



“SERVING THE HUNTER WHO TRAVELS”

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

Special To The Hunting Report World Conservation Force Bulletin

by John J. Jackson, III

DATELINE: US/CANADA

Special Report Status of Wood Bison Suits Against USFWS

The second stage of Conservation Force’s wood bison suit has been dismissed by the Federal Court as anticipated. The Federal District Court Judge in the District of Columbia granted the Government’s motion to dismiss on the basis that the permits have now been processed as the suit demanded and a new notice of intent to sue had to be sent to the USF&WS for its failure to make timely 12-month and 24-month downlisting determinations. The need to file a second notice of intent to sue after the USF&WS made its positive 90-day finding is considered to be a jurisdictional requirement, and the fact the permits have now been processed, though denied, moots the claims to compel the processing of the permits.

The court held that “[o]f course, nothing prevents plaintiffs, after ensuring that they have provided proper

statutory notice (notice of intent to sue) ...from filing an additional suit to compel the 12-month finding.” We anticipated this, so Conservation Force sent a second notice of suit shortly after the Service made the positive 90-day finding because the mandatory 12-month period had also already passed. We had already prepared a second suit to compel the past-due 12-month find-



ing that is a mandatory deadline set by Congress. We filed that suit in June.

The USF&WS has represented that it will make its 12-month finding by September 15, 2010, in which case that part of the second suit we have filed will be satisfied and also be subject to dismissal until we send a third notice

of intent to sue. So much time has passed that the USF&WS can’t be in compliance at any stage, but the court is holding us to the jurisdictional requirement that a notice of intent to sue has to be sent and another, third suit will have to be filed then.

The failure-to-process-permit-applications part of the case was dismissed because they have been processed, despite that permits had not been processed in 10 years! The new suit (the second) that Conservation Force has filed challenges those denials under the Endangered Species Act and the Administrative Procedure Act.

Conservation Force could have settled the entire case had it been willing to consent to a three- to four-year downlisting process and walked away from the permits that we expected to be denied, as they subsequently were. Instead we sent a second notice of intent to sue and have filed a new suit to expedite the downlisting that is late and to overturn the Agency’s denial of the permit applications that were pending up to 10 years. Our position is that there is an obligation to expedite the downlisting of foreign species that are

beyond the jurisdiction and management benefit reach of the USF&WS, particularly when the listing is obstructing the foreign program and the particular population status no longer warrants being listed. It is also our position that the delay, and now the denials of the permits, conflict with the responsible foreign country's programs and the recovery of the species. Canada has said outright in its National Recovery Plan that the ESA listing is obstructing recovery plans.

Conservation Force and its partners have achieved some small measure of success (positive 90-day finding, promises of a 12-month finding by September and permit processing). Now we go into stage two. We will no longer wait 10 years. The steps we are taking can be compared to the polar bear suits filed by the Center for Biological Diversity. The plaintiffs in the initial California polar bear case filed separate notices of intent to sue for the 90-day, 12-month and 24-month deadlines on the matching date. On top of that, they persuaded the Federal Judge to override the APA and ESA notice period protection before the listing was made effective. We expect no less under the law for the interest of foreign species and hunters.

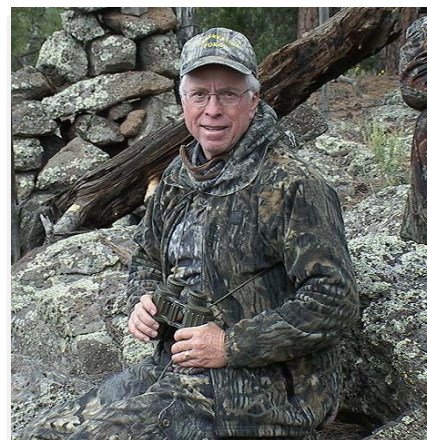
The entitlement to payment of legal fees and the amount of attorney fees is the only remaining issue in the first (90-day determination deadline) suit that has been dismissed. It is a much more serious issue than foreseen. Although the government had been willing to pay attorney fees had we agreed to settlement, we could not agree to their settlement terms, for they wanted us to agree to an illegal four-year downlisting process. The downlisting of Canada's wood bison from “endangered” is too simple and uncontroversial to take twice the nondiscretionary 24-month period Congress has mandated. Moreover, the USF&WS knows the conservation importance of the downlisting and had promised to downlist the bison on its own initiative many years before the Wood Bison Recovery Team gave up and took the initiative by filing its own petition to downlist the wood bison.

The broken promises and delays have been inexcusable and outrageous.

The recovery of legal fees has become a serious concern for another reason. The Justice Department that represents the USF&WS in litigation has filed an opposition to the request for attorney fees. They are arguing that attorney fees are not recoverable under the “Citizen Suit” section of the ESA. Although that section allows the court to award reasonable attorney fees that it deems “appropriate,” that section, they argue, does not apply to complaints challenging delays in import permit application processing and challenging the legality of the denials of permits. They argue that the Citizen Suit section only applies to listing and downlisting determination issues, not to discretionary regulatory matters such as import permitting of species that are listed.

A decision that fees are not recoverable can seriously affect Conservation Force's litigation division. We have more than 21 attorneys across the nation that have joined forces with Conservation Force who are expending thousands of hours to the cause with the expectation to be paid on a contingency basis, i.e. they are expecting a fee award from the court if we advance the underlying cause. If the Citizen Suit provision does not apply, then attorney fees will be lower and will only be awarded when the defendant's conduct takes place after, not before, an actual order or judgment. That will seldom happen because the government normally takes action after being sued but before an actual judgment is rendered. For example, in the wood bison, markhor, Mozambique elephant and Zambia elephant cases the USF&WS has completed the processing of the permit applications that had been languishing for many years before suit was filed and have smartly or mischievously processed the applications before the court issued an order or judgment.

This is just one of the many battles we are fighting to protect hunters' interests. No doubt a loss on this point would handicap our efforts to establish timely processing of permits. It



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may also limit or eliminate recovery of legal fees in all the trophy seizure court cases. Then again, reasonable fees

may be recoverable under 42 U.S.C. 1983, a civil rights law, if and when a court finds there has been a violation

of a permit applicant's US Constitutional rights such as the denial of procedural “due process.”

● **Briefly Noted** ●

History of Delay and Low Priority Treatment:

The low priority treatment and delay in processing of import permit applications in the Canadian wood bison suit (10 years), Mozambique elephant suit (10 years), Zambia elephant suit (five years), etc. are not new problems. It is a chronic problem of the International Affairs section of the USF&WS. They have expressed many times that they are not “a service.” Instead, they view themselves as a “regulatory” division, and their attitude towards permitting is negative, i.e. permits are exceptions under CITES and the ESA which they have a practice of disfavoring. This is in direct conflict with many CITES Resolutions and Recommendations. It conflicts with sustainable use. They have an unstated conflict with tourist hunting as a force for conservation. A great deal of the current litigation is aimed at testing various clauses in the ESA to establish duties as a matter of case law to timely process trophy import applications and to not jeopardize foreign country programs. Since the ESA does not benefit foreign listed species it is important that it not conflict with scientifically-based conservation strategies. Conservation Force's litigation over the next few years may be for nothing, but we are trying (and we need your support).

This chronic problem within International Affairs is expressly why Congressman John Dingel inserted Section 9(c)(2) in the ESA providing that the USF&WS (really International Affairs' management and scientific authority divisions) should not regulate game imports for “threatened” listed species protected by an Appendix II listing under CITES. Unfortunately, the International Affairs section of USF&WS is ignoring that ESA section, particularly in a number of its new regulations, all of which we are challenging.

Ian Barnes is one of the great elephant authorities in Africa and has

been a contracted expert for the USF&WS on a number of occasions. In the late 1970s, when he was under contract to the USF&WS, he was called before the Committee on Merchant Marine and Fisheries of the House of Representatives, Ninety-Sixth Congress, First Session, July 25, 26, 1979 on H.R. 4685. There he testified under oath as follows:

I have a reluctance to criticize their institution (USF&WS). However, as it is at the very core of the problem where the United States is concerned, this cannot be avoided... Without question the U.S. Fish and Wildlife Service's application of CITES in regard to ivory is the worst I encountered in any developed country. As an organ of the world's wealthiest nation, it would not be unreasonable to expect it to function as the most effi-



cient of its kind. Regrettably, it takes longer to answer correspondence or process permit applications than any similar department in the developed world and much longer than most of those in the under-developed world.

That was in 1979. Nothing has changed.

Iran Transactions: On June 18th, 2010, the Department of the Treasury's Office of Foreign Assets Control (OFAC) amended its Iranian Transactions regulations in the Code of Federal Regulations. The amendment expands the persons technically treated as the “Government of Iran.” Transactions with those individuals and the “Government of Iran” are prohibited.

“US persons and others engaging

in transactions subject to the ITR (regulations) ...are prohibited from engaging in most transactions with any person located in Iran... regardless of whether a person is listed. The prohibitions...apply to most transactions with persons located in Iran that are not the Government of Iran.”

The notice in the Federal Register and the regulation amendment can be found at 75 F.R. 34630, June 18, 2010. The document and additional information concerning OFAC are available from OFAC's website at <http://www.treas.gov/ofac>.

In sum, the amendment adds 22 businesses and people to the list of those treated as the government even though most are businesses with private entity titles, i.e. front companies. The amendment does not overtly change any other aspects. It does not specifically change hunting transactions, nor does it have any additional bearing on the fact that one has to have a special OFAC license to import hunting trophies from Iran. No such license has been issued to date.

Lion Conservation Developments:

There have been a number of positive new developments in African lion conservation. First, Conservation Force presented \$32,070 to the International Foundation for the Conservation of Wildlife (Philippe Chardonnet, CEO) in early June for the campaign to complete lion national action plans. The funds were donations from dozens of individuals and entities and were all 100 percent pass-throughs, i.e. not a dime is withheld by Conservation Force. The largest sums were from The Chancellor Foundation and John B. Ellis, followed by ESPN Outdoors/Disney, Steven Scott and others.

Second, Paula White has completed the lion aging guideline for Zambia lion that Conservation Force contracted last year. We hope to post it on Conservation Force's website but

can't do so until some kinks are worked out. We will advise. In the meantime, Paula has printed and distributed this new *Regional Aging Guide* to the PHs and operators in Zambia.

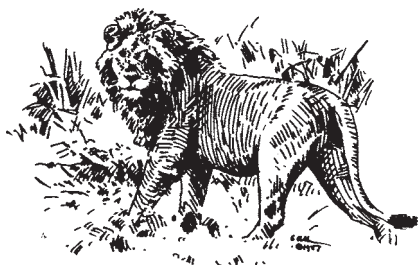
In Paula's words, “*The Regional Guide for Zambia* is being promoted as a ‘work in progress’ and is specifically designed to elicit feedback from the hunting community here on what they find helpful, lacking, good, bad, etc. The main point is to raise awareness and to generate dialogue, and from the initial responses of the first few PHs who viewed the guide, it will indeed prove interesting and informative. I am also hoping that the pictures in the guide will help educate folks on what sorts of photos are most useful for aging purposes, and that future photos will be a bit more standardized.

“Overall, it is an impressive compilation and speaks to the dedication of the Zambian hunting fraternity that they provided this much information over the years, as well as to yourselves as the funders helping to make this guide happen. The goal now is to obtain feedback and trophy info from the 2010 season, and then revise the guide accordingly to make a final version available by May 2011.”

Third, the Tanzania lion study has been completed. Philippe Chardonnet's team and the Tanzania wildlife department authorities worked together on the fact-gathering project. Though the report has not yet been released a few points can be made. It concludes that 5.1 times more land is part of the hunting areas than the other protected areas (parks). There are an estimated 17,000 lion in Tanzania, by far the largest population in the world. This estimate is thought to be conservative. It is several thousand more than the Chardonnet/Conservation Force estimate of 2002, but that does not mean there has been a population increase. To the contrary, the 2002 study, though more comprehensive than any other study, was conservative and incomplete. It demonstrates that the earlier 2002 estimate was as conservative as we represented it to be at the time. It cannot be concluded that the population has gone up or down in the past decade,

only that it is still substantial. Some of the survey does demonstrate that the lion is capable of rapid increase, that the population in some areas have declined and some increased.

Safari Club International funded nearly half of the project and gave convention booth credit points to the hunting operators that donated the largest share. SCI has really stepped up to the plate. It funded the lion study followed by the action plan workshop in



Mozambique and is in the process of doing the same in Malawi. We are proud to say Conservation Force Board Member Philippe Chardonnet, Ph.D. has been contracted to do the work in each instance. The survey in Tanzania will be followed by a workshop to develop an up-to-date National Lion Action Plan for Tanzania.

Fourth, Karyl Whitman has been contracted by Conservation Force to

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do a small foldout brochure on how to age lions in Eastern and Southern Africa. This will be a smaller version but not a substitute for the 52-page guide we made available through publisher Safari Press. We will provide more information in the next month or two.

Fifth, some other international organizations are stepping up their lion conservation activities. National Geographic and Panthera are both fundraising for the great cats of the world. Unlike Conservation Force's campaign that they mimic in part, they are not devoted exclusively to the African lion and contributions will not be 100 percent pass-through.

Rhino Poaching Up in South Africa:

A number of sources have reported that rhino poaching in the Republic of South Africa has surged. The cause is reported to be Chinese use of the horn in medicines and as an aphrodisiac, despite scientific proof that horn does not contain such medicinal properties. Scientifically, horn is no more than keratin, which is the protein found in hair and nails. There is no evidence that biting one's nails improves one's sexual capacity. Then again, why are there very many nail salons? Ha.

Last year 120 rhino were poached. So far this year, 124 have already been poached for a total of 244 in one and one-half years. This is more than the whole decade before 2009. For instance, only 10 were poached in 2008. The South African authorities are not idle as they have already made 42 arrests this year. Unfortunately, some of those reported arrests include professional hunters. The poaching is also occurring on private lands by sophisticated means such as helicopters and soundlessly with crossbows. It is crucial that private landholders not lose their incentive to maintain their populations due to the heightened risks. - *John J. Jackson, III.*

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