UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, et al., Defendants.	
TERRY OWEN, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	1:11-cv-01564-BAH (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH) Hon. Beryl A. Howell
EXOTIC WILDLIFE ASSOCIATION, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

The ranchers and conservationists who have brought these three antelope species back from the brink of extinction in the United States ask this Court to delay enforcement of the

January 5, 2012 Final Rule until after the Court rules on the Rule's validity. The permitting scheme required under the Final Rule will have a dramatically adverse impact on the continued survival of three antelope species. Yet the Government will suffer no harm if enforcement of this Final Rule is delayed as this Court considers the Rule's validity.

FWS's primary argument against granting this preliminary relief boils down to its contention that it lacked discretion in issuing this Final Rule because Judge Kennedy required the Agency to issue it. But while it is certainly true that Judge Kennedy issued a decision invalidating a prior rule exempting these three endangered antelope from certain permitting requirements,[1] there is nothing in Judge Kennedy's ruling that required FWS to promulgate a new rule specifically subjecting these species to this particular one-size-fits-all permitting scheme. And there is nothing in Judge Kennedy's ruling that requires FWS to ignore the unique circumstances of these three antelope species and the dispositive role that Exotic Wildlife Ranchers' captive-breeding operations have played in the remarkable recovery these animals now enjoy in the United States. In short, there is nothing in Judge Kennedy's ruling that required FWS to publish this Final Rule that will lead to the swift and irrevocable destruction of these three species of antelope.

Finally, there is nothing in Judge Kennedy's ruling that required FWS to retain the thriving U.S. populations of these three species of antelope on the endangered species list. In fact, the Exotic Wildlife Ranchers petitioned FWS to delist these three species and remove them from the endangered species list, but FWS has not even acted on that petition.[2] Judge Kennedy's ruling is entirely consistent with FWS taking a fresh look at the startlingly successful numbers of

[1] *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009).
[2] *Owen v. United States Dep't of the Interior*, No. 12-cv-00194-BAH; *Safari Club Int'l v. Salazar*, No. 1:11-cv-01564-BAH.

these antelopes on ranches owned by Plaintiffs, and to conclude that these animals should now be removed from the endangered species list.

And even if FWS were correct that Judge Kennedy had required it to promulgate the ill-fitting permit scheme—which the Exotic Wildlife Ranchers dispute—FWS's failure to consider if there was a better way of complying with the ruling was arbitrary and irrational. After all, when FWS adopted the rule listing these three species of antelope in 2005, FWS made clear that it was doing so only because it was also adopting a tandem rule exempting the highly successful captive-breeding operations from these counter-productive permit requirements: "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 their legal status under the [Endangered Species] Act to ensure that no breeding programs would be disrupted by a final listing determination…."[3]

Therefore, FWS's arguments that it was not required to comply with the Administrative Procedures Act (APA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) all because of Judge Kennedy's ruling is simply incorrect. 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, "Exotic Wildlife Ranchers"), reply to the Opposition to the Preliminary Injunction Motion filed by Defendants, the U.S. Department of the Interior, Secretary of Interior, Ken Salazar, Director of the U.S. Fish and Wildlife Service, Daniel Ashe, and the U.S. Fish and Wildlife Service (collectively, "FWS" or "Agency") as follows:

[3] Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 Fed. Reg. 52,310, 52,313 (Sep. 2, 2005).

1. Judge Kennedy did not order FWS to promulgate this rule

Nothing in Judge Kennedy's order required FWS to promulgate this rule:

> Pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 22nd day of June 2009, hereby ORDERED that these cases are remanded to the United States Fish and Wildlife Service of the Department of Interior for further proceedings consistent with the memorandum opinion.
> This is a final, appealable order. *See* Fed. R. App. P. 4(a).[4]

Judge Kennedy's order is consistent with the principle that "only in the rarest and most compelling of circumstances" does a district court compel an agency to engage in a specific rulemaking.[5] Judge Kennedy did not violate that principle in this case, contrary to what FWS now contends. He did not compel FWS to publish this particular rule.

As the D.C. Circuit has explained, on remand an agency generally has the full panoply of options following an invalidation ruling: "[T]he usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand."[6] Again, the D.C. Circuit's statement is true in this case as well. There was nothing in Judge Kennedy's ruling that limited the Agency's ability to promulgate a new rule that would continue to protect the three antelope species, and comply with the APA, the ESA, and NEPA.

So the FWS's primary defense to the preliminary injunction (and to all the reasons why the Final Rule is arbitrary, capricious, and contrary to law)—that Judge Kennedy made the Agency do it—lacks any foundation. For Judge Kennedy's ruling was nothing more than an invalidation of the tandem regulation exempting the three antelope species from the inappropriate permitting requirements. Nothing more. He then remanded the matter to FWS for

[4] *See* Pls.' Ex. A.
[5] Defs.' Opp'n to Pls.' Mot. Prelim. Inj. ("Defs.' Opp'n") at 18 (citing *WWHT, Inc. v. Fed. Commc'ns Comm.*, 656 F.2d 807, 818 (D.C. Cir. 1981)).
[6] *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29 (D.C. Cir. 2005) (agency had all options available on remand, including reinstating prior invalidated rule, if agency consider all alternatives as required by the remand).

further proceedings consistent with the ruling, leaving it to FWS to take "further proceedings consistent with this memorandum opinion."[7]

Thus on remand, FWS remained free to use its discretion to consider all of the same options that it had when it originally published the tandem rules listing the three antelope and exempting them from the permit system in 2005 (provided it gave notice as required by Judge Kennedy's decision)—including delisting all U.S. captive-bred populations of the three antelope species;[8] listing only wild populations of the species;[9] defining the rule by populations;[10] relocating surplus animals produced in captivity;[11] and "implement[ing] a different permitting system."[12] FWS, not Judge Kennedy, made the decision to promulgate this rule.

Indeed, in an unguarded comment even FWS admits at one point in its Opposition that it "did have the discretion to implement a different permitting system."[13] Yet FWS chose not to do so. Instead, FWS arbitrarily chose to institute the unworkable permitting system that has been responsible for ensuring the failure of captive breeding programs for species such as the Arabian Oryx and Barasingha Deer.[14]

FWS relies on *WWHT, Inc. v. Federal Communications Commission,*[15] for the proposition that Judge Kennedy's ruling required the Agency to promulgate the Final Rule.[16] But *WWHT* was an example of the rare instance in which the district actually compelled a

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[7] *Friends of Animals*, 04-cv-1660 HHK, Doc. No. 85-2.
[8] 70 Fed. Reg. at 52,310.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 52,313.
[12] Defs.' Opp'n at 26.
[13] *Id.* at 25.
[14] *See* Pls.' Ex H to Pls.' Mem. Supp. Mot. Prelim. Inj., Joe Green Decl. ("Joe Green Decl.") ¶ 2; Pls.' Ex J to Pls.' Mem. Supp. Mot. Prelim. Inj., Johnson Decl. ("Johnson Decl.") ¶ 7.
[15] 656 F.2d at 819.
[16] Defs.' Opp'n at 18.

rulemaking. Here, FWS was not compelled by Judge Kennedy to conduct a rulemaking—FWS did so on its own volition—and nothing in Judge Kennedy's order limited the agency's discretion during that rulemaking.

In short, FWS arbitrarily and capriciously failed to respond to significant comments and consider all reasonable options in how to best protect the scimitar-horned oryx, addax, and dama gazelle.

2. The ranchers and the antelope will suffer irreparable injury if enforcement of the Final Rule is not enjoined

FWS admits that Exotic Wildlife Ranchers' private captive breeding efforts have saved these three antelope species from the brink of extinction: "Captive breeding in the United States has enhanced the propagation or survival of the scimitar-horned oryx, addax, and dama gazelle worldwide by rescuing these species from near extinction and providing the founder stock necessary for reintroduction."[17]

At the heart of this system of private conservation is the economic incentive that allowed a rancher to either sell an animal he or she raised for a profit, or to sell to a hunter the right to take an animal. FWS's permit system, designed for research projects at zoos and wildlife preserves (which rely on funding from other sources), robs the Exotic Wildlife Ranchers of the economic incentive—destroying the private captive breeding system that has saved these three African antelope species from extinction.[18]

For this reason, the Final Rule threatens the continued survival of these species. The survival of these three species depends on Exotic Wildlife Ranchers. And the ranchers' activities require the economic incentive of (1) a sale price for that animal that will cover the costs to raise and care for the animal; or (2) the sale of hunting rights for excess animals in order to continue

[17] 70 Fed. Reg. at 52,310.
[18] *See id.*

their conservation efforts. Without this economic incentive, the Exotic Wildlife Ranchers simply cannot afford to continue raising herds of these three antelope species, but must turn to cattle or other operations to support their families.

These species cannot live in the wild—here or in Africa. Zoos and other refuges cannot raise enough of them to provide genetic diversity. If the Exotic Wildlife Ranchers cease to raise them—Noah's Ark will sink.

3. FWS fails to contradict the evidence that enforcement of the Final Rule will result in irreparable injury

Without any evidentiary support, FWS simply asserts that it does not believe that enforcement of the Final Rule will have a devastating effect on the continued survival of these three antelope species.[19] But the facts presented here are too substantial to ignore. Since the proposed rule was announced in August 2011, populations of these three species have declined, and the prices of animals have dropped precipitously.[20] Just the announcement that FWS was considering the Final Rule has already resulted in the unnecessary and pointless deaths of hundreds of antelope, all because Exotic Wildlife Ranchers cannot afford to continue to maintain the antelope under the permitting scheme about to go in effect on April 4, 2012. That FWS would ignore these facts is inexcusable and inexplicable given its mission to protect these species: "The U.S. Fish and Wildlife Service's mission is, working with others, to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people."[21]

[19] Defs.' Opp'n at 3.
[20] *See* Section 3, *infra* at 9.
[21] U.S. Fish and Wildlife Service Mission Statement, http://www.fws.gov/help/mission.cfm.

Charly Seale, Executive Director of the Exotic Wildlife Association, estimates that already the total population across the three species has dropped by 20%-30%,[22] but the decline may be even more dramatic. Seale himself has had to reduce his herd from 23 scimitar-horned oryx to 6.[23] Eddy Blassingame, the owner of the Diamond J ranch, has been forced to sell off most of his scimitar-horned oryx, shrinking his herd from 80 animals to 30. Ray Dockery, manager of the White Point Ranch, LLC, has been forced to reduce his herd of oryx from about 200 down to 52.[24] Joe and Nancy Green have reduced their herd in half.[25] Tommy Oates, manager of Huntsville Livestock Services, an auction house, has sold off all of his scimitar-horned oryx and addax.[26] And Ed Valicek, owner of the Lucky V Wildlife Ranch, has cut his herd of up to 100 individuals of scimitar-horned oryx and addax down to 47.[27]

This is all because the permit requirements have made it impossible for ranchers to even cover the cost of feeding these animals: "Our oryx are free-ranging, but we still have to feed them, and they are pretty big eaters . . . This all breaks down to about $1000– 1,200 per year to feed an oryx."[28] Further, ranchers who broker live sales of these animals—such as Plaintiff Terry Caffey—are being forced out of any business involving these antelope. [29] Ranchers who can no longer afford to raise and conserve these antelope have been inundated with requests by hunters seeking one last opportunity to hunt the antelope before the rule goes into effect.[30]

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[22] Pls.' Ex C to Pls.' Mem. Supp. Mot. Prelim. Inj., Seale Decl. ("Seale Decl.") ¶ 8.
[23] *Id.* ¶ 11.
[24] Pls.' Ex G to Pls.' Mem. Supp. Mot. Prelim. Inj., Dockery Decl. ("Dockery Decl.") ¶ 2.
[25] Joe Green Decl. ¶ 3; Pls.' Ex I to Pls.' Mem. Supp. Mot. Prelim. Inj., Nancy Green Decl. ("Nancy Green Decl.") ¶ 4.
[26] Pls.' Ex K to Pls.' Mem. Supp. Mot. Prelim. Inj.,Oates Decl. ("Oates Decl.") ¶ 2.
[27] Pls.' Ex L to Pls.' Mem. Supp. Mot. Prelim. Inj., Valicek Decl. ("Valicek Decl.") ¶ 3.
[28] *See* Pls.' Ex D to Pls.' Mem. Supp. Mot. Prelim. Inj., Blassingame Decl. ("Blassingame Decl.") ¶¶ 2, 4, 5.
[29] Pls.' Ex E to Pls.' Mem. Supp. Mot. Prelim. Inj., Caffey Decl. ("Caffey Decl.") ¶4.
[30] Valick Decl. ¶6; Oates Decl. ¶5; Caffey Decl. ¶5.

Plaintiff Ed Valicek explained that the mere announcement of the new rule has caused the prices for live sales of juvenile oryx and addax to drop by more than 50%.[31] These are the "animals used to introduce new genetic material and prevent inbreeding" of populations.[32] Plaintiff Thomas Oates also has observed a 50% reduction in the price for juvenile oryx and addax just between the January and February 2012 exotic animal auctions.[33] Juveniles are not the only animals to lose their value, with all live sales of oryx and addax dropping by 50% or more in price.[34] Additionally, ranchers have dropped their entire herds of oryx and addax off for liquidation at the exotic animal auctions.[35]

Considering just the ranchers described above, the announcement of the new rule has already caused the numbers of these animals to plummet from 519-464 down to 185-170. That's a reduction of nearly 2/3 of the herds. And some ranchers plan to sell off the remainder of their herds entirely once the Final Rule goes into effect on April 4, 2012.[36]

An injunction will halt this dramatic decline in numbers before these three species have reduced beyond the point of possible recovery.

4. The facts do not support FWS's contention that the irreparable harm is at all self-inflicted

FWS makes the unsupportable contention that it is the Exotic Wildlife Ranchers who are responsible for the irreparable injury that will result if the Final Rule is enforced on April 4, 2012. But it was, of course, FWS who promulgated the Final Rule—over the Exotic Wildlife Ranchers' objections. And it is the FWS-proposed regulatory scheme that is now causing a

[31] Valicek Decl. ¶4.
[32] *Id.*
[33] Oates Decl. ¶5.
[34] *See* Blassingame Decl. ¶4; Caffey Decl. ¶4; Dockery Decl. ¶2.
[35] Oates Decl. ¶4.
[36] Valicek Decl. ¶ 5 .

decline in antelope populations and values—a harm that this preliminary injunction would help relieve, at least temporarily while the Court considers the merits of the Final Rule challenge.

Likewise, FWS knew even back in 2005 when it listed these three species as endangered that the Exotic Wildlife Ranchers' captive breeding program could not exist under the permit system. In exempting these captive breeding efforts from the permit system, FWS stated that "[n]ot requiring each person to apply for a permit or authorization prior to engaging in these activities provides an important incentive to these operations to continue their captive breeding and management programs."[37] As FWS itself knew:

> 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.[38]

FWS gives no reason for its current litigating position that contradicts its 2005 conclusion that exemption from the one-size-fits-all permit system provides an "important incentive to these operations to continue their captive breeding and management programs."[39]

Nor is there any support for FWS's claim that the harm that the Exotic Wildlife Ranchers complain of is self-inflicted: the harm here is completely unlike the harm in *Pennsylvania v. New Jersey*,[40] a case relied on by FWS in support of this contention.[41] In *Pennsylvania v. New Jersey*—which was not a preliminary injunction case—a group of States asked the Supreme Court to exercise its original jurisdiction and hear a lawsuit against other States that had enacted

[37] 70 Fed. Reg. at 52,313.
[38] Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52,319 (Sept. 2, 2005).
[39] 70 Fed. Reg. at 52,313.
[40] 426 U.S. 660 (1976) (per curiam).
[41] Defs.' Opp'n at 36.

taxes on nonresidents' income.[42] The Court declined to hear the case because the State legislatures had extended a tax credit to their residents for taxes paid in another State, explaining: "No state can be heard to complain about damage inflicted by its own hand."[43] Here, of course, the Exotic Wildlife Ranchers did not promulgate the Final Rule that subjects the captive breeding program to the permitting requirements. And it is the permitting requirements that render the captive breeding programs economically infeasible.

FWS's reliance on *Lee v. Christian Coalition of America, Inc.*[44] is also misplaced.[45] In *Lee*, the plaintiffs sued their employer and asked for a preliminary injunction to prevent illegal retaliation. The preliminary injunction sought to prevent retaliatory suspension and firing, which was granted to other plaintiffs, but not to one plaintiff who had already been suspended for good cause (fighting with a coworker) and so could not be suspended without cause (in illegal retaliation). In *Lee*, the suspension was self-inflicted because the plaintiff could have avoided the harm by not fighting with her coworker. Here, the Exotic Wildlife Ranchers cannot avoid the harm resulting from the Final Rule. If they comply with the Rule, they will go out of business. If they do not comply with the Rule, they will go out of business. So in a way, FWS is correct. The Exotic Wildlife Ranchers do have a choice, but it is a Hobson's Choice.

FWS also relies on a Seventh Circuit case, *Second City Music, Inc. v. City of Chicago, Ill.*,[46] incorrectly asserting that it involves "this exact issue."[47] But this assertion is incorrect, for in *Second City*, the plaintiff could have complied with the permit scheme, and compliance with

[42] *Id.* (citing 426 U.S. at 662–63).
[43] 426 U.S. at 664.
[44] 160 F. Supp. 2d 14 (D.D.C. 2001).
[45] Defs.' Opp'n at 36.
[46] 333 F.3d 846, 850 (7th Cir. 2003).
[47] Defs.' Opp'n at 37.

the permitting requirement caused no harm to the plaintiff.[48] In sharp contrast, here the irreparable harm to the Exotic Wildlife Ranchers and the three antelope species results from compliance with the permitting requirement and thus cannot be cured. The Exotic Wildlife Ranchers cannot afford to comply with the permitting requirement and continue their captive breeding program. FWS thus so overly simplifies the problem that it simply misses the irreparable harm that the permitting requirements will have on the economic realities of trying to run a profitable captive breeding ranching operation.[49]

5. FWS is incorrect in contending that the injury in this case can be cured by payment of money damages

The Exotic Wildlife Ranchers' injuries cannot be rectified by payment of monetary damages, and so are irreparable.[50] Once this Final Rule is enforced, an entire captive breeding industry in the United States centered on these three antelope species will collapse. That injury is irreparable. Likewise, harm to the Exotic Wildlife Ranchers' ability to use their land as a ranching operation, which is a way of life based on raising exotic animal herds, is irreparable.[51] And aesthetic injury to the plaintiffs in losing the enjoyment of their animals and contemplating their herds being destroyed is also irreparable harm sufficient to warrant a preliminary injunction.[52]

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[48] 333 F.3d at 850.
[49] *See* Section 3, *supra* at 6.
[50] *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C.Cir. 1962).
[51] *See, e.g., Nat'l Min. Ass'n v. Jackson*, 768 F. Supp. 2d 34, 55 (D.D.C. 2011) (citing *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989) (explaining the general rule that "interference with the enjoyment or possession of land is considered irreparable [because] land is viewed as a unique commodity for which monetary compensation is an inadequate substitute. . . .").
[52] *Fund For Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding plaintiffs carried their burden of demonstrating irreparable harm when they would be harmed by "seeing or contemplating" bison being killed, and enjoining FWS from implementing a bison management rule).

But even if the Agency were correct that payment of monetary damages could redress these harms, which it cannot, there is no cause of action against the federal government for these harms other than this injunction, and the federal government is generally protected by sovereign immunity when an agency acts in the normal course of business.[53] And "where a plaintiff 'cannot recover damages from the defendant due to the defendant's sovereign immunity . . . any loss of income suffered by plaintiff is irreparable per se.'"[54]

The Tenth Circuit has held that a permitting scheme that forces some ranchers out of business and adversely affects breeding programs constitutes irreparable injury for purposes of a preliminary injunction motion. In *Valdez v. Applegate*,[55] ranchers who raised livestock challenged the implementation of grazing permits that ordered grazing reductions.[56] The Tenth Circuit ordered that the ranchers' motion for a preliminary injunction be granted, explaining that the grazing permits would "force some [ranchers] out of business . . . ."[57] The permits would also "adversely affect breeding programs . . . and require more time in moving cattle from one pasture to another."[58] The court also stated that any plan to later address the harm would be too little, too late for ranchers that were forced out of their business. [59] In short, the harm was irreparable.

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[53] *See Gray v. Bell*, 712 F.2d 490, 507 (D.C. Cir. 1983) (explaining that in the United States, the federal government has sovereign immunity and may not be sued unless it has waived its immunity or consented to suit).
[54] *Nalco Co. v. Envtl. Protection Agency*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011); *see also Hoffmann–Laroche, Inc. v. Califano*, 453 F. Supp. 900, 903 (D.D.C. 1978) (finding loss of sales and loss of good will irreparable); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (finding that loss of goodwill and "loss of profits which could never be recaptured" constituted irreparable harm sufficient for equitable relief).
[55] 616 F.2d 570 (10th Cir. 1980).
[56] *Id.* at 571.
[57] *Id.* at 572.
[58] *Id.*
[59] *Id.*

Notably, in 2005, FWS itself recognized that removing the economic incentive from the ranching program by requiring a permit process would result in irreparable injury: "Not requiring each person to apply for a permit or authorization prior to engaging in these activities provides an important incentive to these operations to continue their captive breeding and management programs."[60] And: "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 their legal status under the [Endangered Species] Act to ensure that no breeding programs would be disrupted by a final listing determination…."[61]

Not to be forgotten, too, is the substantial harm to the animals—the loss of these three species—which is also irreparable, as the animals will cease to exist (other than in zoos or as novelty animals) if this Rule is not enjoined. In *Tennessee Valley Authority v. Hill*,[62] the Supreme Court held that Congress's clear objectives and language in passing the ESA removed the traditional discretion of courts in balancing the equities before awarding injunctive relief. "Congress has spoken in the plainest of words, making it abundantly clear that the balance [of equities] has been struck in favor of affording endangered species the highest of priorities."[63] In *TVA*, the Court examined a violation of Section 7 of the ESA and did not balance the equities—instead, the Court ruled that effectuating Congress's clear intent required issuing an injunction, regardless of the equities involved.[64] Subsequent Supreme Court cases reinforced the holding of *TVA* and solidified the rule that, in the context of the ESA, "Congress [has] foreclosed the

[60] 70 Fed. Reg. at 52,313.
[61] *Id.*
[62] 437 U.S. 153 (1978).
[63] *Id.* at 194.
[64] *Id.* at 193−95.

exercise of the usual discretion possessed by a court of equity."[65] And in *Sierra Club v. Marsh*,[66] the Ninth Circuit similarly noted: "In Congress's view, projects that jeopardized the continued existence of endangered species threatened incalculable harm: accordingly, it decided that the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity's scales to strike a different balance."[67]

6. FWS grossly underestimates the burdens of complying with permitting requirements

FWS also grossly underestimates the burdens of its regulatory permitting requirements for these ranchers. Contrary to the FWS's assertion, this is far more than a simple paperwork exercise with a modest filing fee.[68]

For the permit requirement was never designed to apply to exotic hoofstock. The permitting scheme requires ranchers to submit to a regulatory framework that is utterly at odds with the rancher's ability to raise these animals. For example, the permits require:

- A description of how the proposed activities are going to facilitate captive breeding, including a long-term goal and intended disposition of any newly-born animals. But there is no indication how detailed this plan must be, so FWS can impose any plan it desires on the ranchers—regardless of what has worked in the past.

- Documentation showing how the captive breeding program is being managed to maintain its genetic diversity. But there is likewise no indication of what kind of documentation is sufficient, and no provision for individuals that are left out on the ranch and not managed one-on-one—which is how the ranchers have raised these animals for decades.

- For each species, a description of the rancher's experience in maintaining and propagating the requested species or similar species; the same requirement also applies to any buyer, meaning that no one can raise these animals unless they already have done so.

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[65] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *see also Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 543 n. 9, 544−45 (1987).
[66] 816 F.2d 1376 (9th Cir. 1987).
[67] *Id.* at 1383.
[68] Defs.' Opp'n at 34.

- The number of successful births during the past five years, the number of those births that survived more than 30 days, and the number of mortalities during the past five years, including the causes and a description of the measures taken to prevent future mortalities. But as EWA member Kathryn Kyle pointed out in her comments to the agency, ranchers simply cannot know the status of every single individual antelope in their herds: "Our main Addax herd is 2200+ acre pasture of varied terrain typical of Texas Hill country. We know how many we placed there only because it has been done in the past 2 years and we keep records. How many births and deaths have occurred we can only guess, as the animals are not seen daily and certainly, addax can die without us finding them. If we see a young calf, it is recorded if we find one dead it is recorded beyond that there is no more we can do."

The permit requirement for ranchers whose business model involves selling hunts to manage their herd is even more unworkable. That permit would require ranchers to know—up to a year in advance—the birth date, sex, and identifying features of every animal to be taken, and the name, address, and "technical expertise" of each hunter or buyer of those individuals. But the ranchers cannot predict the future—and they cannot know who will be interested in buying or hunting these species, or which individuals will be sold a year in advance. And the ranchers' customers hunt one animal out of a herd of many—not one individual already identified and singled out. Otherwise, the hunt would be a "canned hunt"—no different from shooting fish in a barrel—not a fair chase hunt as required by the Exotic Wildlife Association's code of ethics, which requires the animal to have a chance to avoid being found and, having been found, a chance to escape.[69]

The uncertainty of the permit scheme destroys any incentive to raise these antelope. Even if the Exotic Wildlife Ranchers could clairvoyantly predict who will be interested in buying an antelope and the precise identity of which antelope they will take, should a different antelope accidentally be taken, the ranchers and their customers would be subject to the full panoply of

[69] EWA Code of Ethics, http://myewa.org/pdf/codeofethics.pdf.

the ESA's punishments. This includes a fine of up to $25,000 per civil violation.[70] Criminal violations carry a fine of up to $50,000, one year's imprisonment, or both.[71] The Exotic Wildlife Ranchers have been raising these herds to feed their families, send their children to college, and support them during their retirement. Under the permitting process, though, a single accident or mistake can land the rancher in jail and subject them to crippling fines.

Even if the Exotic Wildlife Ranchers could provide all the information the permits require, FWS does not simply rubber-stamp these permit applications, contrary to what the Government suggests in its response: "[I]f an applicant does not have adequate experience with the species in the application or if the applicant does not supply supporting documentation exactly as FWS wants it, the permit will not be issued."[72] And finding out what exactly those requirements are is not simple either—because "[i]ronically, it is very difficult to get clear directions from FWS to meet their requirements."[73]

Also, permits are subject to notice and comment and possibly a legal challenge. How can an Exotic Wildlife rancher continue raising a herd while operating under the uncertainty of not having a permit—even subjecting himself to a lawsuit?

Finally, FWS's estimate that it will only take 45 days to process these permits is not even supported by the permits—both require the applicant to allow for at least 90 days processing time.[74] As Johnson has testified in his declaration, not only do these permits normally take longer than the 45 days as stated in the Government's response, they take much longer than the

[70] 16 U.S.C. § 1540(a).
[71] *Id.* at § 1540(b).
[72] Johnson Decl. ¶ 4.
[73] *Id.* ¶ 4.
[74] 50 C.F.R. § 13.11 ("You should ensure that applications for permits for . . . endangered and threatened species are postmarked at least 90 calendar days prior to the requested effective date."); Pls.' Exs. A & B to Pls.' Mem. Supp. Mot. Prelim. Inj.

90 days stated in the permits: "[T]he U.S. Fish and Wildlife Service does not issue the permits in the 90 days as they claim. It takes anywhere from 7–10 months to obtain a permit for an endangered species."[75]

7. Once Judge Kennedy invalidated the exemption, FWS should have simply delisted the three antelope species

The two final rules that FWS published on September 2, 2005, listing these three species as endangered while simultaneously authorizing certain management activities, leave no doubt that the two rules are not severable. Throughout the two final rules issued on September 2, 2005, FWS made clear that it was purposely issuing the rules concurrently in order to protect and incentivize the continued captive breeding of these species:

> 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 their legal status under the [Endangered Species] Act to ensure that no breeding programs would be disrupted by a final listing determination. This final rule has therefore been released concurrently with the final listing determination to ensure there is no confusion regarding the authority of [FWS] to regulate such activities for these species. There is no limitation under either the [Endangered Species] Act or the Administrative Procedure Act for related proposed rulemakings to proceed concurrently at the final stage.[76]

Severability is the principle that some portion of a statute or regulation may be severed if a court finds that part of the statute or regulation is invalid, while upholding the rest of the statute or regulation. In the administrative law context, "whether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent."[77] On the other hand, "[s]everance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have

[75] *Id.* ¶ 3.
[76] 70 Fed. Reg. at 52,310, 52,313.
[77] *Davis Cnty. Solid Waste Mgmt. v. Envtl. Protection Agency*, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (citing *North Carolina v. Fed. Energy Regulatory Comm.*, 730 F.2d 790, 795−96 (D.C. Cir. 1984)).

adopted the severed portion on its own."[78] Thus, if the agency would not have adopted the regulation but for the inclusion of an invalid section, then the entire regulation should be invalidated.

Here, FWS would never have listed these three antelope species as endangered without simultaneously issuing the Exemption Rule. As FWS explained: "A consistent theme among the comments received from peer reviewers and stakeholders on the proposed rule to list these species as endangered [was] the vital role of captive breeding in the conservation of these species."[79] Two peer reviewers stated that it was not appropriate or necessary for the scimitar-horned oryx to be listed as endangered because of its success in captivity and extinction in the wild.[80] Two of the scientific peer reviewers specifically recommended that FWS bifurcate the listing so that only the wild populations would be listed as endangered.[81]

The American Zoo and Aquarium Association in its peer review also recommended that FWS "list the captive populations of addax, dama gazelle and scimitar-horned oryx as threatened with a special rule that allows for the continued management and national/international movement of these essential captive populations."[82] And FWS relied on this advice during its rulemaking, by issuing in tandem the Listing Rule and the Exemption Rule:

> Based on the best available scientific information and comments received from peer reviewers, non-government organizations, and the public, we have

[78] *Id.* (citing *North Carolina v. Fed. Energy Regulatory Comm.*, 730 F.2d at 795−96; *Bell Atl. Tel. Cos. v. Fed. Commc'ns Comm.*, 24 F.3d 1441, 1447 (D.C. Cir. 1994)).
[79] *Id.* at 52,311.
[80] Letter from Alan F. Rost to U.S. Fish and Wildlife Services (Oct. 22, 2003), A.R. 199.0001; Letter from the American Zoo and Aquarium Association to U.S. Fish and Wildlife Services (Oct. 20, 2003), A.R. 198.0014.
[81] Letter from the American Zoo and Aquarium Association to U.S. Fish and Wildlife Services (Oct. 20, 2003), A.R. 198.0014; Letter from Steven L. Monfort to U.S. Fish and Wildlife Services (Oct. 20, 2003), A.R. 198.0020.
[82] Letter from the American Zoo and Aquarium Association to U.S. Fish and Wildlife Services (Oct. 20, 2003), A.R. 198.0014.

> determined that U.S. operations that breed scimitar-horned oryx, addax, and dama gazelle have already contributed significantly to the propagation or survival of the three antelope species. Because of the need to facilitate the continued captive breeding of these species in private ranches and zoos, this rule is an appropriate regulatory management provision for scimitar-horned oryx, addax, and dama gazelle captive-bred in the United States.[83]

The Listing Rule and the Exemption Rule were inexorably intertwined—they are inseverable—because they represent one, integral action.[84] Judge Kennedy recognized this when he remanded the Exemption Rule back to FWS without vacating it. Judge Kennedy thus allowed FWS to use its discretion to consider how to respond to the invalidation of the Exemption Rule, to reconsider the Listing Rule, and to determine the best way to protect these antelope species.

CONCLUSION

For all these reasons, the Exotic Wildlife Ranchers request this Court to schedule a hearing and grant this motion for a preliminary injunction.

Respectfully submitted,

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Dated: March 23, 2012

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[83] 70 Fed. Reg. at 52,310.

[84] *North Carolina v. Envtl. Protection Agency*, 531 F.3d 896, 929 (D.C. Cir. 2008) (holding that EPA's rule was not severable when EPA had always maintained that the rule was a single, regional program, and thus "all its components must stand or fall together").

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF ANIMALS, et al., **Plaintiffs,** **v.** **KEN SALAZAR, Secretary of the Interior,** **Defendant.**	**Civil Action 04-01660 (HHK)**
REBECCA ANN CARY, et al., **Plaintiffs,** **v.** **ROWAN GOULD, Acting Director, Fish and Wildlife Service, et al.,** **Defendants.**	**Civil Action 06-02120 (HHK)**

ORDER

Pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 22nd day of June 2009, hereby

ORDERED that these cases are remanded to the United States Fish and Wildlife Service of the Department of Interior for further proceedings consistent with the memorandum opinion. This is a final, appealable order. *See* Fed. R. App. P. 4(a).

Henry H. Kennedy, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, Plaintiff, v. KEN SALAZAR, et al., Defendants.	
TERRY OWEN, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	1:11-cv-01564-BAH (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH) Hon. Beryl A. Howell
EXOTIC WILDLIFE ASSOCIATION, et al., Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	

CERTIFICATE OF SERVICE

This confirms that on Friday, March 23, 2012, I served a copy of Plaintiffs' Reply in Support of Motion for Preliminary Injunction by electronically filing the document with the Court's ECF system, which electronically notified:

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