

Court Decision Update: The FWS Can Make Individual Enhancement Findings... For Now

On March 30, 2018, a federal district court issued its final order in a case governing US Fish & Wildlife Service (FWS) import permits for hunting trophies. Everyone in both the hunting and anti-hunting camps had awaited this decision for many months. The court accepted the FWS' withdrawal of the 2014 and 2015 negative enhancement findings for Zimbabwe and Tanzania elephant trophy imports. You will recall we told you about this pending development last month. The court accepted the FWS' position that the FWS had withdrawn all procedurally incorrect positive and negative countrywide findings (a total of 22 enhancement and non-detriment findings, not all directly the subject of the suit) and that the FWS intends to procedurally make such determinations on a permit application-by-application basis in the future. Under the court's ruling, the FWS can make individual enhancement (and non-detriment) findings for permits for the import of threatened-listed and CITES Appendix I listed hunting trophies. This is the final order of the SCI/NRA case, which has now been dismissed. This decision allows the FWS to move forward and process import permit applications again, but now on an applicant-by-applicant basis. For many months the FWS had been reluctant to process import permits until this final decision.

The Back Story

As readers know, in October 2017, the FWS made an enhancement finding authorizing the import of lion trophies from Zimbabwe for the first time since listing the lion as threatened. The FWS made a similar finding and lifted the almost three-and-a-half-year suspension of imports of elephant trophies from Zimbabwe in November 2017. Those countrywide determinations for three-year periods



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were among those withdrawn by the FWS. The FWS should now start processing applications again but without making prospective determinations for one to three years in the future, which had facilitated the marketing/booking of hunts a season or more in advance.

Almost immediately after the FWS' issuance of the enhancement finding for elephant trophies, animal rights groups sued to challenge the findings. Two separate suits were filed. The first, by the Center for Biological Diversity (later joined by plaintiffs including Humane Society) challenged both the Zimbabwe elephant and lion positive enhancement findings. The second, by Friends of Animals and Zimbabwe Conservation Task Force (ZCTF), challenged only the positive enhancement finding for Zimbabwe elephant trophy imports.

On December 22, 2017, the US Court of Appeals for the DC Circuit issued its opinion that the negative 2014 and 2015 enhancement findings for Zimbabwe elephant imports were invalid because the FWS did not use the appropriate rulemaking procedure. You'll recall this was the argument brought by SCI, later joined by the NRA, in a suit filed after the FWS' April 4, 2014 suspension of elephant trophy imports from Zimbabwe.

The court held that the FWS' 2014 and 2015 countrywide enhancement findings for elephant trophy imports from Zimbabwe were "rules." Under US law, "rules" must be published as proposals, the proposals must be open for public comment, then the agency must publish notice of a final rule that responds to substantive comments received. Because the FWS had not followed this procedure in

making the findings, they were invalid. Presumably, the suspension based on those findings was also invalid. The DC Circuit sent the case back to the district court to issue an order consistent with its decision.

The FWS asked the district court for leave to explain how the FWS interpreted the DC Circuit's opinion. The district court granted this leave. Meanwhile, the animal rights plaintiffs in the two pending lawsuits challenging the positive 2017 enhancement findings amended their complaints. They applied the DC Circuit's logic—if an enhancement finding that barred the import of trophies should have been published for public comment and was invalidated by the FWS' failure to follow this process, then the plaintiffs alleged the favorable findings in October and November 2017 should also have been published

for public comment. Both sets of plaintiffs filed motions seeking a summary judgment that the favorable findings were invalid. Though SCI had successfully invalidated the negative enhancement finding of 2014, the legal argument applied to positive findings as well. Both sides claimed victory

while the bewildered FWS, and, I should add, Conservation Force thought the sky was falling.

On March 1, 2018, the FWS withdrew all pending enhancement findings, positive or negative, for the import of elephant trophies from Botswana, Namibia, South Africa, Tanzania, Zambia and Zimbabwe; for the import of lion trophies from South Africa, Zambia and Zimbabwe; and for the import of bontebok trophies from South Africa. In its supplemental brief, the FWS argued that by withdrawing these findings, it complied with the appellate court's holding. Put simply, the FWS argued it withdrew the improperly adopted rules, and therefore, the case should be dismissed. The FWS' argument was opposed by



the animal rights groups that had intervened in the SCI/NRA lawsuit—the same groups that filed the two other suits.

On March 30, the US District Court in DC entered the order dismissing SCI/NRA's claims. Essentially, the court agreed with the FWS' position. The court held that because the FWS had withdrawn the enhancement findings being challenged, no live "case or controversy" existed on which the court could rule. The court acknowledged that the FWS "intend[s] to process applications for permits to import elephant trophies on a case-by-case basis." But the court has not yet ruled on the appropriateness of this course of action.

The court rejected arguments from the intervening animal rights groups that it should determine if case-by-case processing is appropriate. The court stated: "if the Service in fact proceeds to adjudicate each individual permit request, as it has indicated, interested parties can challenge those decisions" then.

What the Ruling Means

What is the impact of this ruling? First, it means SCI/NRA's case is closed. Second, it is likely the two pending anti-hunting suits will also be dismissed. The initial version of each suit challenged the 2017 enhancement findings made for elephant and lion trophy imports. The amended suits continued to challenge those specific findings, including under the DC Circuit's ruling. The FWS has already moved to dismiss each of the two pending suits for the same reason the district court dismissed the SCI/NRA suit. In sum, the FWS has argued the cases are moot because the challenged enhancement findings are withdrawn.

Plaintiffs Friends of Animals and ZCTF have sought to amend their suit to avoid dismissal by seeking leave to amend their complaint. Among other things, they seek to allege the FWS could not withdraw its prior enhancement findings by memo. The district court *could* allow this amended complaint, but it seems unlikely. The court already acknowledged that the FWS could withdraw the prior enhancement findings in light of the DC Circuit's

opinion when it closed the SCI/NRA case. It is unlikely the court will reverse this ruling it has already made by allowing these plaintiffs to re-argue that issue through an amended complaint.

Third, for the time being, the FWS can process permit applications on an individual basis and make case-by-case enhancement findings for each application. Last, the outcome of the SCI/NRA case paves the way for much future litigation. The court acknowledged that "interested parties can challenge" enhancement findings made in support of individual permit applications. You can bet the animal rights organizations will bring these challenges. Conservation Force expects to intervene in any such anti-hunting litigation.

Our Opinion

1. What does the district court's decision mean for hunters who wish to import elephant, lion and bontebok trophies? What does it mean for the FWS to make an enhancement finding on a case-by-case basis? In our opinion it means processing no more than a batch of applications at a time. Enhancement and CITES non-detriment determinations will no longer be made for a period in the future beyond the current year. The Division of Scientific Authority that makes CITES Appendix I non-detriment findings and the Division of Management Authority that makes ESA threatened and endangered species enhancement findings will no doubt need and seek information from the range nations more frequently. That will likely cause frequent, indefinite delays in the issuance of permits because of lack of information and confusion in communications between governments. The FWS is renowned for its offensive, confusing communications and delays in permitting.

2. Will the FWS look at the countrywide management of the species, or will it scrutinize the individual area's or operator's enhancement contributions, or both? It will likely include a greater focus on operator-specific information. The inclusion of operator-specific information will help the FWS demonstrate legally that it is making application-by-application



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Our Course of Action

The filing of “pioneering” permit applications to open or reopen new destinations or new species that require import permits has long been the hallmark of Conservation Force. We are stepping up that signature program to assist hunters and range nation authorities with the new procedural challenges. Among other things, Conservation Force is proactively developing a questionnaire to send to hunting operators and professional hunters. This short questionnaire will collect enhancement (benefits) and non-detriment information. For example, it will ask for information about habitat security in that area, anti-poaching expenditures, anti-poaching results, and community investment, employment and participation. On the new permit application forms, applicants must specify the operator and specific area of the hunt. The forms already call for attachment of a map indicating the area of the hunt “if available.” Now it will have to be available.

When a hunter comes to us for help in submitting an import permit application, we can collect this data from the operator/PH and provide it to the FWS. The FWS will then have significant, unique data about the enhancement generated for elephant, lion and bontebok in the specific area where the applicant is hunting. In addition to information collected from the range states—which Conservation Force will also help obtain—this individualized information will, hopefully, allow the FWS to make strong enhancement determinations for each permit application, to withstand the anti-hunting groups’ future legal challenges.

One thing is clear, there will no longer be advisory opinions issued by FWS prospectively covering the import of hunting trophies several years in advance. If permit applications are not filed, many advices may never be issued. The surest way to have an import permit determination made is to file, monitor, support and supplement individual import permit applications until granted. That is what Conservation Force will be doing to support the important conservation hunting of lion, elephant and bontebok. We already provide this conservation

service for Canadian wood bison, black rhino, Cape mountain zebra and the various markhor in Pakistan and Tajikistan. We have also already been doing most of this groundwork for elephant trophy imports after the suspensions and lion after the threatened listing.

We have concern for the stability of the market, the operators and range state programs. Rest assured we will do all we can, as fast as we can, both in and out of court to continue the conservation hunting of these species.

We need your help. The filing of applications is now more than ever an essential step to the FWS making positive findings. Please contact Conservation Force if you are hunting lion or elephant so we can assist you with preparing the import permit application. Please let your operator or PH know that they will be expected to provide enhancement information. Conservation Force will continue to provide this essential conservation service to hunters, operators and range states until the hunting community sees its way through this procedural adjustment.

Update on the International Wildlife Conservation Council (IWCC)

The Secretary of Interior’s International Wildlife Conservation Council has been formalized and has held its first meeting. The meeting was held on March 17, 2018 in the penthouse atop of the Department of Interior Building.

Secretary Ryan Zinke treated the 16 members to beverages in his office the day before the first meeting and even lead a personal tour of the of the Lincoln Memorial including its little-known basement. The irony of that tour for me was that this was the very location that Martin Luther King delivered his famous I Have a Dream speech to 250,000 people (see photo). I had taken those words from Dr. King’s speech at the First Eco-World Congress in South Africa at its opening plenary in 1996 to explain my personal feelings for Africa. I addressed those at the Eco-World Congress that I had a dream that the growth in big game hunting in America would spill over into Africa to save its wild places, wildlife and benefit

its people. I made a whole presentation around that dream. Believe me; the speech was from the bottom of my heart, 22 years ago. It struck me to be fitting to come across the very place Dr. King’s speech was made. Indeed, I have had a real dream not yet realized. Hopefully, the IWCC can bring the dream closer to reality.

The 16 members selected by the Secretary are well known to the hunting-conservation community. The sixteen are Jenifer Chatfield, Paul Babaz, Ivan Carter, Steven Chancellor, Cameron Hames, Peter Horn, Chris Hudson, Mike Ingram, John J. Jackson, III (yes, that is me), Gary Kania, Terry Maple, Keith Mark, Olivia Opre, Erica Rhoades and Denise Welker. The members have in turn selected Congressman Bill Brewster as Chair, and he in turn created three initial subcommittees. Those three are the Conservation, Policy, and the Trafficking/Poaching/Communities committees chaired by Denise Welker,

Chris Hudson and Ivan Carter, respectively.

Little business was conducted at the first meeting outside of the necessary administrative matters to get started. It is an advisory committee to



The inscription stone that commemorates Martin Luther King’s famous I Have a Dream speech was a fitting reflection of John J. Jackson’s 22-year dream of conservation success in Africa and hopes that the new IWCC will succeed in its conservation mission.

advise the Secretary of Interior so it is subject to a host of transparency laws and regulations to prevent secret deal making. The members did discuss the plight of Tanzania wildlife and people arising from the apparent collapse of the safari industry due to import permit delays and denials, but only for an expression of the urgency to get to work as a functional working council. The sub-committee meetings are starting in mid-April and will be reported on at the next public meeting in May or June, not yet set at this writing.

There was an unusual number of media representatives present, 20, but little of interest for them. They generally misunderstand the SCI/NRA litigation and are so eager to report negatively on President Trump that they are blinded to the fact that it is a court decision, not a decision by the president. Moreover, the decision of the court and the Administration's compliance was to invalidate the positive findings that underlie elephant imports like those from South Africa and Namibia, but it also invalidated the October

and November positive enhancement findings for lion and elephant for Zambia and Zimbabwe imports.

Ultimately the Council's activism will be reported on its website at: <https://www.facadatabase.gov/committee/committee.aspx?cid=2636>. It provides a forum to advise the Secretary on how to get international hunting back on track and to ensure safari hunting is recognized for the essential conservation role it plays and the ecosystem services it provides.

Camp Is a Retreat Where We All Want to Be

Camp is a personally appealing retreat where we catch up with ourselves, our family and friends and can be inspired by the natural world. It can be a tent camp with what Robert Roark described as a "tiny gleaming camp fire" as well as a weekend hide-away. It is a place that inspires us and where we deeply want to be. It is likely to be on the water or at the very least have a substantial garden.

What I want to share here with fellow sportsmen and women is my recent realization that both the Father of Wildlife Management, Aldo Leopold, and the woman that



A simple "shack" in the woods helped inspire Aldo Leopold's famous work, *A Sand County Almanac*.

shared the distinction with Aldo as the Mother of the Environmental Movement, Rachel Carson, were

inspired by their personal retreats, their camps surrounded by nature.

Aldo had "The Shack," a rebuilt chicken coop along the Wisconsin River where he and his family stayed during weekend retreats. The landscape surrounding the Leopold Shack and farm land "informed the vision put forth by Leopold in his conservation classic, *A Sand County Almanac* (1948), including his call for a 'land ethic'—a caring, ethical relationship between people and nature." (Aldo Leopold Foundation.) I have had speaking engagements about Aldo, his Shack, and his Land Ethic and have visited the simple shack several times. *The Almanac* was a record of the day-by-day change of seasons through the eyes of Aldo, the devoted bow hunter and forester. (See www.aldoleopold.org/visit/the-shack/.)

Rachel was a career marine biologist with the FWS. Her camp retreat was beside the sea instead of a river and until the end most of her writing was about the sea. Her summer cottage in Southport, Maine sits amidst spruce and pine atop a rocky bluff overlooking tidal pools, gulls and lobster boats. The Rachel

Carson Council says that from the picture windows you can imagine "Rachel's feeling of awe in the face of such majesty and mystery. And you can find here the sources of her love." (<https://rachelcarsoncouncil.org/about-rcc/about-rachel-carson/rachel-carson-cottage-at-the-edge-of-the-sea/>.)



Rachel Carson's seaside cottage provided her the perfect retreat to produce her works on the importance of preserving the natural environment.

Aldo's *A Sand County Almanac* was not published until after his death, and Rachel did not write the last of many books, *Silent Spring*, until 1962 when she was dying of cancer. Aldo wrote of the land and Rachel wrote of the sea until *Silent Spring*. Both of these icons were inspired by their nature retreats and in turn continue to inspire us today.

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