

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

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 Hwy, Ste. 330 )  
Ft. Lauderdale, FL 33308-1400 )  
)  
WILD SHEEP FOUNDATION )  
720 Allen Avenue )  
Cody, WY 82414-3402 )  
)  
GRAND SLAM CLUB/OVIS )  
P.O. Box 310727 )  
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)  
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** )  
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)  
JEREMY BRENNER )  
12948 Quincy St. )  
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)  
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2323 W. John )

Case No. 1:09-cv-00495-HHK



non-discretionary timelines for responding to a downlisting **petition or alternatively to complete the downlisting review per the APA.**

2. In addition, the Secretary has failed to process Markhor enhancement trophy import permit applications in violation of the ESA and USFWS' regulations. 16 U.S.C. §1539; 50 CFR 17.22(a)(2), 50 CFR 13.21 **and APA.** Thus, the Plaintiffs ask the Court to order the Secretary to **complete the processing of** the import permit applications in good faith pursuant to the **recovery, encouragement, cooperation and** enhancement provisions of the ESA and USFWS regulations **and APA.** 50 CFR. 17.22(f), 50 CFR 13.21.

## **II. JURISDICTION AND VENUE**

3. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (APA), and 28 U.S.C. § 1361 (Mandamus) and the U.S. Constitution, Fifth Amendment. The relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief) **and 28 U.S.C. § 1351 (mandamus).**

4. Venue is proper in the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) as this civil action is brought against an agency of the United States and officers and employees of the United States acting in their official capacities and under the color of legal authority.

5. By written notice sent to Defendants Ken Salazar, Rowan Gould and U.S. Fish and Wildlife Service and received by email and Federal Express delivery on January 14, 2009, Plaintiffs informed Defendants of the violations set forth in this Complaint

more than sixty days prior to the filing of this Complaint, as required by the ESA. 16 U.S.C. § 1540(g). Despite receipt of Plaintiffs' notice letter, the Secretary has failed to remedy his violations of the ESA.

6. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

7. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(c) **and** (g) and **5 U.S.C. § 701 and** 5 U.S.C. § 702.

### **III. PARTIES**

8. Plaintiff Conservation Force files in its own capacity and as a representative of its many constituent hunters and its supporting organizations and Pakistan conservation partners. It has filed multiple substantive, comprehensive comments supporting the downlisting and the import permits in issue. Conservation Force is a non-profit 501(c)(3) foundation formed for the purpose of wildlife conservation, related education and wildlife research. It advocates and represents hunters and their conservation interests, particularly concerning the Markhor. Its name stands for the fact that the sustainable use of wildlife, most particularly recreational hunting, has been the foremost force for wildlife and habitat conservation in North America for over a century. No one contributes more than sportsmen and women for the conservation of wildlife and habitat, nor has anyone contributed more to the conservation of the Markhor that today is at or near record high numbers. Conservation Force has wildlife conservation projects around the world to conserve, manage and protect species that are listed on the ESA and CITES, particularly Markhor

projects. Its leaders and officers have been participants in the ESA and CITES process since the inception of the ESA and CITES. Most of its supporting organizations are committed to Markhor conservation and the proper implementation of the ESA and/or CITES, many of which organizations have invested heavily in Markhor conservation. Conservation Force is committed to and is directly participating in the conservation of Markhor. Its officers pioneered the U.S. importation of Markhor hunting trophies that has been one of the principle incentives and sources of funding for Markhor management and conservation incentive in the Pakistan. One founding board member, Dr. Bart O’Gara, initially suggested the existing world renowned Targhor Project in Pakistan that led to its inception. It has many members that have taken markhor or would like to, but they are told not to file trophy import permit applications by defendant or their permits are not processed. **Conservation Force filed a comment in support of the import permit application of Clint Heiber, PRT 007657 (March 25, 1999) ten full years ago but the permit has not been granted.**

9. Plaintiff Dallas Safari Club is a nonprofit volunteer corporation in Dallas, Texas that works to preserve hunters’ rights and to conserve wildlife, including straight-horned Markhor. The mission of the Dallas Safari Club includes the conservation of wildlife and to promote and protect the rights and interests of hunters worldwide. DSC appears in behalf of itself and as the representative of its members that have taken Markhor and/or had planned to take a Markhor. DSC is greatly concerned that the listing has severely harmed, not helped, the Markhor. Plaintiff also cares deeply as a sportsman and conservationist organization about the Markhor and the hunting people of the Pakistan. They are deeply committed to protecting the conservation/management system

that has been one of the best in the world. It has members that have taken markhor whose permits are not being processed and more members that would take markhor and support its conservation if it were downlisted or if permits were duly processed.

10. Plaintiff Houston Safari Club is a non-profit volunteer organization that preserves the sport of hunting, supports wildlife conservation and educates the public on hunting and conservation issues. Over the course of three and a half decades, HSC has grown into a large and influential group of hunters and outdoor enthusiasts, enjoying fun and fellowship and spending over 1.7 million dollars toward protecting hunters' rights and furthering the agenda of outdoors enthusiasts in Texas and throughout the country. It has partnered on Markhor conservation and its members have taken Markhor, some of which can no longer be imported, and others wish to take hunts and import Markhor. It appears in both its representative capacity and on its own standing. HSC is greatly concerned that the endangered listing has harmed, not helped the bear. Plaintiff also cares deeply as a sportsman and conservationist organization about the Markhor and the hunting people of Pakistan. They are deeply committed to protecting the conservation/management system that has been one of the best in the world. It has members that have taken markhor whose permits are not being processed and more members that would take markhor and support its conservation if it were downlisted or if permits were duly processed.

11. Plaintiff African Safari Club of Florida, Inc. is a nonprofit membership organization devoted to hunting by sportsmen, wildlife conservation and education of present and future hunters. Their mission is to insure the protection of animal resources throughout the world, including the Markhor. It has members that have taken Markhor

they can't import due to the listing and others that wish to take them if and only if they can again be imported. It is greatly concerned by the fact that the listing has harmed, not helped the Markhor. Plaintiff also cares deeply as a sportsman and conservationist organization about the Markhor and the hunting people of Pakistan. They are deeply committed to protecting the conservation/management system that has been one of the best in the world. It has members that have taken markhor whose permits are not being processed and more members that would take markhor and support its conservation if it were downlisted or if permits were duly processed.

12. Plaintiff The Conklin Foundation is a non-profit 501(c)(3) conservation organization. It financially assists several guide/outfitter associations with the necessary funds to carry out their important "grass roots" initiatives. In its brief history, The Conklin Foundation has already been able to donate more than \$475,000.00 to pro-hunting conservation, governmental, and education initiatives. The emblem of the Conklin Foundation is the Suleiman Markhor and the Conklin award that it gives out annually is a statue of the Suleiman Markhor. The Conklin Foundation and its members are in the best position to save the Markhor species and the USFWS's failure to downlist the Markhor harms the Conklin Foundation's ability to contribute to conserving the Markhor.

13. Plaintiff Grand Slam Club/Ovis is a non-profit 501(c)(3) organization of hunter/conservationists dedicated to improving and perpetuating wild sheep and goat populations worldwide, such as the Markhor. The Grand Slam Club/Ovis is the established documentation and records-keeping organization for legally-taken Grand

Slams of North American wild mountain sheep, Ovis World Slams of wild sheep of the world, and Capra World Slams of wild goats of the world. Their purpose and objective is to encourage the use of legally issued permits, tags, and/or licenses for the hunting of wild mountain sheep and goats and inform and educate people of the world about wild mountain sheep and goats. Their financial resources received from membership dues, donations, or fund-raising events to benefit, directly or indirectly, wild mountain sheep and goats by contributing these funds to established game and wildlife agencies or other non-profit wildlife conservation organizations. With nearly 5,000 members worldwide, Grand Slam Club/Ovis is in the best position to conserve the Markhor. USFWS failure to downlist the species significantly harms this initiative. It has members that have taken markhor whose permits are not being processed and more members that would take markhor and support its conservation if it were downlisted or if permits were duly processed.

14. Plaintiff Wild Sheep Foundation has been a 501(c) (3) non-profit charitable conservation corporation since September 14, 1977. Their mission is to enhance wild sheep populations like the Markhor, promote professional wildlife management such as the TCP, and educate the public about wild sheep and the conservation benefits of hunting. They are the Ducks Unlimited of **wild sheep conservation**. These objectives, while instrumental to saving the Markhor, are significantly harmed by the USFWS failure to downlist the Markhor and/or permit import of the hunting trophies. It has members that have taken markhor whose permits are not being processed and more members that would take markhor and support its conservation if it were downlisted or if permits were duly processed.

15. Plaintiff Jeremy Brenner was willing and able to pay close to \$100,000.00 to hunt a Suleiman markhor in the Torghar Project, but in February 2009 when he called the USF&WS Office of Management Authority he was told they would not issue a permit. He would like to take a Suleiman markhor in the Torghar Project, but has been discouraged by Defendant. The downlisting of the markhor or the granting of import permits would correct the problem and generate greater revenue for the program. In all events he is willing to pay more if he were assured he could import his trophy.

**15(a). Since the filing of the original petition, Jeremy has taken a Suleiman markhor in Torghar, Pakistan and submitted a correctly completed import permit application to defendant with the hope and expectation that this Court will order that it be lawfully and timely processed.**

16. Plaintiff Steve D. Hornady is a U.S. citizen from Grand Island, Nebraska. Plaintiff cares deeply as a sportsman and conservationist about the Suleiman Markhor and the hunting people of the Torghar Hills. He is deeply committed to protecting the conservation/management system that has been the best in the world. He took a Suleiman markhor in January 2004 and applied for an import permit in December 2003 with the USF&WS, PRT US081325/9, before he went on the trip in reliance upon a Federal Register Notice announcement that the USF&WS **had found that the markhor in the Torghar program were an ESA distinct population segment and that the hunting program “significantly enhanced” its survival and thus** intended to issue enhancement permits, 68 FR 49512, August 18, 2003, *Draft Policy for Enhancement of Survival Permits for Endangered Foreign Species*. He was assisted in the filing of his **correctly completed** permit application by Conservation Force. Defendants have

knowingly neglected to process his application because of the illegal practice of not processing such permits. At the same time they have not acted on the downlisting petition that would allow importation of the trophy. He feels there is no rational reason to deny him the import of his lawfully acquired trophy.

**16(a). Plaintiff Barbara Sackman is a citizen of the U.S. domiciled in the State of New York who took a Suleiman straight-horned markhor in the Torghar Hill and Torghar Project of Pakistan in March 2008.**

**16(b). Plaintiff Barbara Sackman is a citizen of the U.S. domiciled in the State of New York who took a Suleiman straight-horned markhor in the Torghar Hill and Torghar Project of Pakistan in March 2008.**

**16(c). Barbara and Alan Sackman are proud to have participated in the program but had not filed import permit applications with defendant.**

**16(d). Now, after more than a year, Barbara and Alan have filed properly completed import permit applications with the hope that the relief provided by this Court will provide fair and lawful treatment of their applications.**

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

18. Defendant Rowan Gould is the acting Director of the United States Fish and Wildlife Service. He is responsible for the administration and implementation of the ESA, including the downlisting of the markhor. He is sued in his official capacity.

19. Defendant The United States Fish and Wildlife Service (“the Service”) is a federal agency within the Department of Interior authorized and required by law to protect and manage the fish, wildlife and native plant resources of the United States, including enforcing the ESA. The Service has been delegated authority by the Secretary of Interior to implement the ESA for the Markhor, including responsibility for making decisions and promulgating regulations, including proposed and final downlisting and the processing of petitions for such listings and the import permitting. The Service has failed to publish the final downlisting determination for the Suleiman markhor under the ESA to issue trophy import permits.

#### **IV. LEGAL BACKGROUND**

20. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

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

22. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review of the status of the species. 50 C.F.R. 424.14. Upon completion of this status review, and within 12 months from the date that he received the petition, the Secretary must make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second determination is known as a “12-month finding.” This deadline is mandatory. There is no mechanism by which the Secretary can extend the deadline for the finding.

**Nevertheless, it is common for the Secretary to exceed that period and to even take years to complete that review.**

23. The USFWS has declared as a part of their listing policies that “For foreign species only, within the limited allocation assigned to that function, those final determinations that have potential for conservation benefit, and assist developing countries with the conservation and management of their species, will be the highest priority within Tier 2.” 63 FR 25502, 25510 (May 8, 1998) in this instance. The USF&WS has not followed that announced Notice **in this instance.**

24. The ESA provides that “the Secretary . . . **shall encourage** . . . foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to the ESA.” 16 U.S.C. § 1537(b) (emphasis added). The range nation’s program is not a threat, it is the solution. The proposed downlisting would reduce the “stricter domestic measure” that is known world wide to be obstructing the TCP’s conservation programs for the Markhor.

25. **Even in the listing process** 16 U.S.C. § 1533 recognizes that the Secretary shall not determine if a species is endangered or threatened until “after taking into account those efforts . . . being made by any . . . Foreign nation . . . to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices.” **The Secretary recognizes that the tourist hunting based conservation program in the Torghar area has “significantly enhanced” the survival of that distinct population segment.**

### PERMIT PROCESSING

26. **In addition, by not completing the downlisting review,** the Secretary has also failed to consider Markhor trophy import applications submitted under the enhancement provision of the ESA. “The Secretary may permit, . . . any act otherwise prohibited by section 1538 of this title for scientific purposes or *to enhance the propagation or survival of the affected species.*” 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

27. 50 CFR 17.22(a)(2) *Permits for...enhancement or propagation of survival...* expressly provides that “upon receiving an application...the Director **will** decide whether or not a permit should be issued.” 50 CFR 13.21 *Issuance of Permits* is also made applicable by 50 CFR 17.22(a)(2) governing species listed as endangered. It provides that “[u]pon receipt of a properly executed application for a permit, the Director **shall** issue the appropriate permit unless” there is a specifically enumerated regulatory reason not to. **All permits in issue herein have been properly completed. Moreover, 50 C.F.R. 13.11(c) provides that “[t]he Service will process all applications as**

**quickly as possible.” The failure to process or grant such permits is a violation of law and regulations, ESA and APA.**

28. The principal goal of the administration of the ESA is to return listed species to a point at which protection under the Act is no longer required. In the case of the Markhor, the downlisting would permit the issuance of trophy import permits to encourage sustainable use that will contribute to the long-term survival of this species and its permanent elimination from the “endangered” listing. It would increase the revenue for the maintenance and propagation for the species. The neglect and refusal to process or approve the import permits has deprived the species and the conservation program of important revenue and undermined the incentives that are at the heart of the **conservation** strategy.

29. During the 1982 ESA amendment hearings, Congress provided that the Secretary must consider the wildlife conservation and management programs of the foreign nation before any listing or permit decisions.

“There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status. The failure to recognize this may result in the foreign nations being denied much-needed revenues derived from license fees that are used to fund their wildlife conservation and management programs. **If the Secretary is in receipt of biological information from a foreign nation with respect to resident game species listed as “endangered,” he should evaluate the status of such species within the country in question.** The evaluation should consider the effectiveness of management programs such as artificial propagation and whether these programs permit sport hunting of listed species in nations where it otherwise might be detrimental to the species. The evaluation should also determine whether the specific country in question has management program for the species, whether the species’ population can sustain a sport hunting harvest, and whether the sport hunting enhances the survival of the species. **If the Secretary determines that sport hunting in such country will assist the conservation of a listed species, he should issue appropriate regulations to facilitate the**

**import of sport-hunted trophies of such specimens.** The above-mentioned criteria should be taken into account in future listings of game species as well.”

*Senate Report No. 97-148* (emphasis added).

30. The USFWS regulations mandate the import of trophies of “endangered” listed species when hunting enhances the survival or propagation of the listed species.

“Upon receiving an application . . . the Director **will decide** (*not optional*) whether or not a permit should be issued. In making this decision, the Director **shall consider** . . .

(ii) The probable direct and indirect effect which issuing the permit would have on the wild population of the wildlife sought to be covered by the permit; . . .

(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 scientist or other persons or organization having expertise concerning the wild life or other matters germane to the application (*like the CITES downlisting, the range nation authorities, and the genuine stake holders’ views*);

*Permits for . . . Enhancement of Propagation or Survival of the Species, Issuance Criteria*, 50 CFR 17.22(a)(2) (emphasis added). Trophy import by the U.S.

tourist/recreational hunters could and would enhance the propagation or survival of the species. **The Secretary has published that the underlying hunting program has “significantly enhanced” the species.**

31. In addition, USFWS acknowledges that listing a foreign species under the ESA may actually harm the species because listing the species “may complicate the implementation of conservation initiatives under other international authorities, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).” 68 FR at 49513.

32. CITES is an international treaty that is used as a conservation tool regulating international trade of certain wild plants and animals. Due to the sustainable use practices of the TCP, the Conference of the Parties to the Convention (COP-10) approved an export quota of six hunting trophies of Markhor from Pakistan per calendar year. Thus, the USFWS failure to downlist is in direct contravention to the international conservation authority. Conf. Res. 10.15. The quota has since been increased by CITES.

33. Because the ESA does not provide benefits for recovery of foreign species as it does for domestic species, the USFWS has a duty to defer to the range nation when there is a conflict between the administration of the ESA and the range nation's conservation regime where the range nation has the greatest interest. *See Restatement Third of the Foreign Nations Law of the United States* § 403 (1987). The neglect of the downlisting and failure to grant import of the trophies is an uncooperative, unilateral action in direct conflict with the Torghar Conservation Project **and conservation of that distinct population segment**. It violates the diplomatic "Principle of Reasonableness," the "Principle of Effects," and the "Conflict Avoidance Rule" of Foreign Affairs. *Id.* The ESA and wildlife permitting system should not serve as a disincentive or extraterritorial impediment to conservation and recovery efforts of other nations.

34. The existing law and regulations compel the downlisting of the **Suleiman/straight-horned markhor** in the Torghar **Hills** area and/or the issuance of **import permits of those markhor** for conservation purposes. **The failure to do so is contrary to law and the intent of Congress.**

## V. FACTUAL BACKGROUND

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

36. There are seven recognized subspecies of Markhor. The subspecies at issue is the straight-horned Markhor that inhabits the Torghar Hills of the Balochistan Province of Pakistan. It is listed as “endangered” on the ESA.

37. The Torghar Hills population of Markhor has increased substantially from 100 animals in mid-1980 to more than 2,000 today **as the defendants well know.**

38. The vitality of the population is attributed to the Torghar Conservation Project (TCP) started by the Society for Torghar Environmental Protection (STEP). The TCP was initiated in early 1985 through the efforts of the local Pathan tribal chieftain, the late Nawab Taimur Shah Jomezai, and Sarbar Naseer Tareen, in consultation with professional wildlife biologists from the US.

39. The TCP is a legitimate private conservation program whereby local tribal peoples are appointed to enforce a total ban on all hunting by locals, the military and outsiders. The TCP is entirely self-sufficient since its inception; depending solely on revenues derived from trophy hunting fees from international hunters. That conservation revenue is artificially lower than would be if Americans could import the trophies. Americans are unwilling to pay full price to hunt at all if they can't bring their trophies home.

40. On March 4, 1999, USF&WS received a petition filed by Sardar Naseer A. Tareen, on behalf of The Society for Torghar Environmental Protection and the IUCN Sustainable Use Specialist Group of Asia, requesting that the Suleiman Markhor be

reclassified from endangered to threatened so that American hunters could import their trophies into the U.S.A.

41. The ESA sets forth strict deadlines for processing petitions. Within 90 days of receiving a petition to remove a species from the list, the ESA requires the Secretary to determine whether “the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). If the Secretary finds the petitioned action “may be warranted,” the ESA requires the Secretary to determine, within twelve months of the petition being filed, whether the requested action (downlisting the Markhor) “is warranted” and, if so, to publish a proposed rule downlisting the Markhor as a threatened species. 15 U.S.C. § 1533(b)(3)(B).

42. On September 23, 1999, over 6 months after receiving the petition, the USF&WS published their “90-day finding” that the reclassification of the straight-horned Markhor may be warranted. The finding was “based on the overall size and documented growth of the Torghar Hills population . . . over the past 14 years, the management program (**tourist hunting based**) called the Torghar Conservation Project, whose game guards (**funded by tourist hunters**) have virtually eliminated unauthorized hunting with the project area, and the relative security of the Markhor habitat in the Torghar Hills.” 64 FR at 51500.

**42(a). In the 90-day finding the defendants recognized the dependence of the Torghar Hills markhor population on international hunting and recognized that it was a “valid conservation program for markhor...” as evidenced by the granting of**

**various export quotas for hunting trophies by the Conferences of the Parties of CITES.**

**“In addition, the discreteness and significance of the Torghar Hills population of straight-horned markhor indicates that it qualifies as a distinct vertebrate population segment under...(the defendant’s) February 7, 1996 policy (61 FR 4722).”**

**The defendants noted that other populations and subspecies that were not in the tourist hunting program were continuing to decline unlike those in the Torghar Hills benefiting from the tourist hunting.**

43. After publishing an albeit late 90-day finding that the petitioned action may be warranted, the Secretary was statutorily required to publish a 12-month finding by March 4, 2000. The Secretary has failed to meet this deadline or the final determination deadline.

44. Because the Secretary is in violation of the ESA’s mandatory downlisting deadlines, Plaintiffs now seek judicial relief declaring that the Secretary has violated the ESA by failing to issue a 12-month finding for the straight-horned Markhor by the statutory deadline of March 4, 2000 **or since**. Plaintiffs also ask the Court to order the Secretary to issue the overdue downlisting determination for the Markhor.

45. The reason for the population growth is a substantial reduction in Markhor mortality as uncontrolled hunting (poaching) was replaced by the Torghar Conservation Project (TCP) which controlled, limited tourist trophy hunting that pays for the cost of local game guards and other conservation measures.

46. The TCP has achieved a complete cessation of unauthorized hunting (by both locals and outsiders) of Markhor. This was achieved because Torghar is a tribal society, and the tribal chieftains gave their full support to a hunting ban. As a result the Markhor population has multiplied in size since 1994.

47. In addition, the Secretary has failed to **process** Markhor enhancement trophy import applications in violation of the USFWS' regulations. 50 CFR 17.22(a)(2) and 50 CFR 13.21 **and the APA**.

48. "The Service recognizes the conservation benefits of delisting activities for domestic and foreign species and recognizes that, with regard to foreign game species, fees from trophy hunters can, in some cases, provide economic incentives for landowners to maintain healthy populations of game species." 63 FR at 25504.

49. The TCP is a world renowned sustainable use program dependent upon export/import of hunting trophies. The issuance of these trophy import permits is very important to the conservation of the Markhor and the program could fail if U.S. import permits are not granted due to the endangered listing. The local people and government should be allowed to profit from implementing the successful management program for the species.

50. As asserted by the USF&WS, the import permits for the trophies would constitute "enhancement of the propagation or survival of the species." 68 FR 49512, 49515 (Aug. 18, 2003) "[T]he Torghar Hills region of Pakistan has successful community-based management program that has significantly enhanced the conservation of local Markhor populations. Under this example this proposed policy could allow consideration of applications for the importation of sport-hunted trophies from this

population, if the necessary enhancement finding could be made, as an incentive to continue and expand the conservation program of the species.” *Id.*

51. The Torghar Project in Pakistan is the foremost international sustainable use model in the conservation world. It is recognized by the Convention of Biological Diversity as the single best example of sustainable use. It has won numerous awards and is cited as an example for others to follow around the world.

52. The project was first conceived by Dr. Bart O’Gara, one of the founding Board members of Conservation Force, who at the time made the recommendation in the performance of his duties as a member of the USF&WS Extension Service.

53. The underlying concept for the project was to create a tourist hunting program that would fund the management and provide the necessary incentives for the local people. Of course, the program has been a celebrated success and the Suleiman markhor population has steadily increased to a total of more than 500% of what it was.

54. 178 Parties of CITES have established a special quota to facilitate exporting and importing of the hunting trophies in recognition of the “enhancement” the limited tourist hunting provides the species. Res. Conf. 10.84.

55. The program has had one serious handicap. The USF&WS International Affairs Division has failed and **neglected** to process or approve trophy import permits. It has gone so far as to advise prospective U.S. hunters that inquire that it will not issue import permits for **the** hunting trophies.

56. Because American hunters are the largest market and pay the highest prices when they can bring their trophies home, **this** U.S. permitting practice has

devalued the trophies and obstructed the conservation effort. In some years the small quota can't even be sold.

57. Other subspecies of markhor that are not listed as endangered are marketed for \$150,000.00 per hunt to American hunters while Suleiman markhor hunts can only be sold for \$45,000.00, if at all. This disparity in revenue is indicative of the harm the listing has done to the conservation of the species by the continued listing. Though the quota is kept low to keep the price high, American hunters are unwilling to pay the higher price for trophies they cannot import home.

58. The quota established at the CITES Conference of the Parties is too low to be of any biological consequence and the enhancement of the species due to tourist hunting is undisputed. The USF&WS permitting practice is contrary to law and regulation and not in the best interest of the species.

59. The listing also irrationally deprives U.S. hunters of their property contrary to due process.

60. 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.

61. 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.

62. The failure to downlist the species or to allow for the import of trophies holds the **Torghar** conservation program hostage and devalues **Pakistan**’s resource.

63. 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.

## **VI. CLAIMS FOR RELIEF**

### **CLAIM I**

#### **(Failure to Consider and Process or Complete the Delisting of the Straight-Horned Markhor)**

- 1. Plaintiffs re-allege and incorporate by reference all the allegations set forth above as though fully set forth below.**
- 2. The Secretary's failure to proceed with the determination of whether the Markhor should be de-listed is in violation of his responsibilities under 16 U.S.C. 1533.**
- 3. The Secretary's failure to consider or to complete the review of the petition to delist the straight-horned Markhor represents a violation of his duties under 16 U.S.C. 1533.**
- 4. The Secretary's failure to consider and proceed with the petition to delist the straight-horned Markhor violates his responsibility under 16 U.S.C. 1537(b) of the endangered species act, which mandates that the secretary "shall encourage" foreign countries to provide for endangered species.**

5. **The Secretary's failure to proceed with or consider the petition to delist the Straight-horned Markhor represents "final agency action" under 5 U.S.C. 551(13), "failure to act."**
6. **The Secretary's failure to proceed with or consider the petition to delist the Straight-horned Markhor is a failure to follow a "rule" within the meaning of 5 U.S.C. 551(13).**
7. **Plaintiffs are persons "adversely affected" by the Secretary's failure to act within the meaning of 5 U.S.C. 702 (right of review for failure to act...) and therefore have a right to seek relief under the Administrative Procedure Act in this Court.**
8. **The Secretary's failure to act for a 9 year period constitutes an action "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. 706(1).**
9. **The Secretary's failure to act for a 9 year period and his attendant misrepresentations and evasions in communication with plaintiffs constitute behavior that is "arbitrary and capricious" and a "failure to observe proper procedure" within the meaning of 5 U.S.C. 706(2), *Scope of Review*..**
10. **Defendants should be compelled to come to a conclusion about the delisting of the Straight-horned Markhor.**

## **CLAIM II**

**(Failure to Process Trophy Import Applications and/or to Downlist this  
Population of Markhor Violates the Fifth Amendment of the Constitution)**

1. Plaintiffs re-allege and incorporate by reference all the allegations set forth in the Complaint, as though fully set forth below.
2. Defendants have violated both the procedural and substantive due process rights of Plaintiffs by failure to process trophy import permit **applications or to follow** their own regulations and/or downlist the Markhor per their own regulations. U.S. Const. Am. 5.
3. There is no rational reason to deprive Plaintiffs of the import of their trophies as the ESA does not have a positive conservation basis as applied and administered in this instance, **i.e. it is irrational as applied.**

**CLAIM III**

**(Failure to Process Permit Applications for the Import of  
Straight-Horned Markhor Hunting Trophies)**

1. **Plaintiffs re-allege and incorporate by reference all the allegations set forth above as though fully set forth below.**
2. **The Secretary's failure to process permit applications for the importation of straight-horned Markhor trophies from the Torghar Hills is violative of his responsibilities under 16 U.S.C. 1533.**
3. **The Secretary's failure to process the Markhor trophy import applications is a violation of 17.22(a)(2).**

- 4. The Secretary's failure to process permits for the importation of straight-horned Markhor trophies is violative of his duties under 50 C.F.R. 13.21.**
- 5. The Secretary's failure to process permits for the importation of straight-horned Markhor trophies is violative of his duties under 50 C.F.R. 13.11(C) ("will process as quickly as possible").**
- 6. The Secretary's failure to process permits for the importation of straight-horned markhor permits violates his responsibility under 16 U.S.C. 1537(b) of the endangered species act, which mandates that the secretary "shall encourage" foreign countries to provide for endangered species.**
- 7. The Secretary's failure to process permits for the importation of straight-horned Markhor trophies represents "final agency action" under 5 U.S.C. 551(13), "failure to act."**
- 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).**
- 9. Plaintiffs are persons "adversely affected" by the Secretary's failure to act within the meaning of 5 U.S.C. 702 and therefore have a right to seek relief under the Administrative Procedure Act in this Court.**
- 10. The Secretary's failure to act for a 10 year period constitutes an action "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. 706(1).**

- 11. The Secretary’s failure to act for a 10 year period and his attendant misrepresentations and evasions in communication with plaintiffs constitute behavior that is “arbitrary and capricious” and a “failure to observe proper procedure” within the meaning of 5 U.S.C. 706(2)(A) and (D).**
- 12. Defendants should be compelled to process permit applications to import straight-horned Markhor trophies from the Torghar Hills of Pakistan.**

#### **CLAIM IV**

##### **(Breach of ESA Duties)**

1. Plaintiffs re-allege and incorporate by reference all the allegations set forth in the Complaint, as though fully set forth below.
2. Defendants neglect to timely process import permits and its discouragement of those who inquire violates ESA.
3. **Defendants neglect to downlist this population of markhor or to timely process import permit applications violates the specific bundle of duties under the ESA to encourage, support, cooperate with range nation programs and to recover listed species.**
4. Plaintiffs are injured by these unlawful practices and the relief prayed for below would mitigate that injury as well as help “enhance” and perpetuate the survival **and otherwise recover** the Suleiman/**straight-horned** markhor.

#### **CLAIM V**

##### **(Failure to Perform 5-Year Review)**

1. **The Secretary 's failure to perform a five year review of the status of the short-horned Markhor violated the 16 U.S.C. 1533(c)(2) requirement that he conduct a 5 year review of the status of any threatened or endangered species.**
2. **Plaintiffs are citizens suing on their own behalf within the meaning 16 U.S.C. 1540(g)(1)(c).**
3. **The Secretary's failure to perform a 5 year review on the short-horned Markhor was a failure to perform a 1533 non-discretionary duty within the meaning of 16 U.S.C. 1540(g)(1).**
4. **This Court has jurisdiction to enforce the regulation violated by the Secretary or to force him to act under 16 U.S.C. 1540(g)(1).**
5. **Defendants should be compelled to perform a 5 year review of the short-horned Markhor.**

## **VII. PRAYER FOR RELIEF**

For the reasons stated above, Plaintiffs respectfully requests that the Court grant the following relief.

1. Declare that the Secretary violated his non-discretionary duty under 16 U.S.C. §1533(b)(3)(B) of the ESA by failing to **ever** make a 12-month and final downlisting determination for the Suleiman markhor;
2. Declare that the Defendants have violated 16 U.S.C. § 1537(b) by not cooperating **with** and encouraging the foreign nation's program;

3. **Declare that Defendants violated 16 U.S.C. 1533(c)(2) by not making a five-year review of the markhor listing and ordering defendant to do so by a specific date.**
4. Declare that the Secretary violated the procedural and substantive, constitutional due process rights of the Plaintiff **permit applicants**;
5. Declare Defendants' permitting **delays** violate the ESA, 50 C.F.R. 17.22(a)(2), 50 C.F.R. 13.21 **and 50 C.F.R. 13.11(c)**.
6. Declare Defendants' illegal practice of not **processing Torghar Hills straight-horned markhor** trophy import permits pursuant to its own existing regulations a violation of the ESA, the APA and Plaintiff's constitutional rights;
7. Issue permanent injunctive relief compelling the Secretary to make and publish in the Federal Register a 12-month and final downlisting determination finding for the Markhor under the ESA by a certain date;
8. Order Defendants to accept and process **all outstanding Torghar Hills straight-horned makrhor** import permits in good faith and in a timely fashion.
9. Order Defendants to complete **the processing of** those applications that are now pending within 30 days of the day of this Order.
10. Award Plaintiffs their costs of litigation and reasonable attorneys fees; and
11. Grant Plaintiffs such other relief as the Court deems just and proper.

DATE: **June 10**, 2009

Respectfully Submitted,

By:

/s/ John J. Jackson, III  
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Attorney for Plaintiffs

## CERTIFICATE OF SERVICE

On this day, Wednesday, June 10, 2009, a copy of the foregoing was transmitted  
via email to

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