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"SERVING THE HUNTER WHO TRAVELS"

"Hunting provides the principal incentive and revenue for conservation. Hence it is a force for conservation."

Special To The Hunting Report

World Conservation Force Bulletin

by John J. Jackson, III

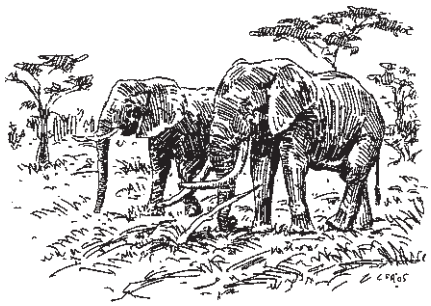
DATELINE: MOZAMBIQUE

News... News... News
Niassa Elephant Trophy Import Permits Denied

On September 3, 2009, International Affairs of USF&WS denied the longstanding applications to import elephant hunting trophies from the Niassa Reserve of Mozambique. Both the Management and Scientific divisions made negative findings. The denials are a shock because Niassa is one of the most promising reserves in the world today with exemplary management. Something is clearly awry.

International Affairs only processed the longstanding permits in response to Conservation Force's Mozambique elephant lawsuit filed in March, 2009. Incredibly, the denial rests upon a Division of Scientific Authority (DSA) "general advice" dated April 8, 2005, which predated the opening of Niassa and the date of the two particular hunts in issue. In short, the DSA's CITES advice that it could not make a non-detriment finding did not consider the Niassa information attached to the permit application at all, nor could it because the advice was rendered before the Niassa hunting was opened or the application was made.

The information about Niassa and where the hunts occurred seems to have been immaterial to the Service during



the years the applications languished. Neither Division made any inquiry or effort. They did not even consider the application attachments.

The Division of Management Authority (DMA) also made a negative enhancement finding under the Endangered Species Act (ESA). The DMA said that "[t]o enhance the survival of the species, the importation must be associated with activities that provide a direct benefit to the species being hunted. Such benefits could include the use of revenue generated by the hunt to support conservation projects or to manage the species. Other benefits that could result from activities that enhance the survival of the species include improving human-wildlife conflicts, anti-poaching efforts, or habitat conservation."

This working definition of "enhancement" under the ESA is very important to know. Such an explanation has been hard to find in the past. Regrettably, it was not applied in this case at all because the elephant hunting in the Niassa Reserve and the immediately surrounding buffer zone is the epitome of every particular of that definition. Both the DMA and DSA ignored the particulars of the Reserve in which the elephant were taken. Had the DSA and DMA made up-to-date findings covering the Niassa Reserve, positive determinations should have been made.

The denial letter states, "[W]e realize it has taken much longer than usual to act on your application and apologize for the extreme delay in re-

sponding to your request." That is quite an admission for an agency being sued for taking too long. In reality, it took more than three full years and a lawsuit. The scientific opinion itself was five years late when rendered and did not include Niassa or the 2005 and 2006 seasons when and where the applicants' hunts took place. No inquiry was made of the hunters or the Mozambique authorities about the hunt period or the hunt in issue. The applications were clearly ignored until suit was filed.

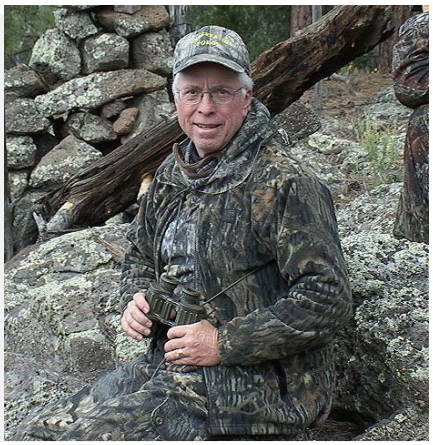
The denial also rests upon August, 2007 USF&WS regulations that were not even in effect during the 2005 and 2006 hunts. Those regulations self-authorize the USF&WS to disregard the non-detriment finding made by Mozambique authorities and also self-

authorize review of both the biological status and the management of the population rather than the purpose of the imports. The failure to take into consideration the particular program and status of the elephant population in Niassa is exasperating and puzzling. Both DMA and DSA also chose to disregard Mozambique's quota and non-detriment finding lodged with the CITES Secretariat.

Niassa Reserve is managed as a standalone unit and forms part of an extremely large and continuous ecosystem with the Selous Reserve in Tanzania. The Reserve alone spans two provinces, is over 9 million acres and has between 13,000 and 16,000 elephant. It is separately managed by SRN (Society for the Reserve of Niassa) and was funding 83 game scouts in 2005 at 19 control outposts. Neither the outdated DSA negative non-detriment advice, nor the DMA negative enhancement determination treated Niassa as distinct. Rather, the permit application denial conspicuously disregards the improving status and exemplary management of elephant where and when the hunting took place, Niassa Reserve. The denial calls for more reliable national surveys of the elephant population, but ignores the state-of-the-art Niassa surveys completed every two years since 1999 that document a continuing elephant population increase. The elephant population has doubled over the past decade, but the denial makes no notice of it. Niassa has one of the best and most regulated elephant populations in the world. If the countrywide quota of 40 elephant were all taken in Niassa Reserve instead of across the whole country of Mozambique, the quota would be less than one-third of one percent of Niassa's elephant population alone. Moreover, Niassa had a quota of less than 10 of those on the national quota. Let them explain that to the Judge – the same Judge who heard the original elephant suit in the early 1990s.

So, where does that leave us? We will amend the District of Columbia Federal Court lawsuit to change the allegations of failing to process the import permit applications into a claim alleging irrational, arbitrary and capricious denial of the applications. Second, we will continue our effort to downlist Mozambique elephant to Appendix II of CITES with an annotation that it is for trophy hunting purposes only, which would eliminate the need for import permits. If we are unable to do it in time for CITES CoP15, to be held in March 2010, that effort will have to wait three more years for CoP16.

In the meantime, Mozambique is coincidentally planning a workshop to complete an up-to-date national action/management plan for the whole of the country, though that has just been delayed. That drafting workshop was scheduled for September and may have at least satisfied the persistent USF&WS demand for a more particularized action plan than the National Elephant Strategy adopted in 1999



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which DMA states was just a "first step." Of course, that workshop is not expected to improve Niassa's management, which is already intensive and state-of-the-art.

In the interval, we can no longer recommend elephant hunting in the Niassa Reserve, much less anywhere in Mozambique. It may be four or more years before we can establish the import of elephant from anywhere within the country. Rest assured we are doing all that can be done. Please continue your support.

DATELINE: NORTH AMERICA

News... News... News
Latest Developments On Polar Bear

It has been colder this year in the Arctic, especially in Southern Beaufort Sea where the bear were reported to be fat, and in Western Hudson Bay, which had the coldest summer in recorded history. So much for weather forecasting. All the while, Conservation Force's three lawsuits moved forward. Now there will be a fourth.

In August, I orally argued the appeal before the Ninth Circuit Court of Appeals that was sitting in Anchorage, Alaska. That is the appeal to overturn the Oakland Judge's order that the listing be given immediate effect, which trapped 40 to 60 trophies in Canada. The counsel for the Center for Biological Diversity argued that the hunters "assumed the risk of the listing," thus had no entitlement. The Department of Interior/USF&WS counsel opposed the appeal on every possible procedural ground with a plea that it was too great a burden on the Service to now issue and reissue import permits.

The three-judge panel did not seem to display any sympathy for the hunters' personal losses. In September, the panel denied the appeal wholly on technical, procedural grounds without ever addressing the underlying merits. In short, the panel held that the hunters had no right to appeal because their intervention was only pending but not granted at the time of the trial court's order. The appeal of the trial court's order dismissing the intervention, the order reconsidering and granting the intervention too narrowly, and the final denial of Conservation Force's motion to reconsider were all held to be procedurally premature. Without ever reaching the merits, the appeal panel held that the case was not ripe for appeal until there is a final judg-

ment in the entire polar bear case. That may be years from now because the underlying polar bear case was transferred to the District of Columbia and is the principle case in the multi-district litigation. The USF&WS's threshold procedural arguments prevailed. We will probably abandon that appeal rather than seek writs to the US Supreme Court. The out-of-pocket expenses have been very high.

As I write this, Conservation Force's growing legal staff is on the verge of initiating an entirely new proceeding for release of those trophies already taken. That is a mandamus, instead of waiting years to appeal when the matter is too stale. A mandamus is an extraordinary supervisory proceeding that does not have to wait for a final judgment. This will be the fourth separate legal avenue taken by Conservation Force and will be filed with the Ninth Circuit Court of Appeals instead of a motion for rehearing.

Conservation Force's suit in the D.C. District Court challenging the listing itself is moving forward. The suit was consolidated with all the others and ordered to be jointly briefed with the State of Alaska, SCI/SCIF, the California Cattlemen's Association and NAACP (yes, strange bedfellows). We are to file a joint summary judgment brief and also separate briefs for issues that are not shared on 20 October.

Because of the extensive number of plaintiffs in Conservation Force's suit and its more than 1,000 pages of substantive comments opposing the listing, it has been given permission to file a slightly larger separate supplemental brief as well. We successfully fought for that extra brief space over several hearings. On the other hand, our efforts to eliminate all the interventions by anti-hunting organizations were all denied. The trial judge has granted permissive intervention to any and all those that requested it, such as HSUS. They too must file their briefs together jointly as one. The schedule of all the cross briefs, replies, and so on are set through the summer of 2010, at which time the court will schedule staggered spaced for all oral arguments on all the separate cases.

Conservation Force's third case is the suit over the USF&WS denial of our attempted import permit applications under the "enhancement" section of the MMPA. That case has been consolidated with all the other trophy import cases and, over our objections, the antis and environmentalists have all been allowed to permissively intervene. Although it is now before the same Judge and is on the same schedule as the other import-related cases, it is to be separately briefed, i.e. a standalone brief. Our opening brief for summary judgment in that case is due 20 November, 2009.

Briefly Noted

Congressional Relief: Aside from the litigation, on 22 September, the House held a hearing on Don Young's H.R. 1054 to permit import of those polar bear already taken that were trapped by the trial judge ordering the listing

effective immediately without the minimum 30-day statutory notice period. Contrary to its position in the Ninth Circuit Court of Appeals in August, the USF&WS' testimony did not oppose the bill, though it does want to limit the imports to those hunters that had applied for permits before the May 15th effective date, i.e. exclude those that had not filed an import application. Forty-four hunters would qualify for import.

HSUS testified that the hunters assumed the risk. To our chagrin, they quoted extensively from *World Conservation Force Bulletins* advising hunters that trophies would not be importable because the listing would trigger a provision in the MMPA that separately prohibits importation. We had emphasized the risk, but that was largely because a prominent international hunting organization was repeatedly publishing that a listing would not necessarily prevent imports.

The HSUS quotes were all out of context because the same articles cited also kept readers apprised that only one or two distinct populations should be at risk of listing, that the proposed listing would be an unprecedented 50-year projection into the future legally beyond "the foreseeable" future, that the Canadian program was too important to obstruct if taken "into account" as the ESA mandates, etc. The listing was a shock, to say the least, and highly improbable as the bear are still at record numbers of 25,500 according to the listing findings, i.e. known populations have increased more than the small decline of Western Hudson Bay, which itself has since improved as expected.

Our thanks goes out to Don Young and the co-sponsors of H.R. 1054 for all they are doing. There is also a bill in the Senate, S. 1395 by Senator Mike Crapo of Idaho, in which no action has yet been taken.

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Forfeiture Cases: Conservation Force is contesting trophy seizures and forfeitures in Federal District Courts from San Francisco and Los Angeles to New York. The first claims we filed were over four different leopard seizures in San Francisco that have evolved into three different federal court cases.

As we feared, the government has taken the legal position in San Francisco that any irregularity, including clerical errors, on permits or loss by third parties such as airlines renders that trophy contraband, which is illegal to possess or release. The government's position in the San Francisco case, set for hearing on 30 September, is that CAFRA does not apply

at all to trophies of listed species because it excludes contraband, and the trophies are contraband. If true, the "innocent owner defense" and "proportionality/excessive penalty" tests will not be available to hunters. It will take an Act of Congress to correct the injustice and the sooner the better. At worst, the cases across the country will demonstrate and showcase the problem. Until now, millions of dollars of trophies have been quietly forfeited while hunters have been misled to believe they were afforded protection of their interests by CAFRA and administrative remission proceedings. On the other hand, we hope to establish that clerical errors don't render trophies contraband like drugs and criminally obtained goods.

The negative attitude we had gleaned from the Agency has surfaced in the litigation. For example, the government is arguing that the purpose of the quota resolution adopted for leopard by CITES was intended to strictly limit trade, while we, on the other hand, view the adoption of quotas as a CITES attempt to facilitate trade and dispense with the need for the exporting and importing countries to make any further non-detriment finding. The quota resolutions actually state that those particular leopard populations are not in danger, that the hunting benefits them, and that importing authorities should permit the trade. Of course, leopards were not listed due to trophy trade in the first place, but it is the twisted view of those enforcing CITES in the field and with whom we are contending that trophy trade is disfavored. Moreover, the leopard at issue had both import and export permits demonstrating the trade was not detrimental and that it also enhanced the survival of the species. In other words, it was duplicatively approved trade.

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Trophy Definition Change: We also have a growing number of cases where trophies have been seized for forfeiture because they were considered by the USF&WS Inspector upon entry to be crafted. That has ranged from elephant leg bones (not just ivory) that have been scrimshawed to tusks that have bases with a metal cap for support. How the Service can unilaterally change the listing of a species by declaring it not to be a trophy is beyond my imagination. It is now up to two or more New York Federal District Court Judges to decide in separate cases. "On the bright side, Law Enforcement has just released elephant tusks that were on a base with a brass retainer."