



SPECIAL SUPPLEMENT

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

World Conservation Force Bulletin

www.conservationforce.org July 2016

New Elephant Import Regulations By US Fish & Wildlife Service Go Into Effect

New elephant import regulations by US Fish & Wildlife Service (FWS) go into effect on July 6, 2016. 81 Fed. Reg. 36388 through 36419, published June 6, 2016. The regulations arise from concern over the international wildlife "trafficking crisis," which peaked several years back. There are three ramifications of these new regulations that are important to hunters and their import/export agents:

DATELINE:
United States



John J. Jackson III

- (1) Enhancement import permits will be required for CITES Appendix II listed elephant regardless of when taken.
- (2) No more than two elephant trophies can be imported during a calendar year no matter when or where taken.
- (3) The new enhancement import permits will bear a "condition" that the ivory never be sold.

The import permit requirement for CITES Appendix II elephant trophies is unprecedented. The elephant of RSA, Namibia, Zimbabwe and Botswana are on CITES Appendix II so no import permit is required under CITES. Nevertheless, they are also listed as "threatened" under the ESA, which is the basis of the new permit requirement. The FWS regulations prior to this change have required the Division of Management Authority (DMA) to make an "enhancement finding" for the import of elephant trophies, but not an import permit. The new permit is an ESA permit, not a CITES permit like that issued for elephant on Appendix I of CITES (e.g., Tanzania, Zambia and Mozambique). Although it will create additional paperwork for hunters, this new permit requirement has one

administrative benefit. This import permit will eliminate the situation that has existed for Zimbabwe, where the DMA did not have sufficient information on hand to make a positive enhancement finding, but there was no permit denial to administratively appeal and to use to identify and target the FWS' concerns during the permitting process. Now there will be an administrative process and administrative record governed by the Administrative Procedures Act, and the FWS can be held accountable for its determinations or failure to make certain findings.

Those hunters that have already taken elephant in RSA, Namibia and Zimbabwe (countries with elephant that are on Appendix II of CITES) will have to file an import permit application no matter when the elephant were taken if they are being imported after July 6, 2016. For example, elephant taken in Zimbabwe in 2015 and 2016 now need an import permit application if they are ever to be imported. Conservation Force will assist hunters in filing import permit applications for 2015, 2016, and hereafter until those applications are finally denied or approved. We will reference the information we have already submitted and the record we have been building or submit all that information again, going back to the date of the suspension/ban (April 4, 2014). We will not abandon you!

Again, these are ESA "enhancement" permits, not CITES permits. We have long

argued with the FWS that Section 9(c)(2) of the ESA exempts CITES Appendix II listed species that are only listed as threatened on the ESA from regulatory requirements such as import permitting. This new elephant regulation is the most extreme disregard of that provision. Earlier instances have been argali and most recently the special rule for African lion that requires ESA enhancement permits.

The 9(c)(2) legal issue aside, there is a positive side to the enhancement requirement, not just for elephant but for lion, argali and black rhino. It is more than a finding that the take of the animal is not detrimental. It is a finding by the DMA and notice to the whole world that the licensed, regulated hunting of elephant, lion, black rhino and argali enhances the survival of those species. When states like New Jersey and airlines like Delta prohibit import or embargo the cargo because of animal rightists' misinformation and legislator ignorance, it is contrary to the public validation of the FWS that these hunting programs are well-managed and benefit the species. Of course, the enhancement finding process can itself serve as a ban, in which case the permit application must be administratively appealed as Conservation Force (and



Photo Credit: Matt Boguslawski

only Conservation Force) laboriously does (and has done for argali, markhor, wood bison, black rhino, elephant, leopard, lion, crocodile, cheetah, black-faced impala, et al.). Enhancement is an ESA statutory mandate for import of "endangered" listed trophies. The FWS administratively imposed its own regulatory requirement for trophies of "threatened" listed game species, but in all instances the underlying benefits are documented and validated to be a tool for conservation. Of course, the permit requirement will provide the permit office an opportunity to deny import permits to applicants that may be disqualified to be issued an import permit, such as known wildlife law violators.

The limit of two elephant trophies per calendar year is also applicable regardless of when taken and in which countries. It applies to all elephant trophy imports regardless of CITES Appendix. Those hunters that for whatever reason take more than two elephant will have to import the excess in a different calendar year. There was a window of 30 days to import more than two before the effective date of the regulation on July 6. The FWS



I Will Not Abandon You, by Norman Wilkinson, a print hanging on my law office wall for 43 years.

points out that there are limits of two leopard, one black rhino and one markhor per calendar year adopted by the CITES Parties. The FWS limit in this instance is under the ESA, as CITES has no such limit for elephant.

Most of the other new regulations concern ivory and elephant parts other than hunting trophies. Hunting trophies are treated separate and apart. Under CITES, the hunting trophies of Appendix I species cannot be commercially traded. The harvest and import/export are for the personal use of the licensed hunter. Those elephant that have been downlisted to Appendix II were down listed with an "annotation" that it was for the purpose of trophy hunting only (personal use). Hence the FWS has long printed a condition on

elephant trophy import permits that no part of the elephant can be sold after import. A knowing violation of that condition is a criminal offense. Now that import permits are required for Appendix II elephant, that same condition will no doubt be added to those new import permits. So, no matter what the regulation is for others, hunters cannot sell their ivory or other parts because of the condition on their import permits. Sale and attempted sale by other members of the public is not prohibited when wholly within a state, but the regulation that applies to hunters is stricter. Both interstate and intrastate commerce is prohibited for elephant hunting trophies and for all parts of the elephant because it is a condition on the face of the import permit. Do not be confused by all the regulations that apply to others. Those that bind the hunter arise from the annotation to the CITES downlisting to Appendix II

and the condition on the import permits that is now required of all elephant trophies. Of course, if the trophy was taken before any elephant were on Appendix I of CITES, January 18, 1990, then the intrastate prohibition may not apply. Our

conclusion that the "condition" on the face of the permit prohibits all sales, intrastate as well as interstate sale of trophies, is deducted from the facts but be advised that there is no direct statement to that effect for clarification nor has there been one in the past.

At the time of writing this Bulletin, the FWS has not published the new permit application forms. In the Notice they state that the forms will be available before the effective date of the regulation, July 6, 2016. We will let readers know when the forms are in fact available. The permits will cost \$100 and require the usual delays. The FWS estimates issuing 300 permits per year, but we presume that is for all elephant trophy import permits combined from all countries and when all countries are approved. ■



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New Jersey Bans State Residents' Possession and Import of Big Four Trophies

On June 1, Governor Chris Christie signed into law S977 (Prohibits possession, transport, import, export, processing, sale, or shipment of parts and products of certain animal species threatened with extinction) and S978 (Prohibits possession and transport of parts and products of certain animals at Port Authority of New York and New Jersey airports and port facilities). These bills prohibit import, possession and transport of lion, leopard, elephant and black and white rhino hunting trophies (defined as "specified African species" in the final version of the bills). Christie conditionally vetoed the bills in May and suggested changes (see the June Bulletin for details). Subsequently, on May 26, both houses of the state Legislature enacted the bills with Christie's changes.¹

S977 became effective immediately upon the governor's signature. It bans residents' possession, import and transport of lion, leopard, elephant and rhino trophies in New Jersey. Its application is not retroactive – all such trophies already in the state are legal and no certificate of ownership

1. More information available at www.njleg.state.nj.us/bills/BillView.asp.

is required. However, hunters in New Jersey are advised to keep their trophy paperwork handy. Civil penalties for import or possession of new lion, leopard, elephant and rhino trophies include a \$200-\$1,000 fine for a first offense and a \$500-\$3,000 fine for each subsequent offense.

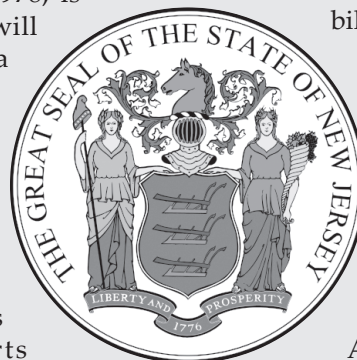
The law allows trophies to pass through the state as long as they originate outside it, are authorized by a federal or another state's permit, and are destined for a point outside the state.

The second law, S978, is not yet effective but will become so if and when a similar law is adopted in New York State (one is pending, A08394/S06072). It bans the import, possession and transport of lion, leopard, elephant and rhino trophies at airports and ports owned or operated by the Port Authority of New York and New Jersey, which includes Newark, LaGuardia and JFK airports (among others), the Port of New York and New Jersey, and the air cargo facility. A violation of this law is a fourth-degree

criminal offense that could result in imprisonment up to 18 months and a fine up to \$100,000.

The bills were introduced by an admitted animal rights advocate, New Jersey Democratic Senator Raymond Lesniak. They were each unanimously passed by the state Senate and by large majorities in the Assembly. When he conditionally vetoed the bills, Governor Christie admitted "[t]here are significant questions whether such bans [as these] help or actually hurt wildlife conservation." It is difficult to understand, then, why the bills were passed and only conditionally vetoed.

Conservation Force is calling for New Jersey hunters to challenge the legality of these bans, which are pre-empted (overridden) by the Endangered Species Act and the issuance of federal permits. We anticipate suing to challenge S977 immediately. If you have a big four trophy awaiting import or intend a hunt for one, please call or email Conservation Force. We need New Jersey residents that have standing. ■



Court Dismisses Suit Challenging Delta Airlines Trophy Embargo

In the November 2015 Bulletin, we wrote about the suit that Conservation Force, DSC, HSC, the CAMPFIRE Association and the Tanzania Hunting Operators Association brought against Delta Air Lines to compel an end to Delta's embargo on the transport of Big Five trophies.

Unfortunately, on June 6, the federal court in Texas dismissed this suit without ever reaching the merits. The court held that Delta's embargo does not violate any duty as a common air carrier because there is no broad duty not to discriminate against certain shippers or types of cargo. The court also dismissed the plaintiffs' alternative claim that the embargo improperly interferes with business relations and found that claim

is pre-empted by federal aviation law. Further, the court found the plaintiffs do not have the right, as private citizens, to enforce certain federal aviation regulations that the Federal Aviation Authority (FAA) is empowered to enforce.

The plaintiffs disagree with the court and expect to appeal this dismissal, especially of their discrimination and tortious interference claims. They will also file an administrative complaint with the FAA to address the issue of the FAA's jurisdiction.

More specifically, the plaintiffs alleged that Delta's embargo on transport of Big Five trophies violates the duty of a common carrier not to discriminate against shippers. The plaintiffs argued that a common carrier

"holding itself out" to carry cargo, including other hunting trophies, cannot discriminate against Big Five hunters and their trophies. Delta argued that a common carrier *can* pick and choose its cargo, even to a point of agreeing to carry some trophies but not others. The court sided with Delta and distinguished the plaintiffs' cases. It held that Delta's embargo does not favor certain shippers over others, but rather, Delta is allowed to "carry only items of its choosing."

The court also dismissed the plaintiffs' alternative tortious interference claim, which asserts that Delta's intentional, unlawful embargo is damaging potential business relations. The Federal Aviation Act pre-empts (overrides) suits that relate to an airline's

“services.” The plaintiffs argued that Delta’s public announcements when it stopped carrying Big Five trophies were defamatory and misleading. These announcements suggested that Big Five hunting trophies had become illegal. But the court construed the claim differently

(and not favorably to the plaintiffs), held that “any claim challenging [Delta’s] statement [it would not transport Big Five trophies] is also a challenge to the refusal of services,” and dismissed the claim.

Finally, the court dismissed the

plaintiffs’ third claim on the grounds that only the FAA is empowered to enforce federal regulations governing airlines. The plaintiffs will file an administrative action with the FAA, and therefore bring Delta’s violations before the regulatory administrative agency. ■

Black Rhino Hunting Permits Available Again in Namibia

The Ministry of Environment and Tourism of the Republic of Namibia has three post-reproductive male black rhinoceroses available for trophy hunting during the current hunting season that ends November 2016. This is a welcome opportunity to support Namibia’s highly successful black rhino program.

The hunts are available in a closed, sealed bidding process being conducted by the Ministry itself. A hunter must bid through a hunting company and the sealed bids must be made before June 30 not later than 1300 shortly before the 1600 opening of the bids. A bidder must

be a Namibian Tourist Board registered, Namibian company owned by or having in its employment a Namibian Ministry registered Big Game Professional Hunter. Offers should indicate when the hunt is to take place and no more than one hunt will be permitted per company.

Full payment must be made in Namibian Dollars to the Game Product Trust Fund by successful bidders on or before July 5, 2016.

If you’re interested, contact a qualified hunting company to bid for you but be advised that some companies

have discounts. A 20 percent discount will be given to companies with at least 20 percent ownership by formally disadvantaged Namibians; and/or a 10 percent discount for companies with formally disadvantaged Namibians at the Professional Hunter (Big Game) level.

This is solely a Ministry process but be assured that Conservation Force will discretely assist any successful US bidder with their FWS import permit application if the bidder wishes. We have been successful with every import application to date. ■

Michael Cassidy Elected to Head US Delegation of CIC

In May the US members of the International Council for Game and Wildlife Conservation (CIC) elected Michael F.X. Cassidy to serve as Head of the U.S. Delegation. He will serve as the representative of US members on the Council of CIC at its periodic meetings and spearhead activities within the US, including membership recruitment and communication. Chrissie Jackson, past Head of the Delegation, has pledged to help Michael during the transition period.

Michael is a delightful individual and the father of eight. Professionally he is a lifelong sales executive in the publishing industry who has spent many years promoting a multitude of media assets including web, print and television throughout his career. He is

currently based with Scout Media and serves as Executive Vice President, Outdoors. He is publisher for *North American Hunter* and *North American Fisherman* as well as *History Channel Magazine* and *Major League Baseball Partners Club* magazine. In this position he is responsible for the oversight of all aspects of editorial, advertising, media, sales and sponsorships. Michael is also the previous owner/operator of Bushveld Publishing Company, LLC and *Fishing Tackle Retailer* magazine.

Membership in the US Delegation and CIC is currently open. If interested, contact Michael Cassidy

at mfccassidy1@gmail.com, 407-625-0992 or Chrissie at cjackson@conservationforce.org, 504-837-1233.

Don’t put it off.

In January the CIC received the Peter Hathaway Capstick Hunting Heritage Award in recognition of its global work to promote wildlife conservation and sustain the diverse hunting heritage across the globe. Chrissie and I

have been members for more than 20 years. We have thoroughly enjoyed the social galas with hunters across the pond and benefitted greatly by the partnering and networking with other hunters. Come join us. ■



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