

Lunch and Learn

The ESA at 50
July 24, 2023



Safari Club International

- ◆ Nonprofit membership organization founded in 1972.
- ◆ Over 70,000 members and advocates, 146 chapters in the U.S. and around the world.
- ◆ SCI's missions are: to protect the freedom to hunt, to educate the public about hunting and its use as a conservation tool, and to promote wildlife conservation worldwide.
- ◆ SCI's sister organization, SCI Foundation, invests millions of dollars in conservation and education each year.



SCI Legal Advocacy

- ◆ SCI is the only pro-hunting conservation organization with mission-focused in-house counsel who litigate in courts around the country.
- ◆ In the past decade, SCI's lawyers have litigated more than 50 cases throughout the U.S. involving domestic and international hunting issues.
- ◆ SCI's lawyers submit administrative comments, and we analyze state or federal legislation that may affect SCI members and can assist in issue-spotting and amendments.



Examples of Recent Cases



ESA Timeline

- ◆ 1966: First federal act dealing with endangered species (the Endangered Species Preservation Act).
- ◆ 1969: Endangered Species Conservation Act expands protections, but still only allows for one category of “endangered” species.
- ◆ March 1973: U.S. signs the Convention on International Trade in Endangered Species.
- ◆ December 1973: Congress passes the ESA as we know it today.



Evaluating the ESA

- ◆ Rep. John Dingell, primary drafter of the ESA, also drafted the 1969 law. But he found that law needed “to be **made more flexible**, to adapt ... to the needs of the animals ... and to deal with problems which did not exist” before.
- ◆ Dingell (and Congress) did not rest with the prior law. He fought to make the law better, for the benefit of the species.
- ◆ We should do the same. So we will look at some places where the ESA is not working as well as it should, or as Congress intended.
- ◆ We will consider how small changes to the statute would have a big impact on making the law more effective in practice, and also making it more consistent with Congress’ original goals.

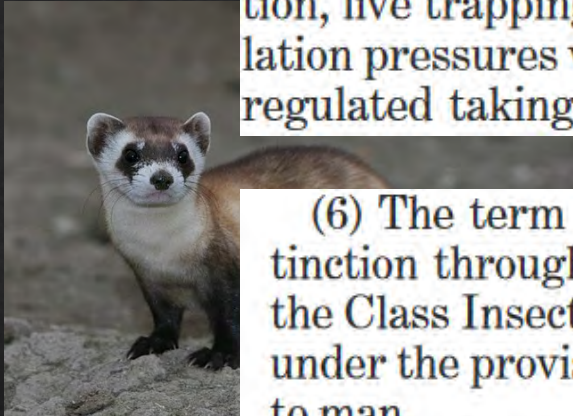
ESA TOC

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Section 3 – Definitions

(3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.



(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

Endangered and threatened are not the same thing.

(20) The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.



Section 4 – Listing Determinations and More

- ◇ 4(a) 5 listing factors; designation of critical habitat
- ◇ 4(b) best scientific and commercial data available, after taking into account state and foreign conservation efforts; timing of decisions on petitions
- ◇ 4(c) maintaining lists; 5-year reviews
- ◇ 4(d) “protective” regulations for threatened species
- ◇ 4(e) similarity of appearance
- ◇ 4(f) recovery plans
- ◇ 4(g) post-delisting monitoring
- ◇ 4(h) agency guidelines

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL.—(1) The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Section 4(b) – Taking Into Account

- ◇ Congress requires Interior to make data-based decisions, and also to consider the efforts being made by States and foreign governments.
- ◇ In our experience, Interior does not implement this provision.

(b) BASIS FOR DETERMINATIONS.—(1)(A) The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking 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 such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

Section 4(b) – Potential Fix

SECTION 4. TAKING INTO ACCOUNT FOREIGN CONSERVATION PROGRAMS.

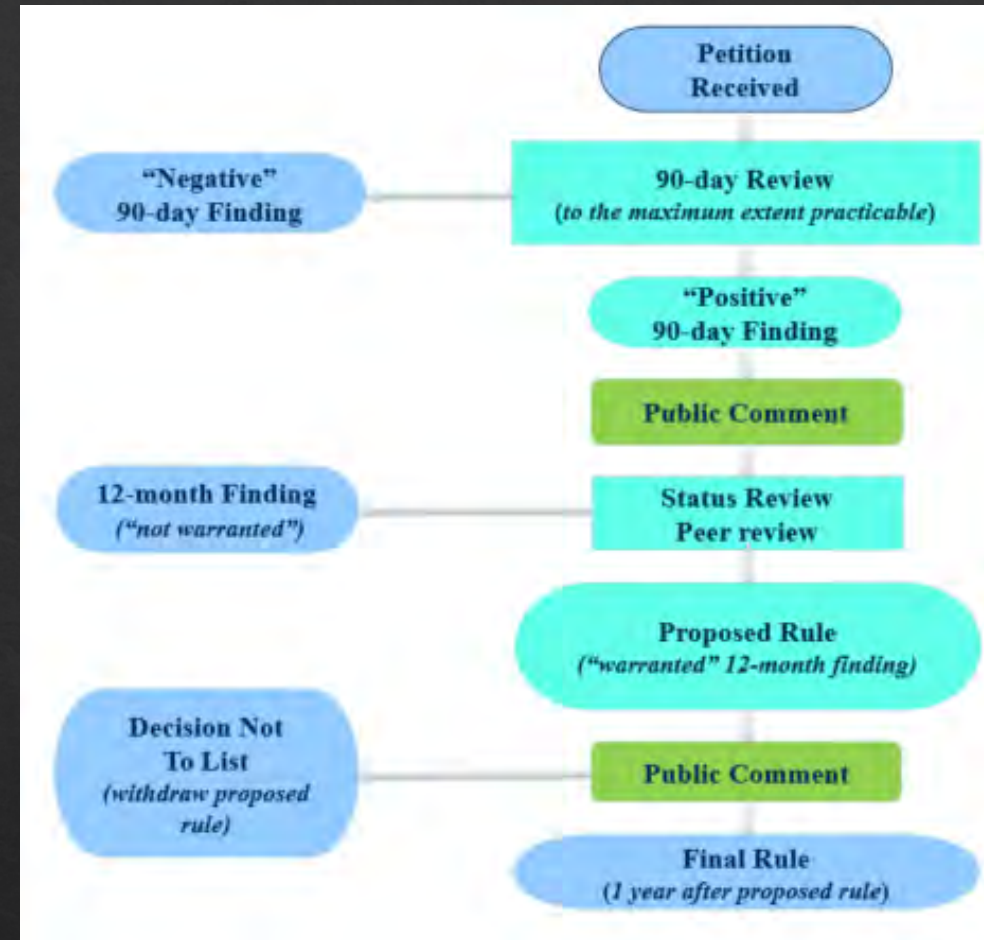
IN GENERAL. Section 4 of the Act (16 U.S.C. § 1533) is amended to add the following Section (h), with all subsequent sections renumbered accordingly:

(h) In taking into account efforts made by any foreign nation, or any political subdivision of a foreign nation, to protect such species, the Secretary shall contact, by in-person contact if possible, any nation in which such species is presently found in significant numbers (at least 3% of the estimated global population), to consult on the status of the species in that nation and potential negative impacts of the listing on that nation's conservation programs. (1) The Secretary shall provide a questionnaire asking for specific information on conservation practices to protect the species in that country. (2) The Secretary shall give any information provided in response to this consultation request the highest weight in assessing the factors identified in the above section. (3) The Secretary shall not list such species in the relevant nation if information provided by that nation demonstrates that its conservation efforts, including predator control, protection of habitat and food supply, or other conservation practices, are reasonably maintaining the available habitat and current population of the species in that nation (which may include a decline in the current population, if the decline is not considered statistically significant by peer-reviewed scientific analyses), unless compelling scientific or management data indicate otherwise. (4) If the foreign nation demonstrates that its current conservation efforts will be damaged by listing of the relevant species, the Secretary must explain in any rule listing such species, with specific reference to data and scientific citations, why the listing is necessary despite the negative impact on the foreign nation's conservation efforts.

- ◆ If a State/foreign nation can show that its conservation efforts are reasonably maintaining the current habitat and population of a species, then Interior cannot list that species (at least not unless it explains why it is disregarding the State or foreign efforts).

Section 4(b) – Timing of Decisions on Petitions

- ❖ The ESA requires a finding that a petition contains substantial information in 90 days, and a proposed rule within 12 months.
- ❖ Deadlines have created a cottage industry for lawsuits.
- ❖ **Potential fix:** Remove the incentive to sue; another option is to change the deadlines.



Section 4(d) – Threatened Species Regulations

(d) PROTECTIVE REGULATIONS.—Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State.

Section 4(d) – Threatened Species Regulations

- ◆ This was a key provision for Congress. There are numerous statements in the legislative history about giving Interior “flexibility” to keep threatened species from becoming endangered.
- ◆ A default rule applying all the same prohibitions for endangered species to threatened species is anything but flexible.
- ◆ In 2019, the Fish and Wildlife Service withdrew a “blanket 4(d)” rule. On June 21, 2023 the Service proposed to reinstate this “blanket 4(d)” rule.

A photograph of a bison standing in a snowy field. The bison is covered in a thick layer of snow, particularly on its back and neck. The background is a blurred, snowy landscape.

Section 4(d) – Threatened Species Regulations

- ◆ **Potential fix:** A small change making a big difference: adding a clause in 4(d) requiring the Service to adopt a 4(d) rule for **every** threatened species.

Sections 9 and 10 – Prohibited Acts and Exceptions

PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

EXCEPTIONS

SEC. 10. (a) PERMITS.—(1) The Secretary may permit, under such terms and conditions as he shall prescribe—

(A) any act otherwise prohibited by section 9 for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

ESA Benefits for Foreign Species

Domestic Species

- ◇ Critical Habitat
- ◇ Recovery Planning
- ◇ Sec. 7 Consultation
- ◇ Appropriated Funding



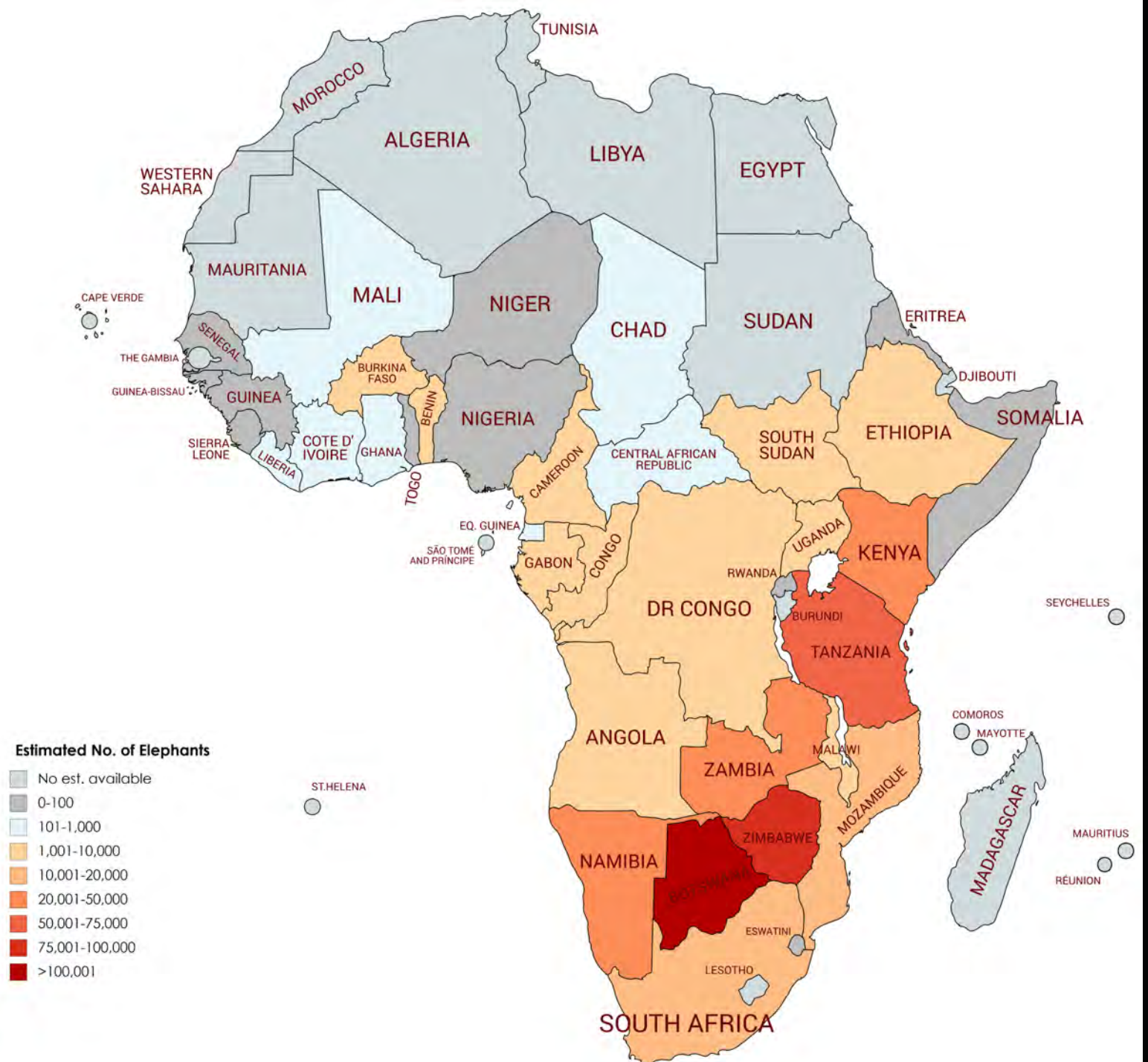
Foreign Species

- ◇ Critical Habitat
- ◇ Recovery Planning
- ◇ Sec. 7 Consultation
- ◇ Appropriated Funding
- ◇ Import Restrictions ... really?



Why Import a Trophy?

- ◈ Avoiding waste.
- ◈ Human nature.
- ◈ Conservation.





Hunting Benefits

- ◇ Habitat.
- ◇ Funding for wildlife.
- ◇ Funding for anti-poaching.
- ◇ Private and community incentives.

Section 9(c)(2) – Importing Species

(2) Any importation into the United States of fish or wildlife shall, if —
 (A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act but is listed in Appendix II to the Convention,
 (B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,
 (C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and
 (D) such importation is not made in the course of a commercial activity, be presumed to be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.

- ◊ Presumes the legality of a (1) non-commercial import of a (2) threatened species that is already protected on (3) CITES Appendix II.
- ◊ The Service has overridden this presumption for elephant, lion, argali.

SCI is not alone in supporting well-regulated hunting programs.

- ◇ John Dingell, primary drafter of the ESA, included 9(c)(2) specifically to protect imports of species from countries with healthy populations of game species.
- ◇ His statements explaining this section reflect an understanding that Interior would not obstruct imports...

H.R. 37 has been attacked by some as a anti-hunter bill; it has been attacked by others as a prohunter bill. In reality, it is neither—it is a bill which has been carefully drafted to encourage State and foreign governments to develop healthy stocks of animals occurring naturally within their borders. If these animals are considered valuable as trophy animals, and are not endangered, they should be regarded as a potential source of revenue to the managing agency and they should be encouraged to develop to the maximum extent compatible with the ecosystem upon which they depend.

I have been informed by the Department of the Interior that they will carefully review the status of animal stocks in foreign countries and that where non-endangered trophy animals are being managed in such a way as to assure their continued and healthy existence, no barriers will be placed upon the continued harvesting of those animals by the government. This is as it should be, because it is only in the understanding that these animals have a real and measurable value that many of the less developed countries will agree to take steps to assure their continued existence.

Real Impacts of Hunting Restrictions

Negative impacts of hunting imports are not theoretical. They can be quantified by lost income to hunting operators, governments, and rural communities.

Unfortunately, the impacts are far worse—local and rural communities become less tolerant of dangerous game when their losses are not offset with benefits.

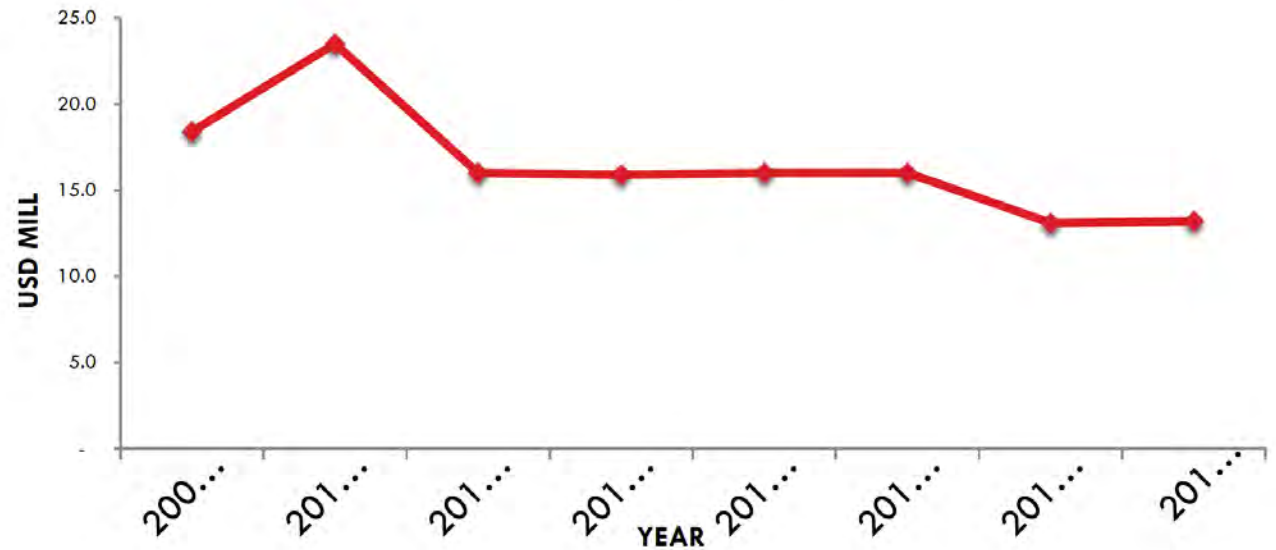
5.0 BAN AND RESTRICTION OF ELEPHANT AND LION TO USA 5.2 Impacts to Conservation and Community in Tanzania



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◆ The consequently...

- Revenue from tourist hunting has declined by 23% from 16.27 in FY 2014/15 million dollars to 13.5 million dollars in FY 2015/16 hunting season



Section 9(c)(2) – Potential Fix

Making this provision mandatory would:

- ❖ Be consistent with Congress' intent;
- ❖ Encourage foreign conservation programs (see ESA Sec. 8);
- ❖ Improve species conservation and rural community development;
- ❖ Reduce Service burden, backlog, and costs; and
- ❖ Align with the Executive Order on Racial Equity and Underserved Communities.

FACILITATING THE IMPORT OF FOREIGN WILDLIFE FROM HEALTHY POPULATIONS.

(a) IN GENERAL. Section 9(c)(2) of the Act (16 U.S.C. § 1538(c)(2)) is amended as follows:

(2) Any importation into the United States of fish or wildlife ~~shall be~~ is lawful, and not subject to permit requirements or other regulation by the Secretary pursuant to this Act, if —

(A) such fish or wildlife is not an endangered species listed pursuant to section 4 of this Act but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity; ~~be presumed to be an importation not in violation of any provision of this Act or any regulation issued pursuant to this Act.~~

Section 11(g) – Citizen Suits

- ◆ Allows for lawsuits to enjoin ESA violations, or to compel Interior to perform a “non-discretionary duty” under Section 4.
- ◆ Includes a provision for attorneys’ fees—unusual in U.S. law:

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

- ◆ However, this creates negative “petition, sue, and settle” incentives.

Section 11(g) – Potential Fixes

- ◊ One option is to change deadlines and other requirements to make them more reasonable.
- ◊ Another is to carve out certain suits, such as deadline and delisting suits, from being able to receive attorneys' fees.
- ◊ The best option in our view is to remove the attorneys' fee incentive. This would save taxpayer dollars and likely reduce the number of petitions and deadline suits.

Section 11(g)(4) of the Act is amended as follows:

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation ~~(including reasonable attorney and expert witness fees)~~ to any party, whenever the court determines such award is appropriate, but such costs shall not include attorney and expert witness fees.

Delisting Doldrums

- ❖ The U.S. Fish and Wildlife Service has been stymied in removing recovered species from the ESA's protections.
- ❖ Animal rights groups have succeeded in most litigation—at huge cost to U.S. taxpayers.

IT IS ORDERED that Plaintiffs' Motions for attorney fees (Docs. 341; 343) are GRANTED. Plaintiffs' initially filed motions (Docs. 310; 313) are DENIED as moot.

IT IS FURTHER ORDERED that Plaintiffs shall be awarded fees and costs as follows:

1. Guardians is awarded \$512,590.50 in attorneys' fees and \$3,150.00 in costs for a total of \$515,740.50 consistent with their timesheets (Docs. 342-1 at 17-36, 342-2 at 17-26; 342-3 at 11-16) as summarized in Doc. 341 at 28-30.
2. Northern Cheyenne is awarded \$354,606.00 in attorneys' fees and \$1,428.50 in costs for a total of \$356,034.50 consistent with their timesheets (Docs. 345-5 at 2-15; 345-6 at 2-3; 345-7 at 2) as summarized in Doc. 344 at 22-23.

DATED this 26th day of July, 2021.



Dana L. Christensen, District Judge
United States District Court

Delisting Doldrums

- ◆ The Service proposes to delist when a species no longer needs the ESA's protections.
- ◆ Every delisting challenge **wastes resources** of the Service, and of groups like SCL.
 - ◆ We have participated in **at least ten** wolf and grizzly delisting suits in the last 20 years!
- ◆ Those resources would be better used on species that need attention, but warrant less public focus than wolves, bears, etc.
- ◆ Constant reversals have made the Service cautious to delist.



Delisting – Potential Fixes

- ❖ Make delisting automatic.
 - ❖ Give teeth to recovery plans.
- ❖ Limit when and how a plaintiff can sue.
 - ❖ Limit standing and the time in which a suit is viable.

DELISTING IN GENERAL. Section 4 of the Act is amended to add the following Section (i), with all subsequent sections being renumbered accordingly:

(i) DELISTING OF RECOVERED SPECIES. (1) It is the intent of Congress that when “measures provided by this Act are no longer necessary,” a species is removed from the Act’s lists. Within 18 months of adding a species to the lists of endangered or threatened species, the Secretary must adopt, and publish in the Federal Register, measurable recovery criteria and objectives. These criteria and objectives shall be based on the best available science, shall be reasonable in terms of the species’ available habitat and population numbers, and shall be developed in consultation with relevant States or foreign nations. (a) For endangered species, the Secretary shall adopt criteria and objectives identifying when the species is no longer endangered but may still be threatened. (b) For threatened species, the Secretary shall adopt criteria and objectives identifying when the species is no longer threatened and no longer requires the Act’s protections. (c) When a species achieves its current recovery criteria and objectives for three consecutive years, an endangered species will automatically be reclassified to threatened. A threatened species will automatically be removed from the Act’s lists. (d) When an endangered species is reclassified to threatened by operation of this section, within twelve months, the Secretary shall adopt criteria and objectives identifying when the species is no longer threatened and will no longer require the Act’s protections. (e) When a species is removed from the Act’s protections by operation of this section, within six months, the Secretary shall, in coordination with relevant States, develop a post-delisting monitoring plan.

Questions? Thank You!

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