


4-6-2015

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### Recommended Citation

Andrew Bartholomew, *Budgetary Scapegoat: The U.S. Fish and Wildlife Service's Inefficiency on Trial in Conservation Force v. Jewell*, 42 B.C. Env'tl. Aff. L. Rev. E. Supp. 14 (2015),  
<http://lawdigitalcommons.bc.edu/ealr/vol42/iss3/3>

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# BUDGETARY SCAPEGOAT: THE U.S. FISH AND WILDLIFE SERVICE'S INEFFICIENCY ON TRIAL IN *CONSERVATION FORCE v. JEWELL*

ANDREW BARTHOLOMEW\*

**Abstract:** By the early 1980s, the population of the straight-horned markhor—a large, shaggy goat with impressive spiraling horns native to the mountains of Pakistan—had dipped so low that the U.S. Fish & Wildlife Service (“FWS”) classified it as endangered. But when a group of conservationists and hunters petitioned the FWS to have the animal reclassified from an endangered species to the lower protection level of threatened pursuant to the Endangered Species Act species protection regime, they were largely ignored. The group then sued the FWS in federal court to compel the Agency to perform its statutory duty. In *Conservation Force, Inc. v. Jewell*, the U.S. Court of Appeals for the D.C. Circuit ultimately denied the group judicial relief because, while the case was pending appeal, the FWS finally performed its duty. This Comment argues that although the FWS’ well-documented funding problems may have contributed to this delay, the agency could have addressed the merits of the plaintiffs’ petitions when they were made, rather than fighting through years of expensive litigation.

## INTRODUCTION

With spiraling, gnarled horns sprouting five feet from its head, a black beard hanging from its neck, and a shaggy mane draping its back, the straight-horned markhor dwells among scrub forests exclusively in mountainous regions.<sup>1</sup> Its precipitous domain serves to protect this large goat from predators such as snow leopards and lynxes, as it utilizes its expert climbing abilities to perch aloft dangerous cliffs.<sup>2</sup> The arrival of humans that came to claim the markhor as a trophy and competition with domestic livestock, however, eventually threatened the wild beast’s very existence.<sup>3</sup>

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<sup>1</sup> *Markhor*, WORLD WILDLIFE FUND, <http://www.wwfpak.org/species/Markhor.php> (last visited Mar. 15, 2015), *archived at* <http://perma.cc/A2Z5-CGW3>; *Markhor* (Capra Falconeri), WILDScreen ARKIVE, <http://www.arkive.org/markhor/capra-falconeri> (last visited Mar. 15, 2015), *archived at* <http://perma.cc/YG8M-YSQX>.

<sup>2</sup> *Markhor*, *supra* note 1; *Markhor* (Capra falconeri), *supra* note 1.

<sup>3</sup> See *Conservation Force v. Salazar* (*Conservation Force II*), 811 F. Supp. 2d 18, 23 (D.D.C. 2011), *vacated, sub nom.* *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013).

This imposing creature can be found in the mountains of Pakistan, a country that claims the markhor's striking image as its national animal.<sup>4</sup> Hunters value the ironically named straight-horned markhor for its most impressive feature: the huge twisting horns it uses for combat during mating season.<sup>5</sup> The added challenge of tracking the galloping trophy through its precarious habitat led to hunting by safari clubs and the like, causing a drastic fall in the overall population of the markhor.<sup>6</sup> Numbers dwindled so low that in 1976, the U.S. Fish and Wildlife Service ("FWS") classified the markhor as endangered.<sup>7</sup>

In response to the impending threat against the markhor, local tribal leaders in Pakistan coordinated with American conservationists to create a more sustainable model for the animal's protection.<sup>8</sup> This system proved very effective—markhor numbers began to rebound, increasing tenfold over the last three decades.<sup>9</sup> In 1999, a local Pakistani conservationist filed a petition with the FWS requesting that the straight-horned markhor be reclassified from endangered to threatened.<sup>10</sup> Eleven years later, in 2010, the FWS finally issued an Endangered Species Act ("ESA") required twelve-month finding.<sup>11</sup>

Despite issuing an initial favorable ninety-day finding to this request on September 23, 1999,<sup>12</sup> the FWS took no further action to reclassify the markhor from endangered to threatened until a new petition was filed in 2010.<sup>13</sup>

<sup>4</sup> *Id.* at 22; *Markhor* (*Capra falconeri*), *supra* note 1; *National Symbols of Pakistan*, GOV'T OF PAK., MINISTRY OF INFO., BROAD. & NAT'L HERITAGE, [http://nationalheritage.gov.pk/national\\_symbols.html](http://nationalheritage.gov.pk/national_symbols.html) (last visited Mar. 15, 2015), *archived at* <http://perma.cc/HK24-ZA4Q>.

<sup>5</sup> *Markhor* (*Capra falconeri*), *supra* note 1.

<sup>6</sup> *Conservation Force, Inc. v. Jewell* (*Conservation Force IV*), 733 F.3d 1200, 1202–03 (D.C. Cir. 2013).

<sup>7</sup> *See Conservation Force II*, 811 F. Supp. 2d at 22.

<sup>8</sup> *Conservation Force IV*, 733 F.3d at 1202–03; *see infra* notes 23–26 and accompanying text.

<sup>9</sup> *Conservation Force IV*, 733 F.3d at 1202–03.

<sup>10</sup> *Conservation Force II*, 811 F. Supp. 2d at 24.

<sup>11</sup> *Id.* According to the ESA,

To the maximum extent practicable, within [ninety] days after receiving the petition of an interested person . . . to add a species to, or to remove a species from, either of the [endangered or threatened] lists . . . , the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned.

16 U.S.C. § 1533(3) (2012). The statute continues, “[w]ithin [twelve] months after receiving a petition that is found . . . to present substantial information indicating that the petition [might] be warranted,” the Secretary is to indicate that the action is either warranted, not warranted, or is warranted but precluded by other pending actions. *Id.*

<sup>12</sup> 16 U.S.C. § 1533(3); 90-Day Finding on Petition to Reclassify the Straight-Horned Markhor Population of the Torghar Region of Balochistan, Pakistan from Endangered to Threatened and Initiation of Status Review for Markhor, 64 Fed. Reg. 51,499 (Sept. 23, 1999) (to be codified at 50 C.F.R. pt. 17).

<sup>13</sup> *Conservation Force IV*, 733 F.3d at 1203.

This new petition—the subject of *Conservation Force, Inc. v. Jewell* (*Conservation Force IV*)—challenged the FWS’s “failure to act” on the 1999 petition, as well as what plaintiffs alleged was the FWS’s “unreasonable delay in processing applications” to import markhor trophies.<sup>14</sup> In the initial district court proceedings, the U.S. District Court for the District of Columbia dismissed the claim associated with the 1999 petition because the six-year statute of limitations had lapsed.<sup>15</sup> It then dismissed the second claim as moot.<sup>16</sup> This Comment argues that the FWS’s inefficiency, and the resulting improper classification of animals under the Endangered Species Act (“ESA”), could have been avoided.<sup>17</sup> Although the FWS lacks adequate funding, its policy of waiting to respond to ESA petitions until litigation arises is a waste of limited resources, a failure to comply with statutory obligations, and a failure to protect animals pursuant to the ESA.<sup>18</sup> Unfortunately, this cycle remains unchecked in the wake of the D.C. Circuit’s ruling in *Conservation Force IV*.<sup>19</sup>

### I. FACTS AND PROCEDURAL HISTORY

In 1976, the FWS classified the straight-horned markhor as endangered.<sup>20</sup> Despite this classification, population levels reached a “critical level.”<sup>21</sup> By the early 1980s, experts estimated the markhor population to be fewer than 200 in their primary habitat of the Torghar Hills along the Pakistan-Afghanistan border.<sup>22</sup>

As a result of the declining markhor population, local tribal leaders formed the Society for Torghar Environmental Protection (“STEP”) and requested support from American wildlife biologists.<sup>23</sup> STEP and the biologists collaborated to form the Torghar Conservation Project (“TCP”), which, according to the FWS, has essentially eradicated poaching of the straight-horned markhor and has overseen a greater than tenfold increase in the species’s population over the past thirty years.<sup>24</sup> The TCP sanctions a limited number of sport hunts by mainly foreign hunters, who pay considerable sums for the privilege of chasing the markhor across its natural habitat.<sup>25</sup> The proceeds of the sanc-

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<sup>14</sup> *Id.*

<sup>15</sup> *Conservation Force II*, 811 F. Supp. 2d at 27–28.

<sup>16</sup> *Id.* While the case was pending in the district court, the FWS processed and denied all applications for the import of markhor trophies. *Id.*

<sup>17</sup> See *infra* notes 84–126 and accompanying text.

<sup>18</sup> See *infra* notes 84–126 and accompanying text.

<sup>19</sup> See *infra* notes 84–126 and accompanying text.

<sup>20</sup> *Conservation Force II*, 811 F. Supp. 2d at 22.

<sup>21</sup> *Conservation Force IV*, 733 F.3d at 1202.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1202–03.

<sup>25</sup> *Id.* at 1203.

tioned hunts are then distributed among the local inhabitants of the Torghar Hills, who are thus incentivized to protect markhor population numbers by eliminating illegal poaching.<sup>26</sup>

In 1999, Sardar Naseer A. Tareen, a local involved in the conservation effort, filed a petition on behalf of STEP requesting that the FWS downlist the markhor's ESA designation from endangered to threatened.<sup>27</sup> Initially, the FWS issued a ninety-day finding reporting that the request presented substantial information to imply that the action may be warranted.<sup>28</sup> It then noted that it would begin to review the status of the entire markhor population.<sup>29</sup> Despite this finding, the FWS did not make a final finding—a twelve-month finding<sup>30</sup>—on the petition's merit within twelve months after it was received, even though the ESA statutorily obligated it to do so.<sup>31</sup>

In the summer of 2004, while waiting for the issuance of the twelve-month finding, Tareen allegedly met with officials from the FWS on several occasions.<sup>32</sup> He claimed that during these meetings the FWS assured him that regardless of its delay in issuing the finding, it was in the midst of its comprehensive review of the species.<sup>33</sup> Tareen also alleged that while the finding was pending—during which time the FWS had yet to downlist the species—it represented that it would begin granting import permits for markhor trophies.<sup>34</sup>

Although many of these animals were hunted under the direction of the TCP, the FWS nevertheless rejected the permit applications.<sup>35</sup> Despite the representations made to Tareen in 2004, a number of individual hunters applied

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; *Conservation Force II*, 811 F. Supp. 2d at 24.

<sup>28</sup> *Conservation Force II*, 811 F. Supp. 2d at 24; *see supra* note 11 and accompanying text.

<sup>29</sup> *Conservation Force II*, 811 F. Supp. 2d at 24.

<sup>30</sup> *See supra* note 11 and accompanying text.

<sup>31</sup> *See Conservation Force II*, 811 F. Supp. 2d at 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (noting, at this time, that the FWS assured Tareen that downlisting of the straight-horned markhor was still warranted).

<sup>34</sup> *Id.*; Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. 49,512 (Aug. 18, 2003).

[Although] reclassification of the [markhor] is not considered likely . . . , [TCP] has significantly enhanced the conservation of local markhor populations. Under this example, this proposed policy could allow consideration of applications for the importation of sport-hunted trophies from this population, if the necessary enhancement finding [as is required by the ESA, 16 U.S.C. § 1539(a)(1)(A)] could be made, as an incentive to continue and expand the conservation program for this species.

Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. at 49,512.

<sup>35</sup> *See* Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. at 49,512.

for permits to import markhor trophies in the years following Tareen's petition, and all of them were ultimately denied by the FWS.<sup>36</sup>

On March 16, 2009, a group of hunting organizations and safari clubs,<sup>37</sup> together with the individual permit applicants, Tareen, and STEP (together "plaintiffs") all joined together to challenge the FWS on two separate claims in the D.C. District Court, based on its alleged violations of the ESA.<sup>38</sup> On July 23, 2010, plaintiffs again filed a case re-alleging a number of failures on the part of the FWS.<sup>39</sup> The first claim addressed the FWS's failure to issue a twelve-month finding on the merits of Tareen's 1999 petition to downlist the markhor within the period required by the ESA.<sup>40</sup> The second claim contested the FWS's supposed "unreasonable delay in processing applications" to import markhor trophies killed in their natural habitat.<sup>41</sup> It also alleged that the FWS failed to complete the required "five-year status review of the markhor ESA listing."<sup>42</sup>

On July 7, 2009, the FWS moved to dismiss the first claim.<sup>43</sup> While the case was pending, the FWS denied the permits for import that the individual hunters had submitted.<sup>44</sup> In response to this action, the plaintiffs submitted a third claim arguing that the denial of the permits violated their right to due

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<sup>36</sup> *Conservation Force II*, 811 F. Supp. 2d at 24–25. In its rejection letters to the hunters, the FWS explained that there was insufficient information on which it could determine whether the importation of straight-horned markhor trophies would "enhance survival or propagation" of the animal's population, a requirement mandated by the ESA for permitting endangered species trophy importation. Endangered Species Act, 16 U.S.C. § 1539(a)(1)(A) (2012); *Conservation Force II*, 811 F. Supp. 2d at 25. Even though, in its notice published in the Federal Register on August 18, 2003, the FWS declared that import applications for the markhor may be considered, the rejection letters from 2009 do not indicate such a policy. Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. at 49,512; see *Conservation Force II*, 811 F. Supp. 2d at 25. The FWS additionally suggested that a possible ramification of granting import permits would be an increased demand for markhor trophies, which would place pressure on the Pakistani government to allow more hunts, and thus further threaten the markhor population levels. *Conservation Force II*, 811 F. Supp. 2d at 25. The FWS asserted that there are "only approximately [1250] free ranging endangered markhor in the wild," suggesting that the population cannot withstand the decrease that hunting could bring. *Id.* In fact, the agency contended that more demand could potentially lead to an unsustainable increase in hunts. *Id.*

<sup>37</sup> Conservation Force, Dallas Safari Club, Houston Safari Club, African Safari Club of Florida, Wild Sheep Foundation, Grand Slam Club/OVIS, and the Conklin Foundation. *Conservation Force IV*, 733 F.3d 1200, 1203 n.2 (D.C. Cir. 2013).

<sup>38</sup> The plaintiffs amended this complaint on June 6, 2009 and again on June 22, 2009. The defendants moved to dismiss the second amended complaint on July 7, 2009. On August 26, 2009, plaintiffs moved for summary judgment. Defendants then moved to stay this motion pending resolution of the motion to dismiss all claims. The court granted this stay request on September 4, 2009. *Conservation Force II*, 811 F. Supp. 2d at 21–37.

<sup>39</sup> *Id.* at 26.

<sup>40</sup> *Id.* at 24; see *Conservation Force IV*, 733 F.3d at 1203.

<sup>41</sup> *Conservation Force IV*, 733 F.3d at 1203; *Conservation Force II*, 811 F. Supp. 2d at 24–25.

<sup>42</sup> *Conservation Force II*, 811 F. Supp. 2d at 26.

<sup>43</sup> *Id.* at 22.

<sup>44</sup> *Id.* at 30.

process.<sup>45</sup> Then, on August 17, 2010, plaintiffs—taking the stance that hunting contributes to the management of the targeted animal's population—filed a new petition with the FWS, requesting the same downlisting action that Tareen had requested eleven years earlier.<sup>46</sup> FWS acknowledged receipt of the petition, but did not take immediate action.<sup>47</sup>

The district court dismissed the first claim pertaining to the FWS's failure to process Tareen's 1999 petition because it was not filed within six years after the right of action first accrued, and thus was time-barred.<sup>48</sup> The court also dismissed the claims brought by the individual hunters who had applied for permits because the claims were rendered moot by the FWS's denial of those permits during the proceedings.<sup>49</sup> Finally, the court dismissed the due process claims as well, because the plaintiffs could not demonstrate that they had a constitutionally protected property interest in the markhor trophies.<sup>50</sup>

On April 2, 2012, plaintiffs appealed the district court's rulings to the U.S. Court of Appeals for the D.C. Circuit.<sup>51</sup> The FWS issued a favorable twelve-month finding—"albeit not within twelve months"—while the case was pending on appeal.<sup>52</sup> This finding was accompanied by a proposed rule to downlist the markhor, "based on a review of the best available scientific and commercial data[,] which indicates that the endangered designation no longer correctly reflects the status of the straight-horned markhor."<sup>53</sup>

Upon review, the D.C. Circuit held that once the FWS issued the twelve-month finding, the plaintiffs' challenge became moot as they had received all the relief they had requested.<sup>54</sup> Consequently, the court found that the due process claims relating to the unreasonable delay in processing permit applications were

<sup>45</sup> The FWS then moved to dismiss the due process claim as well. *Id.* at 26.

<sup>46</sup> *Conservation Force IV*, 733 F.3d at 1203; *Conservation of Wildlife and the Natural World*, CONSERVATION FORCE, <http://www.conservationforce.org> (last visited Mar. 15, 2015), archived at <http://perma.cc/V8PK-XR88> ("Our purpose is to establish and further conservation of wildlife, wild places[,] and our outdoor way of life . . . [, and] hunters and anglers are an indispensable and essential force for wildlife conservation.").

<sup>47</sup> Reclassifying the Straight-Horned Markhor With Special Rule, 77 Fed. Reg. 47,011 (Aug. 7, 2012) (to be codified at 50 C.F.R. pt. 17) ("On August 18, 2010, we received a petition dated August 17, 2010, from Conservation Force [et al] . . . requesting the Service downlist the . . . markhor . . . from endangered to threatened under the Act . . . [and i]n a September 15, 2010, letter to Conservation Force, we acknowledged receipt of the petition.").

<sup>48</sup> *Conservation Force II*, 811 F. Supp. 2d at 28.

<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.* at 29.

<sup>51</sup> Appellants' Opening Brief at 1, *Conservation Force IV*, 733 F.3d 1200 (No. 11-5316), 2012 WL 1107883, at \*i.

<sup>52</sup> *Conservation Force IV*, 733 F.3d at 1204.

<sup>53</sup> *Id.*; Reclassifying the Straight-Horned Markhor with Special Rule, 77 Fed. Reg. 47,011 (Aug. 7, 2012) (to be codified at 50 C.F.R. pt. 17).

<sup>54</sup> *Conservation Force IV*, 733 F.3d at 1204.

also rendered moot once the “complained-of delay ha[d] . . . ended.”<sup>55</sup> The court then held that the claim that the FWS had an ongoing practice of ignoring import permits was found not ripe for judicial review and declined to address it because, the court reasoned, it was based on speculation.<sup>56</sup> The court further held that even if the claim were ripe for review, plaintiffs lacked standing because there was no evidence in the record that they would suffer an injury-in-fact from the FWS’s alleged policy of ignoring permits.<sup>57</sup>

## II. LEGAL BACKGROUND

The Endangered Species Act (“ESA”) is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>58</sup> It was legislated to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”<sup>59</sup> The ESA directs the Secretary of the Interior, acting through the U.S. Fish and Wildlife Service (“FWS”), to classify species whose survival is in question as either “endangered” or “threatened.”<sup>60</sup> A species is deemed “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.”<sup>61</sup> A species is “threatened” if it is “likely to become an endangered species within the foreseeable future.”<sup>62</sup> The fundamental goal of the ESA species classification scheme is to make listed species’ populations healthy enough to be delisted altogether.<sup>63</sup>

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<sup>55</sup> *Id.* at 1205.

<sup>56</sup> *Id.* at 1206–07.

<sup>57</sup> *Id.* at 1207. The plaintiffs could not demonstrate that they would be negatively affected by the service’s alleged ongoing delay as none had permits that were still pending and they did not have a plan to apply for them in the future. *Id.*

<sup>58</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978); see *Endangered Species Act of 1973*, 16 U.S.C. §§ 1531–1544 (2012).

<sup>59</sup> 16 U.S.C. § 1531(b).

<sup>60</sup> *Id.* § 1533; *Fish and Wildlife Service*, FED. REGISTER, <https://www.federalregister.gov/agencies/fish-and-wildlife-service> (last visited Mar. 15, 2015), *archived at* <http://perma.cc/4VA-3QX3> (describing the placement of the FWS in the Department of the Interior); *Endangered Species: Overview*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/about/index.html> (last updated May 7, 2013), *archived at* <http://perma.cc/MC9S-F4WK> (describing the FWS “[a]s the principal federal partner responsible for administering the [ESA]”).

<sup>61</sup> 16 U.S.C. § 1532(6); U.S. FISH & WILDLIFE SERV., *WHAT IS THE DIFFERENCE BETWEEN ENDANGERED AND THREATENED?* (2003), *available at* <http://www.fws.gov/endangered/esa-library/pdf/tvs-e.pdf>, *archived at* <http://perma.cc/XW23-XSR2> (“Endangered species are at the brink of extinction now.”).

<sup>62</sup> 16 U.S.C. § 1532(20); U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1 (“Threatened species are likely to be at the brink [of extinction] in the near future.”).

<sup>63</sup> *Endangered Species Act*, NAT’L WILDLIFE FED’N, <http://www.nwf.org/Wildlife/Wildlife-Conservation/Endangered-Species-Act.aspx> (last visited Mar. 15, 2015), *archived at* <http://perma.cc/77BB-76MA>.



Endangered species are subject to all of the protections of the ESA, whereas threatened species receive many, but not all, of those protections.<sup>64</sup> The FWS has flexibility in its assessment of threatened species—it can select which protections might be more helpful in increasing conservation of that animal.<sup>65</sup> For instance, the FWS can approve of certain “takings”—killing, wounding, or trapping, as defined by the ESA<sup>66</sup>—of a *threatened* animal if it will contribute to that animal’s conservation.<sup>67</sup>

The ESA also prohibits the importation of endangered and threatened species, “including hunting trophies.”<sup>68</sup> The FWS may, however, issue permits for the taking of certain endangered species under limited circumstances, including “for scientific purposes or to enhance the propagation or survival of the affected species.”<sup>69</sup> For threatened species, permits may further be issued to take animals for zoological exhibition, educational purposes, or special purposes consistent with those of the ESA.<sup>70</sup>

The ESA expressly outlines the process by which a species is designated as either endangered or threatened.<sup>71</sup> The process begins with a petition, and any interested individual is permitted to petition the FWS to list, downlist, or delist species.<sup>72</sup> After receiving a petition, the Secretary is obligated, “[t]o the maximum extent practicable,” to make a finding within ninety days, “as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”<sup>73</sup> Furthermore, the Secretary must determine whether a petition is warranted, is not warranted, or is warranted but is precluded by pending proposals concerning other species.<sup>74</sup> This action must be completed “[w]ithin [twelve] months after receiving a petition that is found . . . to present substantial information indicating that the petitioned action may be warranted”—a so-called “[twelve]-month finding.”<sup>75</sup> “If such a petition is found to present such information, the Secretary shall *promptly* commence a review of the status of the species concerned.”<sup>76</sup> The

<sup>64</sup> U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>65</sup> *Id.*

<sup>66</sup> 16 U.S.C. § 1532(19) (2012).

<sup>67</sup> “Taking” an *endangered* animal, however, is forbidden if the action might kill or permanently disable the specimen, move it out of state, move it beyond its historical range, or keep it captive in excess of forty-five days. U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>68</sup> *Conservation Force v. Salazar (Conservation Force III)*, 851 F. Supp. 2d 39, 43 (D.D.C. 2012); see 16 U.S.C. § 1538(a)(1)(A).

<sup>69</sup> 16 U.S.C. § 1539(a)(1)(A); Permits for Scientific Purposes, Enhancement of Propagation Or Survival, Or for Incidental Taking, 50 C.F.R. § 17.22 (2015).

<sup>70</sup> Permits-General, 50 C.F.R. § 17.32 (2015); U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>71</sup> 16 U.S.C. § 1533 (2012).

<sup>72</sup> *Id.* § 1533(b)(3)(A).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* § 1533(b)(3)(B).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* § 1533(b)(3)(A) (emphasis added).

ESA also requires that the FWS's listing decisions be solely based on the "best scientific and commercial data available."<sup>77</sup>

Although it is given great responsibility in the aforementioned respects, there is evidence that suggests the FWS does not receive adequate federal funding to perform its intended functions.<sup>78</sup> This reality has been acknowledged by both the federal courts and the FWS itself.<sup>79</sup> At times, courts cite this insufficiency as the cause of, and a reasonable excuse for, the agency's delays.<sup>80</sup> In *Sierra Club v. Babbitt* for example, a federal district court held that when the FWS failed to act on the plaintiff's petition to list the peninsular big horn sheep as endangered within the statutorily required period of time, the failure was excused due to congressional restrictions on the Agency's budget.<sup>81</sup> In other instances, however, courts have declined to accept the FWS' attempted justification.<sup>82</sup> In *Florida Home Builders Ass'n v. Norton* for example, a federal district court in Florida held that when the FWS conceded "that they have failed to comply with a mandatory, nondiscretionary, [c]ongressional directive to undertake status reviews of threatened or endangered species within the five-year deadline established by" the ESA, they could not excuse themselves by appealing to their budgetary restraints.<sup>83</sup>

### III. ANALYSIS

There is little doubt that from a technical legal standpoint, *Conservation Force, Inc. v. Jewell (Conservation Force IV)*, was correctly decided by the U.S. Court of Appeals for the D.C. Circuit.<sup>84</sup> The holding, however, means the U.S.

<sup>77</sup> 16 U.S.C. § 1533(b)(1)(A) (2012).

<sup>78</sup> See *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 43 (D.D.C. 2013). In *Appalachian Voices v. McCarthy*, a case brought by citizens against the Environmental Protection Agency for its failure to timely review and revise regulations concerning coal ash, the court acknowledged that "claims to compel agency action after the agency has failed to meet a statutorily-required deadline for a particular action has yet to be conclusively resolved in this Circuit." 989 F. Supp. 2d at 43 (citing *Conservation Force, Inc. v. Jewell (Conservation Force IV)*, 733 F.3d 1200, 1203–04 (D.C. Cir. 2013)).

<sup>79</sup> See *Sierra Club v. Babbitt*, 948 F. Supp. 56, 57 (D. Cal. 1996). In defense of its delay in issuing a twelve-month finding for the listing of the peninsular big horn sheep, the court agreed with the FWS's contention "that congressional restrictions on their budget and limited funding excuse their failure to meet their statutory deadline." *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330, 1336 (D. Fla. 2007) ("[The FWS] assert[s] that budgetary and resource constraints precluded the Secretary from fulfilling the obligation imposed by Congress . . . [d]efendants should take up such constraints with Congress rather than let mandatory deadlines expire with inaction.").

<sup>83</sup> *Id.*

<sup>84</sup> See *Conservation Force IV*, 733 F.3d at 1202–07. The court held that plaintiffs' claims pertaining to import permits were rendered moot by the FWS's rejection, that the claim concerning the petition for downlisting was similarly mooted by the FWS's issuance of a favorable twelve-month ruling,

Fish and Wildlife Service's ("FWS") failure to act within its statutorily required timeline remains, as of yet, unchecked and judicially unrestricted.<sup>85</sup> It is probable that this delay is a consequence of the agency being inadequately funded to fulfill its obligations.<sup>86</sup> Despite the fact that the FWS was challenged in this instance for delaying review of a request to *downlist* a species,<sup>87</sup> it appears that due to this lack of financial backing, the FWS is just as likely to defer *listing* a species.<sup>88</sup> Such gross inefficiency undoubtedly has a deleterious effect on the species the FWS is compelled, by its mandate from the ESA, to conserve.<sup>89</sup>

The FWS is placed under extreme budgetary restrictions that limit its ability to perform its duties properly.<sup>90</sup> At least one court has refused to accept this excuse when challenges are brought against the FWS and instead has required the agency to comply with its obligations, suggesting that it take its appeals for increased funding directly to Congress.<sup>91</sup> Nevertheless, the FWS has, in the past, acknowledged and used this budgetary limitation as a defense for its delayed action.<sup>92</sup> As a result of its underfunding, the FWS is frequently incapable of meeting its deadlines, and instead often postpones such action until it is "forced"

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that the due process claims were consequently dismissed, and that allegations of unreasonable delay in permit processing were not ripe for judicial review. *Id.*

<sup>85</sup> *Id.*; see *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 43 (D.D.C. 2013). "[C]laims to compel agency action after the agency has failed to meet a statutorily-required deadline for a particular action has yet to be conclusively resolved in this Circuit." 989 F. Supp. 2d at 43 (citing *Conservation Force IV*, 733 F.3d at 1203–04).

<sup>86</sup> Gregory T. Broderick, *Towards Common Sense in ESA Enforcement: Federal Courts and the Limits on Administrative Authority and Discretion Under the Endangered Species Act*, 44 NAT. RESOURCES J. 77, 99 (2004) ("The ESA sets lofty goals and establishes mandatory procedures that [the] FWS simply cannot meet due to budget restrictions.").

<sup>87</sup> *Conservation Force IV*, 733 F.3d at 1203.

<sup>88</sup> Broderick, *supra* note 86, at 114 ("A large portion of the budget is consumed by lawsuits to force critical habitat, the resulting designations, and further lawsuits to overturn the designations . . . [leaving] little, if any, resources for listing species.").

<sup>89</sup> "It is further declared to be the policy of Congress that all [f]ederal departments and agencies shall seek to conserve endangered species and threatened species . . ." Endangered Species Act, 16 U.S.C. §§ 1531(c)(1) (2012). "The Secretary shall . . . determine whether any species is an endangered species or threatened species . . ." *Id.* § 1533(a)(1); see Broderick, *supra* note 86, at 114 ("Thus, these suits to force critical habitat designation actually have a negative effect on overall species protection in that they divert resources meant for species protections, including listing, into designations and lawsuits.").

<sup>90</sup> Broderick, *supra* note 86, at 99 n.156.

[The] FWS's enforcement budget "has been raised to \$8 million, but conservation biologists within and outside the FWS suggest that a budget of \$120 million would be required to carry out the task of listing endangered species properly." In any case, it is clear that the FWS is woefully underfunded to perform its job to the statutory standard.

*Id.* (quoting Jane H. Bock & Katy Human, *NGOs and the Protection of Biodiversity: The Ecologists' Views*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 167 (2002)).

<sup>91</sup> See *Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330, 1336 (D. Fla. 2007).

<sup>92</sup> *Sierra Club v. Babbitt*, 948 F. Supp. 56, 57 (D. Cal. 1996).

to do so.<sup>93</sup> One scholar has noted that citizen petitions and subsequent lawsuits brought when these petitions are not addressed—as was the case in *Conservation Force IV*—are primarily responsible for most listing decisions now brought by the FWS.<sup>94</sup> “Without this action-forcing check on agency decisionmaking and (in)action, far fewer species would come within the protective rubric of the ESA.”<sup>95</sup> This cumbersome process has the further effect of draining the FWS’s already limited budget, as it must allocate substantial funds to pay for litigation, thereby exacerbating an already dire situation.<sup>96</sup>

The D.C. Circuit has noticed the effect of the agency’s inefficiency, but oftentimes it is unable to provide a remedy for aggrieved plaintiffs.<sup>97</sup> It noted in one case that although it was “sympathetic with plaintiffs’ understandable frustration in dealing with an agency that appears to be so dilatory in its obligations as to border on dysfunctional,” it could not remedy their grievance because of a statutory bar.<sup>98</sup> It admitted in the first proceeding of *Conservation Force v. Salazar (Conservation Force I)* in 2010 that, although “multi-year delays to process plaintiffs’ permit applications certainly do not indicate an efficient permit processing system,” the plaintiffs’ requested action was denied for similar reasons.<sup>99</sup> Moreover, after reviewing the holding in *Conservation Force IV*, the U.S. District Court for the District of Columbia expressly acknowledged that agency inability to meet statutorily-required deadlines has yet to be “conclusively resolved in this Circuit.”<sup>100</sup> Accordingly, the FWS has not been held accountable for its chronic inefficiency and will likely continue to proceed in this manner.<sup>101</sup>

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<sup>93</sup> See *Appalachian Voices*, 989 F. Supp. 2d at 43; Katherine Renshaw, *Leaving the Fox to Guard the Henhouse: Bringing Accountability to Consultation Under the Endangered Species Act*, 32 COLU. J. ENVTL. L. 161, 185–86 (2007); *supra* note 85 and accompanying text.

<sup>94</sup> Renshaw, *supra* note 93, at 185–86.

<sup>95</sup> *Id.*

<sup>96</sup> Broderick, *supra* note 86, at 101 (“[T]he FWS’s already meager resources are wasted in its bureaucratic two-step through the courts, which is aimed at avoiding only the most immediate problems.”).

<sup>97</sup> See *Conservation Force v. Salazar (Conservation Force II)*, 811 F. Supp. 2d 18, 31–32 (D.D.C. 2011), *vacated, sub nom. Conservation Force, Inc. v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013); *Conservation Force v. Salazar (Conservation Force I)*, 753 F. Supp. 2d 29, 35 (D.D.C. 2010). Despite the fact that *Conservation Force II* has been vacated, it supports the proposition that the D.C. Circuit Court has acknowledged—albeit in dicta—that the FWS is delaying so much as to appear dysfunctional. See 811 F. Supp. 2d at 31–32; *supra* note 3 and accompanying text.

<sup>98</sup> *Conservation Force II*, 811 F. Supp. 2d at 31–32.

<sup>99</sup> *Conservation Force I*, 753 F. Supp. 2d at 35. Plaintiffs could not demonstrate a non-discretionary statutory duty that required the FWS to process their permit applications by a certain date, so the ESA citizen-suit provision did not authorize judicial review of their claims. *Id.*

<sup>100</sup> *Appalachian Voices*, 989 F. Supp. 2d at 43; see *supra* note 86 and accompanying text.

<sup>101</sup> See *Appalachian Voices*, 989 F. Supp. 2d at 43; *Conservation Force II*, 811 F. Supp. 2d at 31–32; *Conservation Force I*, 753 F. Supp. 2d at 35; *supra* note 86 and accompanying text (citing *Conservation Force I* as an example of a case wherein the court was unable to provide the plaintiffs with the relief requested after an agency failed to meet a statutorily required deadline).

The FWS' underfunding and subsequent inefficiency contributes to its inability to properly reclassify animals according to the best scientific and commercial evidence.<sup>102</sup> This illustrates an unfortunate cycle: first, the FWS neglects its duties due to underfunding; then it is sued by citizens seeking to enforce the ESA; and then finally, it expends a significant portion of its budget on litigation, which, in turn, leaves less financial support to fund listing and delisting of animal populations.<sup>103</sup>

This neglect ultimately blurs the distinction between a *threatened* and an *endangered* species.<sup>104</sup> If populations are not downlisted when they are eligible, then the ESA's classification system is rendered meaningless.<sup>105</sup> When a recovering population remains classified as endangered, despite no longer actually being on the brink of extinction—as such a classification entails—the FWS is unable to scale back the stringent federal protections reserved truly endangered species.<sup>106</sup> This means that the FWS has less control over permitting the taking of certain animals and it cannot approve of importation for zoological exhibition or educational purposes, both actions that might benefit the animal and the general public.<sup>107</sup>

For example, in *Conservation Force IV*, plaintiffs sought to import straight-horned markhor trophies hunted under the direction of the Torghar Conservation Project (“TCP”).<sup>108</sup> Despite the existence of evidence that suggested the TCP had stabilized and favorably impacted the markhor population,<sup>109</sup> the FWS neglected to issue a ruling on the permits until a suit was filed against it.<sup>110</sup> The FWS failed to make a timely ruling on the proposed downlisting of the markhor as well.<sup>111</sup> This practice of delaying a warranted change in classification defeats the purpose of distinguishing between species that are on the brink of extinction and those that might soon reach that level.<sup>112</sup> It is also contrary to the express language of ESA,<sup>113</sup> harmful to animal species,<sup>114</sup>

<sup>102</sup> Broderick, *supra* note 86, at 114.

<sup>103</sup> *See id.*; Renshaw, *supra* note 93, at 185–86.

<sup>104</sup> *See* 16 U.S.C. §§ 1532(6), 1532(20), 1533(a) (2012) (defining “endangered species” and “threatened species,” and explaining how the Secretary determines when a species is endangered or threatened); Broderick, *supra* note 86, at 114; Renshaw, *supra* note 93, at 185–86.

<sup>105</sup> *See* 16 U.S.C. §§ 1532(6), (20), 1533(a); Broderick, *supra* note 86, at 114; Renshaw, *supra* note 93, at 185–86.

<sup>106</sup> *See* Permits for Scientific Purposes, Enhancement of Propagation or Survival, or for Incidental Taking, 50 C.F.R. § 17.22 (2015); Permits-General, 50 C.F.R. § 17.32 (2013); U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>107</sup> *See* 50 C.F.R. § 17.32; U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>108</sup> *Conservation Force IV*, 733 F.3d at 1205; *Conservation Force II*, 811 F. Supp. 2d at 24–25.

<sup>109</sup> *Conservation Force IV*, 733 F.3d at 1202–03; *see supra* notes 24–26 and accompanying text.

<sup>110</sup> *Conservation Force IV*, 733 F.3d at 1205.

<sup>111</sup> *Id.* at 1204. In fact, the FWS did not downlist the species until the appeal was pending. *Id.*

<sup>112</sup> *See* 16 U.S.C. § 1532(6), (20) (2012); *Conservation Force IV*, 733 F.3d at 1204; U.S. FISH & WILDLIFE SERV., *supra* note 61, at 1.

<sup>113</sup> *See* 16 U.S.C. § 1531(b).

an inefficient use of resources,<sup>115</sup> and, as evidenced by *Conservation Force IV*, frustrating to interested parties.<sup>116</sup>

It remains unclear when, or if, the federal courts will be able to resolve this issue and force the FWS to comply with the ESA.<sup>117</sup> The solution, however, ultimately lies not with the courts, but with the FWS itself.<sup>118</sup> The agency is delegated the responsibility of accurately classifying endangered and threatened species,<sup>119</sup> a task it clearly has failed to efficiently accomplish.<sup>120</sup> Rather than gesturing toward its underfunding as the sole impediment to fulfilling its duties, the FWS would be better served to simply redistribute its resources.<sup>121</sup> Instead of wasting untold quantities of capital on defending itself in court and delaying to address petitions until the last second, the FWS should review these requests for their merits and issue a ruling in a timely fashion.<sup>122</sup> The price of litigation is notoriously high, and the alternative—executing administrative functions normally—is much more economical.<sup>123</sup> The FWS has this ability, as it plainly demonstrated by issuing a ruling on the petition to downlist the markhor, albeit after years of expensive trial work.<sup>124</sup>

Until then, however, the FWS is likely to continue delaying action until litigation ensues, at which point it might again issue findings on the contested peti-

<sup>114</sup> See *supra* notes 102–107 and accompanying text.

<sup>115</sup> See *supra* notes 90–101 and accompanying text.

<sup>116</sup> *Conservation Force IV*, 733 F.3d at 1204–07.

<sup>117</sup> See *id.*; *Appalachian Voices v. McCarthy*, 989 F. Supp. 2d 30, 43 (D.D.C. 2013); *supra* note 85 and accompanying text.

<sup>118</sup> The FWS has already been delegated all the power it needs to accomplish these goals efficiently. See 16 U.S.C. § 1531(b), 1533 (2012). Had FWS followed the very regulations it promulgated—for example, issuing a finding on a petition within ninety days and completing an action within twelve months—these suits would not have arisen. See generally 16 U.S.C. § 1533(3) (codifying, in the ESA, that the FWS has ninety days after receiving a petition to act, and twelve months to present substantial information regarding how it will respond to the petition); *Conservation Force v. Salazar (Conservation Force I)*, 753 F. Supp. 2d 29, 35 (D.D.C. 2010) (noting the initial filing of claims in federal court that began this case, which would never have occurred had the FWS properly reviewed Tareen’s petitions for downlisting and trophy importation).

<sup>119</sup> 16 U.S.C. § 1531(b).

<sup>120</sup> See Broderick, *supra* note 86, at 114. See generally *Conservation Force IV*, 733 F.3d at 1200 (illustrating that a private party had to not only file a judicial challenge to compel the FWS to act, but that it had to take that challenge all the way to the D.C. Circuit).

<sup>121</sup> See *Conservation Force IV*, 733 F.3d at 1204. The twelve-month finding on the plaintiffs’ petition to downlist the species was issued in 2012, approximately thirteen years after the initial petition was filed in 1999. Had this administrative action simply been taken earlier—perhaps within the timeframe imposed by the twelve-month rule—years of litigation could have been avoided. See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See Dean R. Nicyper, *Attorney’s Fees and Ruckelshau v. Sierra Club: Discouraging Citizens from Challenging Administrative Agency Decisions*, 33 AM. U. L. REV. 775, 780 (1984) (explaining that agencies operate in a quasi-legislative fashion, and that administrative rulemaking hearings can expose the agency to outside influences). The rulemaking process, however, is necessary because the alternative may be costly litigation. *Id.* “Agency resources . . . would dissipate quickly in expensive litigation if agencies continually maintained an adversarial posture.” *Id.*

<sup>124</sup> See *supra* note 44 and accompanying text.

tions and applications during the proceedings, as it did in *Conservation Force IV*.<sup>125</sup> Be that as it may, aggrieved parties, interested individuals, and susceptible animal populations will still bear the brunt of this inefficient procedure unless different measures are implemented to enforce the ESA regulations.<sup>126</sup>

## CONCLUSION

*Conservation Force, Inc. v. Jewell* demonstrates the U.S. Fish and Wildlife Service's ("FWS") tendency to delay its statutorily-mandated functions until a suit has been filed against it seeking to force it to act in accordance with its statutorily mandated Endangered Species Act ("ESA") duties. In *Conservation Force*, a group of hunters, safari clubs, and local Pakistani and Afghan villagers involved in conservation efforts for the straight-horned markhor sought to compel the FWS to downlist the markhor from *endangered* to *threatened* under the ESA and to process applications for the importation of slain markhor, referred to as trophies.

The U.S. Court of Appeals for the D.C. Circuit found that once the FWS denied the hunters' applications and ruled favorably on the petition for downlisting, the claims were rendered moot, as the plaintiffs received all the recovery they requested. Additionally, the court concluded that the coalition's claim alleging the FWS had a policy of intentionally delaying its statutory responsibilities under the ESA was not ripe for judicial review.

This case is an apt example of how the FWS's lack of funding leads to its inefficient functioning as a government agency. Its resulting postponement of review and change in classifications of at-risk animal populations causes improper classification of endangered and threatened species, which not only negatively affects the at-risk species it is charged with protecting, but also wastes the agency's precious few financial resources.

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<sup>125</sup> See *Conservation Force IV*, 733 F.3d at 1204–07; *supra* notes 93–96, 110–111 and accompanying text. This strategy has the effect of further draining the FWS's already limited budget because it must allocate substantial funds to pay for its legal representation, exacerbating an already dire situation. See *supra* notes 94–96 and accompanying text.

<sup>126</sup> See *supra* notes 85–124 and accompanying text.