IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CONSERVATION FORCE et. al., Plaintiffs, vs. SALAZAR et. al., Defendants.	)	**Case No.: 1:09-CV-00496-JDB** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Introduction

This case concerns the negative effects of United States Fish and Wildlife Service (FWS) policy on the future prospects of the listed Canadian Wood Bison, and the negative effects of FWS policy on the rights of individuals to their legally obtained property. The Canadian Wood Bison was hunted without license or negotiation almost to extinction in the 19th century and was therefore, by the middle of the 20th century, undeniably an endangered species. Canada has engaged in a highly successful effort to recover the species, culminating in the re-introduction of the bison into the wild in 1988. (Plaintiff's Complaint, p. 17). Since the reintroduction, the bison has achieved the recovery goals set by the Wood Bison Recovery. In order to maintain that herd, Canadian conservation authorities employ licensed, regulated hunting as their primary conservation tool, largely because the bison has no natural predators. The hunters who

participate make significant financial contributions to the program and obtain emotionally and financially significant trophies for their own use.

On December 3, 2007 Canada's Wood Bison Recovery Team submitted a petition to defendants to reclassify the Wood Bison as threatened, due to their achievement of recovery goals and continued successful maintenance of the species, which is achieved in part by tourist hunting. The FWS is required to process such petitions, and to make intermediate findings at 90 days and then at 12 months from the date the petition was filed. 16 U.S.C. 1533(b)(3)(A). The FWS failed to make its 90 day finding until plaintiffs gave notice of their intent to sue. This belated decision occurred more than 12 months after the initial 90 day finding should have been made. During this period, and indeed before it, the FWS has also failed to process the enhancement permits that are necessary for hunters to import their legally acquired trophies. This practice has served both to deprive these hunters of their property without available process and to discourage them from participating in the Wood Bison conservation hunting program.

There is no dispute as to the facts of this case. The Secretary and FWS blatantly ignored the ESA their own regulations requiring them to proceed with a downlisting petition within a specified time frame and have undeniably failed to process plaintiffs' petitions for enhancement permits, as their regulations say they must. These efforts are inextricably linked, because the objective of both is to get comparatively wealthy American hunters to participate in the Wood Bison conservation program, the furtherance of which depends on money from hunters. By the date on which plaintiffs sent defendants an intent to sue letter, the 90 day finding was more than 16 months late, and the 12 month finding already 4 months late. The enhancement permits have likewise been delayed for as much as four years. Because both of these failures sabotage the conservation of the Wood Bison, and delays are inevitably destructive when endangered species

are at risk, plaintiffs move for summary judgment at this time. Plaintiffs request that this Court find that the Secretary and FWS are in violation of the ESA for failing to timely process the downlisting petition, for failing to process enhancement permits, and for taking actions that place an endangered species in jeopardy and that defendants have violated plaintiffs' procedural and substantive due process rights by depriving them of their property without legal justification. Plaintiffs further request that this Court order the Secretary to process the downlisting petition and the enhancement permits with all possible haste. Only such an order could provide the plaintiffs with relief, as defendants have clearly demonstrated that they will not timely fulfill their duties without threat of compulsion.

Standard of Law

a. Jurisdiction and Venue

This Court has jurisdiction over the instant action under 28 U.S.C. §1331, providing federal courts with jurisdiction over actions arising under questions of federal law. This court also has jurisdiction under 16 U.S.C. 1540(c), which states that "the several district courts of the United States, including the courts enumerated in section 460 of title 28, shall have jurisdiction over any actions arising under this chapter."

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) because 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.

b. Standing

1. Citizen Suits

Plaintiffs have standing to challenge the defendants' failure to process the downlisting petition for the Wood Bison because petitions to list or downlist endangered species are governed by 16 U.S.C. 1533. 16 U.S.C. 1540(g), which governs citizen suits under the endangered species act, provides that

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—
>
> (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . .
>
> (B) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

Defendants' non-discretionary duty to process petitions to list or delist species therefore falls squarely within the purview of the citizen suit provision.

2. Administrative Procedure Act ("APA")

All of plaintiffs' claims that do not arise under the citizen suit provision of the ESA can be properly brought under the APA. 5 U.S.C. 702 provides that "A person

suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

In seeking judicial review under section 702, a party must be seeking review of an action "made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. For the purposes of the Administrative Procedure Act, an action includes a failure to act under 5 U.S.C. 551(13).

Final agency actions under 5 U.S.C. 704 include "agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy", a permit or license, and any action taken to further an application or petition." Norton v. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004). The Supreme Court includes "failure to take one of the agency actions" so defined as final agency action. Id.

Any claims, including all of plaintiffs' claims not justified by the Citizen Suit Provision of the Endangered Species Act, that allege a deficiency in such final agency action are therefore proper under the APA.

3. Article III

The ESA citizen suit claim requires only constitutionally determined standing established by Article III. To establish the "irreducible minimum" of constitutional standing, a plaintiff must prove he has suffered "injury in fact" that 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, 560-61 (1992). In order to bring suit under the APA, a plaintiff must establish both Article III standing and meet judicially imposed prudential limitations designed to restrict the jurisdiction of federal courts. Warth v. Seldin, 422 U.S. 490, 498 (1975). One of those limitations is 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 case plaintiffs challenge the interpretation of statutes and regulations that govern plaintiffs' own rights and actions, and in such cases 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.

c. Due Process

A claim of deprivation of property under the due process clause of the 5th amendment succeeds when "(1) the claimant [has been] deprived of a protected property interest; (2) the deprivation must be due to some government action; and (3) the deprivation must be without due process." Cospito v. Heckler, 742 F.2d 72, 80 (3rd Cir. 1984). A protected property interest exists when "existing rules or understandings that stem from an

independent source such as state law" recognize it as such. Regents of University of Michigan v. Ewing, 474 U.S. 214, 222 (1985). Plaintiffs' duly purchased and legally acquired property in this case would be classified as personal property under any state law. They therefore have a protected property interest.

When, as here, a government entity has deprived a plaintiff of his property, "speed in the handling of [a] petition . . . is constitutionally required" in order to "ensure the due process rights of administrative claimants". United States v. Von Neumann, 474 U.S. 242, 248 (1986). Where, as here, the defendants have delayed a petition long past the statutorily mandated period for consideration, and where they have refused to process permit applications for years, there can be no argument that they have speedily handled plaintiffs' petitions.

It is furthermore well established that government cannot infringe on due process rights in life, liberty or property if their action is not "narrowly tailored to serve a compelling state interest". AFGE v. United States, 330 F.3d 513, 522 (D.C. Cir. 2003). A compelling state interest is one "supported by a legitimate legislative purpose furthered by rational means". Ileto v. Glock, Inc., 2009 U.S. App. LEXIS 10945 (9th Cir. 2009). The plaintiffs have been deprived of their property in a manner that directly contravenes the essential purpose of the statute under which defendants purport to operate. Defendants have offered no explanation, rational or otherwise, to justify their actions.

d. Discretionary Action and Jeopardy

When an individual submits an application or petition to request an agency action, Federal Agencies have an obligation, set forth in 16 U.S.C. 1536 and 50 C.F.R. 402, to consider certain factors under the ESA before they proceed. An applicant for the purposes of 50 C.F.R. 402 is someone who wishes to undertake a regulated action, and "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." The actions which agencies are required to review are "all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03. Courts have interpreted "discretionary" to mean that, for the purposes of this statute, "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).

Before authorizing any action as defined above requested by any applicant as defined above, a federal agency must "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." 16 U.S.C. 1536(a)(2). Agencies have "an affirmative duty to satisfy the ESA's requirements, as a first priority." Id. (quoting Pac. Coast Fed'n of Fishermen's Ass'ns v. United States Bureau of Reclamation, 426 F.3d 1082 (9th Cir. 2005)). Jeopardy determinations are therefore not only mandatory, they are an essential component of determining the wisdom of any agency action. Furthermore, when a specialized agency such as the FWS has made a questionable determination, "deference is not owed when 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) It is clear that defendants' actions did not take the issue of jeopardy into account.

It is therefore fair to note that whatever decisions have been made are due minimal deference due to defendants' neglect of such a fundamental consideration.

e. Mootness

When a party to litigation takes an action that would ordinarily render the controversy moot, courts may still exercise jurisdiction over plaintiff's claims if defendants' "wrongful delay is capable of repetition, yet evading review." Schaefer v. Townshend, 215 F.3d 1031, 1033 (9th Cir. 2000). An action is capable of repetition yet evading review when "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again". Hubbart v. Knapp, 379 F.3d 773, 777 (9th Cir. 2004). The duration between institution of an action and "full litigation" can be presumed to be too short when the defendant controls the duration. Anderson v. Evans, 371 F.3d 475, 502 (9th Cir. 2002). In finding that the listing of an endangered species satisfies the evasion/repetition requirement, the 9th Circuit explained that such failures to act are particularly problematic because "it is difficult to determine with precision whether future conflicts will run their courses before being fully litigated, because the duration of the controversy is solely within the control of the defendant". Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173 (9th Cir.). This court has likewise found that endangered species listings are the sort of agency action that is capable of repetition, yet evading review, and therefore not mooted by a

finding issued during the course of the action. See, Biodiversity Legal Foundation v. Babbitt, 63 F.Supp. 2d 31 (D.D.C. 1999).

f. Summary Judgment

In an action for summary judgment under rule 56 of the Federal Rules of Civil Procedure, judgment should be granted in favor of the plaintiff where the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as s amatter of law." When evaluating a motion for summary judgment, "evidence is viewed in the light most favorable to the party opposing the motion . . . and that party is entitled to all favorable inferences which may reasonably be drawn from the evidentiary materials." Beard v. Goodyear Tire & Rubber Co., 587 A.2d 195, 198 (D.C. Cir. 1991). However, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading but the adverse party's response, by affidavits or as otherwise provided . . ., must set forth specific facts showing that there is a genuine issue for trial." Minch v. District of Columbia, 952 A.2d 929, 936 (D.C. Cir. 2006).

Facts

a. Downisting Petition

The Canadian Wood Bison is a subspecies of the North American bison. It is distinguishable from the more familiar Plains Bison because its body is larger and it has longer horns and longer hair around the head and neck. The Wood Bison's historic range consisted of the northwestern plains of Saskatchewan, Alberta, British Columbia, Yukon and Northwest Territories. Although the population was robust in 1800, by the end of the 19th century, the numbers had fallen to approximately 250 individuals.

The Canadian Wildlife Service created the *National Recovery Plan for the Wood Bison* and successfully bred and released healthy bison into the wild between 1988 and 1992. The Yukon wild herd had 2,800 healthy individuals in 2001 and grows at a rate of 20% per year. Its management has been given over to the Yukon territory, and the herd is kept healthy and successful by using cull hunting to control its growth.

The Wood Bison no longer has any natural predators, so those responsible for its management have found that maintaining the health of the herd "requires hunting as the principle means of population control. " Because of this well thought out and executed management plan, the CITES has removed the Wood Bison from the Appendix I endangered species list. In light of their progress, the Canadian Wood Bison Recovery Team submitted a petition on December 3, 2007 to the Service to reclassify the Wood Bison as "threatened" under the ESA.

Although the Service did publish a 90 day finding suggesting the delisting of the wood bison "may be warranted" on February 3, 2009, they published that finding 11 months later than was permitted, and as of October 3, 2009, 22 months after the original petition was filed, they still have not published a 12 month finding.

b. Enhancement Permits in Yukon

The Service has received at least four permit applications to import hunting trophies taken as a part of the Wood Bison conservation program. These permits were submitted as Section 10(a) take permits to "enhance the propogation and survival of the species". Such permits were designed to facilitate American participation in conservation programs that included an essential harvest of a given species. The Yukon Renewable Resources management objective has been established at keeping the Yukon wild herd to 500 individuals in order to minimize interference by the bison with other ecosystems. They have therefore established that it is a necessity to harvest 70-80 animals per year. This harvest is performed as part of a formal management program essential to health and survival of the species.

Discussion

a. Failure to make a 12 month Finding on petition to downlist the Wood Bison from Endangered to Threatened

There can be no dispute that the Service has neglected its duty to issue a finding as to whether the Wood Bison should be downlisted or not. First of all, it has failed to meet the demand that

> To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section 553(e)of title 5, United States Code, to add a species to, or to remove a species from, either of the lists published under subsection (c), the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that then petitioned action may be warranted. 16 U.S.C. 1533(3)(A).

Even if it were reasonable to assume that issuing a 90 day finding 11 months after the petition was submitted constituted complying with the ESA "to the maximum extent practicable", it is

absolutely certain that the Service failed to comply with the Act's dictates regarding a 12 month finding. The Act mandates that

> Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make . . . [a] finding[]. *Id.*

It has now been 22 months since the initial petition was submitted, and the case law supports a decision to force the Secretary to take action. Moreover, the comments were relatively limited in number, positive and there is no cause for delay.

Although there is no established statement on this matter by this circuit, other appellate courts have made it clear that the Secretary's duties are unambiguous "where Congress has established a specific, non-discretionary time within which the agency must act. When an agency fails to meet a concrete statutory deadline, it has unlawfully withheld agency action." Forest Guardians v. Babbit, 174 F.3d 1178, 1191 (10th Cir. 1998). This principle has been applied to the ESA requirement that the Secretary make a 12 month finding to determine whether the listing or downlisting of a species as "endangered" or "threatened" is warranted. See, Biodiversity Legal Found. V. Badgley, 309 F.3d 1166 (9th Cir. 2002). *Biodiversity* does establish that, as is indicated by the language of the Act, the Service may extend the 90 day finding beyond the 90 day period. The question before the court was whether the 12 month finding was to take place 12 months after the 90 day finding, or whether it was to take place 12 months after the petition was filed. The court established firmly that the language of the act was to be followed strictly, and that "both the initial finding and the final determination must be completed within twelve months of the date the petition is received." *Id.* at 1172. This

precedent was followed in Center for Biological Diversity v. Badgley, 2000 U.S. Dist. LEXIS 15155 (D. Or. 2000)("when the Secretary fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and the court must compel the agency to act"). There is no question that an order in the nature of mandamus instructing the Service to issue a 12 month finding is appropriate.

Plaintiffs also request declaratory relief stating officially that the Service's failure to issue a 12 month finding on time is unlawful and contrary to the intent of the Endangered Species Act. The Service has established an ugly record of ignoring its duties to endangered species, and plaintiffs believe that the only way to change that behavior is for courts to continue to condemn it. The Service has also failed to issue timely 12 month findings in petitions to list or delist the Straight-Horned Markhor, Spalding's Catchfly, Mountain-legged yellow frog, great basin red-band trout, the yellow billed cuckoo, the chiracahua leopard frog, the gila chub, the cicurina cueva spider, the Gunnison sage grouse, the western gray squirrel, the California spotted owl and many others. See, Biodiversity, 309 F.3d 1166; Center for Biological Diversity v. Norton, 254 F.3d 833 (9th Cir. 2001); Save Our Springs Alliance v. Norton, 361 F. Supp. 643 (W.D. Tx. 2005); Ctr. For Biological Diversity v. Norton, 208 F. Supp. 2d 1044 (N.D. Ca. 2002); Cal. Native Plant Soc'y v. Norton, 2005 U.S. Dist. LEXIS 4634, fn7 (D.D.C. 2005)(noting the Service's consistent failure to produce 12 month findings on listing petitions); Am. Lands Alliance v. Norton, 2004 U.S. Dist. LEXIS 27533 (D.D.C. 2004); Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service, 2002 U.S. Dist. LEXIS 18509 (W.D. Or. 2002). The Service has never offered a better excuse for this behavior than budget considerations and staffing problems. Given the seven year time span of the aforementioned cases, it is obvious that

the Service will *always* have staffing issues and budget considerations, and should be held accountable for their responsibilities nonetheless.

b. Failure to Process Permit Applications

Plaintiffs' claim II demands that the Service process import permits submitted by plaintiffs to be processed. The permit applications were submitted under section 10(a)(1) of the Endangered Species act which allows the secretary to issue import permits "to enhance the propogation or survival of the affected species". The idea that trophy hunting as part of an established conservation program may "enhance" a species has been readily accepted by the Service. They have said that "the ESA and existing regulations provide full authority for issuance of these permits [for sport hunted trophies]". *Draft Policy for Enhancement of Survival Permits for Foreign Species Listed under the Endangered Species Act*, 68 Fed. Reg. 49512 (Aug 18, 2003). They have also provided specifically for the issuance of "enhancement" take permits for specific endangered species, such as the Scimitar-horned Oryx, Addax, and Dama Gazelle. *Exclusion of U.S. Captive-Bred Scimitar Horned Oryx, Addax, and Dama Gazelle from Certain Prohibitions,* 70 Fed. Reg. 5117 (Feb 1, 2005). Plaintiffs' submissions are therefore quite standard and within parameters generally accepted by the Service.

Defendants are required by their own regulations to process plaintiffs' applications for import permits. The permit procedures set forth in 50 C.F.R. 13.21 state that "the director *shall* issue the permit" unless an application has failed to meet requisite standards. [emphasis added] The Plaintiffs in the instant action have completed all of the requirements for a legitimate permit application under 50 C.F.R. 22 and under 50 C.F.R. 13.21. Consequently, the Service is required to "process all applications as quickly as possible." 50 C.F.R. 13.11. These requirements are

absolute and nondiscretionary once an application has been submitted. The Tenth Circuit has stated clearly that "'shall' means shall. The Supreme Court and this circuit have made clear that when a statute uses the word 'shall', Congress has imposed a mandatory duty upon the subject of the command." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1998. Furthermore, the Supreme Court made clear in *Norton v. Utah Wilderness Alliance* that processing of a license or permit is exactly the sort of agency action for which the APA was intended, and that it understands a "failure to act" as a "failure to take one of the agency actions (including their equivalents earlier defined in §551(13)." 542 U.S. 55, 62 (2004).

The processing of plaintiffs' permits does not require a comment period or any of the other complex aspects of the consideration of a listing petition. Yet such a petition must be completed within 12 months. The deadline for the Service's consideration of an import permit is flexible, but reason dictates that processing a permit "as quickly as possible" should not take more time than processing a listing petition, giving the concurrent obligations such a petition includes. Defendants' refusal to process plaintiffs' permits constitutes a refusal to carry out a mandatory action that is both "unlawfully withheld and unreasonably delayed" and "arbitrary and capricious" under section 706 of the APA.

c. Failure to Process Permits and downlist the Wood Bison Violates the Due Process Clause

Plaintiffs' claim II asserts that defendants' failure to process plaintiffs' permits violates plaintiffs' procedural and substantive due process rights. The due process clause of the 5th Amendment mandates that no person shall be deprived of "life, liberty or property without due process of law". In addition to procedural due process, citizens have the substantive due process

right to ensure that the government has not infringed on their fundamental rights unless the infringement is narrowly tailored to serve a compelling state interest.

Any claim to a violation of a person's due process rights to a piece of property must first establish that a property right exists in the first place. The Supreme Court has explained that the "principles of due process 'come to us from the law of England . . . and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." Dent v. West Virginia, 129 U.S. 114, 123 (1889). The notion that a person has a "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." Arnett v. Kennedy, 416 U.S. 134, 179 (1978)(White, J., dissenting). The conclusion that the deprivation of property is a "grievous loss" is self-evident from its inclusion in the due process clause of the 14th amendment.

In evaluating whether a person has a due process right in property the Court has explained that, "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement". Perry v. Sinderman, 408 U.S. 593, 577 (1972). It is a fundamental understanding of state law and generally of society that a person owns his property if it is legally acquired by contract – such as when a permit is purchased to take a hunting trophy - whether that acquisition occurred in Canada or the United States. Ownership therefore exists outside of the United States. While the permitting process does evaluate whether an owner has a possessory interest in his property within the United States, a denial of that permit does not destroy ownership. Because plaintiffs acquired their property legally and with the consent of the

Canadian authorities, the United States government has no right to deprive them of that property interest unless it later becomes part of an illegal act or unless the government produces some other compelling reason to do so. Even under those circumstances, the plaintiffs are entitled to process to adjudicate whether their rights have been violated.

To deny plaintiffs' assertion of a protected due process right would undermine the inherent right to property that is a foundation of the entire system of common law rights because it would suggest that the government can divest a person of his interest in property without justification or process merely because that property is situated outside of the United States. The court has been absolutely clear about the fact that "[the legislature] may not constitutionally authorize the deprivation of [a property] interest, once conferred, without appropriate procedural safeguards." Arnett, 416 U.S. at 167. To do so in this case would not only undermine traditional common law notions about the right to property, it would fundamentally disturb an essential component of global commerce by divesting individuals of their rights to items in trade unless the United States happens to permit their importation. A failure to acknowledge a due process property interest in these trophies simply does not make sense in the larger context of traditional customs laws or constitutionally protected rights.

Plaintiffs find themselves in an untenable situation. They own property which the government is keeping from them and there appears to be no way – other than this action – of compelling the government to at least come to a challengeable decision as to their domestic possessory interests. There appear to be three issues – whether plaintiffs own the property, whether they have a right to import it, and whether the "right to possess" it in this country is totally discretionary. Firstly, the right to possess is not *totally* discretionary. Once an application to import the item has been filed, it must be processed as quickly as possible, it must be granted

if it meets the requisite standards, and the decision may not be either arbitrary and capricious or unreasonably delayed. See, 50 C.F.R. 13.21; 50 C.F.R. 13.11; 5 U.S.C. 706(1); 5 U.S.C. 706(2)(a). Within those restrictions, the government has the discretion to grant or deny the "right to possess" the item within the United states. The Secretary's "discretion" in this matter is not unconstrained.

The government's ability to grant the right to import or the right to possess does not, however, divest plaintiffs of their ownership interest. The court has previously acknowledged that the existence of a legal property right under foreign law affects the US government's treatment of property brought into the United States. See, Pasquantino v. United States, 544 U.S. 349 (2005). The idea that the US government would not be required to take such interests into account is nonsensical – it would amount to a disregard for the extraterritorial property of both citizens and aliens, and it could only be an impediment to international trade. Traditionally, property rights "in a physical thing have been described as the rights 'to possess, use, and dispose of it'". Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, (1982). The government's ability to grant or revoke the right of an individual to possess his property within the borders of the United States does not supersede a person's ownership interest – it merely dismembers his ownership and removes the right of use or possession in one location. If property rights established legitimately outside of the United States were not recognized within it, the United States government would not be required to deliver just compensation to the owners of foreign property taken to serve government interests. See, Zoltek Corp. v. United States, 58 Fed. Cl. 688 (2003). Because plaintiffs still retain a legitimate ownership or property interest in their trophies, the government is absolutely required to provide some sort of procedural safeguard as soon as possible, because deprivation of their property without process

for an unreasonable period is unquestionably a violation of the constitutional requirement of due process.

Having established a property interest and the necessity of procedural due process, it is important to note that this deprivation of property also implicates "substantive" due process. As stated above, infringements on the right to property by the United States Government are only permissible where they can be shown to be narrowly tailored to serve a compelling state interest. In this case, although preserving endangered species is a compelling state interest, the Service has acted in direct contravention of that interest and should therefore be prevented from continuing to deprive plaintiffs of their property.

d. Breach of Bundle of ESA duties

Plaintiffs' fourth claim is brought under both section 11(g)(1)(A) of the Endangered Species Act and section 706(1) and 706(2) of the APA. Plaintiffs allege that by failing to pursue the downlisting of the Wood Bison and by failing to process plaintiffs' permits, defendants have violated not only ESA section IV, but also the provisions under ESA section 7 which require a "Jeopardy Determination" to be made for any action by any U.S. agency that might jeopardize the wellbeing of an endangered or threatened species. *See,* 16 U.S.C. 1536(a)(2)("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 or threatened species.") Section 7 has been applied to situations where the FWS is both the "action agency" and the "consulting agency". They are required to make "intra-agency" consultations for things like incidental take permits. *See*, *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31 (D.D.C. 2007); *Wildearth Guardians v. U.S. Fish &*

Wildlife Svc., 622 F. Supp. 2d 1155 (C.D. Ut. 2009). Section 11(g)(1)(A) of the ESA is intended to allow individuals to ensure "that a person may not harass or harm a listed species." *Ctr. For Biological Diversity v. Marina Point*, 560 F.3d 903, 914 (9th Cir. 2008).

In this case, defendants have brought harm to a listed species both by refusing to consider permits and by refusing to proceed with a downlisting petition. Courts have found that "ESA's citizen-suit provision authorizes the groups to bring suit against . . . the action agency, for failure to comply with its ESA obligations." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008). Although the Supreme Court has decided that section (g)(1)(A) does not provide an independent basis of review for how the Secretary has implemented congressional mandate, it is designed to allow private parties to enjoin regulated parties from harming them by violating regulations as issued by the Secretary. *See*, *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Patrol*, 550 F.3d 1121, 1129 (Fed. Cir. 2008). Moreover, section 11(g)(1)(A) of the ESA has been found applicable to government violations of the procedural requirements for the issuance or denial of a license under section 7 of the ESA. *See*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992). Plaintiffs' fourth claim applies to defendants' neglect of their statutory duties to proceed with a downlisting petition and a permit applications under 16 U.S.C. 1533, 16 U.S.C. 1539, and 50 C.F.R. 17.22 and 13.21, so Claim IV is properly brought under the Citizen Suit Provision of the Endangered Species Act.

Claim IV is also authorized under the Administrative Procedure Act. The requirement of a jeopardy determination has been treated as a final agency action for purposes of the APA by the Supreme Court. See, Bennet v. Spear, 520 U.S. 154 (1997). For the purposes of this suit, the U.S. Fish and Wildlife Service is the action agency who has failed to fulfill its duty to make a jeopardy determination. In Defenders of Wildlife v. Gutierrez, the D.C. Circuit found that the

Coast Guard had performed a final agency action within the meaning of the APA when it neglected to evaluate the jeopardy of a listed species when creating traffic regulations. 532 F.3d 913 (D.C. Cir. 2008). Plaintiffs have already made clear above that a failure to complete an act that would otherwise be final agency action within the meaning of the APA also constitutes final agency action under that statute. Plaintiffs' claim IV may therefore also be legitimately brought under the APA.

The issue of the Service's treatment of foreign species is complicated, and that complexity was clearly explained by this Court in Defenders of Wildlife, Inc. v. Watt, which said that the government

> Has no control over the species or its natural habitat. Their ability to protect the [foreign species] is limited to encouraging the [foreign nation] to implement programs designed to ensure the species well-being. The only leverage Defendants could utilize involved imposing the import ban, with the understanding that the ban would be lifted once the programs were implemented. 1981 U.S. Dist. LEXIS 18548, 11 (D.D.C. 1981).

Because of this dilemma, defendants' failure to act implicates the only two ways in which the U.S. Government can carry out its "encouragement" and "recovery" obligations with regard to foreign species. Canada has created a highly promising program that has begun to recover the species. The only way in which the United States can assist Canada in continuing to recover the species without funding it directly and making the program dependent on American largesse, is by allowing American hunters to go fund the program through import of their hard-won hunting trophies.

The Secretary owes a bundle of duties to foreign species. There is also a ready-made system by which these duties may be evaluated. The jeopardy determination that defendants must make regarding every agency action that might threaten an endangered species logically includes the duties owed by the Service to foreign species, from the duty to recover to the duty to instigate efforts with the Secretary of State to encourage conservation efforts by foreign nations. The Supreme Court has said that "One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act", namely that "each federal agency shall " ensure that their actions do not jeopardize endangered species. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). The statute does not specify to what degree the action must jeopardize the species, and it is fair to argue that failing to support other nations in their conservation efforts actively endangers the species in question. Furthermore, putting aside the fact that defendants have an "affirmative duty to satisfy the ESA's requirements as a first priority", Defendants have no competing interest that would be injured by the permissive importation of Wood Bison trophies, except their alleged budgetary and staffing problems. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1234 (9th Cir. 2006).

The implementation of the Endangered Species Act as to foreign species has often been flawed and the provisions of the Act applying to those species have not necessarily been codified. What is certain, is that when the Fish and Wildlife Service is the action agency, and their actions are taken in this country, those actions do not further any important purpose, and those actions actively harm a listed species elsewhere, the Service should be held accountable. This is not a situation in which American companies or agencies are engaged in trade abroad and that trade affects endangered species at some point. This is a case in which the Fish and Wildlife Service has taken actions under color of the Endangered species act that actively harm an

endangered species. This issue is absolutely under the Service's control, and therefore does not suffer from the difficulties that so frequently arise with nonnative endangered species.

Conclusion

For all the reasons stated above plaintiffs urge this court to issue a summary judgment declaring that defendants withholding of trophy import permits is unlawful, declaring that defendants have impermissibly delayed a downlisting petition, declaring that defendants' failure to process import permits violates plaintiffs' due process rights, and ordering defendants to issue a 12-month listing rule within 60 days and process plaintiffs' permits within 30 days.

Respectfully,

_____/s/_____

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Attorney for Plaintiffs