

1
2 THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF COLUMBIA

4 KEITH ATCHESON) Case No. :
3210 Ottawa st.)
Butte, MT 59701)

5)
6 KEITH HALSTEAD)
308 Stonebrook Farm Way)
Greenville, SC 29615)

7)
8 BEN HAMEL)
2385 Belmer Rd.)
Petoskey, MI 49770)

9
10 MARCUS C. HANSEN
1850 Horseshoe trail
Chester Springs, PA 19425

11 AARON NIELSON
12 2717 Marsha Lane
Royse City, TX 75189

13 KEVIN WIECZOREK
14 45514 Private Shore Dr.
Chesterfield, MI 48047

15 DENNIS DUNN
16 4817 Lake Washington Blvd. N.E.,
Unit #3
Kirkland, WA 98033

17 CONSERVATION FORCE
18 3240 S. I-10 Service Rd. W, Ste. 200
Metairie, LA 70001;

19
20 Plaintiffs,

21 vs.

22 KEN SALAZAR, in his official
23 capacity; ROWAN GOULD, in his
24 official capacity; U.S. FISH AND
WILDLIFE SERVICE
1849 C. Street, NW
Washington, D.C. 20240,

25 Defendants
26

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2
3 **COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF TO OBTAIN**
4 **ENHANCEMENT PERMITS FOR IMPORT OF SPORT HUNTED POLAR BEAR TROPHIES**
5

6 1. Introduction

7 1. This is not a suit challenging the listing of the polar bear or the
8 4(d) Rule or import of polar bear trophies under the 1994 Amendments
9 to the MMPA.

10 2. This suit seeks to overturn the US Fish and Wildlife Service denial
11 of "enhancement permit" applications to import polar bear trophies
12 taken in the Gulf of Boothia. This is the first attempt to import
13 polar bear trophies under those provisions of the MMPA.

14 3. When the U.S. Fish and Wildlife Service listed the Polar Bear as a
15 "threatened" species under the Endangered Species Act (ESA) that
16 triggered section 3(1) of the MMPA, which defines a species as
17 "depleted" if it is "threatened under the ESA without regard to
18 actual population status. The polar bear population in the Gulf of
19 Boothia is not really depleted and is not projected to be in the
20 future.

21 4. Even though the "depleted" status is a fiction, under §3(1) of the
22 MMPA the importation of polar bear trophies is prohibited unless the
23 taking is for scientific research or contributes to the enhancement
24 of the species. The permit applications at issue were the first
25 such enhancement permit applications.
26

1 5. The polar Bear trophies that plaintiffs seek to import were taken in
2 a manner that directly supports and maintains the Canadian polar
3 bear stock.

4 6. Plaintiffs request that this Court issue an order that their
5 trophies taken in the Gulf of Boothia in licensed, regulated hunts
6 as part of Canada and Nunavut's polar bear conservation program be
7 permitted import as specified under the enhancement provisions of
8 MMPA §§ 101(a)(3)(B) and 102(b).

9
10 2. Jurisdiction and Venue

11 7. This action is brought to challenge a government interpretation
12 and administration of the enhancement section of the Marine Mammal
13 Protection Act (MMPA) and 5 U.S.C. 704 (APA) and the denial of MMPA
14 permits as provided for in 16 U.S.C. 1374(d)(6).

15 8. Controversies arising under the MMPA are federal questions, and
16 are subject to federal jurisdiction under 16 U.S.C. §1361 *et seq.* of
17 the MMPA.

18 9. The MMPA specifically establishes the District Court for the
19 District of Columbia as the venue for permit applicants who wish to
20 challenge the denial of their permits. 16 U.S.C. § 1374 (d)(6).

21 10. Furthermore, federal venue is governed by 28 U.S.C. § 1391.

22 Where a plaintiff files an action against a government entity or a
23 government employee acting in his official capacity, the plaintiff
24 may sue in any district where any defendant resides. §1391(e).

25 11. The United States Fish and Wildlife Service (USFWS) is located in
26 Washington, D.C., which makes this Court an appropriate venue.

1 denied by defendants. He then filed a request for reconsideration
2 which was also denied.

3
4 **15. Ben Hamel**

5 Ben Hamel is a U.S. citizen from Petoskey, MI. He lawfully
6 participated in a licensed, regulated polar bear hunt on June 30,
7 2004 in the Gulf of Boothia. Hamel submitted an application for an
8 enhancement permit under section 101(a)(3)(B)(5) of the MMPA to
9 import his trophy and his application was denied by defendants. He
10 then filed a request for reconsideration which was also denied.

11
12 **16. Marcus Hansen**

13 Marcus Hansen is a U.S. citizen from Chester Springs, PA. He
14 lawfully participated in a licensed, regulated polar bear hunt on
15 May 4, 2004 in the Gulf of Boothia. Hansen submitted an application
16 for an enhancement permit under section 101(a)(3)(B)(5) of the MMPA
17 to import his polar bear trophy and his application was denied by
18 defendants. He then filed a request for reconsideration which was
19 also denied by defendants.

20
21 **17. Aaron Nielson**

22 Aaron Nielson is a U.S. citizen from Royse City, Texas. He lawfully
23 participated in a licensed, regulated polar bear hunt on April 30,
24 2003 in the Gulf of Boothia. Nielsen submitted an application for
25 an enhancement permit under section 101(a)(3)(B)(5) of the MMPA to
26 import his polar bear trophy and his application was denied by

1 defendants. He then filed a request for reconsideration which was
2 also denied.

3
4 **18. Kevin Wieczorek**

5 Kevin Wieczorek is a U.S. citizen from Chesterfield, MI. He
6 lawfully participated in a licensed, regulated polar bear hunt on
7 May 29, 2005 in the Gulf of Boothia. Wieczorek submitted an
8 application for an enhancement permit under section 101(a)(3)(B)(5)
9 of the MMPA to import his polar bear trophy and his application was
10 denied by defendants. He then filed a request for reconsideration
11 which was also denied.

12
13 **19. Conservation Force**

14 Conservation Force brings this action in its own capacity and as
15 a representative of its many constituent U.S. polar bear hunters and
16 its supporting conservation organizations and Canadian conservation
17 partners. Conservation Force is a non-profit 501(c)(3) foundation
18 formed for the purpose of wildlife conservation, related education
19 and wildlife research. It was formed to better direct hunting to be
20 an even greater force for conservation than it has been. Its name
21 stands for the fact that the sustainable use of wildlife,
22 particularly in the form of recreational hunting, has been the
23 foremost force for wildlife and habitat conservation in North
24 America for over a century.

25 Conservation force has wildlife conservation projects around the
26 world to conserve, manage and protect game species including the

1 polar bear. Its officers and leaders have been participants in the
2 ESA and CITES process since the inception of the ESA and CITES.
3 Conservation Force is committed to and is directly participating in
4 the conservation of polar bear.

5 Among its members are the Polar Bear hunters who will no longer
6 be able to obtain the objective of their physically, emotionally,
7 and economically taxing polar bear hunts and the Inuit whose economy
8 depends on the infusion of money from guiding American Conservation
9 Hunters on hunting expeditions.

10 Its leadership pioneered the import of polar bear hunting
11 trophies under the Reform of the MMPA in 1994 that has been
12 recognized to have been of great benefit to the conservation of
13 polar bear.

14 15 4. Defendants

16 17 20. **Ken Salazar, U.S. Secretary of the Interior**

18 Secretary Kempthorne is the highest ranking official within the
19 Department of the Interior ("DOI"). As Secretary, he has ultimate
20 responsibility for the administration and implementation of the ESA
21 and the MMPA with regard to the polar bear, and for compliance with
22 all other federal laws applicable to the Department of the Interior.
23 He is sued in his official capacity.

24 25 21. **Rowan Gould, Director of the USFWS**

1 The director is responsible for the administration and
2 implementation of the ESA and the MMPA. He is sued in his official
3 capacity.

4
5 **22. United States Fish and Wildlife Service**

6 The United States Fish and Wildlife Service, hereinafter FWS, is a
7 federal agency within the Department of the Interior authorized and
8 required by law to protect and manage the fish, wildlife, and native
9 plant resources of the United States. This includes the enforcement
10 of the ESA and MMPA. It is the agency that has issued special rules
11 prohibiting the importation of the polar bear.

12
13 **5. Statutory Framework**

14 **a. The Marine Mammal Protection Act (MMPA)**

15 23. Section 3(1) of the MMPA states that the term "depleted" means a
16 situation in which:

- 17 i. the Secretary, after consultation with the Marine Mammal
18 Commission and the Committee of Scientific Advisors on
19 Marine Mammals established under subchapter III of this
20 chapter, determines that a species or population stock is
21 below its optimum sustainable population;
- 22 ii. a State, to which authority for the conservation and
23 management of a species or population stock is transferred
24 under section 1379 of this title, determines that such
25 species or stock is below its optimum sustainable
26 population; or

1 iii. a species or population stock is listed as an endangered
2 species or a threatened species under the Endangered
3 Species Act of 1973 [16 U. S.C. 1531 et seq.].

4 24. When a species has been categorized as "depleted" under this
5 statute, its importation is thereafter governed by section 101(a)(3)(B)
6 of the MMPA, which states that:

7 Except for scientific research purposes, photography for
8 educational or commercial purposes, or *enhancing the*
9 *survival or recovery of a species or stock* as provided for
10 in paragraph (1) of this subsection, or as provided for
11 under paragraph (5) of this subsection, during the
12 moratorium no permit may be issued for the taking of any
13 marine mammal which has been designated by the Secretary as
14 depleted, and *no importation may be made* of any such
15 mammal. (Emphasis added.)

16 25. In order to qualify for a permit to enhance the survival or
17 recovery of a species an applicant must prove that:

- 18 i) taking or importation is likely to contribute
19 significantly to *maintaining or increasing*
20 distribution or numbers necessary to ensure the
21 survival or recovery of the species or stock; and
22 ii) taking or importation is consistent (I) with any
23 conservation plan adopted by the Secretary under
24 section 115(b) of this title or any recovery plan
25 developed under section 4(f) of the Endangered
26 Species Act of 1973 for the species or stock, or (II)

1 if there is no conservation or recovery plan in
2 place, with the Secretary' s evaluation of actions
3 required to enhance the survival or recovery of the
4 species or stock in light to the factors that would
5 be addressed in a conservation plan or a recovery
6 plan. (Emphasis added.)

7 26. The factors determining the acceptability and development of a
8 conservation plan for a depleted species are modeled on the
9 requirements set forth in section 4(f) of the Endangered Species
10 Act, which states that the secretary must:

11
12 (B) incorporate in each plan—

13 (i) a description of such site-specific
14 management actions as may be necessary to
15 achieve the plan's goal for the conservation
16 and survival of the species;

17 (ii) objective, measurable criteria which, when
18 met, would result in a determination, in accordance
19 with the provisions of this section, that the species
20 be removed from the list; and

21 (iii) estimates of the time required and the cost to
22 carry out those measures needed to achieve the plan's
23 goal and to achieve intermediate steps toward that
24 goal.

1 27. In the instant case, the United States has no jurisdiction to
2 create a recovery plan in the Gulf of Boothia that is in Nunavut,
3 Canada.

4
5 b. Administrative Procedures (APA) and Federal Register Acts

6 28. Permit denials that are arbitrary, capricious, an abuse of
7 discretion or not otherwise in accordance with law are are
8 violations of 5 U.S.C. §706(2)(A) of the APA.

9 29. Denials that are "contrary to constitutional right" are also
10 prohibited under the APA. 5 U.S.C. §706(2)(B).

11 30. The APA provides general rules governing the issuance of proposed
12 and final regulations by federal agencies. 5 U.S.C. 551 et seq. A
13 "rule" is defined by the APA as "the whole or part of an agency
14 statement of general or particular applicability and future effect
15 designed to implement, interpret, or prescribe law or policy or
16 describing the organization, procedure, or practice requirements of
17 an agency." 5 U.S.C. 551(4).

18 31. Fundamental to the APA's procedural framework is the requirement
19 that, absent narrow circumstances, a federal agency publish as a
20 proposal any rule that it is considering adopting and allow the
21 public the opportunity to submit written comments on the proposal.
22 5 U.S.C. §553, the APA section governing rule making, and 44 U.S.C.
23 1502 of the Federal Register Act.

24 32. Once regulations have been established, the Federal Register Act
25 mandates that they must be published in the Federal Register or they
26 will not be valid. 44 U.S.C. §§1505 and 1507.

1 33. Any such publication must, at a minimum, include "(1) a statement
2 of the time, place, and nature of public rule making proceedings;
3 (2) reference to the legal authority under which the rule is
4 proposed; and (3) either the terms or substance of the proposed rule
5 or a description of the subjects and issues involved." 5 U.S.C.
6 §553(b).

7 34. An agency may only circumvent the public notice and comment
8 requirements of the APA if it finds "for good cause" that "notice
9 and public procedure thereon are impracticable, unnecessary, or
10 contrary to the public interest." 5 U.S.C. 553(b)(B).

11 35. Regulations and determinations that violate the APA are unlawful
12 and should be set aside. 5 U.S.C. §706(2).

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14
15 c. Scope of Review

16 36. The Administrative Procedure Act mandates that when a court is
17 presented with a question of agency action on review, it shall
18 "decide all relevant questions of law, interpret constitutional and
19 statutory provisions, and determine the meaning or applicability of
20 the terms of an agency action." 5 U.S.C. §706.

21 37. This Court shall also a) "compel agency action unlawfully
22 withheld or unreasonably delayed", b) hold unlawful those actions
23 that were so unwarranted by the facts as to require a de novo trial,
24 and those actions which were arbitrary, capricious or otherwise not
25 in accordance with the law. 5 U.S.C. §706 sections (1) and(2)(a),
26 (f).

1 d. Declaratory Judgment

2 38. The Declaratory Judgment Act is "an enabling Act, which confers a
3 discretion on the courts rather than an absolute right upon the
4 litigant." *Green v. Mansour*, 474 U.S. 64, 72 (1985).

5 39. Declaratory Judgments are, however, a favored form of relief
6 where "(1) when the judgment will serve a useful purpose in
7 clarifying and settling the legal relations in issue, and (2) when
8 it will terminate and afford relief from the uncertainty,
9 insecurity, and controversy giving rise to the proceeding." *Jackson*
10 *v. Culinary Sch.*, 27 F.3d 573, 578 (D.C. Cir. 1994).

11
12 e. Mandamus Relief

13 40. The federal writ of Mandamus was abolished from the federal
14 district courts pursuant to FRCP 81(b). Actions "in the nature of
15 Mandamus" are now governed by 28 USCS § 1361, which allows the
16 district courts to compel federal employees to perform a duty owed
17 to the plaintiff. *Id.*

18 41. Though the writ itself has been abolished, "the principles that
19 governed the former writ now govern attempts to secure similar
20 relief." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir.
21 1985).

22 42. In order to be granted mandamus relief, petitioner must prove
23 that "1) a clear right on the part of the petitioner to the relief
24 sought, (2) a clear duty on the part of the respondent to do the act
25 in question, and (3) no other adequate remedy available to
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4 f. Standing

5 43. The MMPA confers standing in this Court to any individual who
6 personally has applied for an enhancement import permit whose permit
7 application has been denied by the USFWS. 16 U.S.C. § 1374 (d)(6).

8 44. Any person who can prove that he has been injured or his
9 interests impeded by the action of an employee of the U.S.
10 Government within the meaning of a relevant statute has a right to
11 have that action judicially reviewed. 5 U.S.C. § 702.
12 In order for a plaintiff to have Article III constitutional
13 standing, he must have suffered injury in fact, there must be "a
14 causal connection between the injury and the conduct complained of",
15 and the enforcement of an agency action must be likely to redress
16 the injury to plaintiffs. Defenders of Wildlife v. Gutierrez, 532
17 F.3d 913, 924 (D.C. Cir. 2008).

18 45. Furthermore, a plaintiff must have "prudential standing", which
19 requires that "a plaintiff's grievance must arguably fall within the
20 zone of interests protected or regulated by the statutory provision
21 or constitutional guarantee invoked in the suit." Bennett v. Spear,
22 520 U.S. 154, 163 (1997).

23 46. The interpretation for associations and nonprofits is more
24 specific, namely that a group may sue on behalf of its members when
25 "its members would otherwise have standing to sue in their own
26 right, the interests at stake are germane to the organization's

1 purpose, and neither the claim asserted nor the relief requested
2 requires the participation of individual members in the lawsuit."
3 Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528
4 U.S. 167, 181 (2000).

6. Factual Background

a. Effect of the Polar Bear ESA listing

8 47. In January 2007, the USFWS listed the polar bear as a "threatened
9 species". The Endangered Species Act itself does not prohibit the
10 importation of legally taken sport hunting trophies of threatened
11 listed species. In fact, it exempts trophies protected by Appendix
12 II of CITES from restriction. ESA, Section 9(c)(2).

13 48. The polar bear is also regulated by the Marine Mammal Protection
14 Act, which does not make such a distinction.

15 49. The USFWS decision to list the polar bear triggered a provision
16 of the MMPA that requires that any species listed as "threatened"
17 under the ESA also be treated as "depleted" by the USFWS. See MMPA
18 § 3(6). It is a legal fiction, not a fact.

19 50. When a marine mammal is "depleted" a moratorium on the import of
20 that animal is instituted, except for "scientific research purposes,
21 or *enhancing the survival or recovery of a species or stock*".
22 (emphasis added) MMPA §101(a)(3)(B). This suit involves the
23 latter.

24 51. In order to import marine mammal parts under MMPA §104(c)(4)(A)
25 the animal must have been taken in a manner that meets the following
26 requirements: 1) it must "contribute significantly to maintaining or

1 increasing distribution or numbers necessary to ensure the *survival*
2 or recovery of the species or stock"; (emphasis added) 2) the
3 taking is consistent with "actions required to enhance the *survival*
4 or recovery of the species or stock in light to the factors that
5 would be addressed in a *conservation plan* or a recovery plan."
6 (emphasis added) §104(c)(4)(A)(ii).

7 52. Prior to the listing, polar bear trophies were imported under the
8 1994 Amendments to the MPMA, Section 104(c)(5).

9 53. The Endangered Species Act, 16 U.S.C. 1531-1544, provides for the
10 listing of both domestic (USA) and foreign species. In the case of
11 foreign species, the ESA does not provide the same level or kind of
12 benefits it does for domestic species within U.S. jurisdiction, i.e.
13 no critical habitat designation (16 U.S.C. 1538, 1539 (2003)), no
14 habitat conservation mechanisms (16 U.S.C. 1534 (2003)), no
15 cooperative mitigation programs, no recovery planning (16 U.S.C.
16 1533(1) (2003)), no funding (16 U.S.C. 1535(d) (2003)) or most
17 Section 7 consultations and Section 6 grant-in-aid programs. "Most
18 of the key conservation provisions of the ESA do not apply to
19 foreign species." 68 FR 49512 at 49513.

20 54. The FWS has expressly recognized that importation of sport
21 hunting trophies can have "potential conservation benefits...such as
22 when such trade is part of the management plan of the country of
23 origin. In such cases, listing under the Act...which prohibits such
24 trade, may have potential conservation detriment for some species.
25 Certainly the United States should endeavor, when possible, to
26

1 recognize the conservation programs of foreign countries, when based
2 on sound science." 63 FR 25502 May 8, 1998, Final Listing Guidance.

3 55. This consideration when listing foreign species is also carried
4 in the International Cooperation, Section 8(b), Encouragement of
5 Foreign Programs and is explicit in the Congressional history of the
6 ESA. That section of the ESA states that the Secretary "shall
7 encourage (1) foreign countries to provide for the conservation
8 of...wildlife...including...threatened species..." and the Congressional
9 history is clear that includes the revenue necessary to do so.

10 56. The ESA was "carefully drafted to encourage...foreign governments
11 to develop healthy stocks of animals occurring naturally within
12 their borders. If these animals are considered valuable as trophy
13 animals...they should be regarded as a potential source of revenue...and
14 they should be encouraged to develop to the maximum extent
15 compatible with the ecosystem upon which they depend."

16 Congressional Record, Sept.18, 1993, pg. 30163. ESA Section 9(c)(2)
17 recognizes the economic importance of tourist sport hunting, to
18 foreign nation programs. 73 FR at 28242.

19 57. Both the MMPA, 16 U.S.C. 1371(b), and the ESA exempt native
20 Alaskan take of polar bear/marine mammals in recognition by Congress
21 of the conservation benefits and "economic" incentives it provides
22 to Alaska natives. 16 U.S.C. 1539(e) (2003). FWS and Marine Mammal
23 Commission regulations do the same. The interim special regulation
24 and final special regulation exempts Alaskan native polar bear
25 harvest and polar bear parts imports because of and in full
26

1 recognition of its integral economic and conservation benefits. 73
2 FR at 76267.

3 58. The FWS stated it was prohibited from taking consideration of
4 those same factors in the ESA listing determination of Canada's
5 bear. Now the FWS has failed to recognize the benefit for the Gulf
6 of Boothia bear as those in Alaska through a higher revenue harvest.

7 59. Canada manages or shares management responsibility of 13 of the
8 world's 19 polar bear populations. Six of those are in the
9 Archipelago region of Canada that is expected to be affected the
10 least and last, yet they were listed decades before projected
11 decline. Eight, and perhaps nine of those polar bear populations
12 are increasing or stable. The Archipelago ecoregion is projected to
13 lose no more than 3 to 14 percent of its polar bear sea ice carrying
14 capacity over the next 45 years. 73 FR at 28273. That includes the
15 Gulf of Boothia.

16 60. Most of the world's polar bear exist in Canada (approximately
17 two-thirds), which is renowned and recognized for having the best
18 and most comprehensive conservation/management strategy in
19 existence. Of course, it needs revenue to operate and incentives to
20 motivate native people.

21 61. The listing does not reduce the harvest quota or the number of
22 polar bear taken in Canada, i.e. it only reduces its value as a
23 resource to practically zero.

24 62. The overall total worldwide decline in polar bear population
25 today is an insignificantly small part of the total population,
26 approximately one-tenth of one percent (less than 258/25,000). Even

1 that one reduction is disputed. That one population is now stable
2 or increasing. The Gulf of Boothia population has been increasing.

3 63. The overall world polar bear population today is stable or
4 increasing. The FWS published that the population was 20,000-25,000
5 worldwide (73 FR at 28215) as compared to 8,000-10,000 in 1970 and
6 as low as 6,000-8,000 in 1960. More specifically, there are an
7 estimated 22,208 bear in 15 populations not including the Arctic and
8 three more population areas with unknown numbers. Determination of
9 Threatened Status, Id. at 28217.

10 64. There are "19 relatively discrete populations." Id. at 28215.
11 They are "sufficiently discrete to manage the populations
12 independently," (72 FR at 1068) and in fact are managed separately.
13 "The boundaries...are thought to be ecologically meaningful..." and the
14 bear are normally "geographically loyal." 73 FR at 28215. For 12
15 years the FWS has reviewed and approved for trophy import the
16 populations separately, but it did not treat them separately in the
17 ESA listing complained of.

18 65. Canada and Nunavut filed comments opposing the listing and have
19 found that the bear is not threatened under their own equivalent
20 laws, Species at Risk Act (SARA).

21 66. The FWS has repeatedly recognized the interrelated economic,
22 conservation and management importance of sport hunting in Canada
23 and native harvest in Alaska. Id. at 1090, see also 62 FR 7302 and
24 64 FR 1529. The special rule adopted simultaneously with the
25 "threatened" listing preserves the harvest and polar bear product
26 sale rights of Native Alaskans and specifically recognizes the

1 conservation value of that sustainable use. Had it felt legally
2 able to, it would have no doubt done the same for Canada where the
3 sport hunting is recognized as "conservation hunting" by the
4 Sustainable Use Specialist Group and the Polar Bear Specialist Group
5 of the IUCN and other experts and authorities.

6 67. The listing had the perverse effect of compromising the economic
7 viability and consequently the effectiveness of the conservation
8 hunting programs which have contributed to a coherent and effective
9 conservation strategy in the Canadian North.

10 68. The FWS was in the process and fully expected to approve the Gulf
11 of Boothia population for import of polar bear trophies under
12 Section 104 at the time of the ESA listing that triggered the legal
13 "depleted" status. It had been treated as a deferred population
14 while awaiting a population study that has since been completed.

15 69. Tourist polar bear hunting in Canada has been viewed as
16 "*Conservation Hunting*" and has been successfully used to build and
17 maintain the population level of polar bear. The listing does not
18 change that fact.

19 70. That hunting gives the bear its highest value as a resource,
20 approximately \$50,000.00 dollars per hunt, and has provided
21 significant economics means and incentive for the native people to
22 enter into co-management agreements, reduce the offtake of females
23 and cubs, and reduce retaliatory and problem animal killings.

24 71. The bear are going to be harvested anyway, but tourist hunting
25 has caused the overall harvest level to be lower and more
26 biologically selective and sound.

1 72. The Gulf of Boothia population of polar bear is not in need of
2 "recovery" or a plan for recovery as it is not depleted. It was not
3 appropriate for FWS to apply that leg of the enhancement test.

4 73. The Gulf of Boothia population is in need of maintenance and
5 survival and tourist hunting is Canada's proven conservation
6 strategy to do that.

7 74. The defendants ruled in the listing that it could not even
8 consider "the efficacy" of the listing for the bear's conservation
9 in the listing process. 73 FR 28252. In fact, the listing will
10 harm the bear and obstruct Canada's conservation paradigm, and the
11 bear was listed over both Canada and Nunavut's comment objection.

12 75. The permits in issue are the means to offset the negative
13 consequences of the listing with benefits that have been obstructed
14 by the listing that the peer reviewers were concerned about and the
15 Canadian authorities objected to.

16 76. It is not rational to apply a "recovery" test to a population
17 that is not in need of recovery.

18 77. It is not rational to require a recovery plan to a population
19 that has recovered.

20 78. It is not rational to knowingly disrupt and obstruct a successful
21 conservation strategy of a foreign nation when it is within the
22 means of defendants to encourage and support good management
23 practices and strategies that can in turn provide an example for
24 better management for other populations/stocks. The ESA requires
25 the defendants to "encourage", "cooperate" with and support such
26

1 range nation programs of listed species. 16 U.S.C. 1537(b), 50
2 C.F.R. 13.21.

3 79. Defendants' interpretation of the MMPA enhancement clause
4 unnecessarily makes the provision useless and inoperable for species
5 where the depletion is a legal fiction, not a fact. It punishes the
6 people of Canada and undermines their renowned conservation success
7 (the best in the world) for something they have not done and cannot
8 control: global warming.

9 80. In a May 23, 2008 analysis of polar bear importation after the
10 ESA listing, the Solicitor's office for the Dept. of the Interior
11 issued an opinion that

12 nothing in the legislative history indicates that
13 Congress's addition of section 104(c)(5) in 1994 (which
14 specifically deals with standard polar bear importation)
15 was intended to be the exclusive means of authorizing the
16 importation of polar bear parts from Canada that also
17 qualify under a different provision. (M-37015 Office of
18 the Solicitor, Dept. of the Interior, 5/23/08)

19 81. The Solicitor's opinion expressly states that "polar bear parts
20 may continue to be imported under one of the exceptions listed in
21 Section 101(a)(3)(B) and 102(b)...Both sections specify that their
22 restrictions for depleted species do not apply to permits
23 for...enhancement of the survival or recovery of the species or
24 stock," pg. 9.

25 82. The Solicitor continues, "Thus, polar bear and bear parts from
26 Canada may continue to be imported into the United States regardless

1 of depleted status if the stringent requirements for...enhancement are
2 met." Of course, this is much more restrictive than imports in the
3 past.

4 83. The opinion concludes: "I conclude that...[T]he Service may
5 authorize the importation of polar bear parts from Canada under an
6 MMPA...permit for the enhancement of the survival or recovery of the
7 species or stock if the importation meets all statutory and
8 regulatory requirements," pg. 11 of opinion.

9 84. In the ESA listing rule listing the polar bear and in the
10 associated 4(d) Rule under the ESA, the defendants stated the same
11 thing; that polar bear could still be imported under the more
12 restrictive enhancement provisions of the MMPA.

13 85. The Federal trial Judge of the Northern District of California
14 who trapped trophies in Canada by making the ESA listing "effective
15 immediately" also ruled that "Conservation Force may petition the
16 Secretary of the Interior for a waiver of the MMPA's requirements so
17 that its members may import their trophies, or it may seek judicial
18 review in a separate action of any administrative decision to deny
19 its members' applications for import permits." *Order Concerning the*
20 *Importation of Polar Bear Trophies*, No. 08-1339, pg. 5, dated
21 7/11/08.

22 86. According to the FWS denial of the applications in issue, all the
23 above suggestions that "enhancement" permits would apply to polar
24 bear trophy imports were false.

1 87. The Gulf of Boothia where the polar bear in question were taken
2 is the best possible stock/population for issuance of enhancement
3 permits.

4 88. Plaintiffs applied for enhancement permits to import their
5 hunting trophies taken in the Gulf of Boothia as the bear have been
6 increasing in number, are under-harvested and the USGS reports that
7 formed the basis of the listing of all bear found that the Gulf of
8 Boothia is an area not expected to melt in the foreseeable future.

9 89. Defendants denied all the permits. Plaintiffs then filed a
10 request for reconsideration.

11 90. In defendants' denial of plaintiffs' request for reconsideration,
12 defendants state that "to meet enhancement as defined under section
13 104(c)(4) of the MMPA, the importation of the sport-hunted trophies
14 must contribute directly and significantly to increasing or
15 *maintaining* the distribution or numbers of the species or stock, and
16 also must be necessary to ensure the species or stock's *survival* or
17 *recovery*." (emphasis added). Plaintiffs had done that.

18 91. Defendants erroneously state that plaintiffs "failed to clarify
19 how the trophy importations actually maintain or increase polar bear
20 populations and how the imports ameliorate the primary threat to
21 polar bear populations - global warming and sea-ice melt," in effect
22 limiting enhancement to correction of the loss of ice habitat that
23 is not expected to occur in the Gulf of Boothia.

24 92. Defendants erroneously assert that plaintiffs "failed to explain
25 how Canada's polar bear management plan constitutes a conservation
26

1 plan, or is consistent with the factors that would be addressed in a
2 conservation plan, as stipulated under the MMPA." Id.

3 93. Defendants concluded that "while sport hunting and the import of
4 the resulting trophies into the United States may provide some
5 conservation benefits, these activities in and of themselves do not
6 meet the requirements of enhancement under the MPAA," without any
7 further explanation other than the erroneous claim that the
8 enhancement must relieve global warming.

9 94. Defendants made clear, however that if plaintiffs wished to
10 provide further illuminating information "you must submit a new
11 application to this office before such information can be
12 considered," which itself is a violation of the appeal and request
13 for reconsideration rights provided by 50 C.F.R. 13.29(e) that
14 provides additional information should be attached.

15
16 b. Status of the polar bear

17 95. Most of the world's polar bear are found in Canada, which manages
18 or shares management responsibility for 13 of the world's 19 polar
19 bear populations.

20 96. Canada is well known for having the most respected and effective
21 conservation/management strategy for the polar bear. The USFWS
22 acknowledged this fact in its Rule to list the polar bear, saying
23 "Canada continues to manage polar bears in an effective and
24 sustainable manner." 72 FR 1064, 1090.

1 97. Canada's conservation strategy includes the enticement of revenue
2 to regions where polar bear are found and the encouragement of
3 native peoples to participate in the conservation strategy.

4 98. The gulf of Boothia polar bear population "is not . . . depleted,
5 nor is the current population considered to be in need of recovery
6 efforts," Expert Report of Dr. Mitch Taylor attached to application.

7 99. When hunting quotas are determined for such populations, the
8 effect of environmental changes on the sustainability of the bear
9 "is taken into account to ensure the hunting removals do not cause
10 the population to decline." Id.

11 100. Management of the density of a population by harvesting has
12 positive benefits for the health of the bear, including a lower
13 likelihood that the animals will be "infected by disease" and that
14 they will be "more resilient to environmental fluctuations and other
15 stressors than are individuals from populations at or near carrying
16 capacity." Id.

17
18 c. Canadian Polar Bear conservation

19 101. Experts involved in Canadian conservation hunting confirm that
20 "regulated and sustainable hunting is understood by knowledgeable
21 conservationists, and remains a foundational stewardship ethic among
22 Inuit, to be an important conservation practice," Expert Report,
23 attached to application.

24 102. Submissions by experts during the ESA polar bear listing process
25 have likewise indicated that the Canadian conservation plan meets
26 "enhancement" standards, including the Congressional Research

1 Services, the Government of Nunavut, Dr. Andrew Derocher, the State
2 of Alaska, and the Association of Fish and Wildlife Agencies. Id.
3 at 4.

4 103. The hunts are classified as "conservation hunting" by the IUCN
5 Sustainable Use Specialist Group.

6 104. Benefits of conservations hunts include the reduction of the
7 overall number of bear harvested, because "30% of hunts are
8 unsuccessful. Since these (permit) tags may not be re-issued, the
9 total harvest of polar bears is reduced by tourist hunting by U.S.
10 hunters." Id.

11 105. The maintenance of current conservation co-management agreements
12 is so important that "it cannot be sufficiently stressed . . . the
13 goodwill and trust needed to allow current, and highly effective,
14 adaptive co-management arrangements to function. It is widely
15 acknowledged that these co-operative arrangements have contributed
16 significantly to the doubling, and in some cases trebling, of polar
17 bear numbers throughout the Canadian Arctic over the past thirty
18 years." A fear exists in the far north that hunters provide polar
19 bears with their high conservation value, and that value "may be
20 compromised by removal of economic benefit," Expert Report attached
21 to application and administrative appeal.

22 106. American hunters constitute the majority of conservation hunters
23 in the Canadian Arctic, and both their regulated takings of polar
24 bear and the money they are capable of bringing into the economy of
25 northern Canada are integral parts of the Canadian plan to conserve
26 and maintain polar bear populations.

1 107. A sport harvest reduction in the population reduces the
2 nutritional stress within the population by bringing it within the
3 new carrying capacity and prey base of the habitat, particularly by
4 harvesting large old male bear who otherwise tend to consume
5 excessive nutritional resources, and attack and eat female bear and
6 cubs.

7 108. The U.S. importation of polar bear hunting trophies, pioneered in
8 large part by plaintiff Conservation Force, has served as one of the
9 principle incentives and sources of funding for polar bear
10 management and conservation in the Northwest Territories and Nunavut
11 of Canada.

12 109. The interest of plaintiffs and other US hunters has increased the
13 value of the polar bear from \$400.00 to \$1,200.00 for its sale as a
14 pelt to \$40,000.00 - \$50,000.00 as a trophy to U.S. hunters.

15 110. The increase in the polar bear's value to the Inuit communities
16 has led to co-management agreements and better conservation terms in
17 co-management agreements. It has reduced the harvest of females and
18 cubs and has reduced the overall harvest level because of the lower
19 success rate of tourist hunters and the nontransferral of licenses
20 held by tourist hunters.

21
22 d. Consequences of denying Enhancement permits

23 111. Defendants' interpretation and application of the enhancement
24 provision of the MMPA is not in the best conservation interest of
25 the polar bear.
26

1 112. Currently, the system established in Canada, whereby the Inuit
2 have a constitutional right to hunt and are involved in
3 participatory decision-making regarding the management of polar bear
4 populations, is generally seen by groups such as the IUCN Polar Bear
5 Specialist Group as a positive and constructive way to manage the
6 bear. Experts believe, however, that "this situation could quickly
7 deteriorate if the views of local experts are ignored and those of
8 non-local researchers with contradictory opinions are used to over-
9 rule the considered views of those observing regional bear
10 populations and their dynamic and changing environment on a long-
11 term and continuous basis." Id. at p.2.

12 113. The degree to which the economic incentives provided by
13 conservation hunting drive the Inuit involvement in Canadian
14 conservation efforts cannot be underestimated. In fact,
15 Inuit hunting guides are most often individuals who
16 consider themselves full-time hunters and have no desire,
17 nor sometimes the linguistic ability, to participate in
18 full-time wage employment. The importance of the overall
19 subsistence system of the high level of remuneration paid
20 to guides (ranging from \$4,000 to \$4,500 per hunt) is
21 significant, for subsistence hunting requires a large
22 amount of money, time and Inuit effort, and the demands of
23 regular wage work and daily hunting is basically to carry
24 on two full time occupations which, in combination, are
25 rarely both successful. (plaintiffs' petition, exhibits,
26 p.11)

1 The USFWS's suggestion in its denial of plaintiffs' petition for
2 reconsideration that sport hunting in Canada does not "contribute
3 directly and significantly to increasing or maintaining the
4 distribution or numbers of the species or stock" is unfounded,
5 because the entire system of Canadian relies upon incentivizing the
6 Inuit to restrict traditional hunting practices using hunters'
7 money, most of which are Americans.

8 114. The Polar Bear Administrative Committee, consisting of the
9 governments of three territories, five provinces, and the federal
10 government of Canada, has stated emphatically in correspondence with
11 the USFWS that "an ESA listing of polar bears *will have* unintended
12 implications for the conservation of polar bears in Canada for this
13 very reason." Id at p. 6.

14 115. Milton Freeman, a senior Research Scholar at the Canadian
15 Circumpolar institute, suggests that the situation created by the
16 polar bear listing is "puzzling" insofar as the US government would
17 "enact a measure that 1) seriously disrupts the highly effective
18 Canadian conservation strategy, and 2) ignores the explicit legal
19 requirement under the ESA to take fully into account the
20 conservation measures of other range states." (plaintiff's
21 petition, exhibits, p. 6)

22 116. By listing the polar bear as threatened, and adopting a policy
23 whereby the importation of legally obtained hunting trophies cannot
24 be classified as "enhancing the survival or recovery of a species or
25 stock," the USFWS has reversed years of work to develop U.S. hunting
26 as a force for the conservation of the bear.

1 117. Even during the listing process for the polar bear the National
2 Policy Analysis included the concession that "listing the polar bear
3 under the ESA could harm bear conservation efforts by eliminating
4 revenues from the carefully - regulated sport hunting of polar bears
5 by Americans . . . [and] the revenue currently generated by American
6 sport hunters for conservation and research efforts (in the U.S.)
7 would be eliminated." (plaintiffs' request for reconsideration, p.
8 4)

9 118. In failing to take into account the role that US hunters play in
10 the conservation and continued health of the Canadian polar bear, it
11 has not only construed "enhancement" so narrowly that almost no act
12 of conservation could justify the importation of a threatened listed
13 species, it has actively injured the prospects of the species it is
14 ostensibly seeking to protect and conserve.

15 16 7. Claims

17 18 A. The Denials Violate the MMPA

19 119. Plaintiffs incorporate by reference all of the allegations of law
20 and fact in the preceding paragraphs.

21 120. Section 101(a)(3)(B)(5) requires proof of enhancement that
22 benefits the survival of the particular stock/population, not any
23 particular kind of benefit and not just limited to recovery.

24 121. The Gulf of Boothia stock/population is not in fact depleted or
25 in need of recovery, nor are most Canadian populations of bear.
26

1 122. The bear was listed as "threatened" based upon projections 45
2 years into the future, not today's status. Moreover, the Gulf of
3 Boothia population was not listed because of a projected loss of ice
4 but due to a threat to a significant part of the range of the bear
5 elsewhere.

6 123. It was erroneous to limit enhancement to benefits that address
7 global warming.

8
9 B. Violation of Rulemaking

10 124. Plaintiffs incorporate by reference all of the allegations of law
11 and fact in the preceding paragraphs.

12 125. There is no published rule limiting enhancement to benefits that
13 address global warming and/or the cause of the projected decline or
14 depletion if there had been one for the Gulf of Boothia.

15 126. Such a requirement requires a rulemaking under both the APA and
16 Federal Register Act, 5 U.S.C. 553, 701-706; 44 U.S.C. 1505-1507.

17 127. The invented requirement is also ultra vires as well as not a
18 duly adopted regulation.

19
20 C. Disregard of Additional Information

21 128. Plaintiffs incorporate by reference all of the allegations of law
22 and fact in the preceding paragraphs.

23 129. The applications in issue were the first pioneering enhancement
24 applications and were documented to be the first. The defendants'
25 rationale for denial was and remains a complete surprise.

26

1 130. 50 C.F.R. 13.29(e) explicitly provides that permit applicants may
2 submit additional information with requests for reconsideration and
3 appeals, but the defendants stated the applicants could not and
4 apparently disregarded the additional information submitted.

5 131. Defendants violated their own regulations and procedural due
6 process when they apparently refused to consider the expert reports
7 attached to the requests for reconsideration addressing the very
8 specific issues raised by the denials.

9
10 D. APA and Due Process

11 132. Plaintiffs incorporate by reference all of the allegations of law
12 and fact in the preceding paragraphs.

13 133. The failure to find enhancement from the conservation hunting and
14 expert reports attached to the applications and requests for
15 reconsideration was arbitrary, capricious and irrational.

16 134. The requirement that the benefits from the hunting address a
17 fictional status not even relevant to the particular population in
18 issue is nonsensical and irrational and hence contrary to due
19 process and the rationality test of the APA.

20 135. The request for reconsideration was erroneously denied because it
21 did not satisfy "Section 104(c)(4) of the MMPA."

22 136. The applications unquestionably documented that the hunting in
23 issue helps in "maintaining" the population or "enhancing the health
24 or welfare of the...stock" or "ensuring the survival...of the...stock..." as
25 set forth in 50 C.F.R. 216.41(b)(6)(ii).

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Respectfully submitted,

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