Supplement to The Hunting Report Newsletter

Published Monthly

May 2006

"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

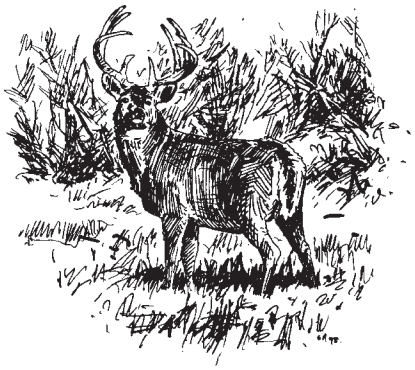
by John J. Jackson, III

One Important Nonresident Rights Case Continues

One federal court case challenging discrimination against nonresident hunters is still very much alive! All of the nonresident rights cases were dismissed last year following the passage of Senator Reid's bill. That bill (*Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief*, 2005) gave states express authority to discriminate against nonresident hunters and anglers. The suit filed by the state of Minnesota and Senator Collin Peterson against the state of North Dakota was appealed. The Attorney General of Minnesota and private counsel of Collin Peterson have made some very persuasive and authoritative arguments to the United States Court of Appeals for the Eighth Circuit. (No. 05-3012) The case was argued on March 24, 2006 and a decision is imminent.

The Minnesota case is unique. Its primary claim falls under the *Privileges and Immunities Clause* of the US Constitution. It singles out the hunting rights of nonresidents that own or lease land in North Dakota.

The right to the equal use of property is the issue, not recreational hunting. Though recreational hunting has not been found to be a protected right under the Privileges and Immunities Clause, "property rights are one of the few rights that have been consistently found to be protected by the Privileges and Immunities Clause." The US Supreme Court has held that the clause prohibits discrimination against nonresidents "in the acquisition and enjoyment of property." Resident landowners don't even need a license. North Dakota fully exempts resident landowners and leasees from licensing for waterfowl hunting. The relevant North Dakota Code section provides: "Any resident, or any member of the resident's family residing customarily with the resident, may hunt small game (includes waterfowl), fish, or trap during the open season without a license upon land owned or leased by the resident." The claim arises from North Dakota's discriminatory restrictions on nonresident's use of their own land.



Minnesota is also continuing with its Dormant Commerce Clause claim. The Trial Court that dismissed the case did not rely upon the Reid Bill. The Judge held a dim view of the Reid Bill's assertion that recreational hunting and fishing are not commerce under the Commerce Clause. He did not feel that Congress can define or limit the Constitutional meaning of commerce. That would take a Constitutional Convention, not just a rider to an appropriations bill. The Court expressed that "Congressional interpretation of what is and is not interstate commerce is not controlling on the judicial branch."

This is a waterfowl licensing case. Waterfowl are migratory species

largely regulated by the USF&WS. Minnesota itself admits that "a state cannot own migratory birds." Management necessity is not the basis for the discrimination. The states of South Dakota, Alaska, Colorado, Kansas, Montana, Nebraska, Nevada, Utah and Wyoming filed a joint *Amicus Curiae* brief in support of North Dakota and against Minnesota. Their arguments ring hollow.

Other Developments

■ The discrimination trend against nonresidents continues to worsen. Licensing was made more discriminatory in Nevada, Arizona, Colorado and other states in 2005.

Even Conservation Force has suffered some retribution for its early leadership role in securing a more equitable share for residents. Conservation Force has lost some important funding and yours truly was threatened with expulsion from one important organization very dear to him. Nevertheless, we continue to look for more balanced solutions. During the summer, I was asked to address the issue before the American Wildlife Conservation Partners (AWCP) at its annual conference. Later, I addressed the State Sportsmen's Caucus Assembly in a similar search for solutions.

My points at both meetings were that the Reid Bill is a wholly one-sided resolution, that most land in some of the discriminating states is federal land primarily managed by the federal government at the cost of nonresidents in the amount of billions of dollars - more than all of the state wildlife management budgets combined. Nonresidents are even bearing most of the state-borne wildlife management costs in those states discriminating against nonresidents.

It's not the nonresidents who are doing the discriminating and it's not nonresidents who made it a Congressional issue. Instead, nonresidents are the ones paying the states' bills. Nonresident hunting would be a growth component of the hunting world but for the artificial barriers being erected by some local groups.

We have not found a solution to this problem, but one was suggested recently at the North American Wildlife Conference. A prominent Western Director suggested that hunters' energy should be redirected to educating local people on a state-by-state basis. It must be their political will. The fate of nonresident hunting and fishing rights is in their hands and has been relegated to each state independently to determine for itself as the people of each state dictate.

Service Proposes Sweeping Trophy Import Rules Changes

■ On April 19, the US Fish & Wildlife Service (USF&WS) issued a 228-page proposal of internal rules for CITES permitting. The new regulation has no equal in the history of the Service and is not customer-friendly.

The stated objective is the revision of the Service's internal operating rules to incorporate decades of Resolutions passed at CITES Conferences of the Parties. That is a serious mischaracterization because the proposal selectively goes far beyond that. Comments are due on or before May 19, 2006, a mere 30 days from the time this is written.

The proposal is really a "re-proposal" of rule changes first noted for comment in 2000. At that time, Conservation Force and others opposed many of the proposed rule changes but Conservation Force's most important comments have been largely disregarded.

One important provision of the Endangered Species Act (ESA), Section 9 (c)(2), sets out a prohibition against the USF&WS regulating importations of trophies of threatened listed species when they are already protected by Appendix II of CITES. That *Dingell Amendment* of the ESA was designed to prevent the Service from interfering with trophy imports. Nevertheless, the Service proposes "that a person who is importing a specimen under this provision must provide documentation to USF&WS at the time of import that shows the specimen was not acquired in foreign commerce in

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 ISSN 1052-4746. This bulletin on hunting-related conservation matters is published periodically free of charge for subscribers to *The Hunting Report*, 9300 S. Dadeland Blvd., Suite 605, Miami, FL 33156-2721. All material contained herein is provided by famed wildlife and hunting attorney John J. Jackson, III with whom *The Hunting Report* has formed a strategic alliance. The purpose of the alliance is to educate the hunting community as well as proadvocacy of hunting rights opportunities. More broadly, the alliance will also seek to open up new hunting opportunities worldwide and ward off attacks on currently available opportunities. For more information on Conservation Force and/or the services available through Jackson's alliance with *The Hunting Report*, write:

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the course of a commercial activity." How this requirement can be fulfilled is not specified. The Service confirms that no import permit is required for Appendix II species, but it conditions the import under some circumstances.

The Service is even proposing to redefine "sport-hunted trophy." "The definition does not include handicraft items or items manufactured from the trophy used as clothing, curios, ornamentation, jewelry or other utilitarian items." "We (the Service) do not agree that utilitarian items manufactured from a trophy should still be considered a trophy. We recognize that manufactured items have been included in trophy shipments imported in the past, but this practice has caused problems in differentiating between commercial and noncommercial shipments…." The Service does not give any CITES-related basis for the definition change. We know that this change was suggested to the Service by anti-hunters. Of course, the proposed rule would only apply to Appendix I species because they are the only trophies requiring import permits. The proposal gives examples of items like briefcases and handbags. It obviously prohibits import of elephant hair bracelets, leopard teeth jewelry, etc. There is no statutory or basis in the CITES Resolutions for this infringement on hunter's enjoyment of their trophies. This is wholly the subjective decision of technocrats who have decided what personal use you can make of your trophies. Of course, you still can have the functional part made from your trophy after it is imported.

The Service is also restricting some uses of trophies after they are imported. The Service feels that trophies should only be put in personal trophy rooms for personal use. They can not be sold. The Service has added meaning to the fact that they cannot be sold. "[A] transfer, donation, or exchange, may be only for noncommercial purposes…. thus, we propose to add this new section that conditions the import and subsequent use of CITES wildlife or plant specimens. The import and subsequent use of Appendix I specimens and certain Appendix II specimens, including a transfer, donation, or exchange, may be only for noncommercial purposes. Such imports are conditioned by the regulation that the specimen and all its parts, products, and derivatives may not be imported and subsequently used for any commercial purpose. The importer will not be allowed to use or transfer the specimen for commercial purposes once in the United States. Any financial benefit of gain would include, but not be limited to, the donation of these types of specimens, including sport-hunted trophies, where the owner claims a tax deduction or benefit on his or her local, State or Federal tax return." The Service gives an example: "One commenter specifically requested that the sale of trophies by estates or trusts be allowed. Although we do not consider transfer to an heir a change in the use of a specimen, the sale or donation of a specimen that results in some form of financial benefit or gain would be considered a commercial activity and not allowed."

The Service states, "We propose to incorporate into 50 CF part 23 a provision that Appendix I specimens and certain Appendix II and II specimens may not be imported and subsequently used for a commercial purpose. This provision is to prevent commercial use after import when the trade allowed under CITES is only for a noncommercial purpose. The provision would apply to Appendix II specimens that are subjected to an annotation that allows noncommercial trade of sport-hunted trophies, such as those of African elephant populations of Botswana, Namibia, South Africa, and Zimbabwe. Under the regulations proposed here, these types of trophies may be imported for personal use only and may not be sold or otherwise transferred for economic gain, including for tax benefits, after importation into the United States." The Service quotes from Resolutions of CITES expressly providing that the Appendix I trophies of leopard, markhor and black rhino be "imported as personal items that will not be sold in the country of import."

The primary purpose of a sport hunt is recreation and not an incidental donation to a public education charity after the fact. Moreover the amount of such a tax deduction is by law only a fraction of the cost of the hunt. In short, it costs more to acquire a personal trophy than the amount of the deduction and, moreover, deductions are not dollar for dollar. Deductions only offset a fraction of a person's income depending upon that person's income bracket. If the person's "primary" purpose was really commercial (donations are noncommercial activities to everyone else), it would be a commercial loss in our opinion. Donations are losses, not gains, and a noncommercial activity from the get-go. That is why they are deductible.

The Service is taking it to an extreme. We must presume the trophy owner would be charged criminally under the *Lacey Act* if he were to make a tax deductible donation of the trophy or is eligible to take such a deduction. We presume there will be no more elephants to replace those centered at the Smithsonian or in the Ackely Room of the New York Museum of National History. Does this mean that a hunter's cash donations to the CAMPFIRE Program during an elephant hunt is a crime? If one buys a hunt of an Appendix I species at a convention above value, will it now be criminal to import the trophy because part of the costs may be deductible? This was not in the original proposal in 2000. It is a recent addition and an overreaction to anti-hunting activists. The Service is unwittingly doing the work of the anti-hunting lobby.

More permits are to be denied through "abandonment". If the Service finds that an application is incomplete, it will contact and give applicants 45 days to provide additional information. If the applicant does not respond within the 45 days, the Service proposes to "abandon the file" and "not re-open the application if the applicant sends the additional information at a later date." Of course, the applicant can submit a new application with a new application fee. The practice was to re-open the file when the applicant was able to respond even though at a later date. The Service itself can take years and often does, but will no longer ex-

tend that right to applicants.

Permit reconsiderations and appeal reviews are also to be changed. The review will be based "on the original application" not supplemental information submitted in response to the denial. Once the permit is denied for whatever reason, the applicant can't then submit the identified information needed. This change can run applicants in circles for years. Even the Service itself often does not determine what it needs or wants until the negative determination is made sometimes years after an application is submitted. Only then can applicants identify what more is needed in the subjective determination process. Permitees may never get to the reconsideration or appeal process, much less court after that, if they must start the process all over again. No rationale for the "run around" proposal is given.

That proposed change may not mean much to the lay hunter but it means everything to Conservation Force and others that represent your rights. The recent Black Faced Impala permit denials are an example, because the Service is applying this new procedure in that case. The Service did not process the permits at all for more than a year and would not even respond to a Freedom of Information Request about what the status of the permits were or what information might be needed. In fact, the denial of the FOIA is itself on appeal. The Service never gave a clue as to what if anything more was needed by the applicants and never requested any further information. It then out-of-the-blue denied all the permits for wholly unanticipated reasons with the statement not to submit additional information. It instructed the applicants to re-file all over again. The practice has been for the Service to expressly ask for and welcome supplemental information from the applicant. The new practice will make using permitting as a conservation tool nearly impossible. The Service itself does not know what proof of enhancement or nondetriment it needs until it receives an application and the permit applicant does not know either until the Service makes its determination in response to a permit. The past practice of adding information to the application as the Service decides and identifies what more it needs to grant the permit is being taken away from hunters by this proposed rule.

The Service is also proposing the acceptance of retrospective permits in some very limited circumstances when errors are made. Unfortunately, it is so convoluted and limited as to provide little or no protection to permit applicants. For example, an arbitrary condition is added that a permitee is not eligible for relief if he or she has ever had a CITES permit before. It prohibits after the fact correction of errors of the permit applicant and any independent-expert broker or taxidermist on behalf of the import permit applicant.

Contrary to the pretext that the Service is implementing the Resolutions of CITES through the proposed regulation changes, it has elected to disregard the meaning and spirit of the two primary CITES Resolutions that govern import of hunting trophies. The Service has decided not to accept the nondetriment determinations made by range nations and not to accept the quotas set by the Parties at a Conference of the Parties. In effect the Service instead presumes both are incorrect and must make its own determination on a case-by-case basis instead of accepting them at face value as the Resolutions provide. This flies in the face of the *Elephant Law Suit* of the early 90s that yours truly won and it is contrary to the hours of vehement range state speeches during COP 9 in Fort Lauderdale when Resolution 2.11 was revised and the Quota Resolution was adopted. The Service is doing exactly what it wants independently of any statutory authority and contrary it to the relevant Resolutions.

The Service is also insisting on duplicating the range nation's biological nondetriment findings rather than just determining that the "purpose" of the importation of an Appendix I species is not detrimental. Its rationale is this: "The findings for the import of an Appendix I species is based on a consideration of purpose for which the specimen will be used upon import into the United States. (That much we agree upon). We can determine the potential for detriment, even when tying it to the purpose, only if we know the biological and management status of the species….What effect the purpose of an import may have is impossible to determine without considering scientific and management information on the species from the exporting country." This regulation would duplicate the work of range countries contrary to what the founders of CITES decided. The founders reasoned that range nations are in the best position to make biological findings. The regulation is far removed from determining the mere "purpose" of the import which importing countries are in the best position to make. The proposal would be a serious burden on lawful trade and an assault on trophy hunting.

The proposal also limits importation of leopard to two, Markhor to one and black rhinoceros to one per year. Special tagging requirements are set for those trophies including indicating which number of the annual quota a particular trophy is. Every separate part must be individually tagged with the information. Over the long term, many hunters can expect to have their personal trophies seized and destroyed because of tagging errors and omissions. – John J. Jackson, III.