

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CONSERVATION FORCE)
3240 S. I-10 Service Rd. W, Suite 200)
Metairie, LA 70001)

YUKON OUTFITTERS ASSOCIATION)
B4- 302 Steele Street)
Whitehorse, Yukon Y1A 2C5)

MERVYN'S YUKON OUTFITTING)
Lot 1196)
Whitehorse, Yukon Y1A 5Y5)

JAMES LEE BROGAN)
511 South State Street)
Athens, WV 24712)

RUSSELL KOHLER)
1050 Porter Street)
Detroit, MI 48226)

LARRY MASSERANT)
8475 Port Sunlight)
Newport, MI 48166)

JOHN SALEVURAKIS)
232 North Ponca Trail)
Mountaineer, AZ 86001)

WILD SHEEP FOUNDATION)
720 Allen Avenue)
Cody, WY 82414-3402)

GRAND SLAM CLUB/OVIS)
P.O. Box 310727)
Birmingham, AL 35231)

Plaintiffs,)

v.)

KEN SALAZAR, Secretary of Interior, in his)
official capacity; ROWAN GOULD, Acting)
Director of USF&WS, in his official capacity; and)

**COMPLAINT
FOR DECLARATORY
JUDGMENT AND
INJUNCTIVE RELIEF**

the U.S. FISH AND WILDLIFE SERVICE)
1849 C Street, NW)
Washington, D.C. 20240)
)
Defendants.)
)
)
_____)

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

**WOOD BISON PERMIT DENIALS AND
ESA DOWNLISTING DETERMINATIONS**

I. INTRODUCTION

1. In this civil action for declaratory and injunctive relief, Plaintiffs CONSERVATION FORCE, *et al.*, challenge the failure of Defendants KEN SALAZAR, United States Secretary of the Interior, and the UNITED STATES FISH AND WILDLIFE SERVICE to comply with the non-discretionary downlisting provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1534 (“ESA”), as well as Defendants’ improper denials of Plaintiffs’ wood bison import permits. The wood bison from Canada (*B. bison athabasca*) is listed as “endangered,” and that listing is inhibiting its conservation. The Defendants failed to issue a 90-day downlisting finding for the wood bison under the ESA within the timeframe set forth by the statute, 16 U.S.C. § 1533(b)(3)(A), continue to fail to make the mandatory 12-month finding, *id.* at § 1533(b)(3)(B), and have now missed the maximum 24-month deadline for determining whether the downlisting is warranted. *Id.* at § 1533 (b)(3)(C)(i). Furthermore, Plaintiffs have failed to and continue to fail to conduct the mandatory five-year review of the listing of the wood bison, as required by 16 U.S.C. 1533(c)(2)(A). Plaintiffs request this

Court to order the Secretary to comply with the ESA's mandatory, non-discretionary timelines for completing the downlisting process. *Id.*

2. Because the Secretary is in violation of the ESA's mandatory deadlines, Plaintiffs now seek judicial relief declaring that the Secretary has violated the ESA by failing to timely issue the 12-month and 24-month findings for the wood bison by the statutory deadlines. The wood bison downlisting petition was filed on December 3, 2007; therefore, the aforementioned deadlines lapsed in December 2008 and December 2009, respectively. Plaintiffs ask the Court to order the Secretary to issue this overdue 12-month determination, and, if appropriate, the overdue 24-month determination.

3. In addition, the Secretary has denied at least four wood bison enhancement trophy import permit applications in violation of the ESA (16 U.S.C. §1539), the Service's own regulations (50 C.F.R. § 17.22(a)(2), 50 C.F.R. § 13.21, 50 C.F.R. § 13.11(c)) and the Administrative Procedure Act (APA) (5 U.S.C. § 706(2)(A)). Thus, the Plaintiffs ask the Court to declare that the denials of Plaintiffs' permit applications were improper, and to order the Secretary to issue the import permits pursuant to the enhancement provision of the ESA and the Service's own regulations.

II. JURISDICTION AND VENUE

4. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (APA), and 28 U.S.C. § 1361 (mandamus). The relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

5. Venue is proper in the District of Columbia pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e) as this civil action is brought against an agency of the United States and officers and employees of the United States acting in their official capacities and under the color of legal authority.

6. By written notice sent to Defendants Ken Salazar, Secretary of the Department of the Interior, and Sam Hamilton, who was, at the time, Director of the U.S. Fish and Wildlife Service¹, by email and Federal Express delivery on November 3, 2009, Plaintiffs informed Defendants of the violations set forth in this Complaint more than sixty days prior to the filing of this Complaint, as required by the ESA. 16 U.S.C. § 1540(g). Despite receipt of Plaintiffs' notice letter, the Secretary has failed to remedy his violations of the ESA.

7. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

8. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g), 5 U.S.C. § 701, 5 U.S.C. § 702 and 5 U.S.C. § 551.

9. In order to bring suit against the federal government, a plaintiff's claims to standing must satisfy "both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise," *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In addition to establishing that he has a case or controversy, the plaintiff must establish that he has an "injury in fact," that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The injury in fact must be "an

¹ Due to Dir. Hamilton's sudden and tragic death, Rowan Gould has been named Acting Director of the Fish and Wildlife Service, and, consequently, is named as a defendant in this action. Plaintiffs wish to express their condolences to all affected by Dir. Hamilton's passing.

invasion of a legally protected interested which is (a) concrete and particularized, and (b) ‘actual or imminent’, not ‘conjectural’ or ‘hypothetical.’” *Id.*

10. In addition, the Supreme Court has introduced a prudential standard design to restrict the exercise of jurisdiction by federal courts. Under this standard, a plaintiff must prove that a plaintiff’s “grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997). In this instance, because Plaintiffs themselves are the object of the regulations that are impeding the conservation efforts in question, there is “little question that [Defendants’] action or inaction has caused [Plaintiffs’] injury, and that a judgment preventing or requiring the action will redress it.” *Lujan*, 504 U.S. at 561.

III. PARTIES

11. Plaintiff Conservation Force files in its own capacity and as a representative of its many constituent hunters and its supporting organizations and Canadian conservation partners. Conservation Force is a non-profit 501(c)(3) foundation formed for the purpose of wildlife conservation, related education, and wildlife research. It advocates and represents hunters and their conservation interests, particularly concerning the wood bison. Its name stands for the fact that the sustainable use of wildlife, most particularly recreational hunting, has been the foremost force for wildlife and habitat conservation in North America for over a century. No one contributes more than sportsmen and women for the conservation of wildlife and habitat, nor has anyone contributed more to the conservation of the wood bison, which today has attained a record high number and is growing. Conservation Force has participated in wildlife

conservation projects around the world to conserve, manage, and protect species listed on the ESA and CITES (including wood bison) for over a decade. Its leaders and officers have been participants in the ESA and CITES process since the inception of the ESA and CITES. Most of its supporting organizations are committed to wood bison conservation and the proper implementation of the ESA and/or CITES, and many of which have invested heavily in wood Bison conservation. Conservation Force is committed to and is directly participating in the conservation of wood bison. Its officers pioneered the U.S. importation of wood bison hunting trophies, which has been one of the principle incentives and sources of funding for wood bison management and conservation incentive in the Canadian Yukon. It has assisted the permit applicants with their permit applications, including providing legal services in preparing the applications as a public service, and has repeatedly asked the Defendants to process the downlisting petition and to properly process the import permits, to no avail. It has assisted the Yukon authorities and Wood Bison Recovery Team with the filing of the downlisting petition from the inception.

12. Plaintiff Yukon Outfitters and Guides Association is a wildlife management co-operative. Its members earn their livelihood from outfitting and guiding, including outfitting and guiding wood bison hunts in the Yukon. The association and its member cannot get full value for the wood bison hunts allocated to them because the bison is not importable into the United States due to the “endangered” listing. They are committed to the successful conservation of the species in the Yukon and have been partners in its recovery from the inception of the recovery program. Now, the population recovery exceeds all expectations; its survival depends upon the revenue it generates,

tolerance of the local people, and their incentives to manage it. The unwarranted listing is the greatest threat to the survival and perpetuation of the wood bison, as it deprives the bison of its highest value as a natural resource, while the ESA provides no benefit whatsoever. The Association has supported Conservation Force and the permit applicants and instigated the Wood Bison Recovery Team to file the downlisting petition. The Wild Sheep Foundation and Grand Slam/OVIS are both members of Conservation Force and depend upon Conservation Force to lead this effort and to protect their interest and that of their members.

13. Tim Mervyn is a Yukon Outfitter who solely owns and operates Mervyn's Yukon Outfitting. He and his wife and children reside in the Yukon and have personally worked with the Yukon government wildlife authorities to reintroduce and restore the wood bison. He has also served from time to time as the President of the Yukon Outfitter and Guides Association. He earns his livelihood and supports his family from hunting and guiding U.S. hunters in the Yukon Territory. His was the first hunting operation to be granted (nonresident) tourist hunting wood bison tags by the Yukon Wildlife Authorities in 1998. Because U.S. hunters could not import their trophies, Plaintiff Mervyn was unable to sell the tags at fair value, or even at a price sufficient to cover his out-of-pocket cost of conducting the hunts. As the President of the Yukon Outfitters Association in the 1990's, he donated a number of the hunts to the Foundation for North American Wild Sheep (FNAWS), which today is called the Wild Sheep Foundation (WSF), as well as other sportsmen's conservation organizations to be sold at conservation auctions to the highest bidder with the promise that the legal services for filing trophy import permits would be handled free as a public conservation service by Conservation

Force. Even though the revenue from the auction of the hunts was directed to recovery of the wood bison, the hunts sold at only a nominal price and for less than the hunts of the abundant common plains bison. The wood bison hunts were auctioned, and the import permit applications were filed and, prior to the recent denials, had been pending with the defendant USFWS since 2000. Since the inception, Plaintiff Mervyn has been unable to cover his costs of conducting wood bison hunts, much less earn a profit. He has been discouraged and distressed that the hunts cannot be sold for profit for himself or for conservation costs and incentives for the local First Nations people, who must tolerate the bison on their native lands. He has personally assisted the Wood Bison Recovery Team in filing its petition for downlisting from the inception.

14. Plaintiff James Lee Brogan is a U.S. citizen from Athens, West Virginia, who purchased a Yukon wood bison hunt at a conservation auction at the Wild Sheep Foundation. The revenue went directly to the Canadian authorities for the conservation of the species. He incurred the expense of traveling to the Yukon and successfully hunted a wood bison in January of 2004. He then, with the legal assistance of Plaintiff Conservation Force, submitted an import permit application for his wood bison trophy on November 11, 2004. He has been bearing the cost of storing his trophy in Canada since that date, as the USFWS only recently processed his import permit, despite an initial acknowledgment letter from USFWS assigning the trophy import application an application number (PRT# US096628/9) and promising a determination within 90 days. The trophy is perishable, and Plaintiff fears that with the passage of time it is deteriorating and will not be salvageable. He is also incensed with the disregard of the Defendants towards the wildlife program of Canada, the First Nation people of the Yukon

(who are the keepers and stewards of the wood bison), and the recovered wood bison itself. His permit application has now been denied and that denial is arbitrary, capricious and contrary to law.

15. Plaintiff Father Russell Kohler is a U.S. citizen and Catholic priest from Michigan. He purchased a Yukon wood bison hunt at a conservation auction at the Foundation for North American Wild Sheep (FNAWS). He incurred the expense of traveling to the Yukon and successfully hunted a wood bison in March of 2000. He then, with the legal assistance of Plaintiff Conservation Force, submitted an import permit application for his Wood bison trophy on December 4, 2000. He has been bearing the cost of storing his trophy in Canada since that date as the USFWS has only recently processed his import permit, despite an initial acknowledgment letter from USFWS assigning the trophy import application an application number (PRT# MA038081-0) and promising a determination within 90 days. The trophy is perishable, and Plaintiff Kohler fears that with the passage of time it is deteriorating and will not be salvageable. He is also incensed with the disregard of the Defendants towards the wildlife program of Canada, the First Nation people of the Yukon (who are the keepers and stewards of the wood bison), and the recovered wood bison itself. His permit application has now been denied and that denial is arbitrary, capricious and in violation of law.

16. Plaintiff Lawrence Masserant is a U.S. citizen from Newport, Michigan, who purchased a Yukon wood bison hunt at a conservation auction at the Foundation for North American Wild Sheep (FNAWS). He incurred the expense of traveling to the Yukon and successfully hunted a Wood bison in March of 2000. He then, with the legal assistance of Plaintiff Conservation Force, submitted an import permit application for his

wood bison trophy on November 26, 2000. He has been bearing the cost of storing his trophy in Canada since that date, as the USFWS has only recently processed his import permit, despite an initial acknowledgment letter from USFWS assigning the trophy import application an application number (PRT# MA037808-0) and promising a determination within 90 days. The trophy is perishable, and Plaintiff Masserant fears that with the passage of time it is deteriorating and will not be salvageable. He is also incensed with the disregard of the Defendants towards the wildlife program of Canada, the First Nation people of the Yukon (who are the keepers and stewards of the wood bison), and the recovered wood bison itself. His permit application has now been denied and that denial is arbitrary, capricious and contrary to law.

17. Plaintiff Dr. John Salevurakis is a U.S. citizen from Mountainaire, Arizona, who purchased a Yukon wood bison hunt at a conservation auction at the Foundation for North American Wild Sheep (FNAWS). He incurred the expense of traveling to the Yukon and successfully hunted a wood bison in February of 2002. He then, with the legal assistance of Plaintiff Conservation Force, submitted an import permit application for his wood bison trophy on October 06, 2002. He has been bearing the cost of storing his trophy in Canada since that date, as the USFWS has only recently processed his import permit, despite an initial acknowledgment letter from USFWS assigning the trophy import application an application number (PRT# MA064687-0) and promising a determination within 90 days. The trophy is perishable, and Plaintiff Salevurakis fears that with the passage of time it is deteriorating and will not be salvageable. He is also incensed with the disregard of the Defendants towards the wildlife program of Canada, the First Nation people of the Yukon (who are the keepers

and stewards of the wood bison), and the recovered wood bison itself. His import permit application has finally been processed but denied, which denial was arbitrary, capricious and contrary to law.

18. Defendant Ken Salazar, United States Secretary of the Interior, is the highest ranking official within the Department of Interior and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to the wood bison, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

19. Defendant Rowan Gould is the acting Director of the United States Fish and Wildlife Service. He is responsible for the administration and implementation of the Endangered Species Act, including the downlisting of the wood bison. He is sued in his official capacity.

20. Defendant United States Fish and Wildlife Service (USFWS) is a federal agency within the Department of Interior authorized and required by law to protect and manage the fish, wildlife, and native plant resources of the United States, including enforcing the ESA. The Service has been delegated authority by the Secretary of Interior to implement the ESA for the wood bison, including responsibility for making decisions and promulgating regulations, including proposed and final downlisting and the processing of petitions for such downlistings. The Service has failed to publish the 12-month and 24-month downlisting determinations for the wood bison under the ESA.

IV. LEGAL BACKGROUND

21. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

22. Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum extent practicable,” to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C § 1533 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial information indicating that the listing may be warranted, the Secretary then publishes in the Federal Register a “90 day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A). The Secretary had failed to issue the mandatory 90-day finding in this case until served with a notice to sue.

23. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12 months from the date that he received the petition (which, in this instance was December 2007) the Secretary must make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second determination is known as a “12-month finding.” The Secretary has failed to issue the 12-month finding within the mandated period of time.

24. The absolute longest period that the Secretary has to make his determination is 24 months from receipt of the petition. *See* 16 U.S.C. § 1533(b)(3)(C)(i). This additional twelve months arises *if and only if* the 12-month finding was that the downlisting was warranted, but that

(I.) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action . . . is

precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and (II.) expeditious progress is being made to add qualified species to either of the lists . . . and to remove from such lists species for which the protections of this chapter are no longer necessary.

Id. at (iii). In any case, the maximum 24-month period expired in December 2009. Defendants failed and continue to fail to meet that deadline.

25. The USFWS has declared as a part of its downlisting policies that “[f]or foreign species only, within the limited allocation assigned to that function, those final determinations that have potential for conservation benefit, and assist developing countries with the conservation and management of their species, will be the highest priority within Tier 2.” 63 FR 25502, 25510 (May 8, 1998). The USFWS has already acknowledged that “when the free-ranging disease-free populations of wood bison meet the recovery plan criteria, the Service may initiate such a downlisting.” 63 FR 65165. The USFWS has not followed its own Notice to the public.

26. The ESA provides that “the Secretary . . . **shall encourage** . . . foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to the ESA.” 16 U.S.C. § 1537(b) (emphasis added). The failure to downlist the species from endangered or to grant enhancement permits for trophies has obstructed and discouraged the Yukon program. The range nation’s program is not a threat; the Defendants’ inaction is the threat. The proposed downlisting would reduce the United States’ “stricter domestic measure” that is known worldwide to be obstructing the Yukon’s conservation program for the Wood bison.

27. The Secretary had also failed to consider wood bison trophy import applications submitted under the enhancement provision of the ESA. “The Secretary may permit, . . . any act otherwise prohibited by section 1538 of this title for scientific purposes or *to enhance the propagation or survival of the affected species.*” 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

28. “Upon receiving an application...the Director **will decide** whether or not a permit should be issued.” 50 C.F.R. § 17.22 (*Permits for...enhancement or propagation or survival...* Section (2) Issuance criteria for “endangered species”) (emphasis added). The Director failed to decide/process the Plaintiffs’ trophy import permit applications for years, and did so only after Plaintiffs took legal action.

29. Also, 50 C.F.R. § 13.21 *Issuance of Permits* is made applicable by 40 C.F.R. § 17.22(a)(2), governing species listed as endangered. It provides that “[u]pon receipt of a properly executed application for a permit, the Director **shall** issue the appropriate permit unless” there is a specifically enumerated regulatory reason not to. 40 C.F.R. § 17.22(a)(2) (emphasis added). Any policy not to process or grant such permits is a violation of law and regulations. Moreover, 50 C.F.R. § 13.11(c) provides that “[t]he Service **will process all applications as quickly as possible.**” (emphasis added).

30. The principal goal of the ESA is to return listed species to a point at which protection under the Act is no longer required. In the case of the wood bison, the downlisting would permit the issuance of trophy import permits to encourage sustainable use that will contribute to the long-term survival of this species and its permanent elimination from the “endangered” listing.

31. Even in the absence of a downlisting petition, the Secretary is **required** to conduct a review of all threatened and endangered species **at least once every five years**, and determine whether any such species should be removed from its respective list, changed in status from threatened to endangered, or changed in status from endangered to threatened. 16 U.S.C. § 1533(C)(2).

32. During the 1982 ESA amendment hearings, Congress provided that the Secretary must consider the wildlife conservation and management programs of a foreign nation before any listing or permitting determination.

“There may be nations where a combination of a healthy population and effective management programs permit the sport hunting of such species without adversely affecting its status. The failure to recognize this may result in the foreign nations being denied much-needed revenues derived from license fees that are used to fund their wildlife conservation and management programs. **If the Secretary is in receipt of biological information from a foreign nation with respect to resident game species listed as “endangered,” he should evaluate the status of such species within the country in question.** The evaluation should consider the effectiveness of management programs such as artificial propagation and whether these programs permit sport hunting of listed species in nations where it otherwise might be detrimental to the species. The evaluation should also determine whether the specific country in question has management program for the species, whether the species’ population can sustain a sport hunting harvest, and whether the sport hunting **enhances** the survival of the species. **If the Secretary determines that sport hunting in such country will assist the conservation of a listed species, he should issue appropriate regulations to facilitate the import of sport-hunted trophies of such specimens.** The above-mentioned criteria should be taken into account in future listings of game species as well.”

Senate Report No. 97-148 (emphasis added).

33. Trophy import by the U.S. tourist/recreational hunters would enhance the propagation or survival of the species.

34. In the case of captive-bred species, the regulations expressly provide that culling and other necessary husbandry practices constitutes “enhancement.” The bison at issue were reintroduced from captive herds.

35. The USFWS has acknowledged that listing a foreign species under the ESA may actually harm the species because listing the species “may complicate the implementation of conservation initiatives under other international authorities, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).” 68 FR at 49513. That is true in this instance.

36. CITES is an international treaty that is used as a conservation tool regulating international trade of certain wild plants and animals. Due to the sustainable use practices of the Yukon Territories, the Conference of the Parties to the Convention completely downlisted wood bison to facilitate hunting trophies from the Yukon. Thus, the USF&WS failure to timely downlist and subsequently approve trophy import permits is in direct contravention to that international conservation effort and the defendants’ related duties under the ESA to implement CITES.

37. Because the ESA does not provide benefits for recovery of foreign species as it does for domestic species, the USFWS has a duty to defer to the range nation when there is a conflict between the administration of the ESA and the range nation’s conservation regime, where the range nation has the greatest interest. *See Restatement Third of the Foreign Nations Law of the United States* § 403 (1987). The neglect of the downlisting petition and the denial of the trophy import permit applications is an uncooperative act, in direct conflict with the Yukon Wood Bison Recovery Program. It violates the diplomatic “Principle of Reasonableness,” the “Principle of Effects,” and the

“Conflict Avoidance Rule” of Foreign Affairs. The ESA is being administered as a disincentive or extraterritorial impediment to the conservation and recovery efforts of the wood bison.

38. The existing law and regulations compel the downlisting of the wood bison and the issuance of permits for conservation purposes. All practices and policy to the contrary are in violation of the law and intent of Congress.

V. FACTUAL BACKGROUND

39. The wood bison is a recognized subspecies of the North American bison, closely resembling the plains bison, but is larger, heavier, and structurally distinct (for example, its horns extend above its forelock, and the highest point on its back is much farther forward).

40. Historically, the wood bison were found on the interior plains of northwestern North America, specifically, northwestern Saskatchewan, northern Alberta, northeastern British Columbia, and southwestern Northern Territories. 63 FR 65164 (Nov. 25, 1998). In 1800, approximately 200,000 wood Bison were believed to exist. *Id.* The population was reduced to approximately 250 animals by the turn of the 20th century. *Id.*

41. However, due to the cooperative efforts of the Canadian Wildlife Service, the Wood Bison Recovery Team, and the local Yukon government, there were more than 2,800 free-range, disease-free wood bison in Canada in 2001. *National Recovery Plan for the Wood Bison*. National Recovery Plan No. 21. Recovery of Nationally Endangered Wildlife (RENEW). Ottawa, Ontario. p. 16 (October 2001).

42. In 1983, these parties agreed to initiate and manage a Wood Bison reintroduction project; whereby 24 wood bison were transplanted and bred in captivity near the Nisling River watershed area of the Yukon Territory, Canada. *Yukon Bison Management Plan 1998 to 2003*, p. 4, 7.

43. The first release of wood bison from the enclosure took place in March of 1988, and the last bison left the enclosure in the summer of 1992. *Id.* at 6.

44. Currently, the wild herd grows at a rate of 20% per year and must be cull hunted. “In the absence of effective predators, the commitment to establish a herd size of about 500 and maintain it at that level requires hunting as the principle means of population control.” *Id.* at 10. Since 1999, the herd size has been over 500. In order to maintain the population at the desired rate, 70-80 animals need to be harvested annually as a conservation tool. The limited cull of the herd is performed under a formal management program for the purpose of enhancement of the survival of the species.

45. The USFWS acknowledged that “at such time when the free-ranging disease-free populations of wood bison meet the recovery plan criteria, the Service may initiate such a downlisting.” 63 FR 65164, 65165 (November 25, 1998).

46. The wood bison in the Yukon has recovered under Canada’s recovery program and its management has been fully returned to the Province of the Yukon.

47. The wood bison in Canada has been completely downlisted under CITES expressly to facilitate trophy trade.

48. On December 3, 2007, the USFWS received a petition from Canada’s Wood Bison Recovery Team to reclassify the wood bison as “threatened” under the ESA, due to

the overwhelming success of the management program, resulting in a steady increase in the wood bison population.

49. The ESA sets forth strict deadlines for processing petitions. Within 90 days of receiving a petition to remove a species from the list, the ESA requires the Secretary to determine whether “the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). In response to numerous inquiries, the USFWS had suggested that a positive 90-day finding was warranted, but did not complete the notice and finding until receiving a notice of intent to sue, more than 12 months after receiving the downlisting petition.

50. If the Secretary finds the petitioned action “may be warranted,” the ESA requires the Secretary to determine, within twelve months of the petition’s filing, whether the requested action (down-listing the wood bison) “is warranted” and, if so, to publish a proposed rule down-listing the wood bison as a threatened species. 15 U.S.C. § 1533(b)(3)(B). The Secretary has failed to meet the 12-month deadline.

51. The Secretary has also failed to conduct the mandatory five-year review of the wood bison’s “endangered” status, in violation of 16 U.S.C. §1533(c)(2). Despite the non-discretionary five-year deadline, the Secretary has failed to review the wood bison’s status for over twice that many years, and continues to improperly delay the review.

51. In addition, the Secretary has improperly denied at least four wood bison enhancement trophy import applications in violation of the ESA (16 U.S.C. §1539), the Service’s own regulations (50 C.F.R. § 17.22(a)(2), 50 C.F.R. § 13.21, 50 C.F.R. § 13.11(c)) and the Administrative Procedure Act (APA) (5 U.S.C. § 706(2)(A)).

52. “The Service recognizes the conservation benefits of delisting foreign species and recognizes that, with regard to foreign game species, fees from trophy hunters can, in some cases, provide economic incentives for landowners to maintain healthy populations of game species.” 63 FR 25504.

53. The hunting permit fees fund the Yukon Renewable Resources Department, which has administered the conservation program from the origin and bears the cost of the annual surveys and management of the species. The hunting itself causes expenditures in the community which provides public incentive for the wood bison habitat and encourages that use of the land. Downlisting the species and granting wood bison trophy import permits would support and further the sustainable use management plan.

54. The responsible Canadian authorities, including the Wood Bison Recovery Team, have declared that the Yukon Wood Bison have recovered.

55. The numbers of wood bison today exceed the management objective, and the authorities are having difficulty harvesting sufficient numbers.

56. The management authorities issue tourist hunting tags to help control the population while providing revenue and important incentives to tolerate the growing number of reintroduced bison. These tags are allocated to the First Nation people, who in turn sell them to outfitters of the Yukon Outfitter Association for revenue.

57. Plaintiffs Brogan, Kohler, Masserant and Salevurakis each legally obtained a tourist hunting tag, took a wood bison, and applied for a trophy import permit. Despite their conformance with all applicable laws, rules, and regulations, and despite the importance of Plaintiffs’ hunts to the ongoing conservation and management of wood

bison, Defendants simultaneously denied all of Plaintiffs permits on October 9, 2009 arbitrarily, capriciously and in violation of law.

VI. PROCEDURAL HISTORY

58. Between 2000 and 2004, Plaintiffs Brogan, Kohler, Masserant and Salevurakis submitted trophy import permit applications.

59. In late 2007, in light of the recovery of a healthy wood bison population, the Canadian National Wood Bison Recovery Team petitioned the Secretary of the Interior to downlist the wood bison from endangered to threatened. That petition was filed at the suggestion of and with the assistance of plaintiffs Conservation Force, the Yukon Outfitters Association and Tim Mervyn.

60. By January 2009, Defendants still had not processed Plaintiffs' permit applications. Similarly, the Secretary had not made the requisite 90-day determination regarding the downlisting. In an attempt to compel action on these issues, Plaintiffs submitted a notice of intent to sue, dated January 13, 2009.

61. In February 2009, the Secretary issued the "90-day" finding, concluding that downlisting the wood bison may be warranted. Despite the fact that over 14 months had passed since the filing of the downlisting petition, the Secretary failed to issue the requisite 12-month finding. Plaintiffs' import permits also remained in limbo.

62. In March 2009, more than 60 days after submitting their first notice of intent to sue, Plaintiffs instituted an action against Defendants in the District of the District of Columbia (Case No. 1:09-cv-00496-JDB) (hereinafter, "Case 496"), for failure to process Plaintiffs' permits and failure to issue a 12-month downlisting determination.

63. On October 9, 2009, Defendants simultaneously denied all of Plaintiffs' trophy import permits.

64. Despite the pending legal proceedings, Defendants continued to breach the absolute mandate of making a 12-month determination. In yet another attempt to prompt action by the Defendants, Plaintiffs submitted a second notice of intent to sue on November 3, 2009. This notice specifically cited Defendants' failure to conduct the mandatory five-year review of the listing for the wood bison, Defendants' failure to comply with the non-discretionary duty to issue a 12-month finding in response to the downlisting petition, and Defendants' improper denials of Plaintiffs' import permits. It was to no avail.

65. Following various motions, the Court dismissed Case 496 on June 7, 2010, on jurisdictional grounds, citing that Defendants' failure to issue a 12-month finding was not expressly included on the original notice of intent to sue, and, therefore, that the issue was not jurisdictionally properly before the Court. (The Court further addressed the issue of Defendants' failure to timely process Plaintiffs' import permits, declaring the issue moot in light of the permit denials.)

66. Today, because Defendants continue to breach their duties regarding the wood bison, Plaintiffs properly file suit as noticed on November 3, 2009.

VI. CLAIMS FOR RELIEF

CLAIM I

(Failure to Make a 12-month De-Listing Determination for the Wood Bison)

1. Plaintiffs reallege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

2. The Secretary's failure to issue a 12-month finding on the wood bison petition filed December 3, 2007, violates his responsibilities under 16 U.S.C. § 1533 and 50 C.F.R. § 424.14.

3. The Secretary's failure to properly consider the petition to de-list the wood bison represents a violation of his duties under 16 U.S.C. § 1533 and 50 C.F.R. § 424.14.

4. The Secretary's failure to properly consider and proceed with the petition to de-list the wood bison violates his responsibility under 16 U.S.C. § 1537(b) of the Endangered Species Act, which says that the Secretary "shall encourage" foreign countries to provide for endangered species.

5. The Secretary's failure to properly consider or proceed with the petition to de-list the wood bison represents "final agency action" under 5 U.S.C. § 551(13).

6. The Secretary's failure to proceed with timely determining the delisting petition is a failure to follow a "rule" within the meaning of 5 U.S.C. § 551(13).

7. Plaintiffs are persons "adversely affected" by the Secretary's failure to act within the meaning of 5 U.S.C. § 702 and, therefore, have a right to seek relief under the Administrative Procedure Act in this Court.

8. The Secretary's failure to meet the 12-month determination deadline for de-listing petitions constitutes an action "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. § 706(1).

9. The Secretary's failure to meet the 12-month deadline and attendant misrepresentations and evasions in communication with plaintiffs constitutes behavior that is "arbitrary and capricious" and a "failure to observe proper procedure" within the meaning of 5 U.S.C. § 706(2).

10. Defendants should be compelled to reach a conclusion regarding the de-listing of the wood bison.

CLAIM II

(Failure to Conduct Mandatory Five-Year Review of Wood Bison "Endangered" Listing)

1. Plaintiffs reallege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

2. The Secretary's failure to conduct the requisite five-year review of the wood bison's "endangered" status violates his mandatory duties under 16 U.S.C. 1533(c)(2).

3. The Secretary's failure to conduct the five-year review demonstrates the Defendants' complete disregard for the wood bison's status and recovery.

4. Defendants should be compelled to undertake the five-year review.

CLAIM III

(Improper Denials of Plaintiffs Hunting Trophies)

1. Plaintiffs reallege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

2. The Secretary's denials of Plaintiffs' wood bison trophy import applications is a violation of his duties under 16 U.S.C. § 1539.

3. The Secretary failed to make a proper intra-agency jeopardy consultation and determination with regard to the negative impact of the denials on the wood bison, in violation of 16 U.S.C. § 1536(b).

4. The Secretary's denial of permits for the importation of wood bison trophies violates his responsibility to "encourage" foreign countries to provide for endangered species. 16 U.S.C. § 1537(b).

5. Similarly, the Secretary's denial of permits for the importation of wood bison trophies violates his responsibility to "tak[e] into account" the conservation efforts being made by the wood bison's range nation. 16 U.S.C. § 1533(b)(1)(A).

6. Plaintiffs are persons "adversely affected" by the Secretary's failure to act within the meaning of 5 U.S.C. § 702 and therefore have a right to seek relief under the Administrative Procedures Act in this Court.

7. The Secretary's improper denials of Plaintiffs' permits following his failure to act for a multiple years and his attendant misrepresentations and evasions in communication with Plaintiffs constitute unlawful behavior within the meaning of 5 U.S.C. § 706(2) (including, but not limited to, actions and/or findings that are "arbitrary, capricious, an abuse of discretion" and "without observance of procedure required by law.")

8. The denials should be overturned and the permits should be granted or remanded for proper processing.

CLAIM IV

(Breach of Bundle of ESA Duties)

1. Plaintiffs reallege and incorporate by reference all of the facts and allegations set forth above as though fully set forth here.

2. The Endangered Species Act was created to achieve the recovery of endangered species and it places an obligation on federal agencies to “afford first priority to the declared national policy of saving endangered species.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

3. The Secretary has a bundle of duties under the Endangered Species Act to promote and encourage recovery of foreign endangered species, to cooperate with range nation programs and to consider range nation programs in any actions that might affect those programs and consequently the endangered species in question. Defendants have harmed the wood bison and impeded recovery efforts by refusing to implement these duties.

4. By impeding recovery efforts for the wood bison, Defendants have injured Plaintiffs within the meaning of Article III of the U.S. Constitution.

5. An action under 50 C.F.R. § 402.02 is defined as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

- a. actions intended to conserve listed species or their habitat;
- b. the promulgation of regulations;
- c. the granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid; or
- d. actions directly or indirectly causing modifications to the land, water, or air.”

6. Actions which may be challenged under Section 402 are further defined as “actions in which there is a discretionary Federal involvement or control.” 50 C.F.R. § 402.03.

7. According to the terms of 50 C.F.R. § 402.03, “the only actions not subject to ESA requirements are ‘those the agency does not authorize, fund, or carry out.’ Id. (alterations omitted). Under this approach, any action actually taken by the agency is discretionary.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1234 (9th Cir. 2006).

8. 16 U.S.C. § 1536 (a)(2) mandates that “each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species.”

9. Defendants’ consistent practices of delaying the review of enhancement permit applications, failing to make timely determinations on the downlisting petition, and failing to conduct the mandatory 5-year review have a demonstrably negative effect on the prospects of this endangered species and therefore jeopardize its continued existence.

10. When considering a listing or de-listing application, Defendants must take into account “those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect [a potentially endangered or threatened] species.” 16 U.S.C. § 1533(b).

11. Defendants have completely failed to account for the highly successful wood bison recovery program when considering the de-listing of that species, for if they had, they would have noted the degree to which their delays are actively damaging to the species. This failure has jeopardized the wood bison’s continued existence.

12. The duty to recover domestic endangered species imposed by the Endangered Species Act does not apply to foreign endangered species because the Secretary has no authority to impose recovery plans. Instead, the Endangered Species Act imposes a duty upon Defendants that they “shall encourage...foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4 of this Act.” In addition to this general exhortation of support and encouragement, Defendants are directed to work with “foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.” ESA § 8(b) 1-3.

13. Plaintiffs in this suit are of a variety of nationalities and all of them are actively involved in the recovery of the wood bison. Plaintiffs were participating

in a highly acclaimed indigenous conservation program. In failing to carry the interests of the wood bison forward for as much as ten years, the Defendants have not only failed in their duty to encourage and actively assist in the conservation efforts of foreign nations, they have displayed a callous disregard for a species they saw fit to list as endangered, and that disregard has firmly placed that species in greater danger.

14. Furthermore, because Defendants have failed so completely to take the conservation of this species into account, any technical determinations they have begun deserve little deference because the “agency has completely failed to address some factor, consideration of which was essential to [making an] informed decision.” *Pac. Coast Fed’n of Fishermen’s Ass’n v. Gutierrez*, 2008 U.S. Dist. LEXIS 98611, 61 (e.D. Ca. 2008).

15. These failures are a perfect example of an agency forgetting or ignoring the fact that though they “may have nondiscretionary types of obligations,...they still maintain discretion – indeed, a duty – to balance the competing demands and honor their ESA obligations.” *Nat’l Wildlife*, 431 F.3d at 1234.

16. Defendants have utterly failed to meet their “affirmative duty to satisfy the ESA’s requirements, as a first priority,” and should be compelled to consider the status of endangered species and indigenous conservation programs both when processing permit applications and when listing or de-listing a species. *Id.*

VII. PRAYER FOR RELIEF

For the reasons stated above, Plaintiff respectfully requests that the Court grant the following relief.

1. Declare that the Defendants violated their non-discretionary duty under 16 U.S.C. §1533(b)(3)(B) of the ESA by failing to timely make a 12-month downlisting determination for the wood bison;
2. Declare the Defendants have violated 16 U.S.C. 1537(b) that mandates the Secretary shall encourage foreign conservation programs and cooperate with the same.
3. Declare that Defendants' denial of Plaintiffs' wood bison trophy import permits is a violation of the ESA, the APA and the Constitution;
4. Issue permanent injunctive relief compelling the Secretary to make and publish in the Federal Register a 12-month downlisting determination for the wood bison under the ESA within 60 days or other definite date;
5. Issue permanent injunctive relief compelling the Secretary to make and publish in the Federal Register a five-year review and determination for the listing of the wood bison under the ESA by a definite date;
6. Issue an order declaring the permit denials to be arbitrary, capricious and a violation of law and granting the permits or remanding to the Agency for correction;
7. Award Plaintiffs their costs of litigation and reasonable attorneys fees; and
8. Grant Plaintiffs equity and such other relief as the Court deems just and proper.

DATE: June 21, 2010

Respectfully Submitted,

By:

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