apply for wood bison trophy import permits in the future. *Id*. at 106. Here, however, Plaintiffs submitted evidence that at least one member of Conservation Force, Dallas Safari Club, Wild Sheep Foundation, and Grand Slam Club/Ovis planned to hunt markhor and apply for a permit to import any markhor trophy that he may take during that hunt. *See* Sworn Decl. of Joseph A. Smith, submitted with Dkt. 24. (Note that Mr. Smith did, in fact, participate in a hunt as planned. However, given Defendants' treatment of straight-horned markhor

permits, Mr. Smith opted out of a straight-horned markhor hunt and instead hunted a subspecies of markhor whose import would not be blocked by Defendants.)

Furthermore, STEP, the organization responsible for the markhor's success, is a plaintiff in this action. STEP is being harmed by Defendants' stubborn and irrational refusal to cooperate with the legitimate, successful, world-renowned Torghar Conservation Project. Even if the denials of the individual hunter Plaintiffs' import permits somehow moot the claims at issue for those Plaintiffs, STEP has been permanently affected by the negativity arising from Defendants' refusal to process import permit applications for an unreasonable period of time. The conservation revenue lost as a result will never be regained. The TCP is a novel concept, especially in the way it involves the cooperation and participation of local tribespeople, and STEP has worked hard to ensure its success. Now, Defendants' policy of ignoring import permits is crippling it. STEP respectfully requests the protection of the Court, as it appears to be the only way to get Defendants to act fairly.

In addition, the Court in *Wood Bison* indicated that the plaintiffs there did not properly argue that the defendants' behavior was "capable of repetition yet evading review." 715 F. Supp. 2d at n.12. Here, the failure to process is "capable of repetition, yet evading review" and is indeed the proper theory to be applied. The recent cases cited by Defendants is proof in itself that the neglect of permits is

ongoing in FWS. It is being repeated regardless of the species at issue. In the alternative, the claims at issue are not moot because Defendants have an ongoing practice and long-standing policy of illegally ignoring valid markhor (and many other) trophy import permit applications, and/or because Defendants voluntarily ceased their illegal conduct.

b. Monzillo is completely inapplicable.

The district court relied on *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984), for the proposition that when an action sought to be compelled has already occurred, injunctive claims are moot. Dkt. 33 at 17. *Monzillo* is inapplicable to this case, however, as it involved very specific circumstances relating to a one-time event. In *Monzillo*, the plaintiffs sought a court order preventing a certain board from acquiring new headquarters until a union convention on a particular date. 735 F.2d at 1458. The district court issued an injunction according to those terms, and the defendant board complied therewith. *Id*. On appeal, the plaintiffs contended that there was a "continuing dispute between the parties" concerning the board's authority to acquire new headquarters, but the Court of Appeals stated that "[t]he relief sought and granted by the district court … expired on its own terms" and was not capable of repetition, and so the underlying controversy was moot. *Id*. at 1459-60.

The circumstances here are so dissimilar that *Monzillo* is inapplicable.

Plaintiffs have not requested that Defendants be prevented from doing something until a specific date, and there certainly has been no injunction ordering Defendants to comply with Plaintiffs' requests. On the contrary, Plaintiffs take issue with Defendants' repetitively not processing permit applications, which is not tied to any particular date, relates to all permits, is part of an ongoing policy, and is being repeated, not just capable of repetition. Using *Monzillo* as a basis for mooting Plaintiffs' claims was inappropriate.

2. Plaintiffs' claims are not moot, because Defendants have an ongoing policy of refusing to process trophy import permit applications.

"[A] plaintiff's challenge will not be moot where it seeks declaratory relief as to an ongoing policy." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009), citing *City of Houston, Tex. v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1429 (D.C. Cir. 1994). Ongoing governmental action constitutes a "policy." *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 123 (1974). A "policy" is defined as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 960 (11th ed. 2009). When a complaint challenges a Government policy, "not merely the Government's handling of [a specific] incident," the claims there involved should not be rendered moot simply because the specific incident has ended. *See Ukranian-American Bar Ass'n v. Baker*, 893 F.3d 1374 (D.C. Cir.

1990). In this case, Plaintiffs' Second Amended Complaint addresses Defendant's policy and "practice," not merely the Defendants' handling of Plaintiffs' particular permits:

> 62. **The practice** is contrary to the ESA requirements that defendant shall "encourage" and cooperate with foreign nations' programs for the conservation of listed species and second, that it recover species.
> 63. **Defendant's practice** is irrational and illegal. **The practice** interferes with and obstructs the range nations' programs and deprives Americans of their lawfully acquired trophies without offsetting benefit or rationale.
> […]
> 65. The project would serve as a better model to others if the Defendants granted trophy import permits. The granting of permits would serve as an award and tool for conservation of other populations and other species fortunate to be game species. This game species has an advantage in the recovery because of that status **but for defendant's permitting practices**.

Pl. 2nd Am. Compl., para 62-65 (Dkt. 10). *See also id*. at Claim III, para 8 ("The Secretary's **failure to process permit applications for the importation of straight-horned Markhor trophies** is a failure to follow a "rule" within the meaning of 5 U.S.C. 551(13).") and at Claim III, para. 12 ("Defendants should be compelled to **process permit applications to import straight-horned Markhor trophies** from the Torghar Hills of Pakistan.").

Here, Defendants have an ongoing policy of ignoring trophy import permit applications, then denying them only when faced with legal action. Even if this is

not a *written* policy, it is the method of action that Defendants have employed regarding the markhor import permit applications, four wood bison trophy import permit applications involved in *Wood Bison*, seven elephant trophy import permit applications involved in *Franks v. Salazar*, (Case No. 09-942-RCL)(D.D.C.) and four elephant trophy import permit applications involved in *Marcum v. Salazar* (Case No. 09-1912-RCL)(D.D.C.). In addition, Defendants have indicated that they do not intend to grant such permit applications in the future. *See* Decl. of J. Alain Smith; Decl. of Gray Thornton, attachments to Dkt. 24. *See also Larsen*, 525 F.3d at 4, quoting *Nat'l Black Police Ass'n. v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) (Defendant "[saying] it would commit the same alleged violation again under certain circumstances," gives plaintiffs "solid 'evidence indicating that the challenged [policy] likely [would] be reenacted.'"). Defendants practically admitted to having such a policy in its notices to change the policy. Considering that this behavior has been employed for a decade, that it has affected *at least* nineteen[7] individual trophy import permit applications, and that, by Defendants' own admission it will likely be employed in the future, it can and should be considered a policy and repeated practice. The claims addressing that practice/policy are not moot simply because the individual Plaintiffs' permit

[7]This number represents only those applications of which Plaintiffs' counsel is personally aware. The actual number may be much higher.

applications have now been processed. If so, Defendants would be allowed to continue the improper practice without consequence, and Plaintiffs and others similarly situated would have no recourse.

Furthermore, Plaintiffs are not seeking the type of "broad programmatic relief" that is prohibited under the APA. *See Lujan v. Nat'l Wildlife Fed'n*, 497 US. 871, 882 (1990). First, the claims at issue in *Lujan* were based on affidavits that did not express an actual injury, just "general allegations of injury." *Id*. at 889. Second, the court there specified that the "program" at issue "[did] not refer to a single [agency] order or regulation, or even a completed universe of particular [agency] orders or regulations." *Id*. At 890. The court stated clearly that "[i]f there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review…, it can of course be challenged under the APA by a person adversely affected[.]" *Id*. The instant Plaintiffs do not seek "broad programmatic relief." On the contrary, Plaintiffs take issue only with Defendants' *specific policy* of delaying properly-completed permits for a particular type of import: a "particular measure" applied "across the board" to applications to import hunting trophies taken lawfully as part of foreign conservation programs. This is precisely the type of policy that is appropriate for review under the APA.

3. Plaintiffs assert that their claims for injunctive relief are not moot. Assuming arguendo that such claims are moot, however, Plaintiffs' claims for declaratory relief are still alive.

Cessation of conduct does not necessarily render a claim for declaratory judgment moot. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-1175 (9th Cir. Or. 2002). Again, "'the question . . . is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment.'" *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (quoting *Preiser*, 422 U.S. at 402) (emphasis omitted). Here, the facts show just that. The controversy is whether Defendants' conduct (namely, the extreme delay in processing Plaintiffs' applications and refusal to consider or otherwise process enhancement permit applications until after notice and suit) violated the ESA, Defendants' own regulations, and the APA. Despite the fact that the applications submitted by the individual Plaintiffs have now been "processed" (in denials that explicitly contradict the FWS's own Federal Register Notices), the issue remains as to whether Defendants' actions prior to processing the permits were appropriate, and the organizational Plaintiffs and Plaintiffs STEP and Tareen continue to have a stake in this litigation, a "legally cognizable interest in the outcome." The organizational Plaintiffs consist of members who wish to and will participate in markhor hunts in the future. Plaintiffs STEP and Tareen will always

have an interest in the outcome of any claims that have a direct impact on the future of their markhor, the species that they work so relentlessly to conserve. In addition, the issues are still "live" because the Court can provide an effective remedy by declaring Defendants' policy and corresponding actions inappropriate.

The organizational Plaintiffs and Plaintffs STEP and Tareen are not "mere potential plaintiffs," as was the case in *National Wildlife Federation v. Department of Interior*, 616 F. Supp. 889 (D.D.C. 1984). There, the "sole injury" to the sole plaintiff was a $113 fee charged in conjunction with a Freedom of Information Act request, and any future harm was purely hypothetical. *Id*. at 892. Here, the injury is very real, yet practically immeasurable due to its ongoing nature: In refusing to process Plaintiffs' permits for *years*, Defendants discouraged American hunters' participation in the program, robbing the markhor of precious, irreplaceable funds. This is exactly what happened in the case of Joseph Alain Smith, a member of multiple organizational Plaintiffs who intended to participate in the TCP and so swore (*see* attachments to Dkt. 24), yet, based on Defendants' mistreatment of straight-horned markhor import permit applications, opted instead to participate in a hunt of another subspecies of markhor, one whose importation would not be blocked by Defendants. This is a concrete example of a loss of tens of thousands of dollars for the program. The actual extent of the damage remains unknown.

Allowing Defendants to continue the delay in processing of properly-

completed import permit applications for years without recourse would leave the door open for Defendants to engage in the same unlawful behavior and fail to process in a timely fashion the import permit applications of organization members who take and wish to import markhor now and in the future. (Defendants' behavior is capable of repetition, yet evades review. *See infra.*) The Court here can provide an effective remedy: declaring that Defendants' failure to timely process properly-completed, properly-submitted trophy import permit applications is a violation of the Endangered Species Act, especially Defendants' duties to recover species, encourage and support foreign programs to recover listed species and not to jeopardize listed species by agency action. "The real value of the judicial pronouncement – what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion – is in the settling of some dispute which affects the behavior of the defendant toward the Plaintiff." *Lawyer v. Dept of Justice*, 521 U.S. 567, 579-80 (1997). Here, a decision by the Court would settle the dispute that has arisen out of Defendants' ongoing refusal to abide by the ESA and cooperate with the legitimate, otherwise-successful conservation program run by STEP. Defendants' behavior not only affects the organizational Plaintiffs and their members, but also affects STEP and its ability to continue its successful program. In this instance, Plaintiff STEP and the community itself respectfully implore the Court's protection, as it is the only protection available to them.

B. Because Defendants' behavior is capable of repetition, yet evades review, Plaintiffs' "failure to process" claims are not moot.

An issue is not moot if the offensive action is "capable of repetition, yet evading review." *See Del Monte*, 570 F.3d at 321-26; s*ee also*, *Super Tire*, 416 U.S. at 122 ("And since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here 'capable of repetition, yet evading review,' so that petitioners are adversely affected by government 'without a chance of redress.'") (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). Such a situation exists when there exists a "reasonable expectation that the same complaining party w[ill] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See also Del Monte*, 570 F.3d at 322. Here, it is very likely that members of the organizational Plaintiffs will be subjected to the same action again, that is, Defendants' failure to process properly-completed straight-horned markhor trophy import permits for *years*, and/or until faced with legal action, then deny them en masse. Witness all the other recent failures to process import permit applications cases cited by Defendants themselves. Conservation Force and a number of the Plaintiffs filed at least four suits within one year for failure to process import permit applications for five years. The damage is done to Plaintiffs and the recovery of the species long before processing is compelled.

1. Defendants' failure to act within a reasonable time is capable of repetition.

In deciding whether an action is "capable of repetition," the issue is whether the "legal wrong complained of by the plaintiff" is reasonably likely to recur, not whether the "precise historical facts" are reasonably likely to recur. *See Del Monte*, 570 F.3d at 323-24. The question, then, is whether Defendants are reasonably likely to ignore properly-completed markhor trophy import permits in the future, *not* whether the individual permit-applicant Plaintiffs are likely to apply for markhor import permits again. Defendants have demonstrated an ongoing disregard for markhor import permits: Plaintiff Hornady submitted his import permit application in December 2003 and took a Suleiman markhor as part of the TCP in 2004, but the unprocessed applications go back to 2000. *See* Pl. 2nd Am. Compl., para. 18 (Dkt. 10). Given Defendants' pattern of ignoring import permit applications for markhor and at least three other species and/or countries, and worse, discouraging applicants from filing, it is reasonably likely that Defendants will ignore such applications in the future.

Defendants' refusal to admit that ignoring permit applications for years is improper demonstratively proves that Defendants are likely to repeat such behavior in the future. *See Larsen*, 525 F.3d at 4 ("[W]hen a complaint identifies official conduct as wrongful and the legality of that conduct is vigorously asserted by the officers in question, the complainant may justifiably project repetition.") (internal

quotations omitted). The consequences to the conservation of the species and its recovery are too great to be ignored.

2. Defendants' behavior, by its nature, evades judicial review.

To "evade review," an action must be "by its very nature short in duration so that it could not, or probably would not, be able to be adjudicated while fully live." *Conyers*, 765 F.2d at 1128. This Court has held that "agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action." *Del Monte*, 570 F.3d at 322. Here, the fact that Defendants had irresponsibly delayed the processing of permits for nearly ten years should not afford them protection from this doctrine. Processing permit applications, by its nature, should take much less than two years' time. This is evidenced by the fact that, upon being sued, Defendants "processed" (denied) Plaintiffs' permits almost immediately. The nature of permit applications is such that Defendants *should* be able to process them in a timely fashion, and, in any event, do process them swiftly when faced with legal action. *See also Wood Bison*, 1:09-CV-00496-JDB (where Defendants ignored permits for nine years, yet simultaneously denied them within seven months of the filing of the suit). Therefore, Defendants' behavior of habitually ignoring permit applications and then swiftly processing them when faced with legal action meets the standard for evasion of judicial review. The "capable of repetition but evading review" doctrine

should be applied.

C. In the alternative, Defendants' processing of Plaintiffs' permits constitutes voluntary cessation of illegal conduct; therefore the claims regarding that conduct are not moot.

When a defendant voluntarily ceases illegal conduct, a claim regarding that conduct is not moot unless the defendant makes certain showings. *See Abu-Bakker Qassim v. Bush*, 466 F.3d 1073, 1075 (D.C. Cir. 2006), quoting *Motor Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998). "In such cases the **defendant** must show that there is **no reasonable expectation that the alleged violation will recur** and that interim relief or events have **completely and irrevocably eradicated the effects of the alleged violation**." *Conyers*, 765 F.2d at n. 9 (emphasis added). *See also Larsen*, 525 F.3d at 4. Therefore, Defendants must show that there is no reasonable expectation that they will fail to process markhor trophy import permits in the future, and that their "processing" (denial) of the individual Plaintiffs' import permits completely eradicated the effects of ignoring those permits for nearly a decade.

Were the individual permit applicants the only Plaintiffs in this case, it is possible that this theory would not apply, as these particular individuals (Barbara Lee Sackman, Alan Sackman, Jerry Brenner, and Steve Hornady) will likely not hunt markhor again, nor apply to import markhor trophies, given how unpleasant, burdensome, and frustrating this experience has been for them. Nevertheless, these

individuals are not the only Plaintiffs in this case. As stated *supra*, STEP, Naseer Tareen, and the organizational Plaintiffs continue to have a stake in this litigation. In addition, Defendants' denial of the individual Plaintiffs' import permits has in no way eradicated the negative effects of ignoring those applications for up to a decade. The failure to process the permits had countless negative effects. For example, the perishable trophies in question have likely deteriorated, especially the trophy of Plaintiff Hornady, which by this time has been stored without proper care for almost eight years; Plaintiffs have experienced angst and frustration over Defendants' failure to act, which has turned their memorable, positive, once-in-a-lifetime opportunity and participation in an international conservation program into an off-putting legal battle; the negativity surrounding the delay and denials discourages other potential hunters from participating in the program; and those who will participate are amenable to paying only a fraction of what they would pay for their "conservation hunts" were they relatively certain that the enhancement permits would be granted, depriving STEP and the TCP of hundreds of thousands of dollars that would have benefitted the markhor. It was Defendants' burden to show that there is no reasonable expectation that the violation will recur, and that the denial of Plaintiffs' permits completely eradicated the effects of ignoring them for so long. Defendants have not made such showings. Therefore, Plaintiffs' claims regarding Defendants' failure to process import permits are not moot.

CONCLUSION

The processing of the permits was more than fundamentally unfair, it conflicted with the recovery goals and purpose of the ESA. When the enhancement permits are constructively denied, so is the potential recovery of the species that they promise. The fact that the neglect of permits is being repeated in other cases in the same time frame demonstrates the conduct was capable of repetition rather than moot.

The District Court granted Defendants' Motion to Dismiss without ever reaching Plaintiffs' Motion for Summary Judgment. The dismissal should be reversed and the case remanded.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY THAT the foregoing brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). As determined by the Microsoft Word software used to produce this brief, it contains 13,830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

Dated: April 2, 2012.

/s/ John J. Jackson, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing brief was filed electronically with the Court via the CM/ECF system on April 2, 2012. All parties registered with the Court's CM/ECF system will receive notice of an access to this filing *via* that system.

/s/ John J. Jackson, III