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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: AFRICA

News... News... News...
Crisis Over Trophies In Transit Resolved

That problem I previously told you about regarding African trophies stuck in transit has been favorably resolved after four months of work and worry. The Office of Law Enforcement for the US Fish & Wildlife Service has issued a *Chief's Directive* clarifying its permitting requirements for trophies that transit intermediate countries. Simultaneously the USF&WS released trophies that had been "seized" or were being "detained" in nearly every port of embarkation in the USA. Tons of other trophies that were awaiting resolution of the issue are now on their way to happy hunters. There are some caveats, however, making it important for hunters to understand when they must acquire import and/or re-export permits from transited intermediate countries.

To recap what has happened: On August 31 the port of Chicago started seizing CITES-listed hunting trophies that had passed through (transited) South Africa because the transit period of time was not "immediate." USF&W began requiring this "immediate" transit under the new regulations the agency put into effect this past summer. Because the transit was not "immediate" the USF&WS required a re-

export permit from CITES authorities of South Africa. That in turn would have required the shipment to be opened and inspected and the re-export permit verified before departure. The industry and African authorities were surprised and bewildered by the new USF&WS requirement that threatened the importation of trophies from Botswana, Mozambique, Zambia, Zimbabwe and perhaps other countries. The South Africa CITES Authority said it was unnecessary, served no purpose and would add problems and delays.

Importantly, the normal delay necessary to change cargo carriers in South Africa was not the cause of the in-transit delays that triggered the seizures by USF&WS. It was a regulation from another US agency. Because of US Department of Agriculture (USDA-APHIS) requirements, the wood parts of containers and crates used in trophy shipments must be fumigated before entering the US. Though the fumigation occurred under South Africa's customs control without the shipments ever clearing customs and thus without official entry, the South Africa passage (transit) did not conform with the new UFS&WS regulations that the transit be "immediate."

The problem grew worse. What started in Chicago in late August spread to most other ports in a period of weeks. Other enforcement officers joined forces behind the Chicago interpretation. We then learned of a "guidance" being circulated within the

enforcement division reinforcing the new "immediate" requirement and spelling doom for the safari industry of Southern Africa. Freight forwarders and trophy brokerage firms on both sides of the Atlantic grew frantic as tons and tons of trophies backed up.

By late October, we had a full understanding of the problem and had completed a comprehensive review of the CITES in-transit article that has always exempted in-transit shipments from permitting requirements. The new USF&WS regulation had added a condition that the passage through an intermediate country be immediate, while the CITES "exemption" article only required it to remain in Customs Control. After consulting all the respective experts and authorities, Conservation Force filed a formal petition with the USF&WS director and the Secretary of Interior to have the USF&WS revise its new regulation and suspend its enforcement in the interim.

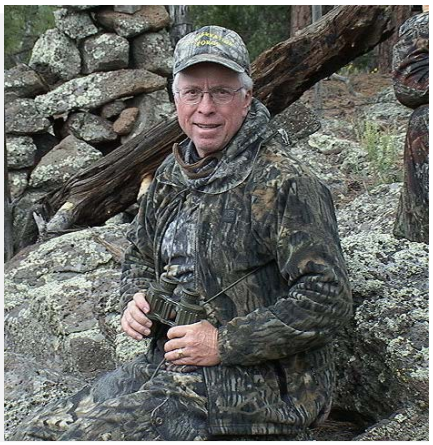
The petition was on behalf of Conservation Force, South Africa and Mochaba Developments, perhaps the largest and most responsible trophy shipping agents in Africa. Though they were not parties in the petition, Coppersmith, Inc. helped identify the problem and helped avoid unnecessary seizures. Due to their help, a lot of seizures were avoided during the months of uncertainty when the problem seemed to worsen and the USF&WS seemed unresponsive to the petition.

Sensitive intragovernmental communications took place behind closed doors between South Africa and USF&WS CITES authorities, as well as the CITES Secretariat itself. There were also sleepless nights at Conservation Force, at Mochaba and some hunters' homes. Conservation Force began drafting a suit for declaratory and injunctive relief that it did not have to file, and at least two hunters had to file petitions for remission for the return of their seized trophies. In late December, the crisis resolved when the USF&WS "clarified the intent of the regs so it does not happen again." It sent a clarification to all inspectors "recognizing the realities associated with some of those shipments." The so-called Office of Law Enforcement Guidance issued by the USF&WS is in the form of a *Chief's Directive.* After giving the history it states, **"Guidance: Imports of non-living specimens destined for the United States that have been shipped through an intermediary country and remained in Customs Control will be cleared for import into the United States, provided no other violations exist,"** signed by the Chief, Office of Law Enforcement.

The explanation in the Chief's Directive is important. It states that "[t]he primary intent of the new regulation is to prevent the misuse of the in-transit exemption, particularly when delays could be used to deliberately circumvent permitting requirements of an intermediary country. However, we have recognized that some shipments transiting intermediary countries experience delays that are beyond the exporter/importer's control." In the case of South Africa, it knew well of the delay and approved of it. Moreover, the delay was because of a US regulation requiring fumigation of the packaging before import.

Importantly, the regulation remains in effect. The "shipment must remain under Customs Control while in the intermediary country" (not new regulation) and must "stay only for the time needed to immediately transfer the specimen to the mode of transportation used to continue to the final destination." In short, we solved the problem arising from the necessary delay in South Africa, but only there and for the purpose of fumigation. Other delays are not included in this exemption. For example, two argali trophies were detained by the inspector in Chicago and were re-exported in lieu of seizure because the hunter left them in bond while he stayed over for two days in an intermediary country. He could not get a re-export permit from the intermediate country, though he tried, because the trophies never officially entered the country. So it is over, but it is not.

The overall magnitude of this crisis demonstrates the vulnerability of safari hunting and the conservation dependent upon hunting. The USF&WS emphasizes it is going to be monitor-



JOHN J. JACKSON, III
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ing in-transit delays closely. Conservation Force has once again served one of its purposes, but a special debt of gratitude is due the USF&WS for recognizing the realities associated with these shipments. When the new regulation conflicted with reality, they could have taken an uncompromising stance, which is what at one point they appeared to have done.

The *Chief Directive* for *CITES In-Transit Shipments* is posted on the Updates & Alerts page of Conservation Force's web site at www.conservationforce.org/news.html.

□ **Special Report**

Two Important Legal Actions

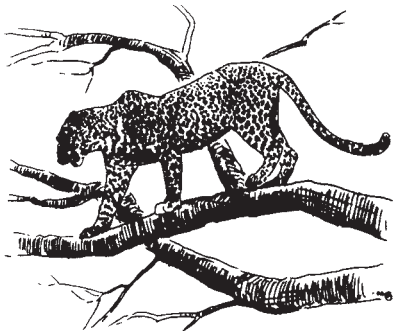
■ While the in-transit crisis was resolved short of going to court, it is time to litigate other important matters. It has been years in coming, but it is now time to implement the last resort. The pending litigation discussed below is unprecedented and will be the most important in international hunting history. It will have worldwide impact. Counting the two polar bear suits, Conservation Force is launching no less than six suits against the USF&WS.

On January 6, 2009, Conservation Force and its allied partners filed a 60-day notice of intent to sue the Secretary of Interior, Director of Wildlife and the Regional Solicitor for the Pacific Southwest Region. That notice arises from the USF&WS's seizures and forfeitures of trophy shipments because of mere technical and clerical mistakes. After a seizure the USF&WS has maintained that the trophy is "contraband;" therefore, the hunter's innocence or lack of personal fault is no defense. Hunters have had to forfeit their trophies regardless of the price of their hunts or their service to conservation.

In 2001, Congress passed a law to protect citizens from abusive seizures/forfeitures from government agencies. That was the *Civil Asset Forfeiture Reform Act*, 18 USC 983. The USF&WS, its Office of Law Enforcement and the Solicitors of the Department of Interior have repeatedly refused to honor the new legislation. Instead, they maintain the statutory protection intended for "innocent owners" is not applicable to wildlife seizures because they are "contraband." They repeatedly cite court cases that predate the reform of the law. And contrary to what they say, the law defining "contraband" doesn't include trophies at all.

We are of a far different view, as we have seen hunters lose everything from argali to elephant trophies. Consequently, Conservation Force has been waiting for the right case to arise and take to court for the benefit of everyone. We now have that case. Unless the USF&WS favorably responds to the notice, we will be filing a petition for declaratory and injunctive relief in Federal District Court to resolve the law and end the abusive regulatory practices once and for all.

The case chosen is one where an airline lost the shipment documents, including the CITES export permit, on a leopard trophy. The airline explained the situation, and the export country



issued a replacement export permit. There is a special CITES Resolution that provides for a replacement permit in such circumstances, but, as usual, the USF&WS did not honor it. Of course, it was not the hunter's fault at all, and the forfeiture of the trophy was an excessive penalty for a mishap that was absolutely harmless.

A petition for remission and then a petition for reconsideration was filed on the basis of the innocent owner defense and the CITES Resolution that expressly provides for replacement export permits in the inevitable cases of permit loss. The petition also rested on the excessive penalty or proportionality argument. It was denied in full by the Assistant Solicitor on the basis that the leopard trophy was "contraband." Who could be more innocent than a hunter waiting at home when paperwork is lost by the transporting airline and there is no dispute about the legality and identity of the trophy?

The case will establish once and for all whether the innocent owner defense applies to hunting trophies. It will decide if lawfully taken hunting trophies are "contraband" simply because of clerical and technical errors and mishaps, expirations, etc. It will decide the applicability of the US Constitution's due process clause to the property rights of hunters regarding their trophies. That is an important standalone issue by itself. It will determine the applicability of the "excessive" fines clause of the US Constitution to the forfeitures that have been taking place at an increasing rate when the penalty is disproportionate to the harm done. I repeat, the errors are after the fact and do not harm anyone.

We have confirmed that over the last several years the number of seizures and forfeitures has skyrocketed, and little consideration is being given to the innocence of the hunter/owner and no consideration is being given to the proportionality or excessiveness of the forfeiture to the technical offense that *has done no harm*. The Law Enforcement Office and the Solicitors treat trophy trade as "unfavored" trade instead of "conservation hunting." In most instances the hunting is favored by CITES and other authorities by quotas of the Parties at CoPs, non-detriment determinations and even enhancement findings. The Solicitors that should provide relief instead act

as enforcement reinforcement. They turn a deaf ear because the trophies are, they claim, contraband.

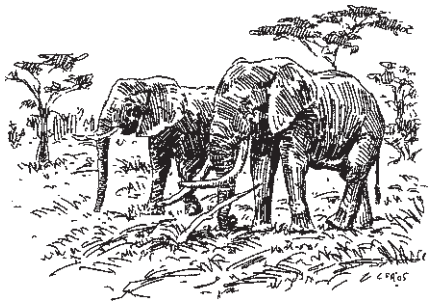
It is long past time that we all join forces to do this through Conservation Force. We need your financial support to do it. Believe me, your trophy may be next if you have not lost one or more invaluable trophies already. Hunters pay for conservation in developing nations, but are treated like criminals at home upon the importation of their trophies. Enough is enough. It is growing far worse. There is no choice but to seek the help of the courts, but to succeed we must have your support.

A second notice of intent to sue that we have filed involves the failure of the USF&WS to issue permits at all when the species are listed as "endangered" and also the failure of the USF&WS to downlist foreign species when it is in their conservation interest to do so. This is not one suit, it is a multiplicity of suits that will have to remain confidential until each is filed. This is the year that the property interests hunters have in their trophies will be determined as a matter of law. It is directly at issue in both of the polar bear cases Conservation Force has filed (appeal in 9th Circuit for spring 2008 trophies and suit in D.C. to invalidate the species' listing). It will be directly at issue in suits filed for not timely downlisting different species and for failure to grant various enhancement permits. Ultimately, the suits will decide everything from the import of black rhino to China's argali.

On January 13, 2009 Conservation Force filed the 60-day notice of intent to sue on behalf of itself and those it represents, including seven (7) other organizations. These suits are long overdue challenges of the USF&WS's permitting and downlisting practices under the Endangered Species Act (ESA). We dare not make public at this time anything more than the notice to sue until the suits are filed. The "Re:" to the notice reads "Obstruction of Foreign Programs/Failure to Issue Enhancement Permits." The notice reads as follows:

Dear Secretary Kempthorne and Director Hall,

This is a 60-day notice of intent to sue under the Endangered Species Act. It is for the illegal practice of not issuing trophy import permits for "endangered" listed species under the "enhancement" provisions of the ESA. That practice is contrary to published FWS regulations and violates the mandatory obligation to "cooperate" with the conservation efforts of foreign nations. The USF&WS has a history of listing foreign game species



over the objection of foreign nations without rational consideration of the efficacy or the negative impact on the conservation efforts of the foreign nation, then not exercising its authority to support and encourage conservation programs through the issuance of trophy import permits that would "enhance" the survival of the listed species in the wild. For example, two such species are the Suleiman markhor taken in the Targhor Project in Pakistan and wood bison taken in the Yukon, Canada. Import permits applications for both of those have languished within the USF&WS for the length of the present Administration. The knowing obstruction of some of the foremost sustainable use projects in the world and the indifference to permit applicants' "due process" and property rights continues to be unconscionable and illegal. Those are just two examples.

The prior Administration was ready to correct these illegal practices, but this Administration has delayed and denied that reform. We know and understand that the USF&WS and DOI have recommended the enhancement practice and would have adopted it but for the failure of this Administration to accept the recommendations. That leaves us no alternative but to sue.

This is also notice for the failure of the USF&WS to make a timely 90-day determination on the petition to downlist the Yukon wood bison and a 12-month finding on the petition to downlist the Suleiman markhor in Pakistan....

We incorporate by reference herein all the prior pleas, requests, comments by Conservation Force and those it represents and diplomatic protest by foreign nations. This is final notice.

In short, the Administration reneged. These suits will once and for all determine the applicability of the concept of sustainable use to the conservation and recovery of listed species. They will determine if hunters can be a force for the conservation of game animals. They will determine the rights and fair treatment of hunters themselves, as well as their conservation interests. I must humbly apologize to those hunters whose trophies have rotted while waiting for the promised reform within the USF&WS. The promises are over. But for the misleading promises given to us, we would have taken action before. Now we have no choice. Late as it is, it is now or never.

We need your support. Send your tax-deductible contribution to Conservation Force at P.O. Box 278, Metairie, LA 70004-0278.

Conservation Force Sponsor

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