UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF ANIMALS 777 Post Road Darien, CT 06820; Plaintiff, v. SALLY JEWELL, in her official capacity as Secretary of Interior, Department of the Interior 1849 C Street, N.W. Washington D.C., 20240 and U.S. FISH AND WILDLIFE SERVICE, an Agency of the United States, Defendants.	)	Civ. No. 14-0357

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. Through this action, Friends of Animals ("FoA") seeks a declaratory judgment that Section 127 of the Consolidated Appropriations Act, 2014 (the "Special Interest Rider" or "Rider") is unconstitutional and injunctive relief prohibiting the Secretary of the Interior and the U.S. Fish and Wildlife Service (collectively, "Federal Defendants") from implementing the Rider's purported mandate that the U.S. Fish and Wildlife Service ("FWS") reinstate an illegal permitting program under Section 10 of the Endangered Species Act ("ESA" or "Act") to allow the killing of endangered African antelope on U.S. sport-hunting ranches.

2. The Special Interest Rider is aimed at undermining a series of cases in this Court dating back to 2006. The first of these cases, *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009), was resolved in 2009 by former Judge Henry H. Kennedy. In that case, the court interpreted the legal requirements under Section 10 of the ESA for the permitting of private, for-profit hunting ranches that bred and raise endangered scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus)*, and dama gazelle *(Gazella dama*) (collectively, the "three African antelope") in captivity for the purpose of trophy hunting.

3. Judge Kennedy's interpretation of Section 10 in *Friends of Animals v. Norton* is at the center of two other ongoing civil cases concerning the legal status of the captive populations of these three species. In *Safari Club International v. Salazar*, 11-cv-01564 (2011), which is now on appeal to the D.C. Circuit Court of Appeals, the sport-hunting industry seeks to undermine Judge Kennedy's interpretation of the ESA by challenging FWS's 2005 decision to include both the U.S.-based and African populations of the three African antelope on the endangered species list. In *Friends of Animals v. Ashe*, 1:13-cv-01580 (2013), which is currently pending in this Court, FoA alleges that FWS has continued the permitting practice found to be illegal under Section 10 by Judge Kennedy.

4. Reversal of Judge Kennedy's legal interpretation would effectively dictate the outcome of both cases. Indeed, the sport-hunting industry has already moved to stay both cases as a result of the Rider.

5. The Special Interest Rider violates the Separation of Powers Doctrine contained in the U.S. Constitution. In passing the Special Interest Rider, Congress did not amend the ESA, devise any new legal principal to guide the permitting process under Section 10 of the Act, or in anyway alter even a single substantive or procedural requirement applicable to the issuance of Section 10 permits. Simply put, the Special Interest Rider is a legislative effort to do one thing: reverse the decision in one resolved federal civil action, and, therefore, direct the outcome in two other ongoing civil actions.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), and may grant the relief requested under 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e), as Federal Defendants officially reside in Washington, D.C.

PARTIES

8. Plaintiff, FRIENDS OF ANIMALS ("FoA"), sues on behalf of itself and its adversely affected members. FoA is a nonprofit, international animal advocacy organization incorporated in the state of New York since 1957. FoA seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living and domestic animals. FoA engages in a variety of advocacy programs in support of these goals. FoA informs its members about animal advocacy issues as well as the organization's progress in addressing these issues through its magazine called Act'ionLine, its website, and other reports. FoA has published articles and information advocating for the protection of endangered species so that they can live unfettered in their natural habitats. FoA in particular has a long-standing commitment to protecting animals imperiled due to poaching, sport-hunting, and other animal-exploitation markets. FoA' members have a long-standing personal, informational, philosophical, and scientific interest in the three African antelope species.

9. FoA' members and staff actively seek protection for the three antelope under the ESA. To save these species from extinction, FoA funds and participates in recovery efforts for the antelope in their native habitat. FoA facilitated the reintroduction of the antelope within Ferlo National Park in northwest Senegal. Through member support, FoA funds habitat restoration efforts at Ferlo National Park. For example, in fiscal year 2013, FoA spent $66,000 on expanding the Oryx Fence Project which includes dama gazelles. 120 oryx

and 20 dama gazelles benefitted along with other animals from these funds.

10. FoA invests considerable resources in its efforts to end trophy- hunting of endangered species. FoA publicizes the plight of the three antelope species, the negative impacts of captive breeding and canned hunting, and the organization's progress in recovery efforts to its members and the public through its quarterly journal ActionLine and its website. FoA actively opposes canned hunting of the three antelope species as well as other endangered species. FoA monitors the Federal Register and other sources for the Secretary's actions, through FWS, involving the three antelope species and actions affecting endangered species generally.

11. FoA is a party in each of the three civil cases for which Congress, through the Special Interest Rider, seeks to dictate the outcomes.

12. Defendant SALLY JEWELL, in her official capacity as the Secretary of the Department of the Interior ("Secretary"), has the ultimate responsibility for ensuring that agencies within the Department of Interior, including FWS, comply with the requirements of the ESA.

13. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is a federal agency within the U.S. Department of the Interior. FWS is responsible for administering the ESA with respect to terrestrial wildlife such as the three African antelope species.

14. Defendants Jewell and FWS are responsible for implementing the unconstitutional Rider challenged in this suit.

THE SPERTATION OF POWERS DOCTRINE

15. The Separation of Powers Doctrine, setting apart the executive, legislative, and judicial functions of government, is one of the basic constitutional "checks and balances" contained in the Constitution. As Chief Justice Marshall wrote nearly two hundred years ago, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 23 U.S. 1

(1825); *see also Marbury v. Madison*, 5 U.S. 137 (1803) (establishing authority of judicial branch, including authority to order executive to comply with law and to overrule acts of Congress).

16. Defending the Constitution in the Federalist Papers, James Madison described the Separation of Powers Doctrine as "essential to a free government." The Federalist No. 48 at 308, James Madison, New American Library ed., 1861.

17. In keeping with the framers' intent, the Supreme Court has stated: The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because "[b]ehind the words of the constitutional provisions are postulates which limit and control." *National Mut. Ins. Co. of the Dist. of Col. v. Tidewater Transfer Co*., 337 U.S. 582, 590-91 (1949), *quoting Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

18. In interpreting the Constitution's Separation of Powers Doctrine, the Supreme Court has held that Congress has authority to make prospective changes in the law, and that even if it does so in a manner intended to impact the outcome of pending litigation its exercise of its prospective law-making authority is not unconstitutional. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

19. On the other hand, if Congress passes a law directing the judiciary to reach a particular outcome in a pending case under existing law—yet does not amend the existing law—Congress exceeds its Constitutional authority and treads on the judiciary's authority to construe existing law. *U.S. v. Klein*, 80 U.S. 128 (1871).

20. Accordingly, the question of whether a law which influences the outcome of a pending case is unconstitutional in violation of the Separation of Powers Doctrine depends on whether Congress amends existing law, and thus behaves constitutionally under *Robertson*, or whether Congress directs the judiciary as to its construction of law and decision-making in a pending case, and thus behaves unconstitutionally under *Klein*.

THE ENDANGERED SPECIES ACT

A. General Legal Background of the ESA.

21. The purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which the species depend. 16 U.S.C. § 1531(b). The Supreme Court recognized that by enacting the ESA, Congress "intended endangered species to be afforded the highest priorities." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 174 (1978).

22. In enacting the ESA, Congress expressly provided authority for listing non-native species that are deemed endangered in their home ranges in other countries.

23. Congress' decision to include authority for listing of non-native species was based upon a desire to make the United States a leader in protecting species and ecosystems both domestically and worldwide.

24. Congress found that steps to close U.S. market to trade in endangered and threatened species may not be sufficient, in and of themselves, to remove the pressure and thus to allow these species to recover. Thus, Congress decided to extend protection to all endangered species, including those in captivity in the United States.

25. The fundamental method by which the ESA protects endangered species is its aggressive prohibition on taking any endangered species within the United States. 16 U.S.C. § 1538.

26. Defined broadly, the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

27. The prohibition on taking endangered animals applies equally to wild animals and those held in captivity for commercial activity.

28. Congress recognized the need to protect captive breed populations, because "[t]he threat to animals may arise from a variety of source . . . pressures of trade."

B. Section 10 Permitting Requirements.

29. Congress provided for a narrow exception to the ESA's prohibition on taking endangered species.

30. Section 10(a)(1)(A) of the ESA allows FWS to issue permits authorizing the taking of an endangered species "for scientific purposes or to enhance the propagation or survival of the affected species . . ." (hereinafter, "Survival and Enhancement Permits").

31. FWS is generally required to publish in the Federal Register notice of each application for a Survival and Enhancement Permit and invite the submission of comments on the application from interested parties.

32. FWS may only grant a permit under Section 10 of the ESA if the agency makes a finding that: (1) the permit was applied for in good faith; (2) if granted and exercised the permit will not operate to the disadvantage of such endangered species; and (3) that issuance of the permit will be consistent with the purposes and policy set forth in Section 2 of the ESA.

33. Among other things, Section 2 states that it is the purpose of the ESA to provide a program for the conservation of endangered species.

34. Among other things, Section 2 states that it is the policy of Congress that all federal agencies seek to conserve endangered species.

35. In the ESA, the terms conserve, conserving and conservation are defined to mean "to use and the use of all methods and procedures which are necessary to bring endangered species and threatened species to the point at which measures provided [in the ESA] are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking."

36. In deciding to issue a Survival and Enhancement Permit, FWS must publish its findings in the Federal Register.

PAST AND PRESENT ESA STATUS OF THE THREE AFRICAN ANTELOPE SPECIES

37. The road to protection of these beautiful and rare species of North African antelope has been a long one.

38. FWS recognized the imperiled status of the three African antelope species as far back as November 5, 1991, when it published in the Federal Register a proposed rule to list the three species as "endangered" under the ESA.

39. FWS did not finalize the November 5, 1991 proposed rule until 2005, following at least one lawsuit for not meeting the statutory timeline for doing so.

40. On September 2, 2005, FWS published the Final Listing Rule, listing the three African antelope species as endangered throughout their ranges.

41. FWS found the three African antelope species to be endangered due to habitat loss through desertification, permanent human settlement, competition with domestic livestock, and by regional military activity and uncontrolled killing.

42. Concurrently with the final listing rule, on September 2, 2005, FWS also issued a regulation that exempted U.S. captive populations of the three antelope species from the ESA's prohibition on taking, exporting, reimporting, or selling endangered species, and thereby permitting continued hunting of these endangered species for sport (the "Sport-Hunting Rule").

43. Under the Sport-Hunting Rule, any person could:

> Take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce live wildlife . . . and sport-hunted trophies of scimitar-horned oryx (Oryx dammah), addax (Addax nasomaculatus), and dama gazelle (Gazella dama).

44. To qualify under the rule, the activity must have been associated with "the management or transfer of live wildlife . . . or sport hunting in a manner that contributes to increasing or sustaining captive numbers or to potential reintroduction to range countries." The rule required that, a person claiming the benefit of the exception must maintain accurate written records of activities, including births, deaths, and transfers of specimens, and make those records accessible to FWS officials for inspection.

45. Therefore, a hunting facility only needed to demonstrate that it was "sustaining" numbers of any of the three African antelope species to allow sport hunting and commerce in trophies. The rule did not require any current or future plans to assist in conservation or reintroduction efforts or engage in scientific study.

46. In 2006, FoA and other groups filed suit against FWS for promulgating the Sport-Hunting Rule.

47. On June 22, 2009, the Sport-Hunting Rule was found by Judge Kennedy to violate Section 10(c) of the ESA and was remanded to FWS. Judge Kennedy found:

> By assertedly complying with subsection 10(c) through publishing a proposed rule, accepting comment on that proposed rule, and providing information received in that process as opposed to through responding to an individual application, FWS abstracts the question of whether the exception will enhance the propagation or survival of the species from the specific to the general. In this way, FWS avoids providing the information that would necessarily accompany an [individual] application, such as "a complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained," and "[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit." This hinders the ability of individuals and groups to participate in the meaningful way contemplated by the ESA because, without this information, it is impossible to evaluate whether each permitted act will enhance the propagation or survival of the species.

Friends of Animals v. Salazar, 626 F. Supp. 2d 102, 118 (D.D.C. 2009).

48. As a result of the court's decision, on July 7, 2011, FWS rescinded the Sport-Hunting Rule.

49. Shortly after rescinding the Sport-Hunting Rule, two pro-hunting organizations filed suit against FWS trying to prevent regulation of the three African antelope on U.S. ranches.

50. The Safari Club International ("SCI"), a group that promotes unrestricted hunting of animals for sport, filed a lawsuit to remove all captive members of these three African antelope species from the list of endangered animals. In its Complaint, SCI specifically states:

> This suit challenges the Federal Defendants' violations of the Endangered Species Act and the Administrative Procedures [sic] Act in their: (1) decision to include U.S. captive populations of the scimitar-horned oryx, dama gazelle and addex in the endangered species listing of the three antelope species on September 2, 2005; and (2) failure to correct that endangered species listing by removing the U.S. captive herds of the three species from endangered species status **after the 2009 ruling by Judge Kennedy of the U.S. District Court for the District of Columbia, which found illegal federal regulations exempting those captive populations from ESA protections.**

(Emphasis added).

51. The Exotic Wildlife Association ("EWA"), a group that promotes the interests of canned-hunting ranches in Texas and other states, filed a lawsuit to prevent FWS from removing the 2005 Sport-Hunting Exemption.

52. These two cases were consolidated in the United States District Court for the District of Columbia.

53. FoA intervened in the consolidated cases to defend FWS' decisions to list the three antelope species as endangered under the ESA and its decision to remove the 2005 Sport-Hunting Exemption.

54. On August 9, 2013, this Court upheld FWS's decisions that treat captive and wild populations of the three antelope the same under the ESA.

55. The decision for the District Court has been appealed by SCI to the D.C. Circuit Court of Appeals.

56. On October 13, 2013, FoA brought suit against FWS in this court challenging FWS continued failure to comply with Section 10 when it comes to regulating captive members of the three African antelope. In that suit, FoA argues that FWS has failed to comply with Judge Kennedy's interpretation of the ESA, and as a result, continues to deny the public a meaningful opportunity to participate in the permitting process.

THE SPECIAL INTEREST RIDER

57. Section 127 of the Consolidated Appropriations Act of 2014 is titled "Antelope Rule" and reads: "Before the end of the 60-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the final rule published on September 2, 2005 (70 Fed. Reg. 52310 et seq.) without regard to any other provision of statute or regulation that applies to issuance of such rule."

58. Section 127 does not alter any statutory provision in the ESA.

59. Section 127 does not alter the permitting process under Section 10 of the ESA.

60. Section 127 does not contain any substantive criteria for FWS to apply in issuing a Section 10 permit for the take of the three Antelope species.

61. Section 127 does not alter the endangered status of the three Antelope species.

62. Section 127 purports to require FWS to publish the exact findings contained in the illegal permit issued on September 2, 2005.

63. Section 127 applies only to the three Antelope species.

64. Other species on the endangered or threated species list that are also hunted on U.S. hunting ranches continue to require an individual Section 10 permit from FWS before they can be taken.

65. A single hunting ranch might hold in captivity one or more of the three Antelope species as well as one or more other species for which a Section 10 permit is required.

66. In passing the Consolidated Appropriations Act of 2014, neither house of Congress specifically addressed Section 127 during floor debate.

67. The only mention of Section 127 in the Congressional record is found at 160 Cong. Rec. H475-01, a document entitled "EXPLANATORY STATEMENT SUBMITTED BY MR. ROGERS OF KENTUCKY, CHAIRMAN OF THE HOUSE COMMITTEE ON APPROPRIATIONS REGARDING THE HOUSE AMENDMENT TO THE SENATE AMENDMENT ON H.R. 3547, CONSOLIDATED APPROPRIATIONS ACT, 2014."

68. Regarding Section 127, Mr. Rogers' explanatory statement provides only "Section 127 directs the Secretary of the Interior to reissue a rule pertaining to wildlife." *Id.* at H967.

69. Outside of Mr. Rogers' explanatory statement, there is no legislative history regarding Section 127's purpose and intent.

70. Two members of Congress—Representative John Carter and Representative Steve Stockman—have been working with SCI, EWA and others for more than a year to overturn Judge Kennedy's interpretation of Section 10 in *Friends of Animals v. Norton*, and to stop the ongoing litigation over the three Antelope species.

71. In assisting the sport-hunting ranches, Representatives Carter and Stockman have chosen one side over the other in these federal civil court cases. Section 127, which was drafted by Representative Carter, places for-profit, private interests in endangered species above the public interest that was intended to be protected under Section 10's permitting requirements.

72. As Representative Carter states in a January 2012 press release:

> [I am] introducing legislation to restore the original USFWS ruling that allows hunting preserves to stock, breed, hunt, and preserve the species, under which the antelope were saved from extinction over past decades. Lawsuits by extremist animals rights groups led to the agency's revocation of those rules. As a result, game ranchers will be economically forced to cull their herds of African antelope by April [2012] unless the rules are changed.

73. What Representative Carter fails to say is that in two separate rulings, the Federal Defendants have found that these captive African antelope are endangered, and most recently, that absent legal protection of both captive and wild populations, the continued

existence of all three species is at risk. *See* 78 Fed. Reg. 33793, 33795 (June 5, 2013).

74. After Section 127 was passed by both houses of Congress, EWA posted the following on its Facebook page:

> After 4 long years of disappointing court battles, setbacks in Congress, the President of the United States is expected to sign into law a provision that will place the 'Three Species" (Scimitar Horned Oryx, Dama Gazelle, and Addax Antelope) back under the September 2, 2005 provision, within the Endangered Species Act, that exempted these U.S. born animals from the onerous confines of the very act that was suppose to protect them from extinction but in actuality has had a detrimental effect.

75. In a subsequent Facebook post, EWA explains:

> The three species were granted a Congressional mandate with this victory that places them back under the September 02, 2005 exemption which allows owners to buy, sell, trade and manage them through hunting. The price more than doubled this past weekend with the announcement of the news. This has really insured their future. Thanks again to those that supported the EWA and it's [sic] relentless fight for U.S. ranchers and their private property rights.

76. In addition to undermining Judge Kennedy's 2009 interpretation of Section 10 of the ESA to promote private interests, Section 127 will direct the outcome in *Safari Club International v. Salazar*, 11-cv-01564 (2011) and *Friends of Animals v. Ashe*, 1:13-cv-01580 (2013). Indeed, in both cases, SCI moved for and obtained stays of those judicial proceedings on the grounds that FWS's compliance with Section 127 will moot both actions.

CLAIM FOR RELIEF

77. FoA incorporates by reference all proceeding paragraphs of this Complaint into this claim for relief.

78. Section 127 of the Consolidated Appropriations Act, 2014 does not amend the Endangered Species Act, does not contain any substantive requirements applicable to

Section 10 permits, and does not provide for any perspective change in any law of general applicability.

79. Rather Section 127 merely directs the Federal Defendants to reissue a permit to allow for the take of three endangered antelope species for private gain in order to reverse a court decision interpreting such a permit to be plainly contrary to the language of the ESA, and to ensure that two other cases regarding the legal status of these animals are rendered moot.

80. In so doing, Congress impermissibly trespassed on the judiciary's power to construe existing law and thereby violated the Separation of Powers Doctrine contained in the United States Constitution.

PRAYER FOR RELIEF

FoA respectfully request that this Court enter judgment providing the following relief:

A. Declare Section 127 of Consolidated Appropriations Act, 2014 unconstitutional in violation of the Separation of Powers Doctrine contained in the Constitution;

B. Enjoin the Federal Defendants' reissuance of the permit that was issued by FWS on September 2, 2005 (70 Fed. Reg. 52310 et seq.) under Section 10 of the Endangered Species Act ("ESA" or "Act") to allow the killing of endangered African antelope on U.S. sport-hunting ranches;

C. Award Plaintiffs their reasonable attorneys' fees, costs, and expenses associated with this litigation consistent with the Equal Access to Justice Act, 28 U.S.C. § 2412, or other applicable authority; and/or

D. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Dated: March 5, 2014

Respectfully Submitted,

/s/ Michael Harris
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