

August 4, 2011

Public Comments Processing  
ATTN: FWS-R9-2010-0056  
Division of Policy and Directives Management  
United States Fish & Wildlife Service  
4401 N. Fairfax Drive  
Suite 222  
Arlington, VA 22203

**Re: Comment on proposed elimination of special rule for  
Scimitar-Horned Oryx, Addax and Dama Gazelle, 76 FR 39804, July 7, 2011**

This is a comment on behalf of numerous concerned organizations and stakeholders in opposition to the proposed elimination of the above cited exemption. Commenters support an alternative, less burdensome, less complex, more suitable and effective approach than that proposed for these three listed exotic game species within the United States. The successful system in issue warrants a separate permit specifically for these three species.

This comment is on behalf of Conservation Force, which is one of the leading conservation organizations in the world in enhancement and recovery of ESA listed foreign species. For example, Conservation Force established and operates its *Ranching for Restoration* program which has projects for enhancement and recovery of ESA listed Eld's Deer, Arabian Oryx, Red Lechwe and Barasingha around the globe. These are the foremost programs for those species in the world. Two of its leaders are on the IUCN Antelope and Deer Specialist Group. No other organization has its history of leadership and record of diverse efforts to enhance the survival and propagation of foreign ESA listed species, most particularly exotic listed game species such as those in issue.

Conservation Force is joined in these comments by Dallas Safari Club, Dallas Ecological Foundation, Houston Safari Club, African Safari Club of Florida, Shikar Safari Club International, the Wild Sheep Foundation and Grand Slam/OVIS. It is also joined by the International Professional Hunters Association and National Taxidermist Association. It is joined by the Louisiana, Alabama and Mississippi Chapters of Safari Club International.

**Discussion of Special Exemption and Court Case**

The special exemption adopted September 2, 2005 at 70 FR 52310 was thought to meet the standards for both enhancing the propagation and enhancing the survival of U.S. captive-bred Scimitar-Horned Oryx, Addax and Dama Gazelle for each of the criteria found at 50 CFR

17.22(a)(2) for endangered species, and Section 10(d) of the ESA. The special exemption went further. That rule eliminated the need for obtaining individual ESA species permits, both cull and captive-bred, thus the notice for comments of those permit applications. Additionally, it eliminated the need to annually contribute and document five percent (5%) or more of the gross revenue to acceptable *in situ* projects for the species before an enhancement finding/application could be granted or renewed. The current proposed rule makes no direct mention of this *in situ* contribution requirement. Yet, the District Court dismissed all claims that the ranching constitutes enhancement of both the survival and propagation of the three species without the additional *in situ* project finding. The proposal is to return not only to individually noticed permits procedurally required, but also to incorporate the extra measure of enhancement through *ex situ* projects. The Court only requires informational notice and an opportunity to comment.

### Court Case

In the District Court case, the plaintiffs' motions were denied in part and the defendants' were granted in part. In short, part of the case was won by the USF&WS and intervenors, which is not yet reflected in the current proposal. That part is important and has not even been taken into consideration in the proposed rule. There is no rationale for abandoning the enhancement findings already made.

The Court held that "notice and comment" of permit applications was procedurally mandated by subsections 10(c) and (d) of the ESA. Plaintiffs had an "informational injury" or violation of their statutory right to information on each separate permit application.

The Court found that plaintiffs only had standing as regards to subsection 10(c), but not 10(d).

Subsection 10(c) of the ESA creates an explicit statutory right to information. See 16 U.S.C. 1539(c) ("Information received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.") Subsection 10(d), by contrast, requires the Secretary to make certain findings. See *id.* § 1539(d) ("The Secretary...may grant exemptions...only if he finds and publishes his findings in the Federal Register....")

626 F. Supp. 2d 102, 115

Although the Court held that the ESA (subsection 10(c)) "requires case-by-case consideration before the USF&WS may permit otherwise prohibited acts to enhance the propagation or survival of endangered species," the enhancement of the propagation and survival of the species determination was upheld. Plaintiffs had no standing to challenge the enhancement finding, nor could they have won on the merits. The claims that the *ex situ* game ranching activity did not constitute enhancement were denied. The Service's enhancement

determination survived the litigation as it should have. The game ranching in and of itself constitutes enhancement.

The Court upheld the USF&WS position that the game ranching constituted enhancement even though the regulation no longer required the payment of revenue to *in situ* projects, i.e. contributions to projects in the country or countries of origin. The sport hunting of captive-bred animals generated necessary revenue to support the operations, relieved pressure on wild populations and was an ordinary and necessary husbandry practice to manage excess growth. Plaintiffs' attacks on that finding were dismissed; consequently, that component of the special exemption should not be discarded. Moreover, it may be arbitrary to abandon that enhancement determination. We at Conservation Force are proud of our Ranching for Restoration Program. Nevertheless, it is an added expense and administrative burden on the successful system that already enhances the propagation and survival of the species. The FWS has already determined to eliminate that requirement for these three antelope.

The new regulation should incorporate the enhancement finding that survived the Court case. It should eliminate the requirement that there be a payment of 5% or more of the gross proceeds from the hunting to a project in the country of origin. This should be not only because the Court denied the plaintiffs' attack on that enhancement finding, but because of the historic problems of the direct contribution requirement. Ranchers and conservation partners have been plagued with threats and intimidation by animal rightists and those opposed to exotic, captive-bred ranching and/or hunting despite its acknowledged benefits to the species. Project recipients of the contributions have been threatened and intimidated repeatedly and have withdrawn from the projects. Both the Smithsonian Research Institute and The Wildlife Society of India have been intimidated and have withdrawn from Conservation Force projects at intervals in the past. This has happened on multiple projects and on multiple occasions. Those philosophically opposed to the breeding and necessary culling would rather the animals cease to exist than be game ranched. Most certainly they set out to destroy every *in situ* conservation project that has been established in foreign range countries. They can't complain if the contribution component is eliminated because that is what they have attempted project-by-project. That form of enhancement remains in perpetual jeopardy as long as the issuance of permits is dependent upon *in situ* projects. Moreover, the Service has now made an enhancement determination and the Court has upheld that enhancement determination in the absence of such direct contributions.

In summary, though the Court held that individual permitting with publication and comment is procedurally required for "informational" purposes, it denied the claims that the ranching activity did not satisfy the enhancement of the survival and/or propagation substantive requirement.

### **Onerous Conflict**

The USF&WS is well aware that the system is too onerous with too many hoops to be made and repeated. It is acknowledged to be a disincentive that conflicts with the benefits that

would otherwise enhance the listed species. Since the ranching itself constitutes enhancement, obstruction of that program jeopardizes the species. The proposal in its current form would be a perverse disincentive, i.e. it would discourage the continued extensive breeding that has occurred. The benefits are self-evident and self-proving. The three antelope exploded in ranches between 2004 and 2010 according to the Exotic Wildlife Association. The 2010 Exotic Wildlife Association survey conservatively documented 11,032 scimitar-horned oryx, 5,112 addax and 894 Dama gazelle on more than 300 ranches in Texas.

### **Enhancement**

The USF&WS amply recognized the benefits of the breeding ranches in its original rule, 70 FR 52310, September 2, 2005. Facilitation of applications and encouragement of the permits should be guided by the following points and findings:

“Sport hunting of surplus captive-bred animals generates revenue that supports these captive-breeding operations and may relieve hunting pressure on wild populations.” 70 FR 52310 at 52311

“[W]e have determined that U.S. operations that maintain captive-bred specimens of these three species contribute to the enhancement of the propagation or survival of these species...” 70 FR 52310 at 52311

“[T]hese activities for U.S. captive-breeding operations enhance the propagation of these species by providing an incentive to continue to raise animals in captivity while managing their genetic diversity, serving as repositories for surplus animals....” 70 FR 52310 at 52311

“[T]hese activities also enhance the survival of the species by providing an incentive to continue captive-breeding...which have...prevented the possible extinction of at least one of the species, contributed significantly to the total number of remaining animals of the other two species, and provided founder stock for reintroduction.” 70 FR 52310 at 52312

“[P]roviding opportunities for sport hunting of captive-bred wildlife may relieve pressure on wild populations of the species by providing an alternative to legal and illegal hunting of animals in the wild.” 70 FR 52310 at 52312

“[W]e have found that ranches...whether or not they allow sport hunting of the three antelopes, enhance the propagation or survival of these species.” 70 FR 52310 at 52312

“Sport hunting of surplus animals...is anticipated to reduce the incentive for removal of wild animals in their range countries by providing an alternative source of specimens.” 70 FR 52310 at 52313

“[S]ome killing of surplus specimens may be necessary to manage captive herds (e.g., to reduce aggression among males) and to finance captive-breeding operations.” 70 FR 52310 at 52313

“It was critical that development of a rule that provides an incentive to continue captive breeding of these species....” 70 FR 52310 at 52313

“[T]he measures included in the final rule would reduce the threat of extinction to the species by facilitating captive breeding.” 70 FR 52310 at 52313

“Captive breeding programs operated by zoos and private ranches have effectively increased the number of these animals while genetically managing their herds.” 70 FR 52310 at 52314

“[R]anches can serve as repositories for surplus animals....” 70 FR 52310 at 52314

“[M]any ranches, whether offering hunts or not, have provided research opportunities....” 70 FR 52310 at 52315

**“This rule will reduce the threat of extinction facing the scimitar-horned oryx, addax and Dama gazelle by facilitating captive breeding for all three species in the United States.”** 70 FR 52310 at 52315 (emphasis added)

“Based on information available to the Service, captive breeding in the United States has contributed significantly to the conservation of these species...but for captive breeding, the species might be extinct.” 70 FR 52310 at 52315

“[C]aptive breeding in the United States has contributed significantly to the conservation of these species.” 70 FR 52310 at 52315

“Ranches...are able to provide large areas of land...and can accommodate a large number of specimens than can most urban zoos. Thus provide opportunities for research, breeding and preparing antelopes for eventual reintroduction.” 70 FR 52310 at 52315

“One way this rule will reduce the threat of extinction is by allowing limited sport hunting of U.S. captive-bred specimens to facilitate captive breeding of all three species. Given the cost of establishing and maintaining a large captive breeding operation and the large amount of land that is required to maintain bachelor herds or surplus animals, it is difficult for many private landowners to participate in such endeavors. An incentive to facilitate these captive breeding operations and secure...herds are available for future reintroduction programs is to allow the limited hunting of captive-bred specimens.” 70 FR 52310 at 52315

“An incentive to facilitate these captive breeding operations...is to allow the limited hunting...” 70 FR 52310 at 52315

“In Texas, the number of ranched scimitar-horned oryx went from 32...in 1979 to 2,148 in 1996; addax...from 2...in 1971 to 1,824 in 1996; and Dama gazelle...from 9...in 1979 to 369 in 2003.... Limited hunting...facilitated these increases by generating revenue....” 70 FR 52310 at 52315

“Ranches also need to manage herds demographically.... Such management may include culling...which may be accomplished through hunting.” 70 FR 52310 at 52315

“Hunting also provides an economic incentive for private landowners such as ranchers to continue to breed these species and maintain them....” 70 FR 52310 at 52315

“Thus, hunting of U.S. captive-bred specimens of these species reduces the threat of the species’ extinction.” 70 FR 52310 at 52315-52316

“[W]e have determined that U.S. operations...**have already contributed significantly** to the propagation or survival of the three antelope....” 70 FR 52310 at 52316 (emphasis added)

In sum, the prior rule recognized that the ranching has been and is expected to continue to be enhancement by itself without more. The application and permitting process should be facilitated. Imposition of regulations that have already been determined to be a negative deterrent is not prudent.

#### **Enhancement by Definition**

**The USF&WS has always recognized that captive breeding and culling of ESA listed wildlife in captivity enhances the propagation or survival of the species under the ESA.**

Culling is a normal and necessary practice of animal husbandry needed to maintain captive populations.

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 17:

*Enhance the propagation or survival*, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

#### 50 C.F.R. § 17.3, *Definitions*

The CITES Parties have also recognized the benefits of ranching by adopting Ranching Resolutions. This has been confirmed as recently as AC25 in Geneva in July 2011 in Doc. 12 and Decision 15.51 at CoP15 in Doha, 2010.

It follows that an enhancement finding for the ranching in issue is perfunctory unless good cause is shown to the contrary in any particular permit application.

Since the existing game ranching strategy is enhancement, then impediments, added costs, duplications and confusing permit applications and regulations jeopardize these species.

#### Facilitation and Encouragement are Desirable

In the original rule the USF&WS recognized that reduction of the burdens of permitting would provide “an important incentive to these operations to continue their captive-breeding and management programs.” (pg. 52313) It recognized “[t]he probably positive direct and indirect effects of **facilitating** captive breeding in the United States.” (pg. 52314) Emphasis added. “One way this rule will reduce the threat of extinction is by allowing limited sport hunting of U.S. captive-bred specimens to facilitate captive breeding of all three species.” The USF&WS said, “The probable direct and indirect effects of this rule will facilitate activities associated with captive breeding and thus contribute to the propagation and survival of the species.” (This is self-evident from the explosion in the population since 2004.) The purpose of the rule was to “facilitate” the captive bred ranching and “encourage the breeding and management.” Nothing has changed in that regard. Reduction in unnecessary burdens and

hoops is in the best interest of the species. The following are actions that would facilitate and encourage the ranching that has already been determined to be beneficial.

### Alternatives

The Service has acknowledged and recognized that the current regulations that are now proposed for application to these three antelope are not in the best interest of the species. It necessarily follows that those regulations should be modified instead of made application, as is to these three antelope. There is a great deal that can be done for the Service to be of greater service than it has been with other listed exotic game species.

### Joint Applications and Permits

Both captive-bred and cull applications and permits should be combined (consolidated or merged into one) as one application and one permit. One joint application and one permit would reduce the cost, confusion, duplicative information, etc. Perhaps it could be titled "Captive Game Ranching and Culling Permit for..." Most of the information in the two applications is the same. Tracking the renewal of two different permits with different renewal dates commonly causes permits to lapse. One permit can and should serve both purposes, particularly since the FWS previously determined no application or permit was required. The informational notice and opportunity for public comment would be the same.

### Create Grace Period

A grace period of 60 days should be created to reduce the threat of unintended permit expirations. Renewal applications should be considered 60 days after permits expire, i.e. the existing permit or permits should continue in effect if a renewal is filed within 60 days of the expiration of the permit or permits. There are few things more onerous than having to start the renewal process all over again because a permit has expired. Sending notice of expiration on or before expiration would also support the enhancement.

### Explicit Purpose Permit Applications

Captive-bred and cull permits should be made specific for this type of exotic game ranching and be plainly titled. The current application forms are confusing and unnecessarily complex because many of the questions don't relate to the type and kind of ranching/exotic captive breeding in issue. It is common for applicants to complete sections not relevant or to respond "not applicable" to questions the FWS intended to be answered. The forms are tedious, duplicative and confusing to professionals, much less lay ranchers.

### Real-Time Application Process

Permit application procedures need to be available for completion in real-time on the internet.



### State Management

These species can have a huge impact on habitat and compete with native wildlife. Allowance has to be made for State authorities to manage and control the three antelope on public land and throughout the state. Perhaps the whole process needs to be delegated to responsible State authorities on an elective basis.

### Longer Term Permits

Current captive-bred permits are three years in duration but cull permits must be renewed annually. This has proven to be confusing and hard to track and administer by ranchers. It can take six or more months to get a cull permit, then a renewal application must be received by the Service more than 30 days before expiration. That means the renewal application must be prepared in the 11<sup>th</sup> month to file before the 12<sup>th</sup> month commences, even though the rancher did not receive it until the 6<sup>th</sup> or 7<sup>th</sup> month after it was effective. Additionally, an Annual Report must be filed. All could and should be lengthened. The term of duration of the cull permits should be no less than those for captive breeding, three years, and both could be five years. That alternative would procedurally satisfy the Court (contrary to no permit or publication at all), reduce the burden and encourage the captive ranching. It would be fully consistent with the prior rule and its rationale, which is unchanged. (“[t]he rule provides an incentive to continue captive breeding,” pg. 52316). It has already been soundly determined that the object should be to reduce the burden of permitting on the rancher-breeders. The new regulation, as proposed, does not accomplish that purpose. It is a return in total to a system that is in and of itself a disincentive. It is inconsistent with the sound reasoning expressed in the initial exemption rule.

### Renewal

There is confusion whether an existing permit stays in effect if a renewal for a permit is filed before the passage of its stated termination date or does so only if received by FWS 30 or more days before the stated expiration. This needs to be unambiguously clarified and uniformly represented.

Second, sending a notice of expiration 15 days in advance would help maintain communications, alert the permit holder and help maintain the permits that have been determined to be of benefit. Since the ranching enhances the three species, the result warrants the warning notice.

### DPS/Range

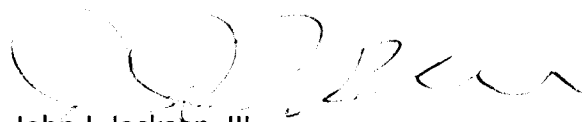
It is within the Service’s discretionary authority under the ESA to treat the U.S. population of these three species in exotic game ranching as distinct populations and/or a separate range. The populations in the U.S. are thriving, not endangered. They should not be

listed at all. The proposal to require duplicative permit applications with conflicting expiration dates that often require half their term length just for processing (six months to process an application for a permit of only 11 months duration because renewal of the application must be made a month or more in advance of expiration) is perceived to be a barrier and is a disincentive to maintenance of the U.S. population.

### Conclusion

Animal rights organizations' direct attempts to undermine *in situ* projects funded with "blood money" call for an alternative to the customary regulations. The Service has already established that the ranching/breeding/culling should be facilitated and encouraged and that the current regulations for captive-bred and cull permits are discouraging. Although a permit and its publication is procedurally required, the enhancement has already been determined, all other things in order. We urge the Service to continue the general enhancement finding in the absence of demonstrated special circumstances and to eliminate the additional, duplicative *in situ* project contribution burden. The Service should also encourage and facilitate the ranching by making it less onerous in every way possible, though a permit is procedurally required. One combined application and one permit for both breeding and culling, properly titled, and exclusively for exotic game ranching of these three species is called for to facilitate the ranching that has been determined to be beneficial. In the prior special regulation the FWS implicitly and explicitly recognized that relief from the current regulations was warranted. The rationale and conservation value for reducing the permitting burden has not changed.

Respectfully submitted,



John J. Jackson, III  
Conservation Force  
3240 S. I-10 Service Rd. W., Suite 200  
Metairie, LA 70001-6911  
Tel: 504-837-1233  
Fax: 504-837-1145  
Email: jjw-no@att.net