Supplement to The Hunting Report Newsletter

Published Monthly

December 2003

"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

Antis Tell Court They Would Rather See Elephants Euthanized Than in a Zoo

Court Allows Live African Elephants to be Imported for First Time in More Than a Decade

On August 8, 2003, the United States District Court in Washington, D.C., denied a request by animal rights organizations to stop the importation of live African elephants into the United States. Consequently, live elephants were imported pursuant to a permit issued by the US Fish & Wildlife Service (USF&WS) for the first time since late 1989 when the African elephant was listed on Appendix 1 of CITES. The case is important and significant as pointed out below. It addressed everything from how "non-detriment" determinations are made for import permits of all Appendix 1 species to the real motive behind animal rights litigation. In the words of the lawyer for the animal rights plaintiffs, "[I]t's an extremely important precedent that you're (court) being asked to make here . . . . The world's leading experts on African elephants . . . say they are extremely concerned about the precedent this decision is going to set for the international trade, not only in this species, this Appendix 1 species, but in other Appendix 1 Species. . . ."

The plaintiffs sought to invalidate

import permits issued by the USF&WS to the San Diego and Lowry Park Zoos that were trying to import elephants from Swaziland. The plaintiffs were the Born Free Foundation, Elephant Alliance, Elephant Sanctuary, In Defense of Animals, Animal Protection Institute (API), People for the Ethical Treatment of Animals (PETA), Animal Welfare Institute, San Diego Animal Advocates, Animal Legal Defense Fund, Toshimsuke Katoh and Richard Allan.

The animal rights plaintiffs raised every possible argument including challenging the non-detriment determination made by the Service. All import permits for Appendix 1 species, whether for hunting trophies or live animal trade, require the Service to make a non-detriment finding. In technical jargon, the Service must determine that the "purpose of the import is not detrimental to the species." "The country receiving the animal under CITES is supposed to look at the purposes. The country exporting is supposed to look at whether it's detrimental to the survival of the elephant," said Wayne Hettenback representing the Department of Justice.

The plaintiffs tried to shift

Swaziland's determination to the USF&WS, but Judge John D. Bates kept rejecting that. The plaintiffs argued that the Service had to duplicate the biological findings made by the exporting country, but the Service's position, which the Court accepted, was that the US (importing country) was only required to make a "purpose" finding. The protectionist even argued that the Service should take into account the effect of the removal of the elephants on the "social structure" of the elephants remaining in Swaziland. In this case, the U.S. Attorney actually admitted that "they (the Service) do more in practice than they're required to under the language of this convention."

That doing "more in practice" itself is not good for U.S. hunting interests. That practice is what led to the *Elephant Trophy Import Guidelines Suit* I filed and won against the Service in the early 90s. Despite the success in that elephant trophy importation case, the Service appears to be continuing their excessive and illegal practices that can make import of trophies of Appendix I Species nearly impossible.

The zoos and USF&WS that issued the permits argued that the import of the elephants was necessary to reverse the decline in the gene pool of African elephants in the U.S. because of the lack of successful breeding. In other words, the elephants in the zoos in the United States are at risk, which risk would be lowered with the importation. The plaintiffs demonstrated complete contempt for maintaining elephants in the United States for exhibition. The antis complained that "[i]t is for one purpose only: to make more animals to put on display at these zoos and other zoos around the country because they're planning on trading them and entering them into a captive breeding program with other zoos." The antis claimed that was exclusively a "commercial purpose," which trade is prohibited for CITES Appendix 1 species. Apparently, the antis do not care if U.S. zoo elephants genetically decline or cease to exist. They do not want animals in zoos. The ESA and CITES have become their tools against zoos.

The plaintiffs stated on the record that they would prefer the elephants be euthanized than imported. They prefer that animals cease to exist rather than be hunted. This is a position that animal rightists organization leaders have made to me personally at various CITES meetings over the years. In this case, the elephants had been separated and were to be culled in Swaziland if they could not be imported:

THE COURT: But his most recent declaration is pretty unequivocal.

MS. MEYER: He says it again. He says it again. 'I would like to avoid it if I could.'

THE COURT: But he says, if we can't export these elephants now, I'm going to cull them.

MS. MEYER: Because, Your Honor, that's a convenient thing to say to make sure the deal goes through.

THE COURT: It may be Russian roulette, but how do I look behind it?

MS. MEYER: I think there's plenty of evidence in the record for you to look behind it. And the last thing I want to say, Your Honor –

THE COURT: You're telling me to let the chips fall where they may, and the chips falling where they may, may be that the elephants are culled.

MS. MEYER: If the elephants are euthanized in Swaziland, if Mr. Reilly and the zoos or their brokers all decide that that's the better outcome here than to have a preliminary injunction in place until you can decide the merits, that would be a better outcome than to have these elephants put in crates, put on airplanes, brought over here, trained with bull hooks, put in cages, and live the rest of their lives in captivity. That's right, Your Honor.

THE COURT: That's the position of your client.

MS. MEYER: Absolutely, Your Honor.

THE COURT: Or at least some of your clients.

MS. MEYER: All of them. Thank you, Your Honor, I have nothing further.

Twice in his decision denying plaintiffs' preliminary injunction, the trial judge cites plaintiffs' shocking position:

1.) "In the end, as stated unequivocally

JOHN J. JACKSON, III
Conservation Force

"SERVING THE HUNTER WHO TRAVELS"

World Conservation Force Bulletin

Editor/Writer
John J. Jackson, III

Publisher
Don Causey

 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:

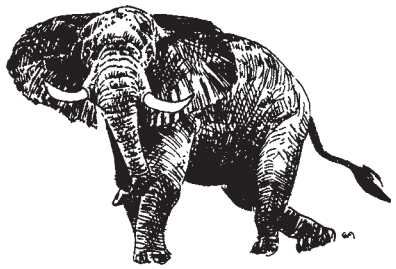
Conservation Force
One Lakeway Center, Suite 1045
Metairie, LA 70002
Tel. 504-837-1233. Fax 504-837-1145.
www.ConservationForce.org

For reprints of this bulletin or permission to reproduce it and to inquire about other publishing-related matters, write:

The Hunting Report
9300 S. Dadeland Blvd., Suite 605
Miami, FL 33156-2721.
Tel. 305-670-1361. Fax 305-716-9119.

by counsel for plaintiffs, given the choice, plaintiffs would rather see the elephants dead than in a zoo. . . ." 2.) "[I]f an injunction is granted, the elephants will be culled. This might appear to mean, somewhat ironically, that plaintiffs would be irreparably injured as the result of the very injunction that they request; however, at the August 6 hearing in this matter, counsel for plaintiffs explained that, from plaintiffs' perspective, the elephants will be better off – and thus plaintiffs' interests will be more fully advanced – if the elephants are killed rather than imported and placed in the zoos. Taking the plaintiffs at their word, the Court concludes, on balance, that plaintiffs' interests – interests about which the Court has some concerns in terms of standing - will be harmed if an injunction is not granted, yet somewhat advanced if an injunction is granted."

In short, the culling of the elephants would ironically advance plaintiffs' interests! They view the risk that the elephant would be culled as the lesser of two evils. The Environment News Service quotes Dr. Michael Hutchins, Director of Conservation and Science for the American Zoological Association (AZA), as commenting "we can provide these elephants with excellent care, rather than seeing them culled, as their current park home cannot accommodate them. It is surprising animal rights activists who profess to care about animals would rather have them killed, than to live and help support essential wildlife conservation, research and educational efforts."



The elephants were imported in late August, but the underlying suit is still proceeding in the trial court. The denial of the injunction has also been appealed. The lawyers for the protectionists and animal rightists plaintiffs were Meyer and Glitzenstein, the same lawyers as in the recent *Argali* case (see below). Also, one of the plaintiffs, Animal Legal Defense Fund, was a plaintiff in the *Argali* case. The primary motion before the Court at this time is one to dismiss the case on the grounds that plaintiffs do not have standing. That is what won the *Argali* case, so we are watching this elephant case closely for we expect the *Argali* case may be appealed. In fact, the government cited our *Argali* case as authority to deny the elephant/zoo case request for an injunction. "This case (*Argali*) supports defendants' arguments that since the interim relief the plaintiffs seek does not prevent the harm to their interests, the Court should not enter an order that does not redress this harm." They actually attached a copy of the *Argali* decision. The appellate court in this elephant case may also establish important precedent on how non-detriment determinations are to be made, which apply to import of trophies of Appendix 1 game animals, as well as to trade in live animals. I must express sympathy for the zoos, the Service, and the conservation of elephants for all that the protectionists are putting them through. We cannot protect our institutions, ourselves, our wildlife or our way of life without a commitment to fight for our rights.

Briefly Noted

Another Round Won in the *Argali* Case: On October 30, 2003, the Federal District Court Judge denied the Request for Reconsideration filed by the anti-hunting organizations to overturn the *Argali* decision. The Fund for Animals and other antis had asked the court to reconsider the recent summary judgment that dismissed their attempt to stop import permitting of *Argali* hunting trophies. The judge ruled that an injunction against imports "would actually lead to increased injury to *Argali* sheep and decreased conservation efforts." In other words, like the zoo elephant case above, the purported interest of the plaintiffs is an ironic contradiction.

The court quoted the sworn declaration of Raymond Lee, President of the Foundation for North American Wild Sheep, that "if hunting programs are eliminated, the funding available for wildlife conservation programs would also be eliminated. . . . The revenues from U.S. hunting interest is both indispensable and irreplaceable."

The court held that "plaintiffs ignore the two primary pieces of evidence presented by Intervenors, which show that decreased injury to *Argali* sheep and increased conservation efforts would be unlikely if issuance of U.S. importation permits were enjoined as requested by plaintiffs." The court quoted from the sworn affidavits and declarations submitted by both the Conservation Force team of intervenors and the SCI-U.S. Sportsmen's Alliance intervenors. The court cited the affidavit of Bob Kern "that the killing of *Argali* sheep actually increased" when import permits had before been banned because revenue and incentives to control poaching were lowered by the ban. The court also cited the Affidavit of Ray Lee, President of FNAWS, in its finding that "*Argali* conservation efforts will likely decrease if U.S. importation permits are withdrawn because these countries do not have excess governmental funds for *Argali* conservation." The court continued, "Plaintiffs fail to suggest how these countries would fund such conservation efforts in the absence of revenue generated by selling hunting permits to U.S. hunters." The court concluded "that Plaintiffs still fail to fulfill the redressability requirement of standing because they cannot show that it is highly likely 'that the injury

[to A*rgali* sheep] will be redressed by a favorable decision.'"

Insight: Let me share some insight with you. We wonder if anyone would have won on "standing" if they had gone it alone? Although Conservation Force submitted a significant number of authoritative affidavits, the cumulative effect of all intervenors hammering the same point was a winning combination. When the SCI-U.S. Sportsmen's Alliance chimed in on the same point, the cummulation was too much for the Judge to ignore. Conservation Force shared its briefs with the SCI-U.S. Sportsmen's Alliance Intervenors and beseeched them to join in the standing argument and we are certainly glad they did.

We did the same thing with the government, which chose not to join in support of the intervenors' motions. Their failure nearly scuttled the ship. In their request for reconsideration, the antis argued that the government did not share our beliefs because the government had not argued the point. Luckily, the government attorneys' after-the-fact brief stating that it fully agreed with the Judge's decision that the plaintiffs did not have standing crossed in the mail.

Another positive spin-off from the *Argali* suit is that during the second year of the *Argali* litigation, SCI finally decided to add a full-time litigation attorney to its staff. I have been urging SCI to do that for more than a decade. In fact, I began representing SCI *pro bono* in litigation out of necessity 14 years ago in the lawsuit challenging the Service's unpublished guidelines for import of CITES Appendix 1 Species, the Elephant Trophy Import Guidelines Suit, *SCI v. Luan*. There was no choice if the surge in hunting losses was to be stemmed. The elephant hunting was also the highest revenue earner in many of the African countries. It was also the threat of litigation that forced the Service to begin issuing polar bear import trophies after the Marine Mammal Protection Act was amended to permit imports. The threat of litigation was absolutely necessary to counter balance the same threat by the antis that had halted the implementation of the reform. The necessity to represent SCI *pro bono* for years changed the course of my personal and professional life, as well as my wife's life. It was one of the necessities that led to the formation of Conservation Force. Initially, it was a great personal sacrifice. Now, it is our whole life as well. My success in court also helped change the course and self-image of SCI. It is

ironic today, that the use of the term "advocacy" was then found offensive by key SCI staffers and others. The elephant wars also influenced the Wildlife Legislative Fund of America (now USSA) to formalize its litigation division, though WLFA had long blazed the litigation trail and is the leader in that category by far. Now that we have Conservation Force, USSA and SCI with litigation capacity the work of turning back the tide can begin in earnest.

Scimitar-Horned Oryx, Addax and Dama Gazelle Listing Proposal: The comment period for the proposal to list these three North African species as "endangered" closed on October 22. The original proposal began in 1991. There are no scimitar-horned oryx, only a few hundred addax and a few thousand Dama gazelles reported to be left in their particularly harsh, desert, historical ranges. Unregulated hunting is partially blamed. If anyone has useful information that they would like to share with Conservation Force please contact us.

Conservation Force filed a comment opposing the listings. We advised the Service that "unless the Service makes special effort, the net effect of the proposed listings will be negative" because the ESA does not provide the array of benefits for foreign species that it does for domestic species and because of the costs and barriers the listings would add to the captive breeding, propagation and restoration of the three species.

We also challenged the validity of listing the species under a proposed rule that is 13 years old when the legal time limit is one year. These species are already protected from trade by their Appendix 1 listing under CITES, which adequately controls trade in the species without the added costs and burden of an ESA listing.

Substantial numbers of all three do exist outside of their historical range in captive breeding programs, particularly in Texas and the Republic of South Africa. Consequently, we have urged the Service to treat those differently so as not to interfere with their continued propagation and/or reintroduction into the wild. We cited an instance in 1996 in which it took more than a year and a fortune to export listed Arabian oryx from the U.S. because of the permitting difficulties with "endangered" species.

We have pledged to help with their reintroduction through Conservation Force's Ranching for Restoration Program. – *John J. Jackson, III.*

Conservation Force Sponsor

The Hunting Report and Conservation Force would like to thank International Foundation for the Conservation of Wildlife (IGF) for generously agreeing to pay all of the costs associated with the publishing of this bulletin. IGF was created by Weatherby Award Winner H.I.H Prince Abdorreza of Iran 25 years ago. Initially called The International Foundation for the Conservation of Game, IGF was already promoting sustainable use of wildlife and conservation of biodiversity 15 years before the UN Rio Conference, which brought these matters to widespread public attention. The foundation has agreed to sponsor *Conservation Force Bulletin* in order to help international hunters keep abreast of hunting-related wildlife news. Conservation Force's John J. Jackson, III, is a member of the board of IGF and Bertrand des Clers, its director, is a member of the Board of Directors of Conservation Force.

International Foundation for the Conservation of Wildlife