IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL Plaintiffs, v. KEN SALAZAR, *et al.* Defendants.	Case No. 11-cv-01564(BAH) (consolidated with cases 1:12-cv-00194-BAH and 1:12-cv-00340-BAH)
TERRY OWEN, *et al*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.* Defendants.	
EXOTIC WILDLIFE ASSOCIATION, *et al*, Plaintiffs, v. U.S. DEPARTMENT OF THE INTERIOR, *et al.* Defendants.	

SAFARI CLUB INTERNATIONAL'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

I. Introduction

Under the extraordinary facts of this case, the U.S. Fish and Wildlife Service ("FWS" or "Service") is undermining successful conservation of wildlife species by classifying populations of those species as endangered under the Endangered Species Act ("ESA"), 16 U.S.C. § 1533. The populations at issue are captive, non-native scimitar-horned oryx, dama gazelle and addax ("three antelope species") living on private ranches in the United States. The FWS's only justification for including the U.S. captive non-native members of the three antelope species in the listing of the species generally, is that it would "not be appropriate" to exclude them. Despite the professed legal impropriety, the Service has, on multiple occasions, encountered similar listing situations and has excluded or distinguished the captive or non-native populations from the listing of the species generally. Defendants Ken Salazar *et al*. ("Federal Defendants") dismisses these discrepancies, claiming that the FWS (and its counterpart, the National Marine Fisheries Service "NMFS") is entitled to be inconsistent. Inconsistency, without an explanation, qualifies as arbitrary and capricious agency action.

Federal Defendants attempt to dodge the implications of their unexplained inconsistent conduct by asserting that claims by Plaintiff Safari Club International ("Safari Club") in this litigation have taken them by surprise. In fact, Safari Club's comments on the FWS's ability to disparately classify the U.S. non-native captive populations of the three antelope species did place the FWS on notice. Equally important, notice of the claims came from other commenters, peer reviewers, and decision-making officials within the FWS itself. And if that notice was not enough, the question of whether the Service had legal authority to exclude non-native captive populations of a species from the listing of the species in the wild was so essential to the Service's listing determination that the issue was raised repeatedly by the Service's own

personnel during the 14 years that it took the FWS to decide how to deal with those populations. The Administrative Record demonstrates that it was impossible for the Service to have been caught off-guard by Safari Club's challenges.

Federal Defendants also dispute Safari Club's allegations of irreparable harm, allege the harm to be self-inflicted, and suggest that permits issued by the FWS will alleviate all harms. This blind reliance on process completely ignores the factors that are totally outside the control of Safari Club and its members. The announcement of permits and federal regulation required by the enforcement of endangered status for these populations affected the market for these animals and undermined the incentive for continued conservation. The result is fewer breeders, fewer animals, depressed value and a stark reversal of the conservation achievements won through a free market and sustainable use conservation. Safari Club cannot reverse the trend or prevent further losses of the three antelope species by obtaining a permit from the Service. The only remedy is to stay the impending enforcement of endangered status and allow trade and hunting to take place without unnecessary regulatory restriction.

The conservation climate under the impending enforcement of endangered status is harming, not helping, species conservation. The public interest is in species conservation – in deed, not simply in word. Endangered status is intended to help conserve the species. For the captive U.S. populations, it does not. The only way to promote actual on-the-ground conservation for the three antelope species is to stay enforcement of endangered status.

II. ARGUMENT

A. Safari Club Is Likely to Succeed on the Merits of Its Claims

As explained in detail below, none of the Federal Defendants' arguments undermine that Safari Club is likely to succeed on the merits of its claims. Safari Club has not waived its right

to challenge the unexplained inconsistency of Federal Defendants' approach to captive and non-native populations of species under consideration for listing because: 1) Safari Club commented on the FWS's ability to classify the U.S. non-native captive herds as a separate, excludable population; 2) other parties commented on the Service's ability to treat the U.S. non-native captive populations separately from those in the wild in the species' home ranges; and 3) the separate classification was so intrinsic to the listing process, that the Service had an independent obligation to address those issues. Safari Club did not "attempt[] to suggest that there is some type of mandatory or otherwise established policy for the Service to exclude animals held in captivity." Federal Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief ("Def. Opp.") at 14. Instead, Safari Club explained that, at the time that Federal Defendants included the U.S. non-native captive populations of the three antelope species in the endangered classification for the species as a whole, the Service stated that it ***could not*** separately classify the U.S. captive populations, when in fact it had done so on numerous occasions. Safari Club correctly argued that the Service failed to follow its distinct population segment policy despite the propriety of doing so. Finally, Safari Club correctly showed that, in concluding that listing non-native captive U.S. populations would not be appropriate, the Service actually undermined the conservation purposes of the ESA.

1. The Service Had Notice of Safari Club's Claim

a. Safari Club Submitted Comments On the FWS' Ability to Classify the U.S. Non-native Captive Populations Separately.

Federal Defendants incorrectly imply that Safari Club failed to place the Service on notice of its authority to classify U.S. populations differently than those in the wild. To the contrary, in response to the 1991 Proposed Rule, Safari Club very specifically commented, recommending that "the Service not list these species as endangered ***within the U.S***." Letter,

dated September 1, 1992 from Safari Club International to Dr. Charles Dane, Chief, Office of Scientific Authority, U.S. Fish and Wildlife Service, AR 82.0019 (emphasis added) (Exhibit M)[1]. In its comment letter dated October 22, 2003, Safari Club further explained that the U.S. non-native populations could be classified differently than those in the wild, in their native ranges:

> These species that are native to North Africa currently have "distinct population segments" in other parts of the world, each of which must be given separate consideration for the purpose of this proposed listing. While North Africa is the location for the native DPS of these species, the addax and dama gazelle each have additional DPS' within the United States. Scimitar-horned oryx have one DPS in the United States and another distinct population segment in South Africa.

Letter, dated October 22, 2003 from Safari Club International to Chief, Division of Scientific Authority, U.S. Fish and Wildlife Service, AR 199.0004 (Exhibit X). Safari Club's comments further explained:

> The populations of these three antelope species qualify as Distinct Population Segments when analyzed under the criteria of the U.S. Fish and Wildlife Service's DPS policy. In accordance with the FWS's policy, it is appropriate to assign different classifications to different DPS's of the same vertebrate taxon and therefore, while the DPS' for these antelope for North Africa may require one listing, the DPS' of the United States and South Africa need no listing at all.

Id. at AR 199.0005 (Exhibit X).

b. Other Commenters Raised the Issue of the Service's Inconsistent Treatment of Other Captive Non-Native Populations

Safari Club's comments put the Service on notice of their authority to separately classify the populations of the three antelope species within U.S. boundaries. Other members of the public offered similar information, including specific examples of how the Service had distinguished between wild and captive populations of other species. In addition, other commenters, including Peer Reviewers selected by the FWS to evaluate its decision to list the

[1] All references to Exhibits A – X, and AA – EE refer to Exhibits attached to Safari Club's Motion for Preliminary Injunctive Relief.

species, offered the Service similar and/or alternative methods by which to exercise their authority to exclude and/or classify differently the U.S. non-native captive populations.

For example, the American Zoo and Aquarium Association ("AZA") recommended the exclusion of the U.S. non-native captive populations to avoid the creation of disincentives for species conservation:

> As there is no longer a direct impact between the wild and captive populations, AZA urges the USFWS to consider a bifurcated listing, with the wild populations of addax and dama gazelle listed as endangered, and the captive populations of addax and dama gazelle and scimitar-horned oryx retaining the current non-listed status.

Letter from AZA to Chief Division of Scientific Authority, October 20, 2003, AR. 198.0012, 198.0014 (Exhibit J). One of the Antelope Listing Rule's Peer Reviewers, Steven Monfort, similarly explained:

> Given the disparate situation between the wild (critical) and captive (abundant) populations, a bipartite listing would be most appropriate for these species. This would provide strict protection of wild populations (including scimitar-horned oryx, should they move beyond fence reintroductions), while minimizing restrictions on the use and movement of captive individuals to support the formation of 'world herds' and reintroduction efforts.

Letter from Steven L. Monfort, DVM, PhD, Research Veterinarian and Chair, Sahelo-Saharan Interest Group, (Peer Reviewer) Smithsonian National Zoological Park to Robert R. Gabel, October 20, 2003, AR. 198.0018-19 (Exhibit K). In August of 1992, Terrie Correll, Species Survival Plan (SSP) coordinator for addax, wrote the following:

> At this time the captive population is neither threatened nor endangered and does not warrant listing. A <u>bipartite listing</u> would be appropriate in this situation where the wild population is endangered but the captive group exists in sizeable numbers but has no impact on wild addax. The Fish and Wildlife Service has set a precedent for bipartite listings for other species such as the desert tortoise.

Letter from Terrie Correll to Dr. Charles Dane, Chief, Office of Scientific Authority, August 27, 1992, AR. 82.0012 (emphasis in the original) (Exhibit N).

Even if Safari Club itself had not commented on the FWS's ability to distinguish between captive and wild populations and/or native and non-native populations, the notification requirement was satisfied by the fact that others did. "It is sufficient that an issue was raised by any commenter; the party petitioning for judicial review need not have done so itself." *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 935, 948 n.12 (D.C. Cir. 2004), *citing Reyblatt v. Nuclear Regulatory Comm'n*., 105 F.3d 715, 721 (D.C. Cir 1997).(in case challenging emissions guidelines, court ruled that despite petitioner's failure to submit sufficiently specific comments to alert the EPA to its claims, comments provided by others satisfied requirement) "Consideration of the issue by the agency at the behest of another party is enough to preserve it." *Cellnet Communication Inc., v. FCC,* 965 F.2d 1106, 1109 (D.C. Cir. 1992). Even a case that Federal Defendants offer in support of their waiver argument acknowledges that no waiver applies if some party, other than the plaintiff, offered comments.

> We decline to reach the merits of NWF's cost estimate challenges because ***neither NWF nor any other party before the agency*** raised any of the contentions before the administrative phase of the rulemaking process.

National Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002)(emphasis added).

c. Even if No Member of the Public Had Commented, the Service's Own Comments and the Essential Nature of the Question of the Exclusion of Non-Native Populations Made It Necessary for the Service to Address the Issue

The Service's own discussion of its authority to list wild and captive populations of the same species differently, including to its own ongoing practice of doing so with other species, obviated the need for Safari Club to alert the FWS of this fact. Drafts of the Final Rule To List the Scimitar-Horned Oryx, Addax, and Dama Gazelle as Endangered, 70 Fed. Reg. 52319 (September 2, 2005) ("Antelope Listing Rule") and discussions between FWS decision-makers evince the Service's awareness of the significance of this issue:

> From time to time, the Service has treated groups of vertebrates that are in captivity, or that have originated from captive stock, as separate population segments, distinct from fully natural populations, for purposes of the Act. The example closest to that now at hand involves the chimpanzee (Pan troglodytes), which in the Federal Register of March 12, 1990 (55 FR 9135), was classified as endangered in the wild and as threatened in captivity.

(Draft) Endangered Status for Scimitar-horned Oryx, addax and dama gazelle in Their Historic Range, Final Rule, 2/10/1994, AR. 135.0076-77 (Exhibit H). Marshall Jones of the Office of Management Authority of the FWS offered the following comments to Dr. Charles Dane, Chief of the Office of Scientific Authority, on April 2, 1991:

> Dick Robinson's comments on Ron's note emphasize the need for all split listings to have a biological basis. I agree, but I also would argue that many animals in captivity are biologically irrelevant to the species, e.g. subspecific crosses, animals of unknown blood lines. Where an SSP exists, surplus (genetically overrepresented) animals might also fit into this category. All of these are animals which could be considered not part of the biological species which is being listed (i.e. the wild popualations (sic) plus all genetically identified members of those popualations (sic) in captivity).
>
> A further alternative is available when the captive population is considered to be self-sustaining (e.g. chimpanzees). This provides a different basis for split listing.

Letter from Marshall Jones, to Charlie (Dr. Charles Dane), 2 April 1991, AR 2.002 (Exhibit E).

The Record also demonstrates that the Service was fully aware of its authority to separately classify non-native populations of a species. When it first proposed to list the three antelope species in 1991, the Service specifically announced to the public that a populations' non-native status, regardless of whether the population was captive or wild, was a very specific reason for separately classifying that population:

> Captive and free-roaming groups, outside of the natural ranges of the species, may be covered separately from natural populations in any final rule.

Proposed Endangered Status for Scimitar-horned Oryx, Addax, and Dama Gazelle, 56 Fed. Reg. 56491(November 5, 1991). That same issue was raised in the Services' discussions as to the

correct classification of non-native populations of a species, as demonstrated by the statement of FWS biologist Ronald Nowak:

> However, being that we are starting the procedure from the situation of no coverage at all, it might not be contrary to the intent of the law to issue a classification ***excepting populations in the United States. We then would state that our main purpose is to properly recognize the status of the natural populations***, based on the data available, and that we are not now prepared to deal with the U.S. stock. This approach would be something akin to what was done with the chimpanzee.

Memo, Ronald M. Nowak to Chief Office of Scientific Authority, Re: Proposed Listing of Three African Antelopes, 11 March 1991, AR 1.0001 (emphasis added) (Exhibit F).

An issue need not be raised in comments by a member of the public in order to justify a legal challenge to the agency's approach to that issue. So long as there is evidence that the agency actually considered the issue prior to the legal challenge, even if discussion of the issue was generated within the agency itself, the Plaintiff cannot be barred from raising the matter in litigation. *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1084 (D.C. Cir. 1996) (litigation held proper despite lack of public comment over issue raised by Congressman in letter to EPA Administrator); *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987)(Court recognized agency's own statement included in notice of proposed rule as evidence that agency had considered issue later raised in litigation); *Office of Communication of the United Church of Christ v. FCC*, 465 F. 2d 519, 523 (D.C. Cir. 1972)(Court rejected exhaustion of administrative remedies challenge, based on evidence that subject of legal challenge had been raised by dissenting Commissioners during Commission deliberations).

Some issues are so integral to the agency decision that they may be challenged regardless of lack of evidence that the agency received notice of them. The agency bears an obligation to "examine key assumptions as part of its affirmative 'burden of promulgating and explaining a

non-arbitrary, non-capricious rule.'" *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)("Here, aggregate analysis is a vital assumption underlying the Sobotka model. Thus EPA must justify that assumption even if no one objects to it during the comment period, and [Plaintiff] may properly ask this court to review whether EPA has done so."); *Appalachian Power Co., v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (Court deemed compliance date for rule so essential that it would continue to be challengeable even if no party had commented on the issue); *Northeast Maryland Waste Disposal Authority v. EPA, 358 F.3d at 948*(agency was "duty-bound" to set forth its rationale for key assumption on which decision was based, regardless of whether public commented on the point); *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355, 1421 n.63 (D.C. Cir.1985)(Court rejected Department of Energy rule pertaining to mandatory energy-efficiency standards for household appliances, despite lack of public comment on subject).

The Service's authority to exclude the U.S. populations, whether due to their captive or non-native status or both, was a key element to its determination of how to list the three antelope species. The fact that the FWS initiated its 14-year long rulemaking with a statement that ***"[c]aptive and free-roaming groups, outside of the natural ranges of the species, may be covered separately from natural populations in any final rule,"*** 56 Fed. Reg. 56491, makes it clear that the possibility of excluding the three antelope species based on their captive or non-native status alone was essential to the listing determination. Under such circumstances there can be no waiver of this challenge. Because this challenge is not waived, the Service's inconsistent, yet completely unexplained decision not to exclude non-native populations of the three antelope populations from its listing of the three species qualifies as arbitrary and capricious conduct.

2. Federal Defendants Failed to Explain Its Inconsistent Approach to Remarkably Similar Populations of Other Species

In practice, if not formal policy, the Service has listed captive or other non-wild populations separately from the wild populations, demonstrating that it is appropriate to do so. The Service summarized the comments on this point in the Final Antelope Listing Rule:

> The remaining commenters expressed opposition only to listing captive-bred specimens of these species as endangered. Specifically, peer reviewers and the zoo community supported listing of wild specimens only for all three species, noting that the captive herds are relatively robust. They advised that captive-breeding operations should not be impeded in their efforts to maintain globally managed captive herds. According to the information provided, the large captive herds of these species retain a substantial level of genetic diversity and are able to serve as sources of specimens for reintroduction, as needed. The exotic animal ranching community was uniformly against the proposed rule because listing the species would provide a disincentive to continue captive breeding of these three species on ranches. A major concern of ranchers was the need to go through potentially lengthy and cumbersome permit processes to continue their longstanding activities with these species, in accordance with the regulations at 50 CFR 17.21(g)(1).

70 Fed. Reg. 52319 (Sept. 2, 2005). The Service only tersely responded: "[i]t would ***not be appropriate*** to list captive and wild animals separately." *Id*. (emphasis added). The Service failed to explain why it would "not be appropriate." It also failed to explain why, despite such alleged impropriety, the Service had listed captive and wild animals separately for several other species. The issue is not whether the FWS had any sort of policy to deal with inclusion or exclusion of non-native captive members of a species for the purposes of listing. The point is that the Service had, on other occasions, followed a practice of disparately classifying captive and wild populations. When the FWS addressed the three antelope species, it claimed that it could not treat captive populations differently and yet failed to explain the reason for that inconsistency.

a. Inconsistent Approach to Other Captive Populations

Federal Defendants claim that the Chimpanzee and the Nile Crocodile – species that Safari Club has highlighted as examples of the Service's inconsistent approach to other captive populations -- are nothing but "outliers" and fail to demonstrate any type of agency policy. At the time that the Service separately classified captive populations of Chimpanzees from the species generally, the Service did not appear to consider the species as an "outlier." Regardless of whether the Service has adopted any type of set policy, its own explanation of its decision to recognize a non-native captive population of chimpanzees and to classify that population differently than members of the species in the wild demonstrates a practice that the Service itself considered something other than a one-time-only deal. In its 1990 rule classifying the captive populations differently than populations in the wild, the Service responded to a comment challenging its decision to do so:

> Comment: There is no legislative history suggesting that captive populations can be treated as distinct "species" and there is no precedent for listing captive populations differently than wild populations.
>
> Response: In the Endangered Species Act of 1973, as amended (Act), the definition of "species" is not the same as the usual biological definition of species but is expanded specifically to include "any species, subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Captive animals are distinct from wild populations and may have the potential to interbreed when mature. In the case of the chimpanzee, some animals are specifically being managed as an interbreeding population. In listing the ranched population of the Nile crocodile in Zimbabwe, the Service has previously classified specimens in captivity differently than wild populations.

55 Fed. Reg. 9129, 9131 (March 12, 1990). The Service's explanation as to its reasoning for disparately classifying captive and native chimpanzees suggests the significance of the captive population's management as an *interbreeding population* – a condition shared by the U.S. non-native captive populations of the three antelope species. Federal Defendants attempt to diminish

the significance of the chimpanzee example by explaining that the FWS has been petitioned to bring the listing status of captive chimpanzees "in line with the status of the wild ones." Def. Opp. at 18 n.7. What the Service might decide in the future with respect to captive populations of chimpanzees is irrelevant. What is relevant is the fact that the disparate listing for chimpanzees was in effect at the time that the FWS decided it would not be appropriate to exclude the U.S. non-native captive populations of the three antelope species, and that is the time that is of significance to this Court's decision. *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C Cir. 1984) (Court must review the information the decision-maker had at the time of making the decision, rather than allowing agency to take advantage of post-hoc rationalizations).

Federal Defendants also incorrectly inform the Court that if the FWS brings the captive chimpanzees in line, "there will be no instances in which members of a species held in captivity are designated differently than the species in the wild." *Def. Opp*. at 18 For example, within weeks of including the U.S. non-native captive populations of the three antelope species in the endangered classification of the species generally, the National Marine Fisheries Service listed the Southern Resident killer whale distinct population segment as endangered, but specifically excluded from that DPS "killer whales from J, K, or L pod placed in captivity prior to listing" and their "captive born progeny." 70 Fed. Reg. 69903, 69910-11 (November 18, 2005). That listing disparity continues today.

More recently, although no listing ultimately resulted, the Service did specifically exclude commercial (another form of captivity) herds of plains bison when acting on a petition to list four distinct population segments of wild plains bison as threatened. "[W]e will only consider wild plains bison in conservation herds in this evaluation because we do not consider it

to be within the intent of the Act to consider plains bison in commercial herds for listing." 76 Fed. Reg. 10299, 10301 (February 24, 2011).

These examples demonstrate that, with or without a policy, the Service has in fact, on repeated occasions, exercised a practice of excluding or disparately classifying a captive population of a species from a wild population. Like the other species that were the subject of that practice, the U. S. non-native captive herds are interbreeding populations, and came into the U.S. and were placed in captivity long before the Service's decision to list. Nevertheless, the Service offered no explanation why it would not be appropriate to exclude the captive populations of the scimitar-horned oryx, dama gazelle and addax.

b. Inconsistent Approach to Other Non-Native Populations

Federal Defendants characterize the Service's inconsistent approach to other non-native populations of listed species as irrelevant and inapplicable. Not only do these other non-native populations bear striking similarities to the three antelope species but the Service's inaccurate description of these inconsistencies inappropriately undermines their significance.

For example, Federal Defendants incorrectly dismiss the relevance of the Arctic Grayling, another species for which the FWS excluded a non-native population from its listing of native population of the species. Federal Defendants contend that the decision that Safari Club referenced about the Arctic Grayling "post-dates the Listing Rule". Def. Opp. at 15, no. 4. Although, in its Opening Brief (PI Op. Br. 29) Safari Club did cite a September 8, 2010 Arctic Grayling listing decision, that did not represent the first time that the FWS had excluded the non-native population in a listing decision for the Arctic Grayling. On July 25, 1994, the FWS made a finding on a petition to list the fluvial population of arctic grayling as endangered. At that time, the Service determined that listing of the fluvial population of Arctic grayling was

warranted but precluded by other higher priority listings. 59 Fed. Reg. 377738. In that finding, as it did later when it listed the species, the Service noted that it "does not regard the introduced, lake-dwelling graying (sic) to be part of the indigenous upper Missouri River fluvial Arctic grayling population." *Id*. at 37739.

Federal Defendants also inappropriately dismiss the Arkansas River Shiner example as inapposite in terms of the significance of the population to the conservation of the species. In fact the Arkansas River Shiner is remarkably similar to the three antelope species because in both cases, biologists have recognized the potential for ***future*** use of the non-native populations for restoration of the species in the wild, despite the lack of any current ability to use the populations for that purpose. For the Arkansas River Shiner, the biologists recognized that the non-native population had the potential for supplementing the population in the wild, but that protection of the non-native population, by itself, would do nothing to improve the status of the existing species within its historical range:

> While the non-native, introduced Pecos River population of the ARS ***could be important in efforts to supplement native populations of the ARS within the species' historical range***, protection of the Pecos River population would not improve the status of the ARS within the Species' historical range.

63 Fed.Reg. 64772, 64774 (November 23, 1998) (emphasis added). The same situation exists for the three antelope species. The only conservation benefit that U.S. non-native captive herds can have on the native populations in the wild in their historic range is a conditional and future one. Lack of viable habitat and poaching in the species' home ranges in Africa make reintroductions into the wild impossible. In the final version of the Antelope Listing Rule, the FWS documented the lack of reintroductions into the wild for scimitar-horned oryx:

> Fenced reintroductions of scimitar-horned oryx are ongoing in Morocco, Tunisia, and Senegal (Monfort in litt. 2003, Monfort 2003). Five dama gazelle have been introduced to a large enclosure in Senegal (Ba and Clark 2003). These specimens

> are fenced in large tracts of suitable or recovering habitat and held for breeding and eventual reintroduction. The founder stock was largely derived from captive-breeding facilities. ***However, threats to survival of the antelopes still occur outside of the fenced areas so reintroduction into the wild has rarely occurred.***

70 Fed. Reg. at 52322 (emphasis added). The Antelope Listing Rule also noted the role that captive breeding *could* someday have in future reintroductions, but admitted that reintroductions into the wild were presently infeasible:

> Captive-breeding programs operated by zoos and private ranches have effectively increased the numbers of these animals while genetically managing their herds. As future opportunities arise for reintroduction in the antelope range countries, captive-breeding programs will be able to provide genetically diverse and otherwise suitable specimens. Currently, however, continued habitat loss and wonton (sic) killing have made reintroduction nonviable in most cases.

Id. At present, because reintroductions into the wild are impossible, protections of the U.S. captive herds will do nothing to improve the status of the three antelope species in the wild in their historic range. The Environmental Assessment for the Exemption Rule similarly documented the lack of direct connection between U.S. captive herds of scimitar-horned oryx and the species in the wild and the speculative nature of captive population's impact on the fate of the species in the wild:

> Since the final rule only pertains to U.S. captive bred animals and no wild-caught specimens have been imported into the United States since 1997 (as far back as USFWS law enforcement records go), it is unlikely that wild specimens will be imported. Thus, the only possible interaction these specimens may have with wild specimens is ***upon eventual reintroduction into the wild*** of Northern Africa. Currently, the scimitar-horned oryx may only be found in captivity. There are long-range plans for reintroduction of scimitar-horned oryx and addax, but appropriate safeguards and monitoring pre-and post release will be followed (SSIG 2002).

Final Environmental Assessment at 10, AR. 384.0013 (emphasis added) (Exhibit D).

3. The FWS's Duty to Follow Its Own Policy

Regardless of whether the FWS has documented a policy to deal specifically with captive or non-native populations when considering the listing status of a species generally, the Service does have an established policy for recognizing distinct population segments ("DPS") of a species. Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, ("DPS Policy") 61 Fed. Reg. 4722 (February 7, 1996). Federal Defendants maintain that they bear no obligation to designate a DPS, particularly if they are not petitioned to do so. However, in this case, the Service made a legal determination that **"**it would not be appropriate to list captive and wild animals separately." Presumably, this was the Service's applying its own DPS Policy, to determine that it would be inappropriate to designate one or more DPSs. However, the cryptic nature of the Service's legal determination without explanation makes it impossible for Safari Club and presumably the Court, to evaluate the basis for that determination.

If in fact the FWS was basing its determination on that DPS Policy, regardless of whether DPS designation is within the agency's discretion, the Service still had a judicially enforceable obligation to follow the terms of that policy. "Having chosen to promulgate the *DPS Policy*, the FWS must follow that policy." *National Association of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003)(Court ruled that FWS acted arbitrarily and capriciously and in conflict with DPS Policy in failing to provide rational basis for finding population of Arizona pygmy owl to be significant), citing *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C.Cir.2003) (noting that federal agencies must follow their own rules). This is quite different from the situation in the case of *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 28-29 (D.D.C. 2010) cited by Federal Defendants. In *Cape Hatteras*, the Court could find no standard upon

which to judge the Service's critical habitat determination. In this case, the Court must use the DPS policy as a means of assessing the agency's decision-making, and because the Service offered no explanation of why it did not consider the discreteness or significance criteria identified in the DPS policy, 61 Fed. Reg. at 4725, this Court can only find that the Service made its listing determination in an arbitrary and capricious manner.[2]

4. Listing A Population to Its Detriment Without A Rational Explanation Does Not Fulfill the Purposes of the ESA

The Administrative Record does not support the Federal Defendants' rationalization that the inclusion of the U.S. non-native captive herds in the endangered classification works to their benefit and/or to the benefit of the populations in the wild. As Safari Club explained in its opening brief, the Service has already acknowledged that full enforcement of endangered status without an exemption from permit requirements will harm the U.S. captive populations. In the Record of Compliance the Service published for the Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, ("Exclusion Rule"), 70 Fed. Reg. 52310 (September 2, 2005), the Service acknowledged the harmful conservation consequences that could result from full enforcement of endangered status:

> The gene pool management for the recovery of scimitar-horned oryx, addax, and dama gazelle depends on the movement of captive-bred specimens among institutions across state boundaries. In addition, we are including sport-hunted trophies because trophy hunting on private ranches that breed these species may be necessary for wildlife management purposes, provides revenue for the continued operation of captive-breeding operations, and economic incentive for ranchers to continue breeding these species. ***Listing the species without exempting the U.S. captive-bred population could be a deterrent to further captive breeding.***

[2] Even if the decision to designate a DPS was discretionary, the Service still bore an obligation to provide a rational explanation for not excluding the captive non-native populations as it did with other species.

United States Department of the Interior, Record of Compliance for a Rulemaking Document, signed by Robert R. Gabel, Acting Assistant Director, International Affairs, January 7, 2005, AR 237.0122 (emphasis added) (Exhibit S). The Appendix to that Record of Compliance also explained why permit requirements for the sale of hunts of the U.S. captive populations would serve as a deterrent to future participation by private ranchers in three antelope conservation.

> Under Alternative 2[3], individuals subject to the jurisdiction of the United States would need permits to engaging (sic) in domestic and international trade in live or dead captive-bred specimens for commercial purposes. This process takes time, sometimes causing delays in moving animals for breeding or reintroduction. Such movements must often be completed within a narrow time frame and can be further complicated by quarantine requirements and other logistics. This, coupled with the prohibition on interstate commerce of sport-hunted trophies, could remove the incentive to breed these species, which rely on captive breeding for their recovery.

Appendix, Economic Analysis of the Proposed Rule, AR. 237.0126-0127 (Exhibit I). Arguments that the inclusion of the U.S. non-native captive herds will somehow directly benefit the species in the wild also fall flat. The American Zoo and Aquarium Association ("AZA") recommended the exclusion of the U.S. non-native captive populations to avoid the creation of disincentives for species conservation in the wild:

> The goal of maintaining the genetic diversity of the captive populations of these antelope species may be adversely compromised through the inclusion of the captive population of any of these three species as a USFWS endangered species. Our efforts to move animals back and forth between the captive populations in North America, Europe, and elsewhere could be severely hampered by the listing of the captive populations as endangered and the resulting permitting process, possible restrictions and enhancement requirements imposed by such listing. The ability to effectively manage the captive programs for these antelope species may be critical to their future existence, given the continuing pressures on the remaining wild populations.

[3] Alternative 2 indicates an endangered species listing for the three antelope, without any exemption from permit requirements and other endangered species classification prohibitions.

Letter from AZA to Chief Division of Scientific Authority, October 20, 2003, AR. 198.0012, 198.0014 (Exhibit J).

The Administrative Record reveals three essential facts: 1) classifying the U.S. non-native captive populations as endangered will do nothing to benefit those U.S. populations and will likely harm them; 2) classifying those U. S. populations can do nothing at this time to benefit the native populations of the species in the wild; and 3) the Service offered no explanation for its decision not to exclude the U.S. non-native captive populations from the listing of the species generally. The Service's decision offered harm, but no benefit. Federal Defendants' Opening Brief offers a disturbing acknowledgment of the Service's callous and incorrect approach to species conservation. "If the purpose of the ESA is to conserve species in the wild, then even assuming Plaintiff was correct that the Listing Decision has some negative impact only upon the conservation of the antelopes held in captivity in the U.S., it would not be inconsistent with the conservation purposes of the ESA." Defendants' Opp. at 24. In this statement, Federal Defendants admit that they are willing to sacrifice the viability of large and healthy scimitar-horned oryx, addax and dama gazelle populations in order to achieve no conservation benefit for the species in the wild. This listing for the sake of listing does not carry out the purposes of the ESA.

B. Safari Club Has Suffered Irreparable Harm

Federal Defendants claim that the source of Safari Club's irreparable harm is the Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions Rule, 77 Fed. Reg. 431 (January 5, 2012) ("Withdrawal Rule") and not the endangered status of the U.S. non-native captive herds of the three antelope species. Undoubtedly, the Withdrawal Rule has played a role. However, if it were not for the

listing of the U.S. non-native captive herds, the Exclusion Rule would never have been necessary, the FWS would never have had to go to court to defend that rule, Judge Kennedy would never have needed to strike the rule and the Service would never have had to withdraw the permit exemption. The catalyst for all of this and, most importantly, the source of Safari Club's harm is the endangered classification itself. It is irrelevant that Safari Club's harm from the Antelope Listing Rule has been held in abeyance since 2005. That is only because the Service delayed the enforcement of endangered status by a permit exemption rule that was found to be illegal. Safari Club's harm is concrete and a direct result of the populations' endangered status.

The harm that Safari Club and its members have and will continue to suffer is not self inflicted. The Service's announcement of enforcement of full endangered status affected the market generally. The prices of the animals dropped dramatically. Those who did not wish to participate in a federally regulated program and/or maintain endangered animals on their ranches, got out of the business. Lower prices and increased costs and responsibilities translate to reduced incentive to own, raise, breed and conserve these animals. With fewer ranches participating, there are and will continue to be fewer animals and fewer options for new blood lines to maintain healthy herds. The Safari Club members who submitted declarations in support of Safari Club's Preliminary Injunction Motion did not cause the market decline, nor did they remove the conservation incentives to owning, raising and breeding these animals. The only catalyst was the enforcement of the three antelope's endangered status – and that can only be attributed to the Service's listing of the three antelope species.[4]

[4] In its Opening Brief, Safari Club was completely forthright about the fact that declarant J. David Bamberger is not a Safari Club member. As Safari Club has already explained, J. David Bamberger's declaration was included, not to assert Mr. Bamberger's own harm, but to demonstrate how the implications of Mr. Bamberger's response to the enforcement of endangered status to future conservation of the three antelope species. The fact that

Federal Defendants' ignore the bigger picture when they allege that the permit process poses minimal burdens in terms of time and resources for any individual rancher who chooses to apply.[5] A rancher who obtains a permit will not be able to restore the value of the species to where it was prior to the announcement of the impending enforcement of endangered species status, nor will his receipt of a permit encourage other ranchers to participate in species conservation or generate additional stock. The ranchers' possession of a permit will not increase the genetic variability of the species that is dependent upon the existence of large numbers of herds. In fact the only action that is likely to prevent further conservation losses is a stay of the impending enforcement of endangered status.

Contrary to Federal Defendants' arguments, Safari Club does not bear an obligation to demonstrate with certainty that the requested stay will reverse its irreparable harm. Safari Club only needs to show the likelihood that the requested stay will avert future harm. *Small v. Avanti Health Systems, LLC*., 661 F.3d 1181, 1191(9th Cir. 2011) (Court upheld preliminary relief requiring new hospital owner to bargain in good faith). Since relief from enforcement of endangered status is likely to encourage higher prices for the animals, which should generate at least a temporary renewed interest in ownership and maintenance of these animals, Safari Club's harm is likely to be redressed by an injunction. The irony of Safari Club having to defend its representation of irreparable harm comes from the fact that in the development of the Antelope

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Mr. Bamberger applied for and received a permit actually reinforces Safari Club's position that receipt of permits will not remedy the situation. Since Mr. Bamberger obviously applied for his permit before signing his declaration, his description of his planned approach for his scimitar-horned oryx and the consequences for future breeding remains the same despite his possession of that permit.

[5] It appears from the declaration of Timothy Van Norman that of the 68 ranches that submitted permit applications prior to March 19, 2012, the FWS expects to be able to issue only 30 permits, leaving at least 38 ranches without permits on April 4, 2012 and with the legal uncertainty as to their ranching operations for at least some period of time. Van Norman Decl. Dkt. No 35-1, p. 5.

Listing and Exclusion Rules, Federal Defendants previously acknowledged how enforcement of endangered status would lead to irreparable harm being faced by ranchers, hunters and conservationists. The FWS itself admitted that permit requirements as the result of endangered status enforcement

> would remove all economic incentive to conserve the species by discouraging captive-breeding. Without the ability to cover all costs of captive breeding there is no economic incentive to continue.

Appendix, Economic Analysis of the Proposed Rule, AR. 237.0128.

Federal Defendants unjustifiably imply that Safari Club and its declarants have fabricated their conservation interests in the three antelope species, as a tool to demonstrate irreparable harm for the purposes of Safari Club's preliminary injunction. Safari Club's mission is and has long been "to protect the freedom to hunt and to promote wildlife conservation worldwide." Rew Goodenow Declaration, Exhibit AA, ¶5, 6. Each of the declarants that are members of Safari Club subscribe to and support that mission. Safari Club's conservation interests in the three antelope species involved in this lawsuit are no different than the conservation interests described in Safari Club's April 4, 2005 comment letter to the FWS:

> Hunters play an important role in the conservation process. Hunters provide the financial fuel for the conservation of the species. The funds paid by hunters for the take of these animals help to finance ranchers' requirements for the raising and feeding of these animals. Hunters also help the ranchers to relieve population pressures on their herds by reducing the number of animals to a level in sync with the available habitat and the ranchers' ability to provide proper care and nutrition.

AR237.1379 (Exhibit Z). Safari Club's and its members conservation interests in the three antelope species are no less than the interests Safari Club represented to the Court in declarations in support of Safari Club's intervention in the case of *Friends of Animals v. Norton et al.* 1:04-1660 (HHK) involving the challenge to the legality of the permit exemption for the three antelope species.

> I support sustainable use conservation and recognize hunting as a valuable conservation management tool for species such as scimitar-horned oryx, dama gazelle and addax.

Declaration of Safari Club (former) President Mike Simpson, Dkt. No. 15-3. Exhibit FF

> Safari Club International promotes conservation of wildlife through sustainable use practices and supports hunting as a valuable, efficient and cost effective tool for managing wildlife populations.

Declaration of Safari Club (current) President Kevin Anderson, Dkt. No. 15-5. Exhibit GG.

The story of the U.S. populations of scimitar-horned oryx, dama gazelle and addax demonstrates the invaluable role that hunting can play in the conservation of a species. Safari Club is devastated to watch how the impending enforcement of endangered status of these populations has and will significantly reverse the conservation successes of the last several years. And although the declarants who provided statement in support of Safari Club's motion for preliminary injunctive relief describe individual injuries that are related to economic interests and the need devote their ranchland and other resources to species that can generate income, the loss of these conservation successes and the loss of their ability to participate in this conservation effort cannot be replaced with money.

C. The Balance of Harms Tips in Favor of Injunctive Relief

Federal Defendants and Safari Club actually agree that the balance of interests, including public interest, must tilt in favor of protected species. For this reason, the balance of interests favors the preliminary injunction. Enforcement of endangered status for the U.S. non-native captive herds does nothing for the populations of the three antelope, either in the wild or in captivity in the U.S. If there is any benefit for the species, it comes from the removal of endangered status, not from its imposition. Ironically, the zero protections about which Federal Defendants warn are exactly what resulted in healthy thriving populations of these antelope

species on ranches in the U.S. and the very circumstances that prompted the Service to attempt to find some way to exempt the U.S. captive herds from endangered classification enforcement when it decided to list the three species generally. The best medicine for three antelope conservation would be to return to a free, unrestricted trade system and let the ranching and hunting community restore their extremely successful private conservation system.[6]

D. Safari Club Did Not Delay the Filing of Its Preliminary Injunction and a Delay Is Not a Basis for Denial

Federal Defendants accuse Safari Club of delaying the filing of its motion for a preliminary injunction. Safari Club filed its Motion for a Preliminary Injunction almost a full month before the April 4, 2102 date of withdrawal of permit exemptions for the three antelope species. Although Safari Club needed time to prepare its legal and factual support to demonstrate its entitlement to preliminary injunctive relief, it by no means waited until the 11th hour to file. Even if Safari Club had delayed its filing, such delay would not be a basis for a Court's denial of preliminary injunctive relief – especially if the triggering event has not yet been

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[6] Federal Defendants' Opposition Br. mischaracterizes the statements of Declarant Timothy Van Norman. Mr. Van Norman does not say that unregulated trade in the captive U.S. animals would undermine the conservation of the species in the wild. He merely says that "the Service would have a more difficult time enforcing the prohibitions of the ESA and CITES because it would be harder to establish that any given specimen came from the wild as opposed to from a captive population."

In fact, in their own explanation of the Exclusion Rule, Federal Defendants disputed any notion that a failure to enforce endangered status for the U.S. populations would undermine conservation for the species in the wild by increasing demand for trophies or creating incentives for illegal trade.

> Service Response 7: There is no evidence that sport hunting of captive-bred animals increases poaching of these species in the wild. Sport hunting of these species has been occurring on ranches in the U.S. for more than 20 years. There is no evidence that the availability of captive-bred animals to trophy hunters has contributed in any way to hunting pressure on these species in the wild.

70 Fed. Reg. at 52313.

implemented. *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011) (Court remanded lower court's denial of last minute preliminary injunction motion).

Federal Defendants neglect to mention that part of the reason that briefing for preliminary injunctive relief and summary judgment overlap is because the Service did not publish its intent to withdraw the permit exemptions and fully enforce endangered status for the U.S. non-native captive populations until approximately four months after Safari Club filed this action. Safari Club filed this suit in a timely fashion within the six year statute of limitations that commenced on September 2, 2005, when the FWS published the Antelope Listing Rule. Safari Club also made a timely filing of its Motion for a Preliminary Injunction, weeks before the Service would enforce full endangered status for the three antelope species.

III. CONCLUSION

Safari Club has established that it is likely to succeed on the merits of its claim, that it is likely to sustain irreparable harm, that the balance of harms weigh in Safari Club's favor and the public interest supports preliminary injunctive relief. Safari Club respectfully requests that this Court stay the enforcement of endangered status until the Court enters a final ruling on the legality of the inclusion of the U.S. non-native captive populations of the three antelope species in the listing of the species generally.

Dated this 23rd day of March 2012:

Respectfully submitted
/s/ Anna M. Seidman
Anna M. Seidman
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501 2nd Street NE
Washington, D.C. 20002
Tel: 202-543-8733
Fax: 202-543-1205
aseidman@safariclub.org

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the Reply in Support of Motion for A Preliminary Injunction to be served on all parties via the court's ECF system:

Respectfully submitted
/s/ Anna M. Seidman
Anna M. Seidman
D.C. Bar No. 417091
Douglas S. Burdin
D.C. Bar No. 434107
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Table of Contents

Table of Authories

Statutes

Rules

Safari Club International v. Salazar *et al.*

Case No. 11-cv-01564- BAH

Reply in Support of Motion for Preliminary Injunction

EXHIBIT FF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY
133 Oracle Street
Tucson, Arizona 85705

and

FRIENDS OF ANIMALS
777 Post Road
Darien, Connecticut 06820

Plaintiffs

v.

GALE NORTON, Secretary of the Interior

Defendant

and

SAFARI CLUB INTERNATIONAL
4800 West Gates Pass Road
Tucson, Arizona 85745

and

SAFARI CLUB INTERNATIONAL
FOUNDATION
4800 West Gates Pass Road
Tucson, Arizona 85745

and

EXOTIC WILDLIFE ASSOCIATION
105 Henderson Branch Road West
Ingram, Texas 78025

Proposed
Defendant-Intervenors

1:04cv01660 (HHK)

DECLARATION OF MIKE SIMPSON

I, Mike Simpson, do upon personal knowledge declare as follows:

1. I am a resident of Conroe, Texas, a life member of Safari Club International, and am currently President of Safari Club International.

2. I am an avid hunter and have hunted a variety of species throughout the world.

3. I am the owner and operator of Conroe Taxidermy, located in Conroe, Texas.

4. I also own a ranch in Iola, Texas on which I raise several species of animals, including addax. I raise, hunt, buy and sell these antelope. My involvement with these species helps to increase their value in the United States. The community of those who raise these species of antelope have made these animals a valuable commodity in the United States. As a result, these animals are able to thrive and increase in number on my ranch and on the ranches of other members of this community.

5. I raise these animals on my own ranch, to enable Safari Club International members and others to enjoy and hunt these antelope and to engage in sustainable use conservation of these species.

6. It is my intention to purchase some scimitar-horned oryx for my ranch this winter in order to start a new herd.

7. I personally have hunted addax, scimitar-horned oryx and dama gazelle and have accompanied friends and acquaintances on their hunts for these animals. It is my hope and intention that I will accompany my sons and my grandchildren on their future hunts for these antelope species. During 2006, I intend to accompany and/or guide others on their hunts for addax on my own ranch and on the ranches of others who own one or more of the three species.

8. Without the regulation, recently adopted by the U.S. Fish and Wildlife Service that is applicable to addax, scimitar-horned oryx and dama gazelle, statutory and regulatory restrictions would be imposed that would make it too costly and/or difficult to raise and/or hunt these animals. If the regulation was invalidated, I will be forced to abandon my plans to start a herd of scimitar-horned oryx and will no longer be able to raise any of the three antelope species on my ranch. Instead, I will have to shift my focus to other species that can be raised and hunted without such legal restrictions and I will lose the opportunity to hunt and conserve these animals.

9. I support sustainable use conservation and recognize hunting as a valuable conservation management tool for species such as scimitar-horned oryx, dama gazelle and addax.

10. If the Plaintiffs in this lawsuit are successful, it will interfere with my ability to raise, hunt and enjoy the antelope that are the subject of this action as well as with my efforts to support conservation of these species both in and outside the United States.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, as provided under 28 U.S.C. Section 1746.

Executed this 1st day of February 2006.

By: _____
Mike Simpson

Safari Club International v. Salazar *et al.*

Case No. 11-cv-01564- BAH

Reply in Support of Motion for Preliminary Injunction

EXHIBIT GG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY
133 Oracle Street
Tucson, Arizona 85705

and

FRIENDS OF ANIMALS
777 Post Road
Darien, Connecticut 06820

Plaintiffs

v.

GALE NORTON, Secretary of the Interior

Defendant

and

SAFARI CLUB INTERNATIONAL
4800 West Gates Pass Road
Tucson, Arizona 85745

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SAFARI CLUB INTERNATIONAL
FOUNDATION
4800 West Gates Pass Road
Tucson, Arizona 85745

and

EXOTIC WILDLIFE ASSOCIATION
105 Henderson Branch Road West
Ingram, Texas 78025

Proposed
Defendant-Intervenors

1:04cv01660 (HHK)

DECLARATION OF KEVIN ANDERSON

I, Kevin Anderson, do upon personal knowledge declare as follows:

1. I am the Chairman of the Legal Task Force of Safari Club International, a Vice President and member of the Executive Committee of Safari Club International and a member of the Board of Safari Club International.

2. I am an attorney and a partner in the law firm of Anderson, Milholland and Wagner P.C. of Harrisonville, Missouri.

3. Safari Club International is a 501(c)(4) tax-exempt social welfare organization created to promote, protect, and preserve the hunting heritage for the common good and general welfare of the public. Safari Club International Foundation is a 501(c)(3) charitable organization created to promote wildlife conservation through scientific, educational, and humanitarian programs for the common good and general welfare of the public.

4. Safari Club International promotes conservation of wildlife through sustainable use practices and supports hunting as a valuable, efficient and cost effective tool for managing wildlife populations.

5. SCI has a profound interest in the conservation of scimitar-horned oryx, dama gazelle, and addax. To further that interest, SCI submitted formal comments in response to the U.S. Fish and Wildlife Services solicitation of comments during the reopening of the public comment period concerning the potential ESA status of the three species.

6. In these comments, SCI provided the U.S. Fish and Wildlife Service with scientific support for the benefit of sustainable use in the conservation of these three antelope species. SCI documented how these species are currently growing and thriving on private ranches throughout the U.S. and explained how inappropriate listing of these animals would jeopardize the current efforts being made to raise and conserve these species. Safari Club International, in these comments, explained how unnecessary statutory and regulatory restrictions will suppress the market for these animals, causing their value to diminish and discouraging ranchers from devoting their time and resources to raising these antelope species.

7. SCI and SCIF, together with the Exotic Wildlife Association, have moved to intervene as a Defendant-Intervenor in litigation, filed in the District Court for the Northern District of California, in which several individuals and organizations have brought legal challenges, similar to those raised in this litigation, to the FWS's Rule pertaining to captive herds of scimitar-horned oryx, dama gazelle and addax. None of the parties to the suit filed in the District Court for the Northern District of California have opposed this proposed intervention and the Court in that matter has already granted SCI, SCIF and EWA leave to participate in the argument and determination of a Motion to Dismiss the Plaintiffs' Claim for lack of standing.

8. If Plaintiffs in this litigation succeed with their challenge to the FWS's Final Rule, the numbers of scimitar-horned oryx, dama gazelle and addax will dwindle and

Safari Club International members who hunt scimitar-horned oryx, dama gazelle and addax will lose hunting opportunities as well as the opportunity to assist in the conservation of these animals.

9. If Plaintiffs succeed in this challenge, Safari Club International and Safari Club International Foundation will be harmed in their work towards promoting sustainable use as a wildlife conservation and management tool.

10. Safari Club International and Safari Club International Foundation seek to participate as Defendant-Intervenors in this action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, as provided under 28 U.S.C. Section 1746.

Executed this 15th day of February 2006.

By: _____
Kevin Anderson

Safari Club International v. Salazar *et al.*

Case No. 11-cv-01564- BAH

Reply in Support of Motion for Preliminary Injunction

EXHIBIT Y

FIRST FOR HUNTERS

October 22, 2003

Re: Proposed rule: reopening of comment period for RIN 1018-A182

Chief, Division of Scientific Authority
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
Room 750
Arlington, VA 22203
Fax No: 703-358-2276
ScientificAuthority@fws.gov

On July 24, 2003, the U.S. Fish and Wildlife Service issued a Federal Register Notice reopening the comment period on a proposed rule to list as "endangered" three species of antelope including the scimitar-horned oryx, the addax and the dama gazelle. These species that are native to North Africa currently have "distinct population segments" in other parts of the world, each of which must be given separate consideration for the purpose of this proposed listing. While North Africa is the location for the native DPS of these species, the addax and dama gazelle each have additional DPS' within the United States. Scimitar-horned oryx have one DPS in the United States and another distinct population segment in South Africa.

The July 24, 2003 proposed rule suggests that the population of the North African DPS' may be waning. Whether or not this is true, the populations of the DPS' in the U.S. and South Africa are thriving. As a consequence, neither the U.S. DPS' nor the South African DPS should be listed as endangered or threatened. To inappropriately list the U.S. and South African DPS' would jeopardize the success that has been achieved in improving the population status of these antelope.

In South Africa, the scimitar-horned oryx has benefited from the income generated through conservation-hunting programs. As a result, population numbers of these animals have stabilized. To inappropriately list this population segment and thereby interfere with the ability of U.S. hunters to import these animals into the U.S., would diminish the value of these animals and negate any incentive that now exists for conserving these animals in this foreign, non-native venue.

In the United States, the three species now thrive in captive populations on ranches in Texas and in several other U.S. states. The ranching industry that supports these exotic species have had amazing successes in developing limited numbers of these animals into large and healthy herds. For example, one ranch introduced four male addax and eight female addax in 1986 and in the 17 years since, the population of addax has increased to 150. On another ranch in Texas, between 20 and 25 each of

scimitar-horned oryx and addax were introduced between 1983 and 1985. The ranch now boasts 200 scimitar-horned oryx and 120 addax.

The breeding successes achieved on these U.S. ranches are creating an opportunity for the eventual return of these antelope to their native range. At some time in the future, it is possible that scimitar-horned oryx, addax and dama gazelle from the U.S. DPS' may be used to repopulate North Africa. When habitat and management conditions are once again conducive for the return of these animals, the healthy populations that now thrive in the U.S. may be used to reseed the native range. However, this opportunity may be lost, if disincentives are created through unnecessary listing and burdensome regulations.

If commerce and trade in these three antelope species are hampered by restrictions and limitations, the ranching industry will suffer. It will not be long before the ranchers who now raise these antelope will find the cost of raising these animals too great to continue. Efforts to encourage the growth of the populations will be abandoned for more economical pursuits and the numbers of these three species will inevitably dwindle. As a consequence, a valuable opportunity to return these animals to their native range will be lost.

The populations of these three antelope species qualify as Distinct Population Segments when analyzed under the criteria of the U.S. Fish and Wildlife Service's DPS policy.
In accordance with the FWS' policy, it is appropriate to assign different classifications to different DPS's of the same vertebrate taxon and therefore, while the DPS' for these antelope for North Africa may require one listing, the DPS' of the United States and South Africa need no listing at all.

Thank you for this opportunity to present our initial comments on this proposed listing. We expect to have more information to provide to the FWS within the next few weeks. Consequently, we reiterate our request for an extension of the comment period and look forward to providing additional information as it becomes available to us.

Sincerely,

Gary F. Bogner

Gary F. Bogner, President
SCI-First for Hunters

Washington DC Office
501 2nd Street, NE, Washington, DC 20002 • Phone 202 543 8733 • Fax 202 543 1205 • www.sci-dc.org

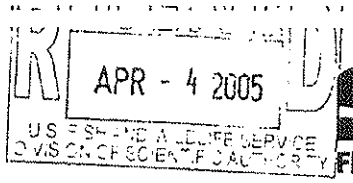
Safari Club International v. Salazar *et al.*

Case No. 11-cv-01564- BAH

Reply in Support of Motion for Preliminary Injunction

EXHIBIT Z

237.1378



SCI
FIRST FOR HUNTERS

April 4, 2005

Re: Comments on February 1, 2005
proposed Rule concerning
scimitar-horned oryx, dama gazelle,
and addax

Chief,
Division of Scientific Authority,
U.S. Fish and Wildlife Service,
4401 N. Fairfax Drive,
Room 750,
Arlington, VA 22203;
or by fax to 703-358-2276;
or by e-mail to ScientificAuthority@fws.gov

Dear Division of Scientific Authority:

Safari Club International supports the Proposed Rule concerning captive populations of scimitar-horned oryx, dama gazelle and addax. The rule recognizes that the current system in which these captive animals are raised, bred, traded and hunted has not only successfully conserved these species, but has allowed tremendous progress toward the future reintroduction of these animals into their home ranges. The Proposed Rule does not ignore the financial underpinnings of conservation. The rule implicitly recognizes that while zoos and other scientific facilities have an important role in the conservation of these animals, the fate of these animals also lies with the ranchers, breeders, traders and hunters.

Conservation of scimitar-horned oryx, dama gazelle and addax is a process that involves a working relationship between varied individuals and businesses that have interests in these species. Although zoos, AZA institutions and research facilities house and breed some of these animals and conduct important research on members of the species, the participation of these institutions is limited and cannot by themselves succeed in effectively conserving these animals. It is the ranches that raise, breed and market these animals that have had a tremendous impact on improving the health and increasing the number of these animals. On private ranches, scimitar-horned oryx, dama gazelle and addax are thriving and growing in number. These ranches are often used by AZA facilities as homes for surplus animals. Ranches, including those that allow hunting, also serve as indirect and sometimes direct sources of animals to be transferred to AZA facilities. Both AZA facilities and private ranches have served as sources for transfers of populations of these species to locations in the Middle East for future release into the wild. Many of the ranches that raise, breed, trade and allow hunting of these animals have also provided scientific research opportunities on the species for a variety of universities.

Washington DC Office
501 2nd Street, NE, Washington, DC 20002 • Phone 202 543 8733 • Fax 202 543 1205 • www.scl-dc.org

Hunters play an important role in the conservation process. Hunters provide the financial fuel for the conservation of the species. The funds paid by hunters for the take of these animals help to finance ranchers' requirements for the raising and feeding of these animals. Hunters also help the ranchers to relieve population pressures on their herds by reducing the number of animals to a level in sync with the available habitat and the ranchers' ability to provide proper care and nutrition.

The current system that allows for hunting and trading of these animals gives these species financial value. Without this value, the incentive to raise, breed and feed these species will disappear, and if this comes to pass there will be fewer and fewer ranches that will be willing to allocate the resources that will enable these species to thrive and increase in number. It is the money from hunting that allows ranches to continue to raise and breed these animals and to bring in new breeders in order to prevent interbreeding and a weakening of the species. As a result of their ability to generate revenues from the sale and from the hunting of some of these animals, these ranchers are taking huge strides toward creating large enough and healthy enough populations of these animals to soon reintroduce populations of scimitar-horned oryx, dama gazelle and addax to the wild in their home range.

Recently, members of the Exotic Wildlife Association assembled a select group of these animals and delivered them to the Middle East for eventual release into the wild. This recent effort stands as an example of the ranchers' success in breeding these species for transfer to the wild and establishes the role that the ranching industry can and will play in the reintroduction of these animals into their home ranges.

SCI does wish to draw attention to one element of the Proposed Rule that requires modification. The Proposed Rule offers a definition for the term "animal" that applies only to live individuals, live gametes, and sport-hunted trophies. The definition should be amended to include "any part, product, egg, or offspring thereof, or the dead body or parts thereof" as listed in section 3, item (8), of the Endangered Species Act. The clarification of the definition will facilitate research and the conservation of these animals.

Sincerely,

John Morrison

President, Safari Club International

SCI
FIRST FOR HUNTERS

The Honorable Beryl A. Howell
U.S. District Court for the District of Columbia
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *Safari Club International v. Salazar et al.*
Civil Action No. 11-01564(BAH)

Dear Judge Howell:

Safari Club respectfully requests oral argument on its Motion for a Preliminary Injunction, filed on March 8, 2012, Dkt. No. 26.

Thank you.

Sincerely,

Anna M. Seidman
Counsel for Plaintiff Safari Club International

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