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"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

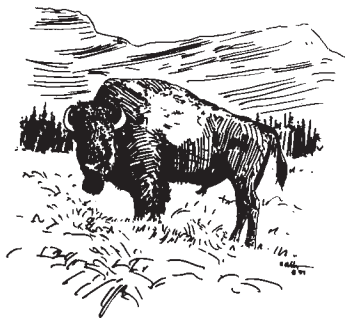
by John J. Jackson, III

DATELINE: US

News... News... News
Court Rules No Fees Due in Permit Cases

The Court has denied our request for legal fees in the first wood bison suit to compel the processing of the wood bison permits. The permit applications to import the wood bison trophies from the Yukon had languished within the USF&WS for nine years. Conservation Force and allied organizations sent a notice of intent to sue in the waning months of the Bush Administration, which was wholly ignored. Of course, when we sued under the Endangered Species Act and Administrative Procedures Act, the International Affairs Division of USF&WS finally processed the permits. (They denied the permits, which denials we are challenging in a subsequent suit, Wood Bison No. 2, being briefed at this time.)

The Court held that it could not award fees under the "citizen suit" provision of the ESA. Although the ESA and the regulations the USF&WS had adopted to implement timelines expressly provide for the permitting, those timelines are "discretionary," not fixed by Congress in the ESA. Under the ESA, one can only sue under the citizen suit provision to enforce fixed, "non-discretionary" timelines. The Court stated that although the process



was obviously "not efficient," there was no legally enforceable right since there was no fixed timeline set by Congress under the ESA.

The Court ruled that the processing delay was actionable under the Administrative Procedures Act, APA, but to get fees under that law the litigation had to be more than just the catalyst for the permit processing action. The litigation must have reached the stage of the court compelling the result. Fees would be due under the APA if the case had reached the judgment or Court order stage. Of course, that will seldom happen as the USF&WS processes applications once sued.

We have three other cases in the same position, where International Affairs did not process the permits until suit or at least notice of intent to sue: the markhor, Zambia elephant and Mozambique elephant applications all languished for five to 10 years until litigation. Fees will no doubt be denied in those cases as well. This is pioneering litigation, so there are no prior case decisions exactly on point. It means that two years of work will go uncompensated. The pro bono legal staff of Conservation Force only gets paid for their legal services out of Court awards. We work for free. No APA legal fees were awarded because the permits were finally processed (denied) before being Court ordered, though processed after suit and notice of intent to sue. The cases have gone on for nearly two years without reaching the

Court order stage because of the stalling tactics of the defendants in Court.

We are appealing this denial of fees because of the importance to all those that submit import permit applications, and the other three cases pending and more to follow. Maybe the appellate Court will fashion an exception because of the extraordinary delay and harm to the recovery of the species in this instance. At least the administrative malpractice will not be a secret anymore. The chronic disrespect and disregard for foreign programs and hunters certainly should go down in history.

We know from administrative records produced in the litigation that the processing of import permit applications is not prioritized and the International Affairs Division has a negative attitude toward importation of trophies of listed species. International Affairs is an independent section of USF&WS that is not ever held accountable, though they certainly jump when the anti-hunters suggest they hop. It is time for Congress to improve fixed deadlines for processing permit applications.

DATELINE: US

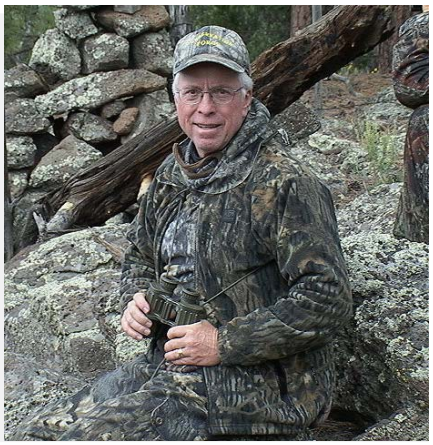
News... News... News
Delays & Revelations In Wood Bison Suit

The second wood bison suit was filed to compel a 12-month downlisting determination and to challenge the import permit denials. The 12-month period is a fixed, non-discretionary deadline set by Congress, so it is enforceable. The USF&WS has managed to delay the case and deter every effort we have made to move it to a fast conclusion. At this time we expect a late January or early February 12-month positive downlisting finding, but the briefing schedule, over our objection, extends the briefing into March. In short, we have multiple 50-page briefs due back and forth that will be mooted by the 12-month finding that will occur before all that briefing is done. The 12-month finding is two years past due and was already promised in September, then November of 2010. Now it is promised in late January 2011.

We tried several times to get the Court to separate the 12-month downlisting deadline case from the permit denial challenges, but the USF&WS opposed the bifurcation, obviously for delay. The administrative record that was finally produced is an absolute sham, but we waived our right to challenge the incompleteness of those records because that alone would have delayed the briefing for four or more additional months. The record was so incomplete one would suspect it was purposely done to lure us into filing motions that would add to the delay. It was not a complete record, though it was sworn to be. Instead, we accepted the record as submitted and argued to expedite the case.

Though the Court would not separate the downlisting and permit claims because of the Government's objection, it did expedite some of the briefing. Our briefs and replies are due on an expedited basis, but the defendant government has the extended periods it asked for to file its briefs and replies. We have an expedited schedule but defendants do not! It is a disappointing but partial success. Wood Bison No. 2 will be fully briefed, both claims, by March. If the Service makes a 12-month finding in January, that related claim will be dismissed as moot, but we will still proceed with the permit denials with what little record we have. Even though the administration records that the government has produced is grossly incomplete, it is revealing.

The issue in the permits case is whether or not the permit denials were arbitrary, capricious, irrational or contrary to law. Though there is an inference in favor of the expert findings of the agency, which is a serious hurdle for us, if the record does not provide a rational reason for the denials it is deemed irrational and remarked to the agency. In this instance, the division published in the Federal Register internally and determined that the hunting did not jeopardize the wood bison in the Yukon and that it "enhanced" its survival. The division, including the Acting Director of USF&WS, was



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tweaking the wording of the findings of enhancement when a "special legal advisor" changed their course in a series of "privileged" meetings.

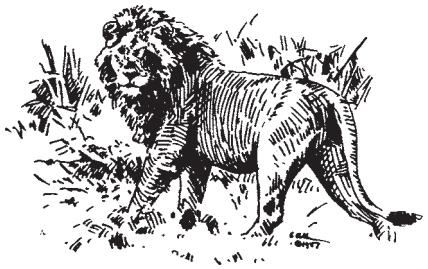
There is no factorial basis in the record for the denials. The specific reasons given for the denials were perfect contradictions of the findings in the record up to the date of the confidential meetings. To top it off, the senior biologist in the Division refused to participate and outright said the change in position was not based upon the best science, that it was something else that he did not have words to describe and did not agree with. The record produced does not have a fact-based rational reason for not finding enhancement. Instead, it has enhancement findings, then a complete reversal of that finding after "privileged" (withheld from the record on the basis of attorney-client communication) meetings with a special legal advisor over the top biologist's written objection. The negative reasons for not finding enhancement point for point contradict the positive findings in the record. By late January, we will see how they defend such a record.

Briefly Noted

Lead Bullets and Fishing Tackle Update: Last month, we reported on the petition of the Center for Biological Diversity (CBD), American Bird Conservancy and others under the Toxic Substances Control Act (TSCA) to the Environmental Protection Agency (EPA) to ban all lead ammunition and fishing weights and other lead tackle. At that time the EPA had ruled that bullets were exempt, but was reviewing lead fishing tackle. (See 75 FR 58377, 24 September, 2010.) The EPA has now ruled that the petitioners have not made a sufficient showing that the requested ban is necessary to protect against an unreasonable risk of injury to health or the environment, which the TSCA requires. It held that the risk did not warrant uniform national regulation and less burdensome alternatives were available and being adopted by states and the industry where necessary.

It was incorrectly rumored that the CBD had filed suit challenging the denials, but we don't think so. The petitioners have 60 days to file suit. The 60 days have expired on lead bullets. The tackle decision was rendered on 4 November so that time was still running when this article was written. Meanwhile, legislation has been introduced in Congress to further protect hunting and fishing interest.

RSA Appeals Court Overturns Regulation: The appeals court in South Africa has reversed the lower court decision that had upheld the regulations on lion hunting. The appeals court held that the regulations were irrational thus illegal. The court found that the purpose of the 24-month waiting period against put-and-take hunting was to provide sufficient time for an intensively managed lion (captive-bred, fed, canned) to be re-wilded before being hunted. That was "irrational" because all the expert opinion in the record, including the experts of the captive breeders, was to the effect that once captive bred, lion can never be rewilded or wilded no matter how long the period. That decision invalidates the law, but we wonder about the ultimate outcome. We don't think the opposition to "canned hunting" of lion in RSA is going to accept this outcome. Even PHASA is opposed to put-and-



take hunting of lion. Frankly, although I was an expert witness in the case on an unrelated aspect at the request of PHASA leadership, I did not appreciate the conclusiveness of the opinions from all sides that lion can never be re-wilded after being captive bred or intensively managed. I certainly understand why the breeders have not broadcasted that disturbing reality to hunters.

The RSA authorities have to go back to the drawing board or abandon the reform effort. For the time being, the lion will not be subject to any such regulation. The regulation has not been in effect because the regulation was voluntarily suspended already by the RSA authorities. Some think that almost all lion hunting in RSA may ultimately be banned because intensively bred lion can't be re-wilded. The time period may simply be dropped from the regulation, and the restrictions on the minimum size of the enclosure could remain. That would not eliminate the put-and-take that is believed to be unacceptable. A regulation that knowingly accepts some degree of dependence less than complete re-wilding may be able to pass court review.

What is Worked Ivory and When is it Importable?: There are two areas of confusion about import of elephant ivory hunting trophies. The first is: What is "worked" ivory? And the second is whether import permits can be obtained. It is extremely complex, but we will present it simply.

When is a tusk considered "worked" by the International Affairs Division of USF&WS? In September 2007, the Division's narrowed definition of sport-hunted trophy went into effect. Since then, trophies have been detained or seized for different reasons in different ports. Some have been detained or seized because they were mounted on decorative stands or there was a skin covering the cracked and chipped base/root area. By filing a claim to transfer to Federal Court, we have just recently obtained the release of tusks that were treated as "worked" because the root area had 6 inches of animal skin covering. That, we hope, is the last of those kinds of misinterpretations. Tusks mounted on bases are now normally being accepted. That includes those with decorative coverings and

fastening parts at the root. The stamped numbers ("markings") must be observable. Some import agents have been alert enough to offer to remove the base covering. Though denied, that offer has helped to ultimately get the tusks released. Of course, if the covering material is elephant skin, it must be separately included on the export permit and entered on the bottom validation section of the export permit.

It does not appear that any amount of painting, scrimshawing (pencil etching) or carving on the surface or deeper will be accepted. Even though the rational for the regulations in the Federal Register suggested that worked items are importable if coded "P" for personal instead of "H" for trophy, that is not true of elephant ivory.

We have processed an import permit application for an elephant tusk taken in Zimbabwe. It was denied. The request for reconsideration was denied, and the Acting Director just refused an opportunity to us to orally argue the merits and denied the final appeal. Permits to import "worked" ivory of elephant on Appendix II (Zimbabwe, Botswana, Republic of South Africa, and Namibia) will not be granted. Ditto Appendix I elephant.

We have two protracted court cases in New York and Atlanta fighting forfeiture of partially scrimshawed tusks of Appendix II elephant from Zimbabwe. The agency's position is that they have been converted from hunting trophies. Therefore, they are not Appendix II, so an import permit is necessary. Of course, the agency won't grant import permits. Consequently, wait until your tusks are home to have work done on them. That is permissible.

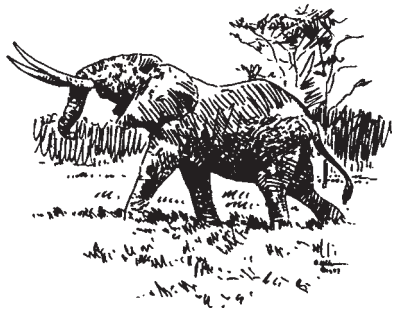
It is important to note that the agency does not stop there. It claims that the "worked" tusks are no longer considered trophies under the ESA and also the African Elephant Conservation Act (AECA), so once a tusk is "worked" it can never be imported. Both the hunters in the New York and Atlanta cases had the work done before the regulation went into effect, but the agency is unrelenting. I will not confuse you with the defenses we have raised or the fact that only the US takes this position. Just be informed you must have an import permit for "worked" elephant tusks because the agency views all "worked" ivory to be on Appendix I. Second, that the agency will not issue an import permit for "worked" ivory of any elephant. Therefore, "worked" ivory can no longer be imported. We have asked the Law Enforcement Division to publish and explain this plainly because this contradicts the Federal Register Notice. The notice states, "worked" items are importable if coded "P" and an import is allowed when on Appendix I, II or III. To date, we have no response. Take a lesson from hunters that have lost trophies: "worked" ivory is not importable.

□ My Friend, Dave Collis, Dies

■ On December 12, Dave Collis died of a sudden stroke. He had taken his pheasant hunters to the airport, then went to lunch with his guides. During lunch he said he did not feel well, stepped outside for relief and went into a coma. He was sent to the hospital in Yuma and then Phoenix (Mayo Clinic), but the damage was too severe. He never regained consciousness and was pronounced dead on the 14th.

Dave operated Dave Collis' Hunters Mexico in Sonora, Mexico. He was one of the few American outfitters legally licensed to outfit in Mexico, license number 16. He had done that for nearly 30 years. He also outfitted elk hunts in the US, including at the Baca Ranch in New Mexico for 14 years.

Dave was an accomplished hunter himself. He had taken the North American 27, the African Big 6, the Grand Slam of North American Sheep and a world slam of turkey. His hunting way of life turned into an occupation in which he guided some of the most noted hunters in the world. He was a life member of SCI, NRA, WSF and a senior member of Pope & Young. He was a shooter in the One Shot Antelope Hunt Club. He also conducted youth hunts on the Baca with SCI Sables when Chrissie was president of Sables. Chrissie and I became sincere friends with Dave decades past. He personally guided Chrissie and me on more than 15 elk and desert mule deer



hunts in New Mexico, Colorado and Sonora, Mexico. In total, we spent many months of our lives in the mountains, meadows and deserts with Dave.

I took both my largest elk and desert mule deer with Dave. You don't do that without the development of a deep friendship. One time I took a fine 6x6 bull elk that unexpectedly stepped out of a hidden crevice between Dave and me. We were sneaking only a few yards apart – drawn there by the bugling. Unaware the raging bull had stepped within feet and between us, Dave heard my arrow fly and turned to me as the bull crashed to the ground beside him. I'll never forget that extraordinary encounter or Dave's look of surprise, amazement and satisfaction. We shared so many encounters like that. My hunts with Dave were more than a lifetime of hunting by ordinary standards.

Before the Baca was sold to the US Government, Chrissie and I booked with Dave for life to bowhunt elk in the September rut. Johnny Morris of Bass Pro also looked to Dave for an annual father-and-son annual bow elk hunt in the Rocky Mountains.

I never had a bad hunt or a cross word with Dave. He just knew what you wanted. I wish there were more like him. He was a true hunter and knew well how to provide a real hunt matter of factly. He was a natural. He was one of us. Thank you, Dave. May you rest in peace. - *John J. Jackson, III.*