SPECIAL SUPPLEMENT

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

World Conservation Force Bulletin

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Special Coverage On Polar Bear: Sustainable Use On Trial

DATELINE: **Arctic Circle**

NEWS...NEWS...NEWS

John J. Jackson III

This is an uncommon time in the history of hunting for Americans. Several of the important cases Conservation Force has spearheaded were argued orally before the courts in March and April. These are unprecedented cases initiated to slow the loss of real hunting rights or to recover rights that have recently been taken from us by the US Fish & Wildlife Service (USF&WS) under the authority of the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA). It is a privilege to handle such important cases but frightening that so very much is at stake and being taken away by the Agency.

In this issue of the Bulletin I will share insights on the issues, arguments and passions that are shaping the right to hunt for our children. Throughout the listings and regulations, the underlying issue at trial is the whole concept of sustainable use, the acceptance of hunting as a conservation tool and the underlying conservation of game and necessary habitat.

On April 13th, the last of the polar bear cases was orally argued before Judge Sullivan in Federal District Court in Washington, D.C. Readers may remember that all the polar bear cases from around the country were consolidated before Judge Sullivan for judicial economy. That included all the cases challenging the listing of the bear as "threatened" under the ESA. Some of those cases claim the bear or some of its populations should have been listed as "endangered" instead of just "threatened," such as that filed by the Center for Biological Diversity and Greenpeace. Others filed by Conservation Force (representing more than 30 individuals and entities), Safari Club International, the State of Alaska, etc. claim the bear and/or particular populations should not have been listed at all. Those have all been called "the listing cases."

A second category of cases includes those challenging the special rule under section 4(D) of the ESA. That is the regulation the USF&WS adopted to implement its listing of the bear. On one side are those litigants that want the USF&WS to use this rule to restrictively regulate all electric and petroleum use and production in order to stop mankind's "march to his own destruction" and to forever put a stop to the course of our civilized lives. It is that regulation that also prohibits the importation of polar bear trophies, including those already taken before the listing, because the Oakland District Judge ordered that the listing be made effective "immediately" rather than after notice and the passage of 90 days - as Congress has expressly provided in the ESA. Conservation Force appealed that "effective date" court order, but the appellate court held that the order was not a final judgment of the lower court and would not be eligible for appeal until the entire case was concluded. That waylaid our effort to get an extra 90 days for import of those trophies already taken from approved areas.

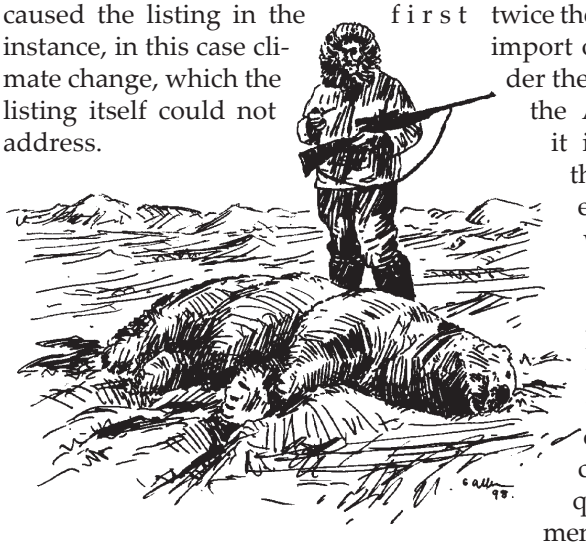
The third category of polar bear cases is called the "Import Cases." That includes the one filed by SCI challenging the USF&WS position that the listing automatically triggered an import prohibition in the MMPA, superseding the 1994 amendments to the MMPA that had permitted trophy imports from approved areas.

The other import case was filed by Conservation Force after the USF&WS denied seven import permit applications we filed under the "enhancement" section of the MMPA added by Congress in 1988 and for which the Agency then denied the applicants' requests for reconsideration. Those permit applications were filed on behalf of seven prominent hunters who had already taken bear in the Gulf of Boothia Management Unit before the listing in anticipation that the area would be approved. Enhancement permits are the only remaining way to import polar bear, according to the USF&WS. But import of hunting trophies under that "enhancement" section had never before been attempted, and the applications were flat-out denied. It is truly pioneering permitting.

On the afternoon of April 13, yours truly orally argued before the court that the denial of the seven

enhancement permit applications was arbitrary and capricious and also contrary to the intent of Congress under the enhancement section of the law. I argued with passion, as life depended upon it: the lives of the Inuit people and the bear. Believe me; the Court took note of the logic, the sincerity and the passion.

I told the Court that the applications were denied for two reasons and that both were illogical. First, the Marine Mammal Commission and the USF&WS took the position that "enhancement" did not include importation of hunting trophies because it did not include parts of lethally taken marine mammals and had never been meant or interpreted to include lethal taking. Second, the USF&WS had taken the position that the enhancement had to target or be related to the threat that caused the listing in the first instance, in this case climate change, which the listing itself could not address.



Both reasons were also illegal. I told the court that neither reason was legal because neither existed in any duly adopted regulation made after publication, public comment and final re-publication as required by law, the Administrative Procedures Act. Furthermore, the USF&WS had wholly neglected to state in the written brief that the MMPA's definition of the term "conservation" in the Definitions section of the MMPA expressly included "regulated taking." The MMPA also expressly allows the "importation of parts." The USF&WS' legal brief went so far as to leave the word "take" out of the definition of "enhancement" each time they quoted the Congressional definition, as if it was not the very first word. "Take" is the very first word in the definition of enhancement! (At this early point, the Court called defense counsel up to explain such tactics.) Quite obviously, "enhancement" does include import of "parts" of polar bear lethally taken. There is no existing regulation to the contrary, and if there were a duly adopted regulation, it would be contrary to the express language and at least three expressions of Congress.

I then turned to the Agency's arbitrary position that the enhancement had to relate directly to the cause of the listing. Again, there is no duly adopted regulation or even permitting precedent to that effect. In this instance, it is even more capricious because the particular polar bear management unit, the Gulf of Boothia, is a population that the US Geological Survey (USGS) Reports project to improve. It has a stable or increasing population that is more than twice the number thought to exist when import of those bear was deferred under the 1994 import criteria. The ice in the Archipelago Ecoregion where it is located is forecasted to be the very last that may experience summer ice melt, and that would be beyond the "foreseeable" next 45 years.

I went on in detail about how that particular population was not presently at risk. Even the listing itself did not and could not target global climate change. How could that be a requirement under the enhancement clause for import of a marine mammal whether or not it was listed? The enhancement section is not limited to just listed marine mammals, so the arbitrary requirement that the enhancement relate to the cause of the listing is not rational. It was just made up in this instance.

That Gulf of Boothia bear population was not listed because of its current or forecasted status. It is actually forecasted to improve with global warming. The bear was listed primarily due to projected loss of sea ice habitat, but that is not true of the Gulf of Boothia management unit. It was lumped together for listing with the other populations for economic savings and convenience of the USF&WS. The "depletion" of the bear there is a legal fiction. Instead of being depleted, it is robust, stable

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or growing and forecasted to remain healthy by the USGS and the foremost experts in the world most familiar with that unit.

In 2002 Conservation Force filed a petition to have that population approved for import under the 1994 amendments to the MMPA before the recent listing. The Administrative Record contains internal correspondence from the Director of USF&WS to the Chief of the Division of Management Authority outright scolding him for letting years pass without approving that "deferred" area. There is no doubt the unit should have been approved for import under the pre-listing 1994 MMPA amendment for import of trophies as promised. Regardless, the argument by the intervening HSUS, Greenpeace and CBD that these permits should not be approved under the previously applicable "trophy" amendments was nonsensical. The two exceptions are a wholly separate, distinct basis for import that don't legally relate to one another in any way whatsoever. Moreover, the Gulf of Boothia population meets the requirement of both, except it had not yet technically become an approved area.

Enhancement is defined as a "taking" or "import" that "contributes significantly…to maintaining or increasing…the…distribution or numbers…of…the stock" (particular sub-population). The hunting both maintains and increases the population in this instance, but the USF&WS wholly ignored the data and attached expert reports that the hunting "maintained" the bear. The defendant Agency never genuinely considered those two issues. The denials state there is insufficient evidence that the hunting "increases" the bear population, but does so summarily without any review, much less analysis of the reams of data and expert reports attached to both the applications and Request for Reconsideration. The foremost experts in the world state that it both "maintains" and "increases" the number of bear, but the Agency did not acknowledge the reports much less address the reports point-for-point, as it must under the Administrative Procedures Act. The experts included Dr. Milton Freeman, Senior Research Scholar of the Canadian Circumpolar Institute; Dr. Lee Foote, the Chair of the IUCN North American Sustainable Use Specialist Group; and Dr. Mitch Taylor who headed the polar bear program for the Nunavut Government. The Agency states it considered the new evidence submitted in the request for reconsideration after the issues were identified, but where is that consideration? The claim that the expert reports and data were considered is post hoc argument of the Agency's legal counsel, not a fact. Until those expert reports are considered point-for-point the Agency can't conclude the hunting does not significantly 1.) maintain, or 2.) enhance that population.

The Agency just recognized the benefits of the hunting in Canada when it listed the bear as threatened, as did a number of the experts of its "peer reviewers." Most of the substantive comments opposing and even those supporting the listing cited the benefits of the hunting program. That included the Association of Fish and Wildlife Agencies, the Circumpolar Institute, the Chair of the IUCN Polar Bear Specialist Group, both the Canadian and Nunavut Governments, the Director of the Marine Mammal Commission, et al. The expert reports attached to the request for reconsideration relate the benefits to this particular population but were ignored in the permit decision making.

I went on to explain how the hunting by tourists increased the revenue and incentives, reduced the number of bear taken on the quota, shifted the harvest from females to males, reduced the cannibalism, etc. It is recognized worldwide as "Conservation Hunting" and has been touted and been the subject of scientific and wildlife management papers at the leading international meetings for a decade. It is one of the most celebrated and documented conservation developments of our time. Half a dozen books have been devoted to the Canadian conservation hunting program. The permit denials fly in the face of the overwhelming consensus, as if the information was not attached and not widely known and accepted even by the Agency itself in the past.

I explained that wildlife today, even in the Arctic, does not exist by accident. Wildlife management is people management, and the foremost authorities in the world have recognized and lauded the program in Canada, while the Agency suddenly has become blind to it. I read from a report by Milton Freeman how the listing was considered a breach of trust by the native people and how the social support and conservation partnerships were already starting to break down because of the ESA listing.

I also pointed out that the Oakland Federal Court Judge that had first heard the case suggested that enhancement permits would be available. The USF&WS, in its Final Listing Rule, expressly stated that enhancement permits would be available. The Solicitor had issued an official opinion that enhancement permits could be obtained if the higher fact test could be made. How could they all represent that the enhancement permit section would apply and then inconsistently or contradictorily preclude it because the enhancement must be of a kind that directly counteracted carbon-dioxide-induced summer ice melt/loss of habitat. It demonstrates that the permit denials are afterthoughts not supported by duly adopted and noted regulations. The denials are contrary to the representation in the ESA Final Rule, the Solicitor's opinion, the Agency's representations to the Oakland Trial Judge – to law and reason.

The lawyer for HSUS represented the Intervenors. His arguments were that "enhancement" was limited to nonlethal imports such as live animals (not take of trophies) and had to counteract the climate change that was the specific threat to the species. He also argued that trophy hunting was itself a threat to the bear because it targeted prime males. There is nothing in the history

of the MMPA enhancement section that suggests enhancement is limited to any particular threat and a great deal to the contrary. It would be particularly onerous in this instance where the Agency that listed the bear for one particular reason admits that the listing itself won't and can't address/counteract the loss of summer ice threat and also admits that the particular population's habitat is expected to improve from global warming. I told the Court that these seven bear were taken before the listing; six of the seven in 2004 and 2005 after the population survey established its healthy status. It was enhancement at the time they were taken, so a fictional legal status years later should not prevent the imports. But, that said, the bear need the continuation of benefits from the conservation hunting independently of that futuristic loss of ice threat that in this population was not forecasted in the "foreseeable" 45-year future.

As already pointed out, the applicable section of the MMPA includes "regulated taking," import of "parts," and "take or importation." The responsible governing authorities and NGO leaders, such as the IUCN Polar Bear Specialist Group, all support the shift of the harvest from females to primarily older adult males. Moreover, the Intervenors' argument was not the rationale for denial of the permit applications.

The Court was very engaged and receptive to Conservation Force's arguments and pointedly thanked me for the interesting presentation. That was the very last of the oral arguments in the polar bear cases. The Court has since asked for some post-hearing briefings on issues in the other cases that will continue the cases into mid-June. The earliest we can expect decisions on the listing of the bear and on the enhancement import application case would be the latter half of June after the post-hearing briefing is concluded.

If the Court finds that the enhancement is limited to that which directly counteracts global warming, the enhancement exception to the MMPA import moratorium will be eliminated as a possibility unless and until the MMPA is amended by Congress. Of course, we may appeal it as well. That said, we feel that enhancement permits will eventually be permitted and know that the Canadian authorities are laying the groundwork for those approvals. Win or lose, this litigation is a giant step to reach that point. Even then imports will be far more restrictive than they have been for approved areas under the 1994 MMPA Amendment.

The polar bear has long occupied Conservation Force, but since the listing was proposed and then the Final Rule, it has "owned us." On top of all that we do, never a day passes without work on the polar bear. It is the most valuable resource of our partners in the Arctic North. As I told the Court, they say "first you took our seal away and now our polar bear. You are punishing us for what we have not done and can't undo." We are punishing the innocent and handicapping if not crippling those who own and largely alone will determine the survival of the bear. ■

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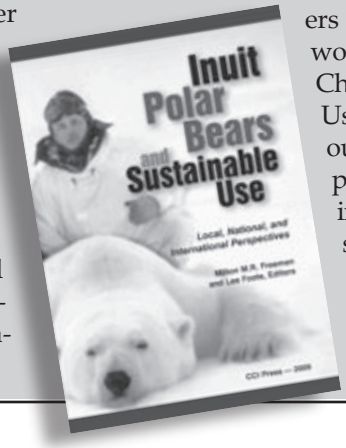
Inuit, Polar Bears, and Sustainable Use

The must-read book on the polar bear listing and the benefits that have been disrupted has been co-edited by Milton R. Freeman, Ph.D. and Lee Foote, Ph.D. It consists of 18 chapters by different expert authorities and is the most definitive work ever written or likely to ever be completed on the benefits of tourist hunting. If you care and want the ultimate scoop on the world class program created in Canada for polar bear conservation, get this book. It can be obtained from CCI Press, University of Alberta, Occasional Publication Number 61, ISBN 978-1-896445-45-8; ISSN 0068-0303, 2009.



It is easy to read and chock full of the real facts that caring hunters should know. In the foreword, Jon Hutton, the long-time Chairman of the Sustainable Use Specialist Group of IUCN, outright states that "[t]he most perverse feature of an ESA listing as 'threatened' is the consequent automatic triggering of a depleted designation of polar bears under the US Marine Mammal Protection Act." "Such a designation prevents US recreational hunters from importing their polar bear trophies into the US from Canada, an action that will very seriously compromise the economic viability, and consequently the effectiveness, of the conservation-hunting programs, which contribute to a coherent and effective conservation strategy in the Canadian North." "In conclusion, the purpose of this volume is to strongly suggest there is a better, more complete, and more publicly accepted way to manage polar bears" than listing. He goes on to state that the disruption of the bear management system is due to "dangerous flaws in the policy process." ■