

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

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SAFARI CLUB INTERNATIONAL, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KEN SALAZAR, *et al.*, )  
 )  
 Defendants. )

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TERRY OWEN, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 U.S. DEPARTMENT OF THE INTERIOR, )  
*et al.*, )  
 )  
 Defendants. )

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1:11-cv-01564-BAH  
 (consolidated with cases  
 1:12-cv-00194-BAH and  
 1:12-cv-00340-BAH)

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EXOTIC WILDLIFE ASSOCIATION, *et al.*, )  
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 Plaintiffs, )  
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 v. )  
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 U.S. DEPARTMENT OF THE INTERIOR, )  
*et al.*, )  
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**PLAINTIFFS’ MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

Plaintiffs the Exotic Wildlife Association, Charly Seale, Eddy Blassingame, Terry Caffey, Ray Dockery, Joe Green, Nancy Green, Roy Leifester, Thomas Oates, and Ed Valicek

(collectively, the Exotic Wildlife Ranchers), ask this Court to supplement the Administrative Record in this case because the record does not reflect all information that the United States Fish and Wildlife Service (FWS) did or should have considered before promulgating the January 5, 2012 Final Rule imposing the permitting requirement on three species of antelope—the Scimitar-Horned Oryx, the Addax, and the Dama Gazelle. That decision is part of a rulemaking process that goes back more than two decades to when FWS first began considering the appropriate status of these antelope

For the reasons explained in the accompanying memorandum, the Exotic Wildlife Ranchers ask this Court to order that the administrative record in this case be supplemented with the administrative record for the rule listing the antelope as endangered and the rule exempting them from the permitting process challenged here, both promulgated on September 2, 2005, and announced at 70 Fed. Reg. 52,310 and 70 Fed. Reg. 52,319. The Government opposes this motion.

Respectfully submitted,

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Dated: May 1, 2012

Counsel for Plaintiffs

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**PLAINTIFFS’ MEMORANDUM IN SUPPORT  
OF MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

This lawsuit is brought by the Exotic Wildlife Association, Charly Seale, Eddy  
Blassingame, Terry Caffey, Ray Dockery, Joe Green, Nancy Green, Roy Leifester, Thomas

Oates, and Ed Valicek (collectively, the Exotic Wildlife Ranchers) to vacate and set aside a final rule issued on January 5, 2012 by the United States Fish and Wildlife Service (FWS) that subjects three species of domestic-bred antelope—the scimitar horned oryx, the addax, and the dama gazelle—to a permitting scheme under the Endangered Species Act.

The January 5, 2012 rule challenged here revokes a regulation adopted by FWS on September 2, 2005, as part of the decision to list these three antelope species as endangered. As FWS made clear in 2005, the exemption rule (and so its revocation) cannot be separated from the listing rule adopted that same day. So, the administrative record here necessarily includes the files on which FWS made its original decision to list these three species—and simultaneously exempt them from the unworkable permit system challenged here. The Exotic Wildlife Ranchers ask this Court to order FWS to complete that record.

## **I. Standard of Review**

An administrative record “is not a documentary record maintained contemporaneously with the events or actions included in it. Rather, it is a convenient vehicle for bringing the decision of an administrative body before a reviewing . . . court.”<sup>1</sup> So if a document was “before the agency decisionmaker,”<sup>2</sup> that document should be included in the record. Likewise, the Court cannot conduct judicial review of an agency action where the agency “failed to examine all relevant factors or to adequately explain its grounds for decision,”<sup>3</sup> and so consideration of material outside the record as filed by the agency is appropriate in that situation as well.<sup>4</sup> A

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<sup>1</sup> *Global Computer Enters., Inc. v. United States*, 88 Fed. Cl. 52, 60 (2009).

<sup>2</sup> *Recent Past Preservation Network v. Latschar*, 701 F. Supp. 2d 49, 54 (D.D.C. 2010).

<sup>3</sup> *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *see also Earthworks v. U.S. Dept. of Interior*, No. 09-1972, 2012 WL 373320 (D.D.C. Feb. 7, 2012).

<sup>4</sup> *Cf. Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008) (“[A] party seeking to supplement the record must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains

decision to supplement the agency record is reviewed “for abuse of discretion.”<sup>5</sup>

**II. The January 5, 2012 Final Rule is part of a rulemaking process that includes FWS’s original 2005 decision to list these antelope because they were also excluded from the permitting process**

The January 5, 2012 Final Rule challenged in this case “revis[es] the regulations that implement the Endangered Species Act of 1973, as amended . . . , by removing the exclusion of U.S. captive-bred live wildlife and sport-hunted trophies of three endangered antelopes—scimitar-horned oryx, addax, and dama gazelle—from the prohibition of certain activities, such as take and export, under the Act.”<sup>6</sup> Yet the administrative record already filed by FWS contains no discussion of how FWS decided on those regulations in the first place.

As the announcement of the January 5, 2012 Final Rule states, those regulations were a pair of tandem rules that listed the antelope species as endangered and simultaneously exempted them from many of the prohibitions of the Endangered Species Act:

On September 2, 2005 (70 FR 52319), the Service determined that the scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and dama gazelle (*Gazella dama*) were endangered throughout their ranges under the Act (16 U.S.C. 1531 et seq.).

. . .

On September 2, 2005 (the same date that we listed the three antelopes as endangered), the Service also published a new regulation (70 FR 52310) at 50 CFR 17.21(h) to govern certain activities with U.S. captive-bred animals of these three species. For live antelopes, including embryos and gametes, and sport-hunted trophies of these three species, the regulation authorized certain otherwise prohibited activities where the purpose of the activity is associated with the management of the species in a manner that contributed to increasing or sustaining captive numbers or to potential reintroduction to range countries. These activities include take; export or re-import; delivery, receipt, carrying, transport or shipment in interstate or foreign commerce in the course of a commercial activity;

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information adverse to the agency’s decision.”)

<sup>5</sup> *Cape Cod Hosp. v. Sibelius*, 630 F.3d 203, 210 (D.C. Cir. 2011).

<sup>6</sup> Removal of the Regulation that Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 77 Fed. Reg. 431, 431 (Jan. 5, 2012).

and sale or offer for sale in interstate or foreign commerce.<sup>7</sup>

When it issued those regulations, FWS considered the listing and the exemption to be two interlocking parts of a single regulatory regime to protect these antelope. As FWS stated in the final rule exempting the antelope from the permitting scheme:

[A]uthorizing these activities for U.S. captive-breeding operations enhances 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, and facilitating the movement of specimens between breeding facilities.

[This] also enhances the survival of the species by providing an incentive to continue captive-breeding and genetic management programs, 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.<sup>8</sup>

And in the listing decision, FWS made plain that the purpose of the exemption was to allow continued private ranching of these antelope, and that the work of those like the Exotic Wildlife Ranchers was the reason why some—or all—of these species even existed:

Captive breeding is a manmade factor that has stemmed the decline of the three species. It has provided the founder stock necessary for reintroduction, maintenance of otherwise potentially lost bloodlines, and opportunities for research. The scimitar-horned oryx is possibly extinct in the wild and therefore, but for captive breeding, the species might be extinct. For addax and dama gazelle, they occur in very low numbers in the wild, and a significant percentage of remaining specimens survive only in captivity (71% and 48%, respectively).<sup>9</sup>

In light of the listing decision, the exemption was vitally needed to ensure that the captive-breeding programs of those like the Exotic Wildlife Ranchers continued unimpeded:

It was critical that development of a rule that provides an incentive to continue captive breeding of these species proceed concurrently with the determination of

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<sup>7</sup> 77 Fed. Reg. at 431.

<sup>8</sup> Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 Fed. Reg. 52,310, 52,313 (Sept. 2, 2005).

<sup>9</sup> Final Rule to List the Scimitar-Horned Oryx, Addax, and Dama Gazelle, 70 Fed. Reg. 52,319, 52,322 (Sept. 2, 2005).

their legal status under the Act to ensure that no breeding programs would be disrupted by a final listing determination.<sup>10</sup>

In the challenged rule, FWS has now revised those regulations by removing the exemption. But FWS has failed to provide the Court with the record that shows why it adopted the tandem listing and exemption rules in the first place. Without that record, this Court simply cannot judge whether FWS's challenged decision to revoke the exemption rule without also revising the listing rule is arbitrary and capricious.

FWS has produced the record on these rules at least once before, in *Friends of Animals v. Salazar*,<sup>11</sup> the case challenging the exemption. It will be no hardship to provide that already-assembled record to the Court.

For all these reasons, the Exotic Wildlife Ranchers ask this Court to order FWS to complete the administrative record by filing the administrative records for the rules regulating these antelope and announced on September 2, 2005, at 70 Fed. Reg. 52,310 and 70 Fed. Reg. 52,319.

Respectfully submitted,

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Dated: May 1, 2012

Counsel for Plaintiffs

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<sup>10</sup> 70 Fed. Reg. at 52,313.

<sup>11</sup> *Friends of Animals v. Salazar*, Nos. 04-01661, 06-02120 (D.D.C.).

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Defendants.	)	
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**PROPOSED ORDER**

Before the Court is the motion of Plaintiffs, Exotic Wildlife Association and its members to supplement the administrative record. Upon the careful consideration of this Motion the

Motion is hereby **GRANTED**.

It is further **ORDERED** that the Defendants supplement the administrative record by filing the administrative record for the final rule promulgated on September 2, 2005, and announced as Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 Fed. Reg. 52,310 (Sept. 2, 2005).

It is further **ORDERED** that the Defendants supplement the administrative record by filing the administrative record for the final rule promulgated on September 2, 2005, and announced as Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 5, 2005).

Dated:

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United States District Judge



This confirms that on April 27, 2012, I served a copy of the Plaintiffs' Motion to Supplement the Administrative Record in *Exotic Wildlife Association v. U.S. Department of the Interior* by filing the document with this Court's ECF system, which electronically notified:

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Dated: May 1, 2012

By:   
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