SPECIAL SUPPLEMENT

"Hunting provides the principal incentive and revenue for conservation. Hence it is a force for conservation."

World Conservation Force Bulletin

www.conservationforce.org September 2013

Downlisting of Straight-Horned Markhor Delayed; USFWS Issues Revised Proposed Rule to Reclassify Species Under ESA

On August 7, 2013, the US Fish & Wildlife Service (USFWS) announced it intends to revise the proposed rule to reclassify the straight-horned markhor (*Capra falconeri jerdoni*) from endangered to threatened under the Endangered Species Act (ESA). This is the same date the final downlisting rule was due and should have been issued. Instead, the USFWS announced that a revised proposal is going to be re-noticed in the Federal Register for comments due to issues with the taxonomy. It is expected to be re-noticed around September 30th.

John J. Jackson III

The proposed rule includes a special rule that would allow the import of straight-horned markhor trophies from approved management programs such as the Torghar Hills project in Pakistan. Approved programs will be those that provide enhancement to the survival of the species in the wild.

The planned revisions to the proposed rule are the result of new information that the USFWS received during the public comment period indicating that *Capra falconeri jerdoni* is no longer a valid taxon and has been combined with *Capra falconeri megaceros* by some caprinae specialists. The combined taxon is still "straight-horned markhor," but includes both Sulaiman and Kabul as a single subspecies, thus the revised proposal will be to downlist both of these subspecies instead of just the Sulaiman.

In our June 2, 2011, 90-day petition finding, we requested information on the taxonomy of C.f. jerdoni *and* C.f. megaceros *to determine if these constitute a single subspecies. We did not receive any information regarding the correct nomenclature that should be followed. During our status review, we did not find consistency in the use of* C.f. jerdoni *or* C.f. megaceros. *We found that papers published around the same time as each other often used both classifications to describe subspecies of markhor. Therefore, until it is clear, we will continue to recognize the distinct subspecies of* C.f. jerdoni *and* C.f. megaceros, *as they are currently listed under the Act, with the straight-horned markhor (*C.f. jerdoni*) being the focus of our status review. We are again requesting from the public additional information on the taxonomy of* Capra falconeri *to determine the proper nomenclature that should be followed (see Information Requested for details).*

In response, some commenters stated that the two should be treated as one under the name *C.f. megaceros*, as Schaller and Khan (1975) suggested based on horn shape and body characteristics. Believe me, we are reviewing that. In this instance it would broaden the downlisting to include populations doing very poorly and that some state are distinct.

The markhor proposal is in response to a downlisting petition filed by Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, The Conklin Foundation, Grand Slam/OVIS, Wild Sheep Foundation and individuals Jerry Brenner, Steve Hornady and Alan and Barbara Lee Sackman on August 17, 2010 after learning in litigation (Markhor I – the first markhor suit) that the USFWS had not taken any action to process a downlisting petition filed more than a decade earlier. In court, the USFWS claimed that so much time had elapsed that the first downlisting petition was no longer enforceable as a matter of law. We appealed the Federal District Court judge determination that the original petition of 1999 was no longer enforceable, which appeal has been argued and is still awaiting a decision by a three-judge appellate panel. We then filed a wholly new downlisting petition, which is the basis of the current proposal. The new petition also had to be enforced through suit (Markhor III – the third markhor suit). That suit ended successfully in settlement and, in due course, lead to the proposal where the USFWS itself is proposing the reclassification from endangered to threatened.

The USFWS and Pakistani authorities have been using the scientific name *Capra falconeri jerdoni* for the straight-horned Sulaiman markhor subspecices, while some have used *Capra falconeri megaceros* to describe the Kabul and Sulaiman as one subspecies. The USFWS listed the Sulaiman markhor (*C.f. jerdoni*) as "endangered" in 1975 (40 FR 44329, September 26, 1975). It also separately listed the Kabul (spelled "Kabal" in the listing) markhor subspecies (*C.f. megaceros*) as endangered. The USFWS has treated them separately since that time. In our petition to downlist, we described the "population of Sulaiman, straight-horned markhor in Pakistan

whether *Capra falconeri jerdoni* or *C.f. megaceros*" and cited 64 FR 51499 (the 1999 petition to downlist 90-day finding when USFWS itself described that markhor as either or both) to avoid the confusion that has arisen. When the USFWS made its positive 90-day finding on Conservation Force's petition, it stated the subspecies to be "*Capra falconeri jerdoni* or *C.f. megaceros*" as we did in the petition to downlist. The USFWS named the subspecies as *Capra falconeri jerdoni* in the proposal to reclassify the subspecies on August 7, 2012 at page 47012.

Now the USFWS will revisit the nomenclature after re-noticing the proposal with its explanation of the issue and suggested way forward. In the meantime, Grand Slam/OVIS is coming to the rescue. Dennis Campbell is producing photographs of both Kabul and Sulaiman markhor. This will demonstrate that the two are distinct and qualify as two separate subspecies. The poor status of the Kabul should not prevent the downlisting of the Sulaiman as proposed (*C.f. jerdoni*), though in fact no population of the Kabul subspecies is significant. Conservation Force will keep readers advised. ■

Sulaiman Markhor Permit Cases Dismissed; Conservation Force Appeals

While the downlisting of the Sulaiman markhor in the Torghar Hills conservation program had been progressing well until the above taxonomy dispute, the denial of the related ESA enhancement import permits has been in litigation before the Federal District Court in the District of Columbia. Those pioneering import permit applications are one more prong of Conservation Force's straight-horned markhor recovery strategy. That case has been pending for nearly three years. We filed a notice of intent to sue on November 3, 2009 and filed suit on July 23, 2010. After two years, on July 14, 2012, the government raised the defense that we had not exhausted the administrative remedies before filing suit, thus the suit should be dismissed. We had elected not to appeal the permit denials to the director of US Fish & Wildlife (USFWS) because of the added delay and because, quite frankly, we were told by the USFWS not to waste our time. Nevertheless, the court granted the motion to dismiss even though the defense was not raised until two years into the litigation and it had not been the USFWS's practice to treat appeals to the director as mandatory at the time the suit was noticed and filed. After we won the related Wood Bison permit case before another Federal District Court in the District of Columbia, the Department of Justice, which represents the USFWS and Department of Interior, started pulling rabbits like this defense out of their hat.

Conservation Force has lodged an appeal of the District Court dismissal. The briefing, oral argument and appeals court decision should take about a year. If we don't prevail in that court, the permit applications will be re-filed to begin the application process from the start. Since the initial applications were filed in 1999, we have gathered several other hunters who have taken Sulaiman, straight-horned markhor in the Torghar Hills program. We may proceed with those permits independently of those on appeal.

The permit applications were denied for suspect reasons just like those in Conservation Force's Wood Bison case, but the trial court never reached the merits in the Markhor II case. Like in the Wood Bison case, the Division of Scientific Authority (DSA) made a determination that the markhor hunting was not detrimental, but the Division of Management Authority (DMA) had to be sued to compel it to process the permit applications, at which time it denied the markhor permits for spurious reasons.

Of course, if and when the straight-horned markhor is downlisted (see above), no ESA import permit will be necessary, only a CITES import permit that rests upon the DSA making a non-detriment finding as it has already done in the past. ■

SPECIAL SUPPLEMENT

World Conservation Force Bulletin

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New Trophy Seizure Issues Arise

In recent months two new kinds of wildlife parts have been seized for forfeiture. The first is hybrid impala from the Republic of South Africa (RSA) and the other is elephant bracelets (hair and foot sole). Seizure of impala from RSA periodically comes to our attention. The impala are seized and forfeited as suspected endangered listed black-faced impala because of black markings on the face and back of the legs and tail of the trophies. They are not black-faced impala. Rather, they are hybrids, and we understand that the ranchers and RDSA authorities represent them to be hybrid common impala.

Hybrids are not protected under the ESA, unlike CITES, but Law Enforcement seizes the trophies, and the burden is on the hunter to prove they are hybrids. We have yet to handle one of these cases because our petition for remission charge is a flat $2,500 fee, and no one to date has wanted to bear that cost for their trophy or the greater cause for the good of all. For many years Conservation Force handled all such matters free as a public service, but it was not free to us and the loss of opportunity costs was far greater than that.

Today many seizures have to be treated as private violations of law and regulation and handled outside of the parameters of Conservation Force on a private legal fee basis. This has not been an easy transition, but if the individual trophy owner does not care enough to pay a relatively small flat fee, we need to stop providing self-sacrificing free professional services.

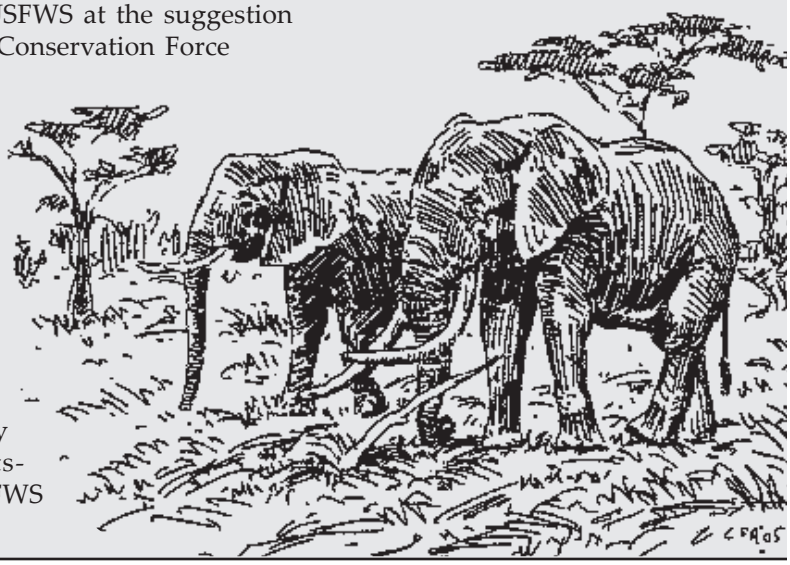
We stand ready to fight whenever someone cares enough to pay the flat fee. Some may take the pretty hybrids, believing that they are getting ahead at a certain risk, when in reality hybrids are not protected under the ESA, thus not subject to forfeiture except by default.

The second item is a first-time occurrence, as far as we can determine. Elephant hair bracelets and bracelets made from the soles of elephant feet have been seized and noticed for forfeiture. The bracelets were in the trophy shipment and apparently treated by Law Enforcement as crafted curios although clearly part of the elephant in the same shipment.

When the term "trophy" was redefined by USFWS at the suggestion of the antis, Conservation Force opposed the inclusion of traditional trophies, specifically citing bear rugs and elephant bracelets made in the hunting camp by skilled craftsmen. The USFWS excluded bear rugs but did not respond to the comments about elephant bracelets. Nevertheless, USFWS has not been seizing the bracelets until this recent incident.

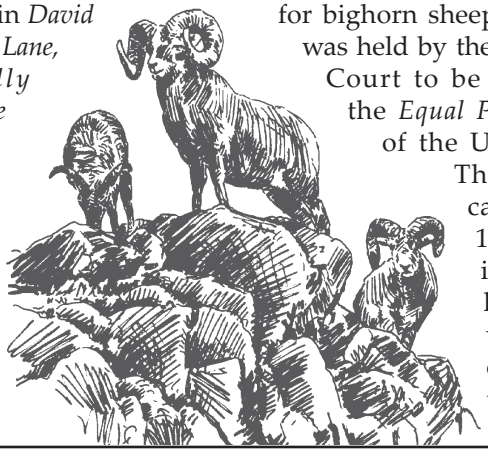
The USFWS has also proposed a return to the more traditional understanding of the term "trophy" after the CITES Parties at CoP15 passed a Resolution expressly to clarify that "trophy" includes "manufactured" parts of the animal taken on a sport hunt for personal use. The regulatory change has been pending for some time with no certainty of adoption.

Such bracelets are traditional trophies and are among the most precious personal property an elephant hunter can own for his personal use. We have filed a petition for remission and will advise on the outcome. ■



New Mexico Nonresident Terk Case Revving Up

The momentum in *David B. Terk v. James S. Lane, Jr. individually and as Director of the Department of Game and Fish, State of New Mexico, et al.* has surged forward. The Terk case in New Mexico is where discrimination against nonresidents in license allocations for bighorn sheep, oryx and ibex was held by the Federal District Court to be in violation of the *Equal Protection Clause* of the US Constitution. The original Terk case was filed in 1974 and decided in 1977. It was largely based upon the sworn deposition of the director of wildlife at the time that the preference of residents over nonresidents was for the sole and knowing purpose of discrimination. The 1977 court decision was challenged before and yours truly was engaged by David Terk, a respected international hunter and contributor to Conservation Force, to oppose the motion by the state to overturn the judgment providing equal license allocation for nonresidents. We won that round, but now New Mexico has, more than a decade later, filed a second motion



to overturn the judgment. Yours truly was served with notice as on-the-record counsel for David Terk, who died more than a decade ago.

While we have been undecided what to do, numerous organizations and states have filed to be intervenors or file amicus briefs in support of the motion to overturn the Terk equal rights decision. Those include the state of Oregon Wildlife Commission; State of Colorado Department of Natural Resources, Division of Wildlife; Idaho Department of Fish and Game; State of Utah; State of Wyoming; International Association of Game, Fish and Conservation Commissions; United Sportsmen for Fish and Wildlife, Inc.; New Mexico Chapter of Wild Sheep Foundation and the Southern New Mexico Chapter of SCI. More are expected. No one is defending the civil rights of nonresidents.

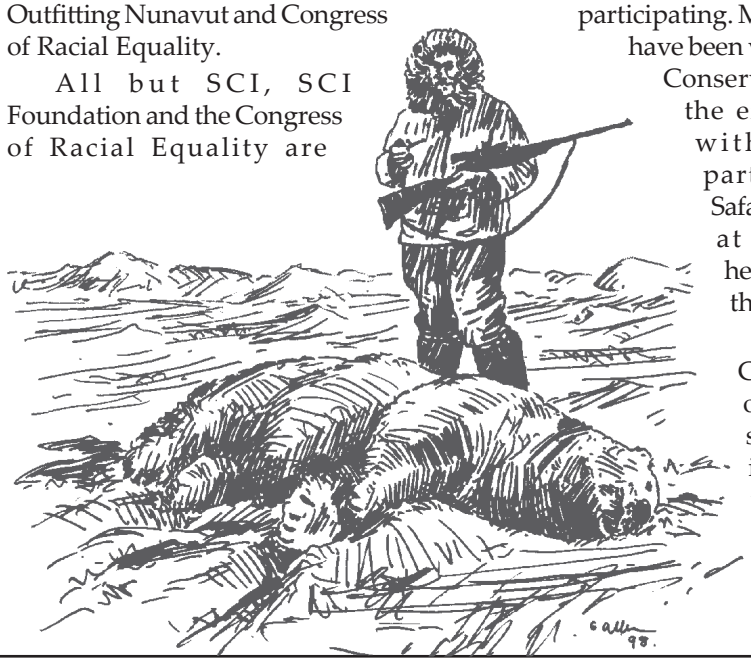
The motion claims that new case law precedent in Wyoming, *Schultz v. Thorne,* 415 F.3d 1128 (2005), that included an equal protection claim, is now the law. The New Mexico motion neglects to mention the deposition of the New Mexico director that was taken under oath or the different factual bases for the discrimination in Wyoming. Moreover, Wyoming has a notorious history of discrimination.

In light of the looming one-sided fight and in honor of the memory of David B. Terk, we have tentatively decided to defend the decision and stand against the onslaught. On the deadline of August 12th, we filed a motion to substitute the co-executrixes of the David B. Terk estate, his two daughters Kimberly and Kristin, as plaintiffs in the reopened case. We are preparing to defend the Terk decision. This will be handled separate and apart from all other Conservation Force matters. Let there be no confusion, we are only defending this one case, not reopening the nonresidents rights initiative. We are only defending the Terk decision if we can get funding support. Kimberly Terk Murphy has pledged a fair sum, but we need $10,000 to $15,000 more to cover costs. Conservation Force is accepting earmarked donations for the "Terk Equal Protection Case" and only in defense of that Terk case – not other nonresident discrimination matters. We have about one month to raise the sum needed. Tax deductible donations can be sent to Conservation Force at PO Box 278, Metairie, LA 70004-0278. ■

Polar Bear Listing Now Before US Supreme Court

Most of the joint plaintiffs challenging the listing of the polar bear filed for writs with the Supreme Court on February 29, 2013. Yours truly is the designated "Counsel of Record," as Conservation Force spearheaded the preparation of the brief. The petitioners joining in the plea to the Supreme Court to hear the case are Conservation Force, Safari Club International, Safari Club International Foundation, African Safari Club of Florida, Ameri-Cana Expeditions, Arviat Hunters and Trappers Organization, Mark Beeler, Canada North Outfitting, Dallas Safari Club, Timothy Decker, Chris Hanks, Henik Lake Adventures, Don Hershey, Steve Hornady, Houston Safari Club, Inuvialuit Game Council, William Keene, Ron Kreider, Allyn Ladd, Ethel Leedy, Everett Madson, Nanuk Outfitting, Aaron Neilson, Louie Nigiyok (Arctic Hills Tours Company), Major Roger Oerter, Bradley Pritz, Kevin Reid, Robert Remillard, Resolute Bay Hunters and Trappers Organization, Jeff Sevor, Steve Smith, Ted Stallings, Larry Steiner, Darwin J. Vander Esch, Joseph Verni (Natura Sport), Tim Walters, Webb Outfitting Nunavut and Congress of Racial Equality.

All but SCI, SCI Foundation and the Congress of Racial Equality are represented by Conservation Force. The State of Alaska and the California Cattlemen's Association, who have been plaintiffs through the District Court and US District Court of Appeals, are not participating. Many of the parties have been very supportive of Conservation Force and the effort to contend with the listing, particularly Dallas Safari Club, appearing at Congressional hearings and behind the scenes.



The Supreme Court accepts few of the many thousands of petitions it receives each year, but the joint plaintiffs have made a monumental effort. ■

Conservation Force Sponsor

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