SPECIAL SUPPLEMENT

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

World Conservation Force Bulletin

conservationforce.org August 2011

US District Court Denies All Challenges to Listing the Polar Bear as "Threatened"

DATELINE: **Arctic Circle**

NEWS...NEWS...NEWS

John J. Jackson III

On June 30th the District Court Judge denied all the claims against the May 2008 "threatened" Endangered Species Act (ESA) listing of the polar bear. That included the claims that some populations should have been listed as "endangered" as well as those of Conservation Force and other joint plaintiffs that some Canadian populations should not have been listed at all.

It is shocking because some Canadian management units were forecasted to improve over the next 50 years in the US Geological Survey reports. It is of great concern because the majority of substantive comments and even several peer reviewers advised that the "conservation hunting" was crucial to the bear and listing would have a net negative effect on its survival. It is shocking because the US Fish & Wildlife Service (USF&WS) recognized the benefits of the hunting program but that was not a factor it could consider. The USF&WS also lumped and listed all management units and regions together for its own fiscal convenience, practically admitting that the listing of some populations was premature.

Our feelings are fortified by what the court did not know or consider about the bear's present status. The Canadian Wildlife Service and Nunavut have recently had to increase the hunting quotas in a number of areas. There is also reason to believe that the bear population in Western Hudson Bay, the only area determined to be in slow decline, is now growing in number. Those bear have also fattened up in response to improved habitat conditions since the listing.

We were also astounded because during the oral hearing the trial judge seemed to understand and be receptive to Conservation Force's argument that the agency fully recognized but wholly failed to "take into account" the "conservation hunting" program and benefits when making the listing determination.

It is a shocking decision unless those following the case understand the underlying judicially created presumptions and inferences that agency decisions are not to be overturned. So what happened? The gist of the decision is that the USF&WS is an expert agency. There is a court-created doctrine called the Chevron Doctrine, named after the US Supreme Court case in which it was established. That doctrine provides that the court will not substitute its judgment for that of an expert agency. The courts have created an inference that the Agency is correct. That inference is treated as a presumption that supports the agency's rulings. The agency has been given wide discretion by Congress, and the courts will not interfere with the exercising of that discretion or substitute its judgment for that of the experts of the Agency.

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The Court noted that there were 160,000 pages of documents and 670,000 comments in the administrative record. What the Court and USF&WS has not said is that only a small fraction numbering in the hundreds were substantive.

[T]he Court is keenly aware that this is exactly the kind of decision-making process in which its role is strictly circumscribed. Indeed it is not this Court's role to determine, based on its independent assessment of the scientific evidence, whether the agency could have reached a different conclusion with regard to the listing of the polar bear. Rather, as mandated by the Supreme Court (Chevron Doctrine)…, the full extent of the Court's authority in this case is to determine whether the agency's decision-making process and its ultimate decision to list the polar bear as a threatened species satisfy certain minimal standards of rationality based upon the evidence before the

agency at the time…. [T]he Court is persuaded that the Listing Rule survives the highly deferential standard…. [T]he Court finds that plaintiffs have failed to demonstrate that the agency's listing determination rises to the level of irrationality. In the Court's opinion, plaintiffs' challenges amount to nothing more than competing views about policy and science…. [T]he Court cannot substitute either the plaintiffs' or its own judgment for that of the agency…. That is particularly true where, as here, the agency is operating at the frontiers of science…. [T]he Court finds that the Service's decision…represents a reasoned exercise of the agency's discretion….

The Court then went on for 116 pages addressing the issues almost one-by-one in a very organized fashion. That said, it must be recognized that the number of issues was limited by the page restrictions and joint pleading requirement. The memorandum opinion can be found on Conservation Force's website under News and Alerts at http://www.conservationforce.org/news.html. It is the 268th document filed in the Court record of this enormous case.

Of course, we knew going in of the Court's abstention approach and focused on the legal and procedural failure to "take into account" Canada's conservation program and the irrationality of listing the bear when the net effect would be negative. It was negative because it would not change climate conditions but would obstruct the benefits dependent upon conservation hunting. That issue is important to the whole sustainable use community for reasons far more reaching than just the polar bear. That was a procedural as well as a substantive challenge. In fact, most of our issues fell in that procedural category that should have escaped the Court's deference in favor of the agency. Even the Court acknowledged that our argument that the agency failed to properly "take into account" the Canadian program was "procedural" and at one point in the decision said that "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decision-making." In short, we argue that the agency did not "take into account" Canada's program or the harm to that program in the listing process. It procedurally skipped that step.

The Court found that "the parties acknowledge Congress did not define the phrase 'taking into account,' nor has it been defined or otherwise clarified by regulation, by agency policy, or by any court." Nevertheless, the Court upheld the agency's determination that "none of those efforts (range nation practices) offsets or significantly reduces the primary threat to the polar bear's survival: loss of sea ice habitat…. According to the defendants, this is all the ESA requires."

This is the most important ESA case of all time and the "taking into account" requirement is important to hunters and others within the sustainable use arena.

After pages of discussion the Court went on to hold that the agency did "all the statute requires…(and) [a]ccordingly…the agency purposely discharged its duty…to take foreign conservation programs into account." The Court really had to do some sidestepping and fact avoidance to reach that conclusion.

The argument that the agency recognized but did not take into account Canada's program was serious enough to overturn the whole listing. It obviously was one of the most serious issues raised and is unprecedented. For example, the agency actually said it could not take the program into account, which

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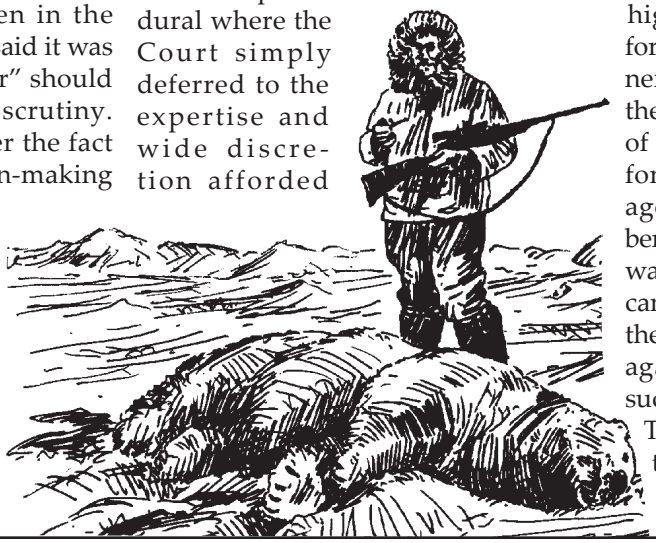
outright contradicts its post-listing argument and the factual basis of the Court's deference-based decisions.

We can't fully cover this issue in this short Bulletin because even the Court's reasoning is twice the length of this publication. It is certainly ripe for appeal, and we just as certainly need renewed financial support for that next important step. This is the most important ESA case of all time and the "taking into account" requirement is important to hunters and others within the sustainable use arena. The community can expect to soon see it in the potential listing of the African lion and other game species. Listing the bear when the listing is a net harm is irrational, not within the agency's reasoned discretion. Claiming to have "taken into account" a foreign country's program after the fact when in the rulemaking process the FWS said it was "not a factor it could consider" should not survive appellate court scrutiny. What the agency argued after the fact and what it did in its decision-making are not the same. Moreover, listing foreign species without even defining (ever) the "taking into account" requirement speaks for itself. It is arbitrary and capricious and contrary to other statutes that require publication, notice and comment governing of definitions. The agency has been operating for too long as if the requirement does not exist in the listing section of the ESA. In our opinion the Court went too far to uphold the listing.

The good side of the Court's opinion for future purposes is the Court held that procedurally the USF&WS must "take into account" the foreign nation's program. That includes the benefits arising from the sport-hunting programs and practices. That is a positive precedent. The negative is it seems to have held that the agency does not have to consider the effect of the loss of hunting as a result of the listing when it is not directly related to the threat that is the basis of the listing, loss of habitat and prey due to climate change in this instance.

There are many other issues that were not procedural where the Court simply deferred to the expertise and wide discretion afforded the agency. We will be joining in those appropriate issues as well on appeal for good reason. Had the agency taken into account the benefits of the hunting, it could have and should have used its broad discretion not to list the polar bear throughout its entire range and in all management units. In our opinion, if the range nation programs were taken into account, some management units would not have been listed. Something else, something unstated, may have been behind the listing.



All the other polar bear cases that were consolidated with the listing cases remain open. The Court certified the listing case as final to permit appeal now without waiting on the other cases. Conservation Force's case challenging the denial of enhancement permits for the Gulf of Boothia - which has a record high population, underharvest and is forecasted by USGS to improve over the next 50 years – still awaits decision by the Court. The Court's studied support of the agency's decision gives concern for the enhancement permit case. The agency argued in that case that only benefits that directly offset the threat that was the underlying basis of the listing can constitute enhancement. Of course there is no regulation to that effect and, again, the listing itself was not put to such a test, nor could it pass such a test. To the contrary, the agency admitted the threatened listing would not and could not offset climate change. ■

Permit Exclusions Eliminated for "The Three Amigos"

The US Fish & Wildlife Service (USF&WS) has finally published a response to the Court decision that it could not exempt Endangered Species Act (ESA) "endangered" listed scimitar-horned oryx, addax and dama gazelle ("The Three Amigos") from captive-bred and cull permitting. The exemption adopted when the three were listed on September 2, 2005 (70 FR 52319) provided that no permit was necessary and no permit publication was necessary before breeding and culling those exotics within the United States. The regulation creating that exemption was held by the District Court to be in violation of the ESA because there were no permits published in the Federal Register for public comment. The matter was remanded back to the agency on June 22, 2009 for action consistent with the Court's order.

Since June 22, 2009, two full years, the USF&WS has not been able to find a lawful way to eliminate the requirement for a permit and public notice and comments on the pending permit application. Despite some express promises that they were working on an alternative, the Notice is entitled *Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions*, 76 FR 39804, July 7, 2011. Permits will be required according to the proposal.

The proposed action "would eliminate the exclusion" that exempted the species from permitting. It states "a person would need to qualify for an exemption or obtain an authorization under the current statutory and regulatory requirements to breed or cull the three species."

The proposed action "would eliminate the exclusion" of these three captive-bred exotics from the normal requirement that a ranch owner have both a permit to breed and a second to cull/hunt the species on his property. The permits must be individual ranch permits.

Comments must be postmarked or received on or before August 8, 2011. The agency welcomes suggestions and this is an opportunity to suggest how the longstanding captive-bred and cull permitting regime can be improved. For example, one suggestion might be that notices of expiration be sent to permittees before their permits expire. Another might be to make the cull permits two years long rather than one year so that renewals are not so often. Ranchers that have had bad experiences or complaints about the current system must speak up now. Conservation Force welcomes all suggestions and will pass them along in its own comments.

The biggest problem we have encountered with the normal regulatory requirement to have a captive-bred and cull permit is ranchers' failure to do the required annual report and the failure to timely file a permit renewal application before it expires. A recent regulation seems to require that a renewal application be filed more than 30 days before the permits expire if they are to remain in effect while they are being noticed in the Federal Register and processed for months or more. This is necessary for both the captive-bred and cull permits.

Another problem has been the fact that the antis track down the identity of those receiving revenue from these programs for projects that benefit the species (five percent or more of the gross revenue from the culling/hunting). The antis then threaten and intimidate the recipients of the project revenue. Many then reject the funds and cancel the projects. This is why Conservation Force has had to create its Ranching for Restoration Program and substitute itself as the recipient. Then all the funds are passed through Conservation Force without any administrative fee. Perhaps it is time to curtail that because the Court upheld the USF&WS finding that the activity enhanced the survival of the species and, of course, culling of captive-bred animals is a necessary husbandry practice.

It seems to be clear and inevitable that the two permits are to be required unless the ESA is amended by Congress. The most we hope for is improvement in the administration of the permitting. On the other hand, be forewarned that the antis opposed to captive breeding and culling-husbandry necessities will have some suggestions of their own! Comments will be posted on http://www.regulations.gov. The Federal Register proposal can be found at 76 FR 39804, July 7, 2011 and is posted on Conservation Force's website under News and Alerts at http://www.conservationforce.org/news.html.

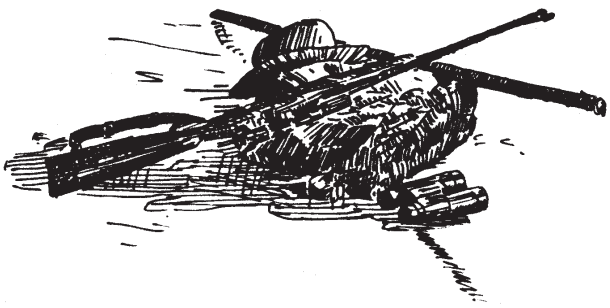
Remember, the agency can't change the ESA, but you can suggest a change of regulation or the way the law is administered by the agency.

So what do owners and managers of these animals do in the interval? The exemption from permits is still in effect until noticed that it is not in effect. Operate as usual but be mindful that you will have to give the status and history of your ranch population in both your breed and cull permit applications. You can prepare by collecting that information while waiting. Filing for permits now is premature. The agency does not want them until the new regulation is complete. When the time comes, Conservation Force will act as legal counsel, assist all permit applicants and maintain projects in the countries of origin of the species, as it has done for over a decade in its Ranching for Restoration Program. If you wish to get on our list, send the following information to Conservation Force at jjw-no@att.net: 1.) Your name, phone and contact information, including postal and e-mail addresses, 2.) the name and address of your ranch, 3.) the estimated number of the three species.

It is also important to note that the District Court upheld part of the rule that was struck down. It upheld the hunting and found it constituted "enhancement." This means a rancher does not have to find and fund an overseas project that will accept a percentage of the revenue from the hunting. Thus, the antis can no longer intimidate overseas recipients out of accepting some of the revenue. It is important that commenters get the FWS to keep that part of the rule upheld. It is enhancement. ■

To Comment On The Permitting Process

Comments may be submitted online through the Federal Rulemaking Portal at http://www.regulations.gov by following the instructions on Docket No. FWS-R9-IA-2010-0056. Postal comments should be addressed to ATTN: FWS-R9-IA-2010-0056; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. The deadline is August 8, 2011.



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