



# **A Review of Concerns Identified by Doyon, Ltd. and the Alaska Department of Fish and Game's Efforts to Address Issues Involving the Status of Wood Bison Under the U.S. Endangered Species Act**

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## **Executive Summary**

Wood bison occurred naturally in Alaska for most of the last 5-10,000 years but were extirpated sometime in the last few hundred years. The most likely reason they disappeared was the combined effects of hunting by humans and changes in habitat distribution. In an effort to re-establish wood bison in Alaska, the Alaska Department of Fish and Game (ADF&G) has been evaluating the possibility of reintroducing them to suitable habitat in Interior Alaska since the early 1990s.

Since the inception of the project ADF&G has provided extensive opportunities for public review and comment and received broad public support from diverse interests. The ADF&G has made a concerted effort to address all the issues raised in the most forthright and transparent manner possible.

Wood bison in Canada are presently considered a threatened species under Canada's Species at Risk Act. They are listed as "endangered" under the U.S. Endangered Species Act (ESA). The U.S. Fish and Wildlife Service (FWS) has initiated a federal rulemaking process to change the status of wood bison under the ESA to "threatened."

Recently, major concerns have been raised about the potential for wood bison restoration to impede oil and gas and other natural resource development projects due to provisions of the ESA. As with other concerns involving the wood bison restoration project, ADF&G has been working to address issues involving the ESA in an open dialog with all interested parties.

Doyon, Ltd. distributed the report "A Major and Unnecessary Risk: Wood Bison on Lands Planned for Development" (Doyon Report #1) to the Governor of Alaska and members of the Alaska Legislature during the week of January 19-23, 2009. A second paper titled "Wood Bison Risks" (Doyon Report #2) was distributed on January 28, 2009. The Doyon Reports outline the company's views on the risks involved with wood bison restoration in Alaska as a result of the ESA. In this paper, ADF&G addresses the concerns raised in the Doyon Reports and provides an explanation of the process the state has underway to address the status of wood bison under the ESA and ensure that provisions are in place to protect resource development projects and other land uses before any wood bison are released in the wild.

The status of wood bison under the ESA and how the listing status might affect opportunities for developing Alaska's natural resources has been extensively reviewed by the Alaska Department of Law (DOL; please note that the narrative of DOL review in this document is for informational purposes only and does imply a formal opinion about any matter discussed.) The DOL and

ADF&G are actively working with the U.S. Fish and Wildlife Service (FWS) to promulgate a special rule under section 10(j) of the ESA to designate wood bison in Alaska as a “nonessential-experimental population.” This action will provide a strong and legally defensible basis for wood bison under the ESA and will include exemptions from many of the regulatory requirements that normally apply to an ESA listed species.

For purposes of the ESA, establishing a special rule to designate wood bison in Alaska as a nonessential experimental population allows them to be treated as “threatened” rather than “endangered.” This will provide FWS greater discretion under ESA section 4(d) to adopt special management programs and regulations. The special rule promulgated under sections 10(j) and 4(d) of the ESA will accomplish the following:

- For section 7 consultation purposes, wood bison would be treated as “proposed for listing” on all lands other than National Park and National Wildlife Refuge lands, where they would be treated as “threatened;”
- Requirements for consultation with FWS regarding specified actions that might affect wood bison would be essentially eliminated on BLM, state, and private lands;
- Designation of critical habitat would be prohibited;
- The rule would specify that unintentional “incidental take” due to other specified activities will not result in FWS or ADF&G enforcement actions (e.g., if a wood bison were accidentally harmed or killed during an oil and gas development project);
- Provide for state management and future harvests of wood bison under state management plans; and,
- The rule would remain in effect even if the wood bison population was diminished or completely eliminated due to unforeseen circumstances.

***ADF&G will not release wood bison into the wild until the final special rule containing the nonessential experimental population designation and special conditions and exemptions are in place and determined to ensure sufficient protection to existing and future land uses.***

ADF&G appreciates the extensive economic investments that Doyon and other organizations have made to assess the oil and gas potential of Minto Flats, Yukon Flats and other areas. The State applauds the efforts of Doyon and others to explore and plan for oil and gas development in Interior Alaska and the State intends to continue working to see those projects come to fruition. In cooperation with the DOL and the FWS we have developed a course of action that we believe will not result in any significant impediment to Doyon’s or other organizations’ plans for oil and gas or other development, either current or proposed, in the areas being considered for wood bison restoration.

ADF&G will work with all parties affected by the wood bison and ESA issue to objectively evaluate the legal protections that can be accomplished through a special rule under section 10(j) of the ESA for the establishment of nonessential experimental population status and reintroduction of wood bison in Alaska.

***By continuing to work together we can implement an approach that will ensure that wood bison and oil and gas and other resource development activities can prosper side by side.***

## Background

In 2004 the Commissioner of the ADF&G wrote to the Director of the U.S. Fish and Wildlife Service (FWS) requesting clarification of how wood bison, if restored in Alaska, would be treated under the ESA. At that time the FWS indicated that wood bison were listed as “endangered in Canada” and the Service would not take action to list them as an endangered species if they were re-introduced in Alaska. Under this legal interpretation the provisions of the ESA would not apply to wood bison in Alaska.

This interpretation of the status of wood bison under the ESA was cited in the April 2007 ADF&G report “Wood Bison Restoration in Alaska: a Review of Environmental and Regulatory Issues and Proposed Decisions for Project Implementation.” Several organizations subsequently submitted comments that expressed concern that the legal basis for this interpretation was unclear and could result in efforts to force listing wood bison as endangered in Alaska after they were released. Comments from Doyon expressed concern that there would be a high likelihood a third party would file a petition to list wood bison as endangered and that litigation could follow with the potential to force a subsequent “endangered” listing.

Based on these concerns and the need to fully address ESA issues, ADF&G sought review of the matter from the DOL. The DOL concluded there indeed was risk of legal challenge involved with the FWS interpretation that wood bison would not be considered as endangered if they were re-introduced in Alaska. Both ADF&G and DOL sought further review of the matter and worked with the FWS to explore other options for achieving a greater degree of legal certainty that wood bison restoration would not result in restricting other resource development activities.

In December 2007, the Department of Interior Solicitor’s Office further evaluated the matter and determined that a more correct and legally defensible interpretation of the law is that wood bison, if introduced in Alaska, would be considered an “endangered” species under the ESA. In a letter received by Commissioner Lloyd in November 2008, the FWS stated that “The wood bison is listed as endangered wherever found and, as such, would retain its endangered status if introduced into the United States.” However, the FWS letter also outlined a regulatory approach that would allow wood bison to be reintroduced to Alaska in a manner that would greatly reduce the regulatory complications normally associated with a listed species. This approach involves adopting a special rule under section 10(j) of the ESA to designate wood bison in Alaska as a nonessential experimental population and include provisions allowed under section 4(d) to provide for state management. The special rule can contain special regulations and exemptions to address the ESA restrictions that would otherwise apply to a listed species.

***While the change in legal interpretation brings wood bison in Alaska under the auspices of the ESA, it also provides legal clarity and an opportunity to develop a special rule to greatly reduce the regulatory burdens normally associated with a listed species.***

ADF&G staff met with the Alaska Regional Director of FWS and other FWS staff on January 16, 2009 and agreed to cooperate in developing a special rule for wood bison in Alaska under the ESA, completing requirements of the National Environmental Policy Act (NEPA), and prepared an initial timeline to complete the rulemaking process.

# How Concerns About Wood Bison and the ESA are Being Addressed

## ***Status of wood bison under the ESA***

The primary concern identified in Doyon Report #1 is the possibility of a third party filing a petition and/or taking legal action to force the listing of wood bison in Alaska as “endangered” under the ESA. ***The FWS determination that wood bison are listed as an endangered species wherever they occur eliminates the basis for a third party petition to force a listing of wood bison in Alaska.*** The examples cited in the Doyon Reports of forced endangered species listings that occurred after “friendly” reintroductions involving lynx in Colorado and bighorn sheep in California are not relevant to wood bison. Those reintroductions involved species that were not listed at the time and therefore were not preceded by a special rule designating them as nonessential experimental populations, such as we are proposing for wood bison under ESA section 10(j). While such a designation is potentially challengeable, we are unaware of any successful challenges of nonessential experimental population designations. As such, we feel confident that that these rules are defensible.

## ***Develop a special rule for wood bison in Alaska under Sections 10(j) and 4(d) of the ESA***

Beyond questions of wood bison being listed as endangered under the ESA, which are addressed above, developing a special rule for wood bison in Alaska under Sections 10(j) and 4(d) of the ESA will address virtually all of the concerns outlined in the Doyon Reports. Requirements for interagency federal consultations are significantly reduced under a nonessential experimental population designation and associated special rules. There is a prohibition against designation of critical habitat, and restrictions on “take” or harm to wood bison can be reduced. Also, we have the opportunity to specify the geographic coverage for these rules. We intend to cover an area that not only includes the release site(s), but also any areas the bison may move onto in the future. This will assure that any protections of the rule apply throughout the possible future range of wood bison in Alaska.

Some issues raised in the Doyon Reports involve speculation about possible change in federal policy due to the recent change in administration. ADF&G is not aware of any indication that policy changes are likely to occur. However, it is extremely unlikely that the FWS would want to change the agreed upon special rule once it was published and adopted given the precedent that such an action would set. Changing such rules would make it difficult for the FWS to enter into agreements for recovery of a species using the nonessential experimental rule process, since it would cast doubt on the strength of such agreements. Providing certainty to the interested parties is the very reason why reintroductions are made under section 10(j). Thus, it is extremely unlikely that a policy change would threaten the rule once it was adopted and administratively in place.

In the following discussion relevant excerpts from special rules previously published in the Federal Register are shown with indents and italics and are intended to provide additional background on the purpose and effects of ESA section 10(j). Emphasis has been added in bold type in several places.

*“Congress made significant changes to the Endangered Species Act (Act) in 1982 with addition of section 10(j), which provides for the designation of specific reintroduced populations of listed species as “experimental populations.” Previously, we had authority to reintroduce populations into unoccupied portions of a listed species’ historical range when doing so would foster the conservation and recovery of the species. However, local citizens often opposed these reintroductions because they were concerned about subsequent enactment of restrictions and prohibitions on Federal, State, and private activities. Under section 10(j), the Secretary can designate reintroduced populations established outside the species’ current range, but within its historical range, as “experimental.” Based on the best available information, we must determine whether an experimental population is “essential” or “nonessential” to the continued existence of the species. **Regulatory restrictions are considerably reduced under a Nonessential Experimental Population (NEP) designation.**”*

Wood bison in Alaska should qualify for designation as a nonessential experimental population because it can easily be determined that they are not essential to the survival of the species in the wild, and the source of wood bison stock is a captive breeding herd in Canada. There are 6 disease-free wood bison populations in Canada, totaling nearly 5,000 animals, so it is hard to envision a way that “non-essential” status in Alaska could be at risk in the foreseeable future because of declines in Canada.

### **Concern about civil or criminal liability for harm to wood bison**

*Under the Act, species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of endangered wildlife. “Take” is defined by the Act as harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibition of take to threatened wildlife. However, permits to allow the take of listed species can be issued when populations reach a level that creates pressure on their habitat...*

*...For purposes of section 9 of the Act, a population designated as experimental is treated as threatened regardless of the species’ designation elsewhere in its range. Through section 4(d) of the Act, threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. **Regulations issued under section 4(d) for nonessential populations (NEPs) are usually more compatible with routine human activities in the reintroduction area.***

A special rule developed under ESA sections 10(j) and 4(d) can address unintentional or incidental “take.” As in previous rules that have been promulgated for NEPs, we intend to

include provisions in the proposed rule that will distinguish “incidental take” that results from authorized activities (e.g.; oil and gas development) from “knowing or intentional take” from unauthorized activities (e.g., poaching) and will specify that ***neither the FWS nor ADF&G will take legal action if unintentional/incidental take occurs.*** Based on precedents and recent discussions with FWS, the proposed rule can also provide for management primarily by the state and for future harvests of wood bison as described in state management plans for each herd, and stipulate that ***even the decline or disappearance of the reintroduced population(s) would not change their status as a nonessential experimental population or the provisions in the special rule.***

## **Concerns about requirements for federal consultation on endangered species**

*For the purposes of section 7 of the Act, we treat NEPs as threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to conserve listed species. Section 7(a)(2) requires that Federal agencies consult with the Service before authorizing, funding, or carrying out any activity that would likely jeopardize the continued existence of a listed species or adversely modify its critical habitats. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing and only two provisions of section 7 would apply--section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer with the Service on actions that are likely to jeopardize the continued existence of a proposed species. **The results of a conference are advisory in nature, and do not restrict agencies from carrying out, funding, or authorizing activities.***

As stated previously, requirements for interagency federal consultations are significantly reduced under a nonessential, experimental population designation. For the purposes of section 7 consultation, each member of the experimental population is treated as “proposed to be listed” except where they occur within a National Wildlife Refuge or National Park. This will significantly reduce the federal consultation requirements, particularly on state and private lands in the Minto Flats area, where ESA consultation would be not be required for specified activities. There would still be some federal consultation requirements for some activities on the Yukon Flats National Wildlife Refuge or other National Wildlife Refuge system lands; however, we do not believe those consultation requirements will result in additional impediments to oil and gas development, which is already closely regulated on refuge lands.

## **Concern about designation of critical habitat**

Section 10(j)(2)(C)(ii) provides that “*critical habitat shall not be designated* under this Act for any experimental population determined under Subparagraph (B) to not be essential to the continued existence of the species (emphasis added).” ***Once a section 10(j) rule is adopted critical habitat cannot be designated.***

## **Concern that a 10(j) rule will be litigated and overturned by the courts**

We have conducted a preliminary review with the FWS and are not aware of any instances where a 10(j) rule has been blocked or overturned by litigation. Footnote no. 1 of Doyon Report #2 cites several cases involving 10(j) reintroduction programs. Not to minimize concerns about litigation, the rules establishing the nonessential experimental populations and related regulations in those case decisions were actually upheld.

## **Differences between a 10(j) rule for wood bison and the 4(d) rule developed for the polar bear**

The paper refers to the polar bear 4(d) rule as the “same type of rule” the ADF&G proposes for wood bison. The situations are not similar. When a species is listed as “threatened” through the typical listing process, by regulation the FWS applies the same prohibitions that would otherwise apply to a species listed as endangered unless it also issues a “4(d) rule” containing any exceptions or special terms. The primary similarity is that ESA section 4(d) is the authority that gives the FWS greater discretion to adopt whatever regulations are necessary for the conservation of a threatened species, whether in the form of a separate 4(d) rule at the time a species is listed as threatened or in support of special terms contained in a final rule under section 10(j). The special provisions and exceptions applicable to wood bison are intended to provide for state management and are not nearly as controversial or likely to generate litigation as the 4(d) rule for polar bears. As noted, the special final rule will result in wood bison being treated as threatened under ESA section 10(j) and will contain special provisions tailored to the wood bison reintroduction, including certain exceptions from the “take” prohibitions as permitted by ESA section 4(d). We intend to include all these provisions in the special final “10(j) rule” that designates wood bison in Alaska as a nonessential experimental population. It is not anticipated that there will be a separate “4(d) rule.” However, should the rule making process in support of the reintroduction of wood bison take the form of separate 10(j) and 4(d) rules, ADF&G will not release wood bison until all rules meet our objectives.

## **Concern about challenges from animals rights groups due to provisions for future hunting of wood bison**

A provision to provide for state management of wood bison and to allow potential harvest of wood bison at an appropriate time in the future will be included in the final rule. These provisions will be subject to public review and comment, which will provide insight into whether any interest groups may challenge this provision. To date there has been no indication of opposition among environmental or animal protection organizations to the idea that wood bison may eventually be hunted.

## ***Wood bison health certification***

Doyon Report #1 references public comments expressing serious concerns that the two year quarantine for wood bison at the Alaska Wildlife Conservation Center in Portage may not work (the only comments received on this point were from Doyon). The second Doyon report indicates the importation of bison was prohibited for several years because of brucellosis and raises concerns about wood bison in Alaska being infected by brucellosis and declining in the future.

The U.S. border was not closed to the import of bison (and cattle) because of brucellosis. The import of bovines, except for immediate slaughter, was banned for several years because of concerns about mad-cow disease (BSE) in cattle. The ban was lifted in 2007.

ADF&G has taken every precaution possible to ensure that any wood bison that are released to the wild will not pose a threat to other wildlife or livestock. ADF&G has developed a cooperative agreement with the Alaska Department of Environmental Conservation (ADEC), Office of the State Veterinarian that specifies very stringent disease testing protocols. In addition, the U.S. Department of Agriculture (USDA) has completed an extensive analysis showing that the risk of disease (including brucellosis) from stock imported from the source herd in Canada is negligible (less than .01 percent). The bison imported from Canada in 2008 were tested twice for brucellosis before an import permit was issued by the USDA. The wood bison will all be tested for brucellosis, bovine tuberculosis and other diseases of concern a minimum of two times before they are certified for release to the wild. The health certification requirements for wood bison likely exceed any health certification program for a wildlife reintroduction that has occurred anywhere in North America, and exceed the requirements for the importation of livestock. Any wood bison that do not meet these stringent health certification requirements will not be released, and if any major issues involving critical diseases of concern arise, the agreement with ADEC includes a provision to destroy the entire herd, if necessary.

### ***Petition for downlisting***

Canada's Wood Bison Recovery Team has submitted a petition to the FWS to downlist wood bison under the ESA to "threatened." On February 3, 2009, the FWS issued a 90 day finding on the petition concluding that it "presents substantial scientific and commercial information indicating that the petitioned action of reclassifying the wood bison from endangered to threatened status under the Act may be warranted." 74 Federal Register 5908. This notice also announced that the FWS is initiating a status review of wood bison to review the reclassification and solicited scientific and commercial information regarding wood bison for the purpose of the review. Following the status review, they will issue a 12-month finding on the petition. There is a strong biological justification for downlisting wood bison to "threatened," and ADF&G anticipates this will occur once FWS completes the necessary biological review and regulatory process.

### ***Effects of global warming***

Should warming conditions occur in Interior Alaska it may increase the habitat available for wood bison. Faculty at the University of Alaska-Fairbanks, including Professor Terry Chapin, a member of the National Academy of Sciences, have suggested that global warming may cause parts of the Interior's boreal forest to convert to grasslands. Having wood bison present on the landscape provides extra assurance that abundant wildlife populations will remain in Alaska, should climate change reduce the quality of habitat available for moose or other species. Wood bison populations in Alaska are not likely to be put at risk by global warming, and instead would be likely to benefit.



## Conclusions

ADF&G has taken Doyon's concerns about wood bison and the ESA seriously and has identified an approach to address those concerns to the greatest degree possible. By using the federal rulemaking process outlined above we can significantly reduce the risk to oil and gas or other natural resource development in the Minto Flats area or elsewhere. We look forward to continued dialog with all stakeholders to ensure that we do the best job possible in addressing concerns about the ESA and other matters as we move forward. Once a proposed special rule for nonessential, experimental population status for wood bison in Alaska is published for public review, ADF&G welcomes an objective analysis of the protections afforded to oil and gas and other resource development projects.

***Once a final rule is adopted, if the conclusion reached by the state in consultation with other interested parties is that adequate safeguards are not present and wood bison restoration could severely impact other development opportunities, ADF&G will not proceed with releasing wood bison in areas proposed for development, or possibly anywhere in Alaska.***



Drawing courtesy of Wes Olson