Litigation Newsletter, May 2016 Vol. X, No. II

NATIONAL PARK SERVICE CONCEDES ON BENEFITS OF VOLUNTEERS AS AGENTS

By: Anna Seidman

While we recognize that smugness isn't very attractive, sometimes it just can't be helped. We might have remained humble if the National Park Service hadn't been quite so stubborn in their refusal to acknowledge the beneficial contribution the hunting community can make to the management of wildlife on National Parks. For almost a decade, the NPS insisted that the use of volunteers as agents for the reduction of wildlife populations was too costly, inefficient and unsafe. Again and again, we demonstrated how and why the NPS was wrong. Then, out of the blue, at a meeting of state wildlife management officials, the NPS revealed that they had changed their tune. The NPS announced the conclusion of a lengthy study on the use of volunteers for wildlife reduction at two National Parks. The study revealed that the use of volunteers is both efficient and cost-effective. Really! Who knew? SCI did.

The saga that led to the NPS's revelation started back in the mid-2000s, when the NPS recognized that it needed to reduce the elk population on Rocky Mountain National Park (RMNP). The elk population had grown to exceed RMNP's carrying capacity because the Park's enabling legislation prohibited hunting within its boundaries. The NPS initially refused to consider the participation of volunteers to help cull the elk. The NPS claimed the use of volunteer cullers would be illegal, too costly and difficult to manage.

SCI, together with the NRA, refused to accept those excuses. We attended numerous meetings with the Director of the NPS and high level NPS officials arguing for the implementation of volunteers-as-agents programs, submitted legal white papers that demonstrated the legality of the practice, and refuted arguments about the potential risks and alleged problems with the approach. The

Continued on Page 4

Inside this Issue

SCI ENJOYING PLENTY OF OPPORTUNITIES FOR ADVOCACY IN COURTS OF APPEAL

By: Doug Burdin

Except for the occasional foray to the U.S. Supreme Court (which SCI has done four times), the U.S. courts of appeal usually represent the final stop for cases in which SCI is involved. Our involvement in any particular case may start with the filing of comments with a federal agency. For example, on numerous occasions, SCI filed comments supporting proposals to delist populations of gray wolves. The second step is often federal district court. Groups or individuals disappointed with the final decision of a federal agency will bring their grievance to a U.S. district court. With the wolf delistings, for example, the anti-hunting groups, who want wolves to reside permanently on the endangered species list, sued to challenge the delistings. As we have with these wolf delisting cases, SCI and other hunting groups often intervene in federal court to defend the agency action.

Based on the legal briefs of the parties, the district court judge reviews the agency decision and issues an initial judicial decision. Unfortunately with wolves, the judges have sided with the anti-hunting groups and reversed the wolf delistings. The party disappointed with the district court's decision then has the option of appealing to the federal court of appeal with jurisdiction over the district court. For example, in the recent wolf delisting cases, the federal government appealed the adverse decisions made by the district courts. SCI and our allies joined by filing our own appeals.

SCI currently finds itself in the courts of appeal in a number of cases, including two involving wolf delistings – the Wyoming wolf delisting and the Western Great Lakes (WGL) wolf delisting cases are currently before the U.S. Court of Appeals for the D.C. Circuit.

Briefing is complete in the Wyoming wolf appeal and we are awaiting the scheduling of oral argument. The parties will complete briefing in the WGL wolf appeal in early June.

Wolves are not the only issue that is keeping SCI busy in appellate courtrooms. SCI is also advocating for hunting in these other cases:

Tanzania Elephants: SCI recently filed the final brief in our appeal involving the U.S. Fish and Wildlife Service's ban on the importation of elephants from Tanzania. (D.C. Circuit.)

Three Antelope: SCI has completed briefing, and the court has held oral argument, in the defense of the law that allows the hunting of captive scimitar-horned oryx, dama gazelle, and addax on ranches in the United States. (D.C. Circuit)

Big Cypress National Preserve: After the recent filing of final briefs, the court of appeals scheduled oral argument for June 14. Continued successful defense of this case will facilitate hunting in this Preserve in Florida. (Eleventh Circuit)

California Mountain Lion: SCI's challenge to California's ban on the importation of mountain lions legally hunted outside of California is on appeal after the district court dismissed our case. SCI will file our opening brief on May 29 and our final brief on July 11. We will then participate in oral argument. (Ninth Circuit)

Having six cases in the courts of appeal at one time is a little unusual for SCI. A case that reaches a court of appeal may take years to complete. Many of these efforts turn out favorably, some don't. But it is always worth the effort and we are enjoying – and making the most of – the opportunities.

WHAT DOES YOUR GUT TELL YOU?

By: Jeremy Clare

Is it unnatural for a bear to feast on an elk gut pile left by another predator, including a human hunter? Certainly not! That's why a U.S. federal district court rejected the claims made by anti-hunters that gut piles left by hunters change the eating habits of grizzly bears in Grand Teton National Park.

In October 2014, two photographers filed suit against the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) to challenge the elk hunt administered jointly by the NPS and the State of Wyoming on Grand Teton National Park. The elk reduction program is part of the Park's enabling statute, and is currently the only statutorily recognized hunt taking place on a National Park. The photographers – who according to news articles have opposed the hunts for years – felt that other recreational users shouldn't have to share the Park and its wildlife with hunters.

Similarly, Sierra Club, Center for Biological Diversity, and Western Watersheds Project later filed suit challenging the FWS's decision to allow the incidental take of grizzly bears (which are currently listed as threatened under the ESA) in connection with the Grand Teton elk hunt. These anti-hunting groups alleged that the elk hunters would likely kill grizzly bears that live in the hunt areas, ignoring the fact that only one bear had been killed in sixty-four hunts since 1950.

Despite opposition from the plaintiffs, SCI successfully intervened in both cases to defend the hunt and protect its members' interests. Of particular concern for SCI was the plaintiffs' allegation that hunters were "harassing" grizzly bears by leaving elk gut piles in the field after a successful hunt. The plaintiffs argued that gut piles were unnatural sources of food for the bears and disrupted the bears' normal feeding habits. Under the ESA, altering a species' eating habits may constitute "harassment" and be an ESA violation. Of course, there's nothing unnatural about a bear eating elk carcasses – a point that SCI made in its briefs.

After the parties completed briefing, the judge ruled without hearing oral argument. Both sets of plaintiffs lost on all counts except one small procedural claim that the FWS can cure without interruption to future hunts. In his opinion, the judge agreed with SCI and the FWS's argument that "feeding on gut piles is not unusual or disruptive to the grizzly bear."

Unfortunately, the story doesn't end with the judge's appropriate conclusion about grizzly bear dietary habits . . . . As of now, two post-judgment motions have been filed, one of which could result in the court reconsidering the gut pile issue. SCI will follow this issue closely and will file additional briefs if necessary.

Special Thanks to Legal Task Force Committee Members:
Rew Goodenow (Chairman), Kevin Anderson, Bruce Benson, James Berglund, Donald Black, Ryan Burt, Richard Capozza, Brent Cole, Tina Cunning (consultant), John Daly, Marc Fong, Ned Johnson, Linda Linton, John Monson, Sue Monson, Alan Stevenson, Paul Turcke, Robert Welch, and David Willms

Continued from Page 1

NPS finally relented and implemented a volunteers-as-agents program to reduce the elk population at RMNP. After North Dakota legislators added some pressure, the NPS adopted a similar program for elk reduction at Theodore Roosevelt National Park (TRNP). Anti-hunting groups sued the NPS in federal district court in Colorado to challenge the legality of the program at RMNP. SCI joined the case as an intervenor to defend the use of members of the hunting community as agents. The district court rejected the challenge and the Tenth Circuit Court of Appeals affirmed that the use of volunteers as agents did not violate any federal law.

Although the NPS finally acknowledged the legality of the program, the agency continued to approach the strategy with little enthusiasm. The NPS contended that the use of volunteers exceeded the cost of using NPS personnel or contractors and argued that volunteer sharpshooters posed unnecessary risks to themselves and other park users. The NPS never employed the program for any other ungulate reduction and repeatedly rejected SCI and NRA's recommendations that they involve volunteers to help with deer reductions on National Parks in the eastern portion of the U.S. At meetings of the Wildlife and Hunting Heritage Conservation Council and other gatherings, the NPS announced its intention to publish a report evaluating the use of volunteers as agents and forecasted that the report would demonstrate that the strategy was too costly and ineffective for further NPS ungulate management.

In stark contrast to the agency's long-standing lack of interest in using volunteers, the 2016 NPS report on the RMNP and TRNP elk reductions was very favorable. It praised the use of volunteers not only as "cost effective" but "potentially applicable to other overabundant ungulate situations within the National Park System," including for eastern white-tailed deer reduction. Moreover, the report explained that the NPS found the volunteers to be "tremendously valuable assets to the programs" and that the volunteers "added legitimacy to the programs by providing positive feedback to the press and other venues about the professionalism of both [culling] operations."

So, SCI and NRA were right all along. It only took the NPS ten years to recognize it. So, although we told the NPS so again and again, and although they've wasted time and valuable resources by not utilizing volunteers to manage wildlife populations on so many National Parks during the last decade . . . no hard feelings. We'll keep the gloating to a minimum. SCI and NRA members and other hunters are willing and able to help reduce overpopulations of wildlife on National Parks. Just let us know where to be and when. And please remember: ***hunters are and will continue to be a valuable resource for wildlife management and conservation on and off public lands.***

For any questions or feedback on litigation matters, please contact Anna Seidman at aseidman@safariclub.org, Doug Burdin at dburdin@safariclub.org, or Jeremy Clare at jclare@safariclub.org

STURGEON WINS IN U.S. SUPREME COURT – REASON TO CELEBRATE OR PYRRHIC VICTORY?

By: Anna Seidman

In March, the U.S. Supreme Court issued a unanimous opinion in a case filed by SCI member John Sturgeon. Although seemingly a victory for Sturgeon, the case and Sturgeon's battles are far from over. The Supreme Court chose not to resolve many issues essential to the ultimate outcome of Sturgeon's case. The final victors could indeed turn out to be Sturgeon and, as a result, hunters and the State of Alaska. But the National Park Service is not ready to concede and have continued their illegal regulation of activities on the waters running through Alaska's National Preserves.

Sturgeon sued the NPS for illegally prohibiting him from operating his hovercraft on navigable waters running through the Yukon-Charley Rivers National Preserve. An Alaska federal district court ruled in favor of the NPS, as did the Ninth Circuit Court of Appeals. Sturgeon sought U.S. Supreme Court review and the Court agreed. SCI filed an amicus brief in support of Sturgeon's position.

The Supreme Court, agreeing with Sturgeon and SCI, ruled that the Ninth Circuit's interpretation of ANILCA led to absurd results. The Supreme Court rejected the Ninth Circuit's approach in which NPS regulations directed specifically to activities in Alaska would apply to "public lands" within Park units in Alaska but would not apply on "non-public" lands if a nationwide regulation was contrary to the Alaska-specific regulations.

All eight justices also agreed that the Ninth Circuit's interpretation of the law was contrary to the federal government's relationship with the State of Alaska. The Supreme Court vacated the Ninth Circuit's ruling and remanded the matter to the Court of Appeals for resolution of several other questions.

For example, the Supreme Court did not decide whether parts of the Nation River that are located within the Yukon-Charley Rivers National Preserve qualify as public or non-public. If the river is deemed "public lands" (which includes waters), then arguably the NPS's nationwide ban on hovercraft use would apply and Sturgeon could not use his hovercraft on these public lands. If, however, the river qualifies as "non-public lands," the NPS arguably would not have the authority to regulate that use on the river. The Court also did not resolve the question of whether the NPS has other authority to regulate hovercraft use regardless of whether the river is public or non-public. The Court left these and other issues to the Ninth Circuit to decide.

So who won? According to the clerk of the Supreme Court – the victor is John Sturgeon. The clerk issued an order directing the NPS to pay Sturgeon $300 as reimbursement for the fee he filed to have his case heard by the Supreme Court. Unfortunately, that $300 does little to offset the tens of thousands of dollars it has cost Sturgeon to pursue this litigation so far.

Despite the Supreme Court's classification of Sturgeon as the winner, the NPS has made it clear that they do not consider themselves to be the loser and that they intend to continue the behavior Sturgeon challenged. NPS spokesman John Quinley pointed out that the Park Service law prohibiting hovercrafts remains on the books, and Park Service rangers will continue to patrol rivers to enforce regulations. Quinley stated: "On the ground, operations haven't changed much and with yesterday's ruling the regulations that were in place on Monday continue in place."

Sturgeon, who has battled the NPS for almost ten years, will still not be able to use his hovercraft to access his favorite moose hunting spots. Sturgeon's continued pursuit of this litigation will involve more of Sturgeon's time and money. In addition, the NPS appears even more determined to interfere with hunters' use of the waterways within National Preserves. SCI will continue to stay involved as this case continues.

CURRENT LITIGATION

SCI is currently involved, will soon be involved, or has recently been involved in the following cases:

• ***Elephant Importation Bans Challenge (SCI v. Jewell)*** – Challenge to the FWS's decisions to suspend the importation of sport-hunted elephant trophies from Zimbabwe in 2014 and 2015 and from Tanzania in 2014. Status: For Zimbabwe, SCI/NRA recently finished briefing in the district court. For Tanzania, we appealed the court's decision to dismiss our claims regarding the 2014 importation ban and have completed briefing on the appeal. We are waiting for the court to schedule oral argument.

• ***California's Ban on Importation of Mountain Lion Trophies (SCI v. Harris)*** – Challenge to the constitutionality of a California law that bans individuals from importing or possessing trophies of mountain lions hunted outside of California. SCI claims that the California law violates the U.S. Constitution. Status: district court granted the state's second motion to dismiss. Instead of amending our complaint again, SCI appealed the dismissal to the Ninth Circuit. Briefing begins in late May.

• ***Wyoming Wolf Delisting Challenges (Defenders of Wildlife v. Jewell; HSUS v. U.S. FWS)*** – Defense of delisting and hunting of Wyoming portion of the northern Rocky Mountain wolf population in D.C. federal court. SCI is a defendant-intervenor. Status: D.C. district court invalidated the rule and returned Wyoming wolves to endangered status. All parties appealed the court's decision. Briefing is complete. We are waiting for the court to schedule oral argument.

• ***Western Great Lakes Wolf Delisting Challenge (HSUS v. Jewell)*** – Defense of delisting and hunting of WGL wolf population. SCI, NRA, USSAF and several other organizations intervened. Status: The district court vacated the delisting and placed the WGL wolves back on the endangered species list. All defendants and defendant-intervenors appealed the decision. After a failed attempt to mediate the appeal, briefing started late last year and is ongoing.

• ***Three Antelope Cases (FoA v. Jewell et al.)*** – In the 2014 Appropriations Law, Congress directed the FWS to reissue a 2005 permit exemption rule regarding the hunting of three antelope species on ranches in the United States. After the FWS reissued the rule, FoA filed suit to challenge the constitutionality of Congress's action and the rule. SCI joined as a defendant-intervenor. Status: The district court denied FoA's summary judgment motion, and FoA appealed to the D.C. Circuit. Briefing has been completed and oral argument was held in late February. (***SCI v. Jewell et al.)*** – SCI challenged the FWS's classification of U.S. captive populations as endangered. Status: Court upheld the legality of the listing. SCI appealed the ruling to the D.C. circuit court. Appeal has been stayed on SCI's request, pending the appellate court ruling on the constitutional challenge. (***FoA v. Ashe et al.)*** – FoA challenged permit process for culling members of captive herds of the three antelope. SCI is a defendant-intervenor in the case. Status: Briefing has been stayed, also pending the outcome of the appeal in the constitutional challenge.

• ***Big Cypress ORV/Wilderness Plan*** (***NPCA et al. v. DOI et al.)*** – Defense of National Preserve (Addition Lands) Management Plan facilitating hunting and ORV use. SCI intervened in case to defend plan. Status: After extensive briefing and an all-day hearing, the Florida federal district court ruled in the NPS and SCI's favor and upheld the plan. The case is now on appeal to the Eleventh Circuit Court of Appeals. Briefing has been completed and oral argument is scheduled for June 14, 2016.

• ***Lead Ammunition in Kaibab National Forest (CBD v. U.S. Forest Service)*** – Defense against attempt to ban lead ammunition use in Kaibab National Forest. Status: district court granted a motion to dismiss filed by the federal government. CBD appealed decision to Ninth Circuit. After a year-long delay, the appellate court overturned the district court and remanded to proceed on the merits. SCI, together with the NRA, moved to intervene.

• ***Grand Teton National Park Elk Hunt (Mayo v. Jarvis; Sierra Club v. Jewell)*** – Two photographers challenged the elk management program administered on Grand Teton National Park in Wyoming. In a separate case, Sierra Club challenged the FWS's approval of the hunt. SCI is participating as a defendant-intervenor in both cases. Status: Briefing was completed in late 2015. The court ruled against the plaintiffs on all but a single claim and allowed hunts to continue while the government addresses the problem. One set of plaintiffs moved for reconsideration of the court's decision on whether grizzly bears' ingestion of elk gut piles amounts to a violation of the ESA.

• ***NPS Regulations in Alaska (Sturgeon v. Masica)*** – SCI member, John Sturgeon, challenged the NPS's authority to regulate activities on non-federal waters in Alaska. An Alaska district court and the Ninth Circuit upheld the NPS's exercise of authority. Sturgeon petitioned the U.S. Supreme Court to consider his case. Status: SCI filed two amicus briefs in support of Sturgeon. The Supreme Court ruled in Sturgeon's favor but remanded the case to the Ninth Circuit for determination of several issues.

• ***Revisions to the Mexican Wolf Experimental Population Rule*** – In January 2015, the FWS finalized revisions to the regulations concerning the management of the Mexican wolf nonessential experimental population. The regulations increase the number of wolves to be recovered and expand the area into which they will be released and allowed to range. Status: SCI filed suit in New Mexico and has been joined by two New Mexico chapters. The case was transferred to federal court in Arizona, and SCI and the FWS are now attempting to resolve a dispute about the contents of the Administrative Record.

• ***McKittrick Policy (WildEarth Guardians v. DOJ)*** – In 2013, WildEarth Guardians sued to challenge the Department of Justice's policy not to prosecute individuals who accidentally shoot ESA listed species. Plaintiffs claim that the policy jeopardizes Mexican wolf recovery. Status: The Arizona federal district court denied the DOJ's motion to dismiss the case. Settlement negotiations between the DOJ and WEG failed. SCI filed a motion to intervene, which is currently being briefed.

• ***Florida Black Bear Hunt (Speak Up Wekiva v. Wiley)*** – Florida group filed suit to challenge Florida's authorization of a black bear hunt. The group filed an emergency request to halt the hunt. SCI participated in the briefing and attended a hearing. Status: The Court denied the group's request and allowed the hunt to move forward. The state held the hunt. The case continues and SCI will continue to stay involved.