SPECIAL SUPPLEMENT

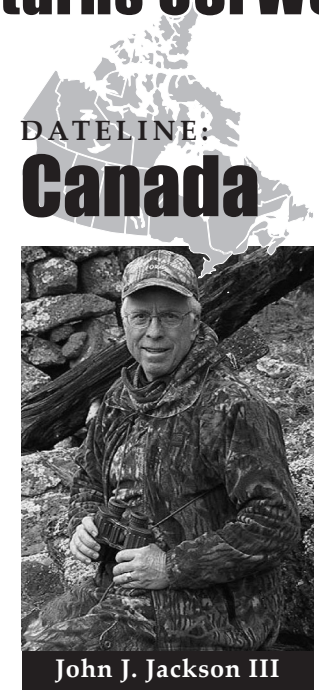
"Hunting provides the principal incentive and revenue for conservation. Hence it is a force for conservation."

World Conservation Force Bulletin

conservationforce.org May 2012

Wood Bison II Litigation Successfully Concluded: Court Overturns USFWS Enhancement Permit Denials

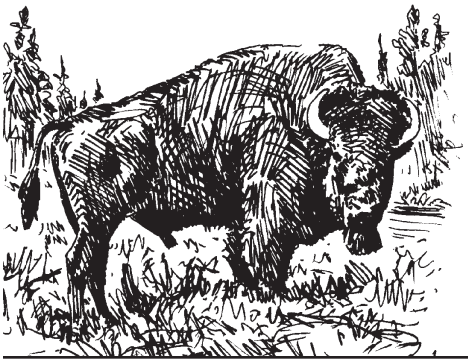
On March 30, 2012, Judge John D. Bates of the US Federal District Court for the District of Columbia issued a favorable Memorandum Opinion in the second wood bison suit, Wood Bison II. It is a signature event in the battle to advance hunting as a conservation tool for listed species. It started with Wood Bison I, filed on March 16, 2009. It is a precedent-setting culmination of three years of hard and laborious litigation, March 2009 to March 2012. In short, the Court "granted Plaintiffs' motion for summary judgment" and "remanded" the claim that the permits were denied unlawfully by the US Fish & Wildlife Service (FWS) to the Secretary of the Department of the Interior for further consideration of the permit applications.



John J. Jackson III

The Court held that it was "quite clear from the record that policy concerns drove the FWS' decision" but that the only policy objective in the record was "a desire to avoid controversy," which was not enough reason for denial. "In general, FWS showed a remarkable disregard for what it at one time described as a 'well managed' recovery program." Initially, FWS was going to grant the enhancement permits, but "changed its course" after "attorney-client privileged" communications from a high-level Department of Interior "attorney-advisor," whose undisclosed advice included "legal issues and litigation strategy."

The Court found that "biologist Mike Carpenter wrote an impassioned email" that there was "nothing scientific or logical about" the input from the attorney, that it was not "rational" and "would be 'essentially ignoring the science….'" The Court quotes record statements by the staff of FWS Senior Biologist Mike Carpenter that the Attorney-advisor "needed to be educated 'in basic biological concepts and wildlife management and conservation.'" The Court held that the FWS "failed to articulate a satisfactory explanation of its decision to deny the import permits," for changing its "originally drafted enhancement findings," and provided no "reasoned analysis" for its "change of course." The Court variously described the negative enhancement finding as "troublesome," "never explained," "unreasoned," "analysis went askew," not "supported by evidence in the record," "unsatisfactory…treatment" of the information, "a remarkable disregard" of earlier findings, and based upon "quasi-scientific rationales."



"In general, FWS showed a remarkable disregard for what it at one time described as a 'well managed' recovery program."

The suit was filed by Conservation Force, Yukon Outfitters Association, Mervyn's Yukon Outfitting, James Lee Brogan, Russell Kohler, Larry Masserant, John Salevurakis, Wild Sheep Foundation and Grand Slam Club/OVIS. Two of the four individual plaintiffs had purchased their hunts in an auction at the Foundation for North American Wild Sheep, FNAWS, in 1999. At that time, the leadership of FNAWS asked Conservation Force if we would assist with the permitting, and the hunts were auctioned with that representation. Those two permits were filed by Conservation Force on behalf of the hunters in 2000. That is how the *Wood Bison Initiative* was formed, and we have been working on it ever since. Although wood bison is soon to be another trophy that can be imported, hunting has not been the primary goal of the *Initiative* of Conservation Force or its partners. Clinching the recovery of the wood bison and improving the administration of the US Endangered Species Act have been the principle two objectives. We will revel in this new hunting opportunity that is imminent, but Conservation Force and the reason for such personal sacrifices have been wildlife and habitat conservation, i.e. being a force for conservation first.

Those initial two permit applications in 2000, and two others we added, went unprocessed by USFWS until after suit was filed in March of 2009. The Court found there was little action in the FWS record from 2002 to 2008. The FWS had proposed the "enhancement" permitting policy in the Federal Register in 2002. In 2008,

six years after publication of the draft enhancement policy was noticed, we started sending messages that enough is enough. Despite the notice of intent to sue that was sent, the permits were not processed until October 2009, seven months after Wood Bison I was filed. When processed, the permit applications were denied. Those denials and the failure of FWS to make the 12-month finding on the downlisting petition led to the filing of Wood Bison II, the subject of this culminating court judgment.

There were four claims in Wood Bison II. Three of the four were generally successful. The first claim was to compel the FWS to make a five-year review of the listing status of the bison that is supposed to be made of all listed species every five years. That was dismissed as moot because after the filing of Wood Bison II, and after the filing of the motion for summary judgment in that case, the FWS made the five-year review that was demanded in that claim.

The second claim was to compel the FWS to complete and publish the 12-month downlisting finding. That too was dismissed as moot because after the filing of the suit and the motion for summary judgment, the FWS had completed the 12-month downlisting finding. It had made a positive finding and published a proposal to downlist the wood bison in full satisfaction of the second claim.

Though the two claims were dismissed, both were successful. The Court found that the "FWS failed to do either timely, and failed to complete the review on September 15, 2010 as represented to the Court in the earlier litigation." In fact, a Final Rule should have been issued in February 2012 so we have filed a *Notice of Intent to Sue* to compel the final downlisting determination. In response, the FWS has assured Conservation Force that the final determination will be made in May, 2012. We hope and expect to announce the downlisting in the next *World Conservation Force Bulletin*, June! No additional litigation should be necessary on the downlisting, and we expect a positive determination. If downlisted as expected, no import permit will be necessary. If not downlisted, then the success on the third claim is that much more important.

The third claim and the "primary" claim, according to the Court, was that part of the suit challenging the denial of the import permit applications. Those are the permit applications that had been pending since 2000 until we filed Wood Bison I. The Court held there were at least six reasons the denial of the permits were not lawful.

Before rendering its opinion, the Court reviewed the facts and general duties of the FWS. "There is a consensus among expert scientists that the permits should be granted." Initially, the particular herd at issue was growing by 15 percent each year, requiring a harvest to prevent overpopulation "as an important conservation tool to limit bison numbers to their habitat carrying capacity." Before the permits were denied, the herd had doubled and was growing at 15 to 20 percent and was over capacity of the habitat. The Court cited the "generous contributions" by the hunters to the Bison Research account of the Yukon Fish and Wildlife Enhancement Trust Fund that FWS had entirely ignored when making its enhancement determination. The Court was critical of the FWS insistence upon evaluating the status of the entire population of wood bison in all of Canada in making its determination on the import permits from the Yukon since each herd was managed separately. (Readers may remember in the Mozambique elephant suit that the FWS insisted upon reliably establishing the status of the country's entire population, not just in Niassa and the other areas being hunted.) The Court found that after being sued the FWS had made a positive enhancement finding until "department members had a meeting with an 'attorney-advisor'… to discuss permit issues, including a discussion of 'legal issues and litigation strategy' relating to the wood bison trophy import permits" and permits for another animal, the straight-horned markhor (citing the Administrative Record and the markhor suit). The Court noted that FWS Department of Management Authority (DMA) biologist Mike Carpenter recognized that "US hunters…were 'actively supporting' the…recovery plans, as well as reducing the threat of extinction 'by giving the species a greater economic value…to local communities.'" The Court quoted Acting Director Saito's conclusion that the wood bison might present "the best

SPECIAL SUPPLEMENT

World Conservation Force Bulletin

EDITOR/WRITER
John J. Jackson, III

PUBLISHER
Barbara Crown

Conservation Force
3240 South I-10 Service Road West, Suite 200
Metairie, LA 70001
Tel. 504-837-1233 Fax 504-837-1145
www.ConservationForce.org

The Hunting Report
12182 SW 128 Street
Miami, FL 33186
Tel. 1-800-272-5656 Fax 305-253-5532

case for issuing such permits," (import permits for endangered species in the wild) but that granting the permit applications would likely draw criticism from members of the public, Congress and various conservation groups. The Court was critical of the final denial determination that there was "insufficient evidence to determine that approving the permits would have any positive effects on the wood bison's recovery."

"they offer quasi-scientific rationales that the Court finds unconvincing."

The first reason for the remand for reconsideration was that the DMA "never explained why allowing trophy imports would likely increase lethal take of wood bison." The hunting is strictly regulated, and the hunting would occur with or without US hunters. The DMA had to explain its rationale for that conclusion, but instead "it went unsaid."

The second point where the FWS "analysis went askew" was when FWS concluded there was "no information demonstrating that population pressures on [those] ecosystems" cannot be relieved…and that increasing lethal take of bison might reduce stock available for reintroduction efforts. The Court said "[N]either of these conclusions is supported by evidence in the record." "[T]here was considerable evidence" that carrying capacity had been exceeded and was itself one of the primary threats to the long-term recovery of the wood bison. FWS did not mention in its final finding, which contradicted its original draft, that Canadian authorities had said there was no realistic possibility that the Yukon bison would be utilized for more reintroductions.

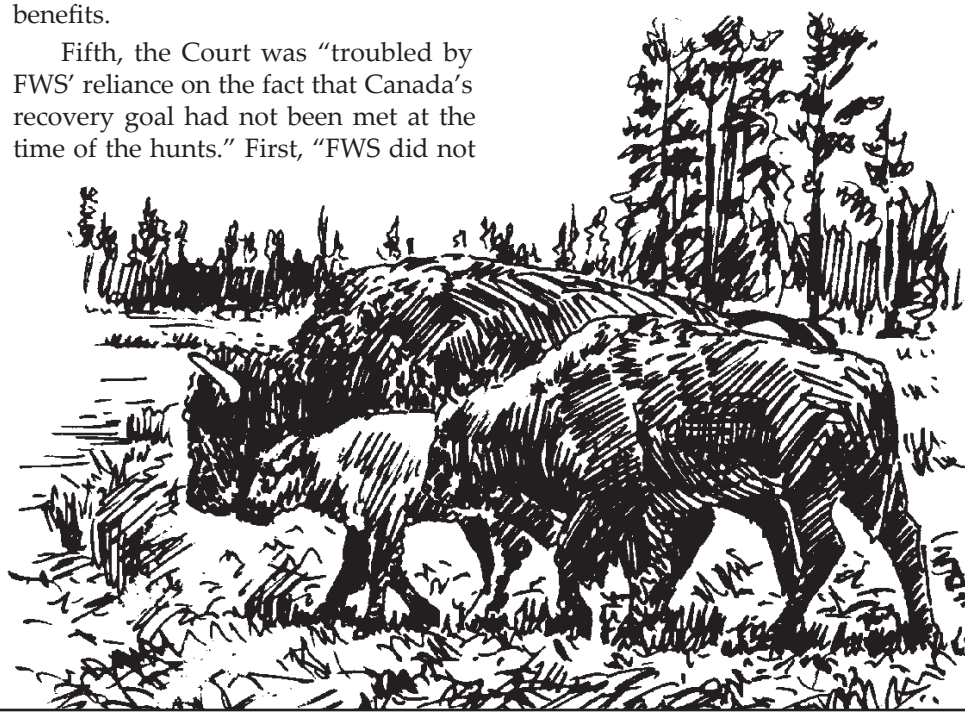
Third, the Court held that finding that issuing or denying the permits "would not have a 'direct' financial effect on Canada's recovery program, because hunting fees did not go to a specific fund for bison recovery" was erroneous. The FWS is "required…to consider the indirect effects of granting the permit applications and did not mention [the] evidence from Canadian officials that increasing the value of the hunt increased voluntary donations that went directly to wood bison recovery." "FWS was not entitled to ignore this effect under the terms of 50 C.F.R. 17.22(a)(2)" that governs issuance of enhancement permits.

Fourth, the Court found "unsatisfactory FWS' treatment of the benefits of hunting to aboriginal communities." The Court cited from the record that "[t]he support and participation of local communities are important prerequisites for successful reintroduction projects in these jurisdictions…a rationale that has been accepted in other situations where limited hunting has been seen as a conservation strategy." The Court cited the argali case, *Fund for Animals v. Norton*, 295 F. Supp. 2d1, 10 (D.D.C. 2003) where the stopping of trophy imports was held to have "increased argali poaching," overall offtake, and reduction in prices of hunts, hence revenue for conservation. "FWS did not indicate why it rejected the theory that benefitting the local community could also benefit the wood bison in the long term," the Court held. Readers may remember that the FWS defended issuance of import permits for argali, in part, on the basis that community benefits were beneficial and the denial of the permits would worsen the status and survival of the species. Indeed, it was suspect for the FWS to suddenly not recognize such benefits.

Fifth, the Court was "troubled by FWS' reliance on the fact that Canada's recovery goal had not been met at the time of the hunts." First, "FWS did not explain why it focused on the time of the hunt, rather than the time of the permit decisions; indeed, its draft enhancement finding (which was positive) had done precisely the opposite." "Second, several Canadian officials had attempted to explain…that the herds were managed separately, by different territorial governments, and that only the status of the hunted herd was relevant….FWS completely ignored these explanations and gave no explanation for focusing on the national population…In general, FWS showed a remarkable disregard for what at one time (before the privileged meeting with the advisor) it described as a 'well managed' recovery program."

Sixth, the Court discussed the fact that the negative DMA enhancement finding (the Department of Scientific Authority made a positive non-detriment finding) was obviously based upon policy because "they offer quasi-scientific rationales that the Court finds unconvincing. Moreover, the evidence currently in the record does not suggest any policy objective other than a desire to avoid controversy." The Court concluded that it was "quite clear from the record that policy concerns drove FWS' decision, but neither the record nor Saito's declaration analyze or explain those policy concerns in any detail."

In its summary of the third claim, the Court concluded that "FWS has failed to 'articulate a satisfactory explanation for its action' in denying the permits for



importation of wood bison trophies."

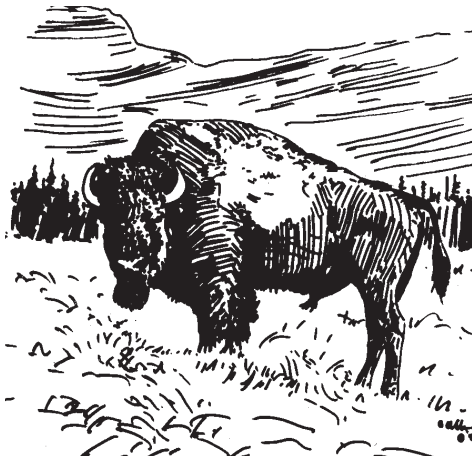
The fourth claim in the suit was not successful. That has been called the "Bundle of Duties" because it includes the possible violation of all the foreign specific clauses of the ESA and implementing regulations that we have been attempting to bring into play. The Court noted that several other judges have rejected similar allegations in Conservation Force's cases. Of course, those cases are on appeal as we search for provisions enforceable by the judiciary. The Court reiterated what other courts have ruled: that there is no ESA remedy in court for "claims based on the Secretary's maladministration of the ESA." Like the others, this held that the alleged violations are of "aspirational provisions that govern how the Service implements the ESA…[which] cannot be enforced through the ESA's citizen suit provision," citing the Mozambique suit, *Franks*, 816 F. Supp. 2d at 56.

The Court held that there is no duty to do an internal agency review of the negative consequences of not granting the permits because the failure to process the permits timely or failure to grant the permits is not agency "action." We have been trying to force the FWS to consider the harm to the species from its neglect; after all, these are enhancement determinations, and thus it is enhancement that the species are being denied when there is a decade of delay or permit denials. No luck in this case, but the decisions in the other cases that a non-jeopardy decision does not have to be made except when the permits are being granted (the FWS taking action) are being appealed.

The Court also repeated that "there is no requirement that the FWS review permit applications within any particular time period….Hence, FWS' leisurely permit review process cannot be said to have violated any non-discretionary duty of the agency." We are not about to accept that, and similar rulings are on appeal. That said, what the judge means is that the ESA has no express timelines for processing permits. Nevertheless, other laws that apply do have timelines. No doubt the FWS will act when sued, before judgment can be rendered.

The Court did recognize that endangered listed species can be imported for enhancement purposes, i.e. "to enhance the propagation or survival of the affected species," citing 16 U.S.C. 1539(a)(1)(A) and 50 C.F.R. 17.22. "In administering the ESA with respect to species found in other countries, the Secretary must take into account certain special considerations." The Secretary has a "general duty to 'encourage' such (foreign) programs."

These are the first denied applications to import endangered listed species from the wild to reach judicial review. According to the Administrative Record, they were almost approved and should have been. All the Court is empowered to do is remand them back to the agency



for proper review. We never guessed that the Administration would coerce the FWS to falsify its scientific findings to prevent controversy, which equates to protecting itself from ridicule. If it falsified its findings once, it remains to be seen if it will now put the purpose and goals of species recovery first or just do a better job of falsifying its reasons for denial.

The FWS has never authorized the import of a sport-hunted trophy of an endangered species taken in the wild (as distinct from the bontebok that is captive-bred). Nevertheless, it has had the statutory authority under the ESA and regulations to implement that authority for decades. It is time to be responsible and use the game animal status and regulated hunting to accelerate the recovery and secure the survival of game species in foreign lands. Of course, if the species is downlisted this month, May, permits will not be necessary. ■

MARKHOR III SUIT SETTLED

Markhor III, the suit to compel the 12-month downlisting determination that is past due on the second petition to downlist the species, has been formally settled in Court. The 12-month determination will be made before the end of July. A claim for attorney fees on Markhor III has been agreed to and settled as well. These are the first such fees in any of the cases over the past three years. The small sum of $22,500 is going to the pro bono, part-time attorneys working in Conservation Force's home office. Yours truly's share is being held in trust to help fund Conservation Force's first paid, full-time attorney.

We also want to thank Corey Knowlton for a timely and significant contribution he made recently when we had as many as three legal briefs of 50 to 70 pages to file in a single week of time.

We need support. Won't you help?

(Send tax deductible donations to Conservation Force at PO Box 278, Metairie, LA 70004-0278, USA. Or donate through our website at http://www.conservationforce.org/donate.html.). ■

Conservation Force Sponsor

Grand Slam Club/Ovis generously pays all of the costs associated with the publishing of this bulletin. Founded in 1956, Grand Slam Club/Ovis is an organization of hunter/conservationists dedicated to improving wild sheep and goat populations worldwide by contributing to game and wildlife agencies or other non-profit wildlife conservation organizations. GSCO has agreed to sponsor Conservation Force Bulletin in order to help international hunters keep abreast of hunting-related wildlife news. For more information, please visit www.wildsheep.org.

GRAND SLAM CLUB/OVIS