SPECIAL SUPPLEMENT

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

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Special Coverage: Getting To The Root Of The Trophy Seizure Crisis – The History and Genesis Of The Problem

NEWS...NEWS...NEWS

John J. Jackson III

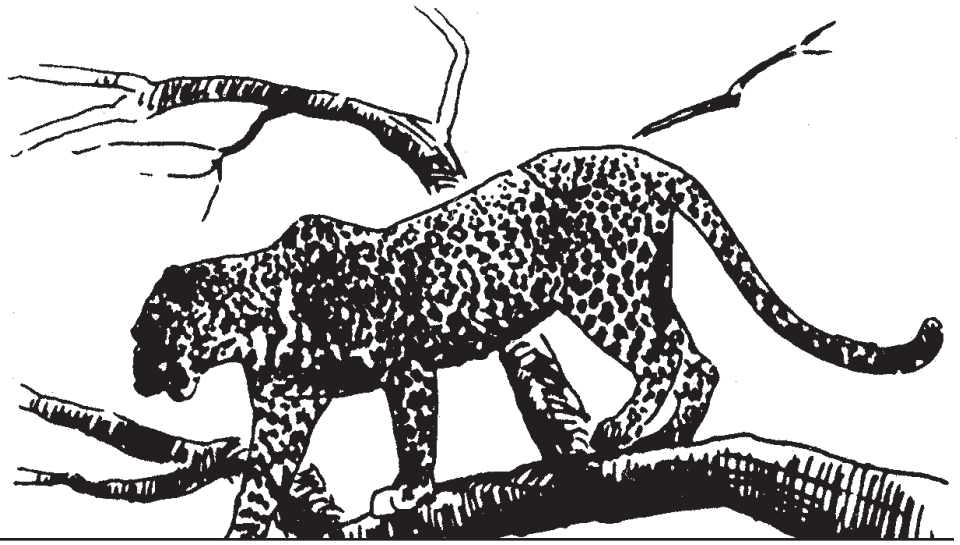
The increase in the senseless seizures and forfeitures of hunting trophies by the US Fish & Wildlife Service (USF&WS) over the past two to three years has been perplexing. We have been on a search to understand if the apparent problem is real. If it is real, then what exactly is the change? What caused the change? Can we do anything about it? This is the result of our investigation and is information that every hunter in the entire conservation community needs to know and understand.

Unfortunately, the changes in seizure and forfeiture practices and policy are real. The changes are embodied in the USF&WS *Service Manual*. Those changes occurred without direct public notice, participation or fanfare. The *Service Manual* is an internal document that sets out the operational policy and practices of the USF&WS and its Law Enforcement division. The silent change in the *Manual* is an abrupt deviation from nearly three decades of past practices and policy. It is an unparalleled change in practice.

The public policy position of Congress towards seizure and forfeiture of wildlife products has guided the Agency's practices in the past. That is no longer true. Congress has explicitly urged the Department of the Interior to afford property owners of trophies an opportunity to prove their good faith or innocence and the fact that the item was legal even if the importation was "not technically in compliance with the law." When reforming the Lacey Act in 1981, Congress spelled this out.

> *The harshness of this provision is mitigated by Section 5(b)'s incorporation of the Customs forfeiture provisions, including the remission and mitigation provisions. There will be instances where the merchandise assumes contraband status as a result of a minor, technical violation. For example,* ***as a result of an honest mistake, an individual may not have all of the foreign documentation that is required for importation*** *of a non-endangered species. Following seizure in this country, either before or after a decree of forfeiture has been entered, the individual may provide the Secretary, or the Attorney General,* ***with reliable proof from the foreign country that the shipment was in fact a legal shipment****. In such a case,* ***the government has the discretion to remit or mitigate the forfeiture.*** *The Committee* ***urges*** *the Secretary and the Attorney General to develop* ***a policy regarding such remissions and mitigations that affords owners of property subject to forfeiture the opportunity to prove their good faith or innocence and the fact that the merchandise was legal even if the importation was not technically in compliance with the law.***
>
> Legislative History, P.L. 97-79 [page 13] Section 5 (*Forfeiture*); page 1760 Congressional Record (emphasis added)

As "urged" by Congress, it has been the practice of the USF&WS not to seize and also to remit (return) seized trophy imports when the importation violation was only a technical error but otherwise the trophy was legal. Now the practice is just the opposite. Technical errors are said to invalidate the permitting and convert the otherwise lawfully taken trophy into contraband that cannot be returned because it has become illegal to possess. Trophies are now being seized and forfeited when the errors are harmless, merely clerical errors of no biological significance, and even when the clerical error is a harmless and correctable mistake of the issuing government. The change is contrary to Congressional intent.



Congress has also made the policy clear that forfeiture should not be excessive:

> *There will be occasions when this sanction is appropriate (forfeiture), but the Committee believes that the Government should use its discretion in using this authority* ***to make sure that the remedy requested fits the violation.***
>
> Lacey Act Amendments of 1981, P.L. 97-79 [page 14]; page 1761 Congressional Record site (emphasis added)

This has been the Congressional intent for three (3) decades. Unfortunately, the norm is now not to exercise discretion. I repeat, every error or omission of any kind, is now treated as a violation that converts your trophy to "contraband."

The maximum fine for the technical violations that the rash of seizures have been based upon is $500 (16 USC 1540 (e)(4)(A)), yet the USF&WS is forcing the forfeiture of trophies costing more than $100,000. The Agency no longer gives any consideration whatsoever to the cost of acquisition, to any component of that cost, or to the deep personal value to the hunter. The forfeitures in nearly all instances no longer fit the violation. The disparity in value has been 10 to more than 200 times greater than the maximum fine for the underlying technical paper error. Moreover, the Agency refuses to accept payment of the maximum civil fine in lieu of forfeiture.

Following the 1981 reform of the Lacey Act, the USF&WS (Agency) implemented the policy and practices suggested by Congress. The Agency adopted the following exemplary provisions in the *Law Enforcement, Wildlife Inspection Policy and Procedures part of the Service Manual*, Part 443.

> *(1) Obtain corrected or new CITES or foreign law permit.*
>
> *(i) For wildlife shipments generally, Service officers may* ***allow the importer/exporter to obtain a corrected CITES permit when a foreign CITES Management Authority admittedly has made an error*** *on an existing CITES permit after official consultations between both nations have occurred and the foreign nation has agreed to issue a corrected CITES permit. The Service will not allow importers/exporters to obtain a CITES permit when a permit was never issued for a wildlife shipment.*
>
> Fish and Wildlife Service – Law Enforcement; Part 443 – Wildlife Inspection; 443 FW 1; Chapter 1: Wildlife Inspection Policy and Procedures (emphasis added)

> *6.9 Foreign Government Action. It is* ***Service policy not to seize wildlife*** *which is accompanied by permits issued by the proper foreign government authority and that authority has failed to supply required information (e.g., permit states as per attached list, instead of listing the species) or has extended the expiration date.* ***Such shipments should be released on the grounds that the issuance of the permit was beyond the importer's control and that the importer should not be held liable for a foreign government action.***
>
> ***7.5 Grace Period***
>
> *A. Policy. An importer may be granted a period of 30 days to provide the required documents or to satisfy the FWS requirements which caused the refused clearance. The purpose of this* ***grace period*** *is to allow for locating lost or misplaced documents or to obtain documents which qualify to be issued ex post facto (e.g., pre-Convention and captive-bred certificates.)*
>
> Service Manual 1(4-83), (emphasis added)

These are only three examples of the better policy and practice before the recent change. This was the guidance for the port wildlife inspectors of USF&WS Law Enforcement. These provisions were wholly eliminated from the Law Enforcement section of the *Service Manual* chapter in March of 2008. That change was not to implement Congressional policy or intent. It was to end-round Congressional legislation Congress adopted to better implement the long existing public policy against unfair forfeiture.

In 2000, Congress passed a law to protect all "innocent owners" from forfeiture under "any" federal forfeiture law. The Civil Asset Forfeiture Reform Act, CAFRA, expressly codified

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the same public policy specified by Congress when reforming the Lacey Act in 1981 but for forfeitures under "any" federal law, not just federal wildlife law, 18 USC 983(d). CAFRA provides that "no innocent owner" shall forfeit his property under "any" federal forfeiture law. CAFRA also expressly provides that forfeiture shall not be disproportionate to the offense, i.e. the remedy should fit the violation. CAFRA was a codification of the public policies Congress had long expressed, i.e. the American policies of fairness and proportionality.

CAFRA should have fortified the long-term fair practices and policy in the USF&WS Service Manual. Instead, its toothy provisions that notice of seizure be given by a certain date, for attorney fees when the seizure was not warranted and any other protections afforded the property owner caused a great deal of consternation in the Law Enforcement Division of USF&WS. The time deadlines under the new law were of particular concern.

CAFRA went into effect on August 23, 2000. That had an unintended effect. It caused Law Enforcement to adopt the negative policy and practices of today. Here is self-explanatory correspondence:

As many of you know, CAFRA, which went into effect on August 23, 2000, significantly changed asset forfeiture practices and procedures. Perhaps most significant to us, CAFRA places new burdens and time limits on the government and allows claimants to recover interest and attorney's fees.

We must now send a notice of administrative forfeiture within 60 days of detention or seizure of an item. Further, a civil judicial complaint must be filed by the United States Attorney within 90 days of the filing of any claim contesting the administrative forfeiture. A bond is no longer required to file such a claim.

The Department and the Service are looking into several ways to address problems associated with CAFRA. ***A proposed regulation is being drafted which, among other provisions, would declare most illegal wildlife imports and exports to be "contraband." "Contraband" items are exempt from the CAFRA time frames.*** *Although the proposed regulations would only deal with wildlife imports and exports, such seizures make up most of our civil forfeiture actions…. Suffice to say, we can anticipate continued changes in the way we handle civil forfeiture.*

Memorandum from Asst. Regional Director of Law Enforcement, Region 1, to All Special Agents and Wildlife Inspectors, Region 1; *Subject: Civil Asset Forfeiture Reform Act (CAFRA) of 2000*; dated October 18, 2000 (emphasis added)

This pertains to all of us, even if we don't work ports so please familiarize yourself with the issues!

Most of you know by now that Congress changed the Civil Asset Forfeiture laws (CAFRA) effective 8/23/00. To this point you probably haven't been told much about what affect those changes have on our operations. This lack of information has mostly been a result of the fact that no one really has had any idea what the affects would be, so we didn't know what to tell you.

For the last month or so a team of us has been working on trying to understand the changes, develop new processes, and write new regulations so that we may come into compliance with CAFRA. I'd like to say that we have things well in hand and here are our new procedures, but we are really only now beginning to get a handle on the impacts and what needs to be changed. Until we get this resolved I'd like to make you aware of some of the issues and some areas where we need to be especially vigilant during this transition period.

1) Even though we haven't developed new procedures and regulations we are bound by CAFRA and courts will require us to meet its requirements. The law changed on 8/23 and we will not be allowed to argue that we're too busy or we haven't gotten around to doing it or other excuses for not following CAFRA.

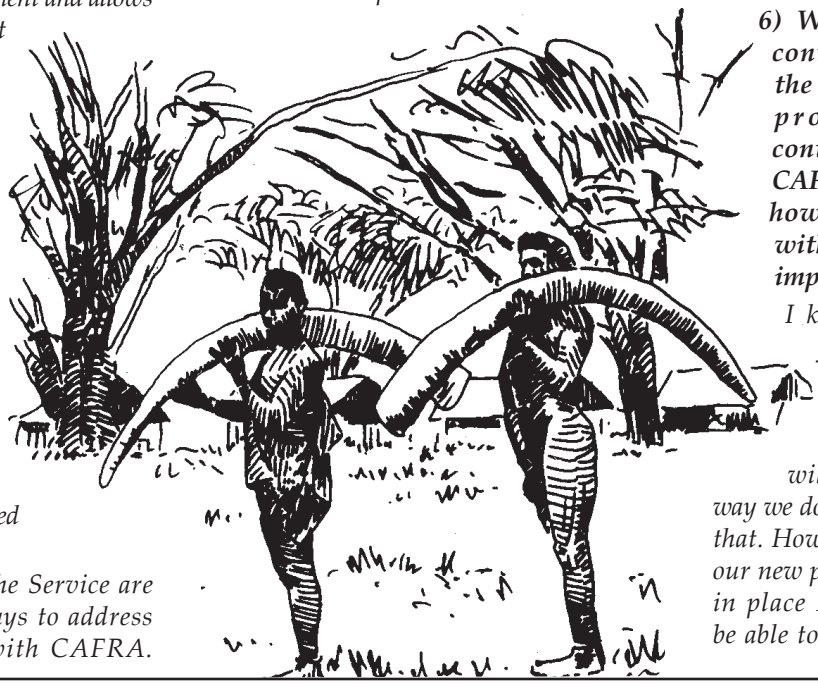
2) There are two hard deadlines we must meet under CAFRA (maybe more, but these impact us most.)

A) Any time we make a decision to seize an item we must notify the owner/interest holder in writing in not more than 60 days. We currently are mostly doing this with our 12.11 letters, but shortly we will be combining the 12.11 letter and the Solicitor's Notice of Proposed Forfeiture into one letter.

….

5) CAFRA directs that if the government loses a forfeiture proceeding the government must pay the claimant's attorney's fees and interest and return the property. This is a big incentive for us to get the process right and to meet our deadlines, etc.

6) We don't need to return contraband no matter what the outcome of the forfeiture proceedings. However, contraband is not defined by CAFRA. We are working to see how this may come into play with illegal/improper wildlife imports.



I know that this all sounds fairly gloom and doom right now, especially if you haven't been exposed to the debates etc. earlier. It will be a major change in the way we do business, no question about that. However, once we work through our new processes and get regulations in place I'm confident that we will be able to make this work. WO-LE is

using these changes as a portion of our requests for additional FTEs and dollars which, if we get them, will be a great salve for the potential problems. We've weathered a lot of changes in the past and with your enthusiasm and ingenuity we'll weather this one too.

From DARD to All Law Enforcement Employees, Region 5; ***Subject: Changes to Civil Forfeiture Procedures***; dated September 8, 2000 (emphasis added)

The "proposed regulation (that) is being drafted" to "declare most illegal wildlife imports…to be 'contraband'" was published in the Federal Register on May 8, 2000. It was within the far broader and more complex proposal to update all USF&WS CITES regulations. *Revision of Regulations for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, 65 FR 26664. Few interests realized the meaning or significance of the repeated statement in that draft proposal that any violation converted the wildlife part into contraband. Contraband treatment was not actually proposed as a regulation. Rather, it was simply stated as a fact in the explanation section of the proposal when initially published, when re-proposed (71 FR 20167, April 19, 2006) and then when adopted as a Final Rule (72 FR at 48403 and 48405, August 23, 2007). It is not a regulation as such, just a repeated statement in the notice concerning other proposed regulations. The proposed new regulations not only expressed the impending "contraband" treatment to follow for any violation without consideration of the scale and technical nature of the violation, but also created more regulations that were contrary to longstanding practices around the globe that could be violated. The greater number of possible violations (particularly those that made common practices illegal like the change in the definition of "trophy", insistence that "in transit" be immediate, etc.) made the effect worse. The changes in the *Service Manual* that eliminated "grace periods" to correct "technical errors," which spurred the treatment of trophies as contraband for any minor "technical" violation, is at the root of the seizure havoc today.

We treat specimens traded contrary to CITES the same as other forms of illegally acquired goods. A specimen that has been traded contrary to CITES becomes contraband at the time it enters the jurisdiction of the United States.

72 FR 48403, August 23, 2007

A specimen that has been traded contrary to CITES becomes contraband at the time it enters the jurisdiction of the United States. If such a specimen makes its way into the United States, the individual or business holding or having control of the specimen has no custodial or property rights to the specimen and, therefore, no right to possess, transfer, breed, or propagate such specimens.

72 FR 48405, August 23, 2007

The above language in the Final Rule first appears in the 2000 proposal and again in the 2007 re-proposal of the new CITES regulations of USF&WS. On March 4, 2008, the Deputy Director of USF&WS, Kenneth Stansell, signed the new *Service Manual Part* setting forth new policy and procedures for wildlife inspection. It wholly eliminated the provisions cited above that allowed hunters a grace period to correct technical errors and which had expressly provided that hunters should not be held responsible for the technical mistakes of exporting governments because that would be unfair. (Our observation is that what was unfair before to the importing hunter is still unfair, i.e. the new Part 443 of 3/4/08 that replaced that part dated 4/83 is unfair and a perverse response to CAFRA that was intended by Congress to protect innocent owners.)

There is one more detail in USF&WS's reaction that has made it worse. Both the 1983 and 2008 *Wildlife Inspection Policy* and *Procedure* Part of the Service Manual (Part 443 FW1) give port inspectors options when imports are "refused." Both the old and the new Part provide for "re-export" of the trophy, to let the hunter "obtain corrected or new CITES" permits, "Refusing Entry Without Seizure," etc. In the 2008 *Manual*, a new clause was inserted.

1.17 What do Service officers do after they refused clearance of a shipment?....

A. There are five options Service officers may choose for the refused shipment. The Service officer should select the option based on the commodity, the quantity, the violation history of the violator, and the violations detected. Service officers must ensure that the shipment does not violate any U.S. laws or regulations other than those enforced by the Service before considering options other than seizure. ***Officers should consider seizure or abandonment before any other options.***

Law Enforcement, Part 443, 03/04/08 *New*; Emphasis added.

Someone inserted this overriding sentence. Seizure has in fact become the option of choice for trophies that are being treated as contraband for innocent, harmless, clerical heretofore correctable errors of no biological significance.

If it was unfair to seize trophies for every conceivable error for decades before 2008, then it still is. Worse, the enforcement is aggressive and the attitude towards the hunters and foreign authorities does not fit with Congressional policy, foreign diplomacy, CITES cooperation or the American Way. It needs to be revisited before more harm is done. ■