



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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US Fish and Wildlife Service Announces 90-Day Finding on ESA Listing for African Lion

The US Fish and Wildlife Service (FWS) announced a 90-day finding on a petition to list the African lion as endangered under the Endangered Species Act (ESA) of the United States. The finding was published on November 27, 2012 and can be found at 77 FR 70727, Nov. 27, 2012. This should not be confused with an actual listing. It is only notice that the FWS finds that its own information together with the petition to list indicates that the status of the lion warrants review for listing as endangered or threatened. In short, it is a determination that "listing may be warranted;" therefore the FWS has initiated "a review of the status of the African lion" to see if "listing is warranted." It is a "may be warranted" finding of all populations as "endangered," but it does not preclude a finding of "threatened," or different findings for different countries or no listing of some or all lion populations.

The petition to list was filed on March 1, 2011 by the International Fund for Animal Welfare (IFAW), the Humane Society of the United States (HSUS), Humane Society International (HSI), the Born Free Foundation/Born Free USA, Defenders of Wildlife and the Fund for Animals (FFA). Some of the assertions are extreme, but much of it is from materials and conservation efforts of the hunting community. It was inevitable that such a petition would eventually be filed.

The 90-day finding does not come as a surprise. There are a number of forces threatening the survival of the African lion, and they are well recognized

DATELINE:
United States



by all, particularly by the hunting community. Those forces include the lion's conflict with humans and livestock, loss of habitat, reduction in prey, poaching, snares and poisoning. Also, "may be warranted" is a low threshold, and FWS generally makes positive 90-day findings. There are three steps to a listing under the ESA of the United States and the next two are far more significant.

How The Listing Process Works

Conservation Force has been inundated with technical questions about the ESA listing process, so here is a breakdown of how it works:

There are three steps to an ESA listing: (1) the 90-day finding, (2) the 12-month finding, and (3) the final determination or second 12-month finding, in that order.

The first step, the 90-day finding that was just made, is simply an initial determination of whether review is warranted. It is limited to the information in the petition to list and the information on hand in the FWS files. If warranted, as in this instance, the review is initiated with public notice calling for comments.

The second step, the 12-month finding, is initiated by the notice issued in the first step. Normally, there is a comment period of 60 to 90 days. It is followed by what is called a 12-month finding that is supposed to be made within 12 months of the date the petition was filed. The comment period is not 12 months. The 12-month finding is made after a comprehensive review of status and after consideration of comments in response to the FWS' published notice

requesting all available scientific and commercial information. That 12-month determination is supposed to be 12 months from the date of the petition, not 12 months from the 90-day finding, i.e. both findings are supposed to be made within 12 months.

After the status review, the process that has now been initiated for the lion, the FWS will make a 12-month finding if listing is warranted, as distinguished from the 90-day determination that listing may be warranted. If that 12-month finding is positive, the FWS will then include in that publication an actual proposal to list the species. That notice of proposal also calls for a second and final round of comments on the findings made in that first 12-month step and which became the basis for the proposal itself.

Step three is the deciding action. If the initial 12-month finding is negative (listing not warranted), the petition to list is denied and the process is terminated. If positive, a finding that the "best available" information warrants listing, then the FWS publishes a notice itself proposing the listing and again provides an opportunity for comments for a limited period. The FWS must address all relevant substantive comments in response to the 90-day and 12-month notices. When it makes its final determination (does not list, lists all or some as endangered or as threatened) it is not effective until a minimum of 30 days after its publication. The notice contains the effective date. (Note: In the polar bear listing the District Court overrode the 30-day minimum notice protection that Congress provides in the Administrative Procedure Act by ordering it be made effective immediately.)

Readers should not be misled by the 90-day, 12-month and second 12-month timeline designations. Although those are mandated periods for each of the

three steps, 24 months in total, the norm is more like three to five years in practice. In this instance, the 90-day determination just completed took 21 months, the next step will probably take 12 months or more, and the final, if warranted, another year or more. That said, the two windows to comment are only 60 to 90 days from publication of the respective notices. The deadline in this instance is January 28, 2013.

Readers should also not be misled by any assumption of benefits implied from the ESA listing of foreign species. The ESA does not provide its host of benefits to foreign species. Worse, FWS typically lists foreign species over the objection of the concerned countries and often in conflict with those countries' management and conservation strategies. Witness the black rhino in RSA and Namibia and the markhor in the Torghar Region of Pakistan that both have specially designated, CITES CoP set quotas for recovery purposes, but their ESA "endangered" listing prohibits import. If the lion is listed as "endangered," it will no longer be importable. Import is prohibited without an import permit, and FWS will not issue import permits for endangered listed species. Witness Conservation Force's Canadian wood bison and Suleiman markhor suits, as well as FWS' denial of and the intentional processing neglect of black rhino, black-faced impala and cheetah import permit applications.

Factors Considered in Making Determinations

There are five (5) factors that are considered when making the 90-day, 12-month and final 12-month determinations. They are (A) the present or threatened destruction, modification or curtailment of the species' habitat or range, (B) overutilization for commercial, recreational, scientific or educational purposes, (C) disease or predation, (D) the inadequacy of existing regulatory mechanisms, and (E) other natural or manmade factors affecting its continued existence. The 90-day notice found that each of the five may warrant the endangered listing of the African lion.

Any one factor may be enough to support listing. Even though the FWS must explain its determination and address issues in the substantive comments it receives, it has a great deal

of discretion in a listing determination. Furthermore, when challenged in court, its decision is presumed to be correct as the expert agency delegated its authority and discretion by Congress. Nevertheless, it is procedurally required to address all relevant comment issues in its published determination.

The commenting process is crucial. Notice is sent to the range nations of the species and published in the Federal Register at each step. Comments from the public at large are invited but the decisions are based upon the best available commercial and scientific information so substantive comments and those supported by data, first-hand experience and expert references and documentation have the greater weight. The determining information is not and seldom can be conclusive. It only need be the "best available" information. This is why it is important for the authorities in the respective foreign countries to file comments and to make their opposition clear.

Specifics of The 90-Day Finding in This Instance

The hunting community is a stakeholder in lion conservation. The plight of the lion is not news to this community. It has long been concerned with the threats and had proactive projects and strategies to conserve the lion. A great deal of the scientific data cited in the 90-day finding and in the antis' petition to list arises from hunters' conservation efforts. Some populations of lion will no doubt be listed as endangered, some only warrant listing as "threatened" and still others should not be listed at all. If only listed as threatened, no import permit should be required as long as that population remains on Appendix II of CITES. If all are listed as endangered, none could be imported, which would be a tragedy that itself would put the African lion in danger of extinction. In the polar bear listing case, the FWS has taken the position that the negative impact of the listing or the positive effect of listing is not a factor they can consider. It is not one of the five factors.

The FWS finding begins with some general statements. It notes that the IUCN treats the lion as "vulnerable" because of the historic and expected decline. West and Central Africa are



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reported to be the worst, but East and Southern Africa populations “are essentially stable over the last three decades.”

The Service made some general observations about the reported status of the African lion. It also recognized that CITES is reviewing the CITES listing status of lion to determine if it is on the correct Appendix and that a periodic review report is expected in 2013. It omits the fact that FWS made the initial request for that CITES process. That review is expected in late February.

The Factors Affecting Lions

A. The present or threatened destruction, modification or curtailment of its habitat or range: The FWS found that the reported loss of habitat, range and prey was serious.

The lion is being impacted by “habitat conversion, especially for agriculture...livestock farming... and human encroachment,” which in turn leads to greater human-lion conflict. The hunting community is in agreement that there is a “negative correlation between lion density and human density.” The lion has lost most of its historic range and related prey, which fact has been well documented by the hunting community, I might add. By the same token, as much as two-thirds of its remaining habitat is in designated hunting areas like in Tanzania. That habitat is secure as long as the hunting is secure. Like it or not, hunting helps secure most of the remaining habitat and prey of the lion today and in the future.

B. Overutilization: The petition to list asserts that lion are “overutilized to a great extent for trophy hunting,” but the FWS concluded that “[t]he overall effect of trophy hunting... is currently unclear.” The FWS also expressed concern about the growing trade for Chinese medicine as well as domestic uses within Africa. The FWS concluded that “overutilization may be occurring...”

In reality, quotas have been reduced, and the actual hunting oftake of lion has been reduced across Africa over the past decade. Some of the cited worst cases of local extirpation of lion have been where hunting has been prohibited (Kenya, WAZA in Cameroon) or where insufficient land has been set aside as hunting areas. The FWS finding recognizes that lion hunting “provides revenue for many countries in the African lion’s range” and that “[t]his practice allows for conservation measures to be implemented” for the lion. It also recognized that some countries “have implemented measures to mitigate the decrease in lion population

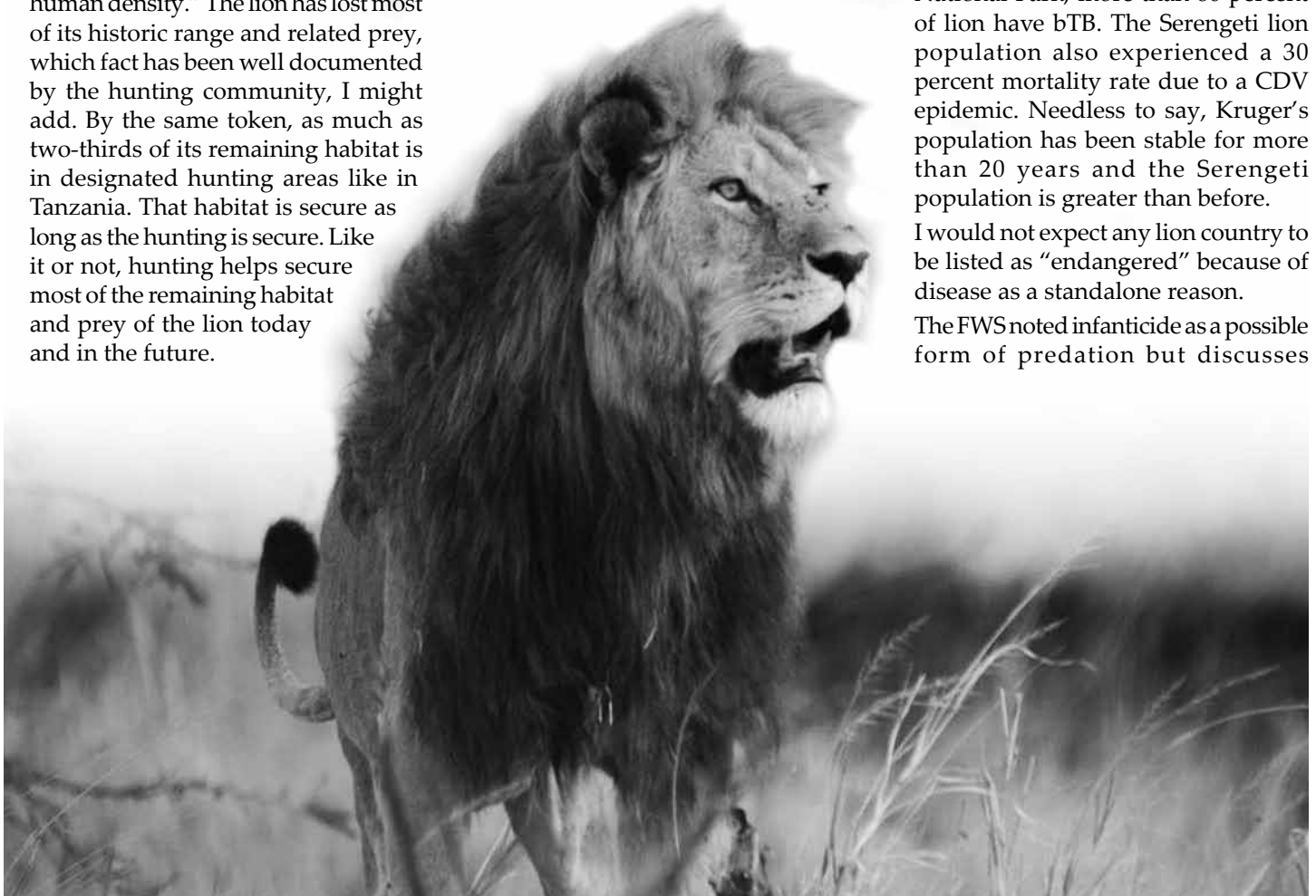
numbers based on the effects of trophy hunting,” citing the adoption of the six-year age approach.

In our view, there can be no question that the hunting community has made a good faith effort to determine and put in place better practices that have reduced offtake. The community has also been at the forefront of lion conservation funding and planning, including the two epic regional workshops and the most national action plans. The hunting community has literally contributed more than any other interest over the past decade of action.

C. Disease or Predation: The FWS did not find predation to be a possible threat, but did find that “lion may be impacted by disease.” Diseases such as canine distemper virus (CDV), feline immunodeficiency virus (FIV) and bovine tuberculosis (bTB) “are viewed as threats by experts.” The FWS cites Ngorongoro Crater in Tanzania where CDV caused the mortality of approximately one-third of the population. In Kruger National Park, more than 80 percent of lion have bTB. The Serengeti lion population also experienced a 30 percent mortality rate due to a CDV epidemic. Needless to say, Kruger’s population has been stable for more than 20 years and the Serengeti population is greater than before.

I would not expect any lion country to be listed as “endangered” because of disease as a standalone reason.

The FWS noted infanticide as a possible form of predation but discusses



it under Factor E, Other Natural or Manmade Factors Affecting Its Continued Existence.

D. The Inadequacy of Existing Regulatory Mechanisms: The petition to list basically claimed that no existing regulatory mechanism is adequate. Without reviewing the existing regulatory mechanisms at the 90-day finding stage, the FWS concluded that “the existing regulatory mechanisms may be inadequate in reducing or removing effects associated with certain factors identified in the Petition.” In short, they will examine that further if they ultimately find a factor that in fact does warrant listing. Obviously, local laws and regulations are going to be relevant to this determination. For example, Tanzania’s regulatory creation of Controlled Hunting Areas is of benefit, but Botswana’s closure of hunting is not likely to be of benefit. The controlled hunting areas provide the largest share of habitat in Tanzania, while Botswana loses more lion due to problem animal control than Tanzania takes trophy hunting. If it is lawful trophy trade that is the issue, quotas can and have been reduced by regulation. Tanzania has led the way. Tanzania’s protected hunting areas (295,662 km²) are 5.1 times larger than its protected areas without tourist hunting activity (57,838 km²). Moreover, new hunting regulations further limit the take, and the six-year age approach has reduced the take to a fraction of what it had been (less than 100 per year in 2011-12 and even less in the 2012-13 season.) Moreover, the regulatory penalty system being put in place, like that in Niassa, adaptively reduces the quota the following year in the event of field errors – the taking of an underage lion.

An international regulatory example is CITES. The Appendix II listing of the lion requires a non-detriment

determination by the exporting country that can be verified in the Significant Trade Review process of the CITES Animals Committee when warranted. It is a mechanism that can control overutilization, Factor B.

E. Other Natural or Man-Made Factors Affecting Its Continued Existence: The FWS accepted the exaggerated claim that when a dominant male is removed through trophy hunting the effect is the removal of other dominant males that can’t defend the pride alone and the killing of the younger cubs. This is an assertion they will be considering. Of course, the recent six-years-of-age approach adopted in Tanzania and being implemented in Niassa Reserve and its buffer zones in Mozambique, Zambia, and most recently in the National Action Plan in Benin adaptively contends with this issue. If a pride lion is five years of age or older, the pride cubs should be old enough not to be harmed. Moreover, the killing of the cubs may not be as common as represented. Most professionals claim to have never witnessed an attrition of cubs after the taking of the dominant pride male. Furthermore, the tenure of the dominant male is normally short and the survival chances of cubs are low as well. Thus, under the principle of compensation, the effect is not as great as it may appear because the events were going to happen anyway (takeover and consequences).

The FWS focuses on human-lion conflict under this category although it must be addressed under the other factors as well. The FWS relies upon some specific instances where local lion have been killed off or reduced, and upon projected human population growth rate.

Finally, the FWS considered the “compromised genetic viability of the lion” because of the increasingly restricted and disconnected habitat

that increases the threat of inbreeding. The FWS simultaneously recognized that the “population resilience of lion is high” and that lion are “capable of producing many young each year and its reproductive cycle is not limited to a particular season, so the species is able to rapidly recover from losses to its population.” It did not find that compromised genetic viability was a factor that may warrant listing, but it will be further reviewed in the 12-month review that has been initiated.

The FWS pointed out that the “substantial information” standard for a 90-day finding differs from the ESA “best scientific and commercial data” standard that applies to a status review to determine whether a petitioned action is warranted. This means that a 90-day finding will not necessarily result in the same 12-month finding. Also, it may not apply to all countries and may turn out that some countries are not listed at all, some are listed as threatened and some as endangered.

The comment deadline is January 28, 2013. The comment instructions can be found on page 70728 of the Notice. After the January deadline date, information has to be submitted to a different location, directly to the Branch of Foreign Species, and may not be included in the determination. It must be submitted on or before the 28th of January if one wants assurance it will be considered. The Notice with instructions for comments can be found on Conservation Force’s website at www.conservationforce.org/pdf/2012-28310africanlion.pdf or on the FWS website at onlinepressroom.net/fws/ or in the Federal Register at www.gpo.gov/fdsys/pkg/FR-2012-11-27/pdf/2012-28310.pdf. All comments will be posted on www.regulations.gov. Many are up already. ■

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