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"SERVING THE HUNTER WHO TRAVELS"

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

Special To The Hunting Report

World Conservation Force Bulletin

by John J. Jackson, III

□ Polar Bear Listing

Assessing The Impact And Mapping A Way Forward

Conservation Force, its allies and Canadian partners were stunned to learn this past month that the US Fish & Wildlife Service has listed all of the polar bears in the world – every population – as "threatened". On the afternoon of May 14th we listened telephonically in disbelief as the Secretary of Interior Dirk Kempthorne delivered his press release. He said it had been a "difficult decision". The Endangered Species Act (ESA) was America's most "inflexible law" and did not permit the service to consider the "adverse consequences" of the listing. The listing would stop the import of all hunting trophies because it triggers a provision in the Marine Mammal Protection Act (MMPA), but nothing else would change. Nothing else would change because the MMPA is stricter than the ESA and the other activities have already been approved under the MMPA. In our view, one more time a foreign species has been listed to the detriment of a foreign nation's people and conservation program without any concomitant benefits.

The "consensus" view about climate change and the future projections for polar bear were the "best available

science". (In the actual rule, this was explained to be synthesis reports of a large number of experts such as the Intergovernmental Panel on Climate Change and Arctic Climate Impact Assessment.) That view is that sea ice is vital to the bear, the sea is melting and computer modeling projects that it is likely to continue melting. The loss of sea ice habitat threatens all bears in the foreseeable future with endangerment even though the current bear population is approximately "25,000". By mid-century, the polar bear is projected to lose 30 or more percent of its sea ice habitat and is likely to become in danger of extinction within 45 years. "It was a difficult decision but I believe that it is the only decision I could make," the Secretary said.

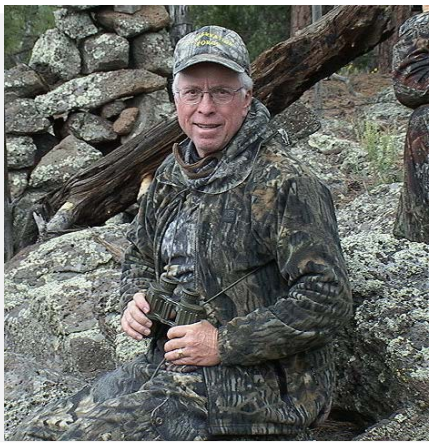
He also said, "While the legal standards under the ESA compel me to list the polar bear as threatened, I want to make clear that this listing will not stop global climate change or prevent any sea ice from melting." He announced that he was taking regulatory action to make certain the ESA "isn't abused to make global warming policies." The subtitle of his press release was the "*Rule will allow continuation of vital energy production in Alaska.*" "List-

ing the polar bear as threatened can reduce available losses of polar bear (US hunters in Canada, I suppose), but it should not open the door to use of the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the ESA law. The ESA is not the right tool to set US climate policy." Kempthorne then quoted a recent statement by President Bush, "There is a right way and wrong way to approach reducing greenhouse gas emissions. The American people deserve an honest assessment of the costs, benefits and feasibility of any proposed solution. Discussions with such far-reaching impact should not be left to unelected regulators and judges but should be debated openly and made by the elected representatives of the people they affect." (Emphasis added.)

The Secretary followed this with a list of four steps soon to be taken "to make sure the ESA is not misused to regulate global climate change." First, the USF&WS is issuing a special rule (4(d) rule) stating that "if an activity is permissible under the stricter standards of the MMPA, it is also permissible under the ESA with respect to the polar bear. (Incidentally, the MMPA has a specific provision allowing subsistence hunting by Alaskans, so that will continue, but treats ESA "threatened" listed species as "depleted", so trophy imports from Canada are prohibited.) Second, the Director of USF&WS would "issue guidance to staff that the best scientific data available today cannot make a causal connection between harm to listed species or their habitats and greenhouse gas emissions from a specific facility or resource development project or government action." Third, "[t]he Department will issue a Solicitor's opinion further clarifying these points." Fourth, "[t]he Department will propose common sense modifications to the existing ESA regulatory language to prevent abuse of this listing to erect a back-door climate policy outside our normal system of political accountability." (Emphasis added.)

I listened for over one-half hour as Conservation Force's staff printed out the 383-page final decision in another room that was being released simultaneously with the telephonic press conference. It had been an uncommonly hard-fought battle, but genuine fear came over me. Fear that US hunters would never know the polar bear again, and anxiety that – all the work aside – those that drafted the rule wanted the bear to be listed. Within an hour I had another fright. The Assistant Director of USF&WS and the top solicitor called on the phone. They said the Final Rule would be published the next day, May 15th, and would be effective immediately because of the Court Order that it be made effective by that date. The permitting office was returning all permit applications by mail and revoking all permits that had been issued but not yet used! Approximately 60 US hunters took polar bears this spring (March, April, May) at a cost exceeding 1.5 million dollars. None of them had yet been able to import their trophy because of the unusually time-consuming import permit application process. According to the Assistant Director, there was nothing left to do for those hunters unless the Marine Mammal Protection Act is amended in the future. It was all over.

I informed the Assistant Director that the federal judge who made the listing effective has agreed to reconsider her Order. The trial court that was forcing the late Final Rule had reinstated Conservation Force's motion to intervene in the suit, granted the intervention to represent the interest of those hunters with outstanding permits and ordered briefs on the effective-date issue. The court ordered the govern-



JOHN J. JACKSON, III
Conservation Force

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World Conservation Force Bulletin

Editor/Writer
John J. Jackson, III

Publisher
Don Causey

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Conservation Force
3240 S I-10 W Serv Road
Metairie, LA 70001
Tel. 504-837-1233. Fax 504-837-1145.
www.ConservationForce.org

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The Hunting Report
9300 S. Dadeland Blvd., Suite 605
Miami, FL 33156-2721.
Tel. 305-670-1361. Fax 305-670-1376.

ment defendants to respond to the issue within 10 days, gave the plaintiffs (Center for Biological Diversity, Greenpeace, Natural Resources Defense Counsel) 10 days to brief the issue if they choose to, and Conservation Force as the intervenor five days after that to reply to those briefs. In sum, the date the Final Rule was to be made effective was not yet conclusive or final. Specifically, the court had agreed to reconsider its Order to permit import of those trophies taken up to the date of the court's Order, 28 April, compelling the USF&WS to make a Final Rule by May 15th. The court had mistakenly said April 17th, but we were able to get it to correct that error in still another motion that changed the deadline date to 28 April.

Conservation Force, as an intervenor, had also filed a motion with the trial court to stay the court's Order which eliminated the minimum 30 day or more date of effectiveness after publication until we could appeal, but the court declined that stay request. At that point, we decided not to take an emergency appeal until after the judge reconsidered the effective date. Thereafter, we may be able to appeal on behalf of any hunters who are still affected, but will have protected the property interests and rights of the others.

On the afternoon of the 14th of May, we went back and forth with this information over a period of several hours and finally convinced the USF&WS to "await any final decision on this (the) case before taking further action on any pending permits," - one small success in the trenches. The USF&WS is holding all pending permits in limbo and those with permits dare not import their trophies until the court rules because the effective date as of this moment is the 15th of May. Imports after the 15th are illegal at the time of this writing. Everyone must await the pending reconsideration.

The service had asked the court to give it until the end of June to publish the final determination, which coincidentally would have been enough time to grant most if not all of the outstanding trophy permit applications. It argued that the bear's current status was not dire and that the petroleum drilling, hunting, etc. was already found not to be risks of concern. The court would have none of it. We at Conservation Force also called and asked the chief trial counsel for the plaintiffs if they would consent to any extension of time for the limited purpose of importation of the already dead trophies, but the plaintiff would not consent. You can judge their objection for yourself. What did our Canadian friends or the US hunters do wrong other than participate in the foremost polar bear conservation and management program in history at a time when the bear population is at an all-time high of more than 25,000? Moreover, it is unprecedented for a species to be listed on projections when its present population has not significantly declined.

Who would have thought the bear was going to be listed based upon 45-year projections when such projections are not reliable beyond 10 years maximum? How could the projections be the best available information when the scientific process calls for testing of hypotheses, not just inventing them? Why would the permit applicants be deprived of reasonable notice when they themselves had to publish 30-day notice to the public in the permitting application process?

Peer Review of Rule

■ According to the Service, one of the peer reviewers (expert outside scientist consulted by the Service) "expressed concern that the proposed rule was flawed, biased, and incomplete, that it would do nothing to address the underlying issues associated with global warming and that a listing would be detrimental to the Inuit of the Arctic." Apparently, the peer reviewers had a great many objections to the proposed listing. We fully agree with those enumerated objections. We think the polar bear has been listed prematurely over the range nation's objections without corresponding benefits, and without taking into account Canada's programs. One more time a foreign species has been harmed by its listing without balancing benefits.

The response to one of the generalized comments by the peer reviewers merits direct quotation:

Comment PR3: Harvest programs in Canada provide conservation benefits for polar bears and are therefore important to maintain. In addition, economic benefits from subsistence hunting and sport hunting occur.

Our response: We recognize the important contribution to conservation that scientifically based sustainable use programs can have. We further recognize the past significant benefits to polar bear management in Canada that have accrued as a result of the 1994 amendments to the MMPA that allow US citizens who legally sport-harvest a polar bear from an MMPA-approved population in Canada to bring their trophies back into the United States. In addition, income from fees collected for trophies imported into the United States are directed by statute to support polar bear research and conservation programs that have resulted in conservation benefits to polar bears in the Chukchi Sea region. We recognize that hunting provides direct economic benefits to local native communities that derive income from supporting and guiding hunters, and also to people who conduct sport hunting programs for US citizens. However, these benefits cannot be and have not been factored into our listing decision for the polar bear.

We note that, under the MMPA, the polar bear will be considered a "depleted" species on the effective date of this listing. As a depleted species, imports could only be authorized under the MMPA if the import enhanced the survival of the species or was for scientific research. Therefore, autho-

rization for the import of sport-hunted trophies will no longer be available under section 104(c)(5) of the MMPA. Neither the Act nor the MMPA restricts take beyond the United States and the high seas, so otherwise legal take in Canada is not affected by the threatened listing.

In the final pages of the listing the Service provides the following insight into trophy importation:

"Regarding ongoing importation of sport-hunted polar bear trophies from Canada, under sections 101(a)(3)(B) and 102(b) of the MMPA, it is unlawful to import into the United States any marine mammal that has been designated as a depleted species or stock unless the importation is for the purpose of scientific research or enhancement of the survival or recovery of the species. Under the MMPA, the polar bear will be a depleted species as of the effective date of the rule. Under sections 102(b) and 101(a)(3)(B) of the MMPA therefore, as a depleted species, polar bears and their parts cannot be imported into the United States except for scientific research or enhancement. Therefore, sport-hunted polar bear trophies from Canada cannot be imported after the effective date of this listing rule. Nothing in the special rule for polar bears published in today's Federal Register *affects these provisions under the MMPA."*

Permit me to add that it is a very serious criminal offense to attempt to import your bear with or without a permit at this time. Just don't do it! We still have a 4-point strategy to get your bear in and your childrens' as well.

Interim Final Rule

■ The Service simultaneously published a special rule, 73 FR 28306 (May 15, 2008). It allows continued subsistence uses of polar bear in Alaska because that take and use is exempt under both the ESA and MMPA. It is limited to Alaskan natives. The special rule states "Under…the MMPA, it is unlawful to import…an individual taken from a species or population stock designated as depleted….The statutory provisions of the MMPA allow fewer types of activities than does the ESA for threatened species, and the MMPA's standards are generally stricter.…Section 9(c)(2) of the ESA sets out an exemption to the general import prohibition for threatened, Appendix II wildlife…(which) would typically apply to the import of sport hunted trophies…However, persons importing sport-hunted trophy polar

bears that were taken in Canada will not be able to use this exemption…(because) [u]nder the MMPA…the polar bear are 'depleted' species as of the effective date of their listing as threatened…under the ESA…." It goes on to state that the ESA cannot "override the more restrictive provisions of the MMPA." It should be noted that reform legislation to carry the ESA exemption for trophies over to the MMPA would once again permit import of trophies from Canada. The Rule also points out that depleted species (those listed as threatened under the ESA) also are not eligible for public display permits.

New Litigation Claims

■ The three plaintiffs served a 60-day notice of intent to sue the government and also amended their suit to make multiple new claims on the date of publication of the final rule, 15 May. They claim all polar bear should have been listed as endangered or, alternatively, some of the populations are distinct populations and those should have been listed as endangered. They challenge the continued petroleum drilling, greenhouse gases, subsistence uses and harvests, and generally challenge the government's tack that the ESA is not to be used to regulate the underlying causes of ice melt and climate change. The court will now decide. Moreover, the service can't go back on its findings that the best available scientific information supports the listing at this time. All due respect to President Bush, unelected regulators and courts will decide the impact of the listing upon the American public, as they already have upon our Canadian friends.

It is imperative that all those who took polar bears this Spring contact Conservation Force at: 504-837-1233. E-miail: jjw-no@att.net. We need information from each hunter to help the whole. Do not delay. We have a four-part strategy and need the information for all four parts. That strategy includes the pending litigation and possible appeal. Next, we will seek special legislation to permit the importation of the trophies snared in the application process at the time of the listing and reform of the MMPA to give back to Canada the conservation program they have been deprived of due to the listing. Finally, we have a legal team reviewing every aspect of the listing and alternative types of permits for importation. Our effort has been and will continue to be beyond compare. We need help now. Please make a tax-deductible contribution to Conservation Force at PO Box 278, Metairie, LA 70004-9821. – *John J. Jackson, III.*