SPECIAL SUPPLEMENT

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

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Special Coverage On Elephant Imports: Challenging The USFWS Definition of "Trophy"

In this issue I continue with the oral hearing of another court case, this one in the Federal District Court (Teddy Roosevelt Courthouse) in Brooklyn, New York, at the foot of the Brooklyn Bridge. The two-hour argument was in April. It is the first claim in court challenging the seizure and forfeiture of a hunter's elephant tusk because it had a drawing of the Big Five pencil-etched in the center of one side. It is a very important case, the first to challenge the narrowed USF&WS definition of a sport-hunted trophy. That is the first regulation stating that crafted or worked trophies will no longer be considered to be trophies. The case provides a great deal of insight into the 2007 regulation and what hunters and their agents need to know to avoid violations.

DATELINE: Africa

NEWS...NEWS...NEWS

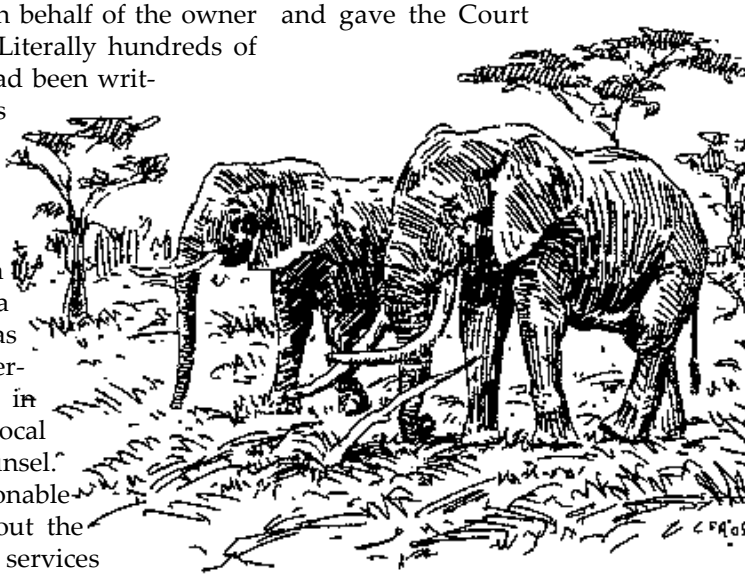
John J. Jackson III

The tusk was taken on a sport hunt in Zimbabwe in a CAMPFIRE area. It was taken and scrimshawed before the new 2007 USF&WS regulation was adopted, narrowing the term "trophy" to exclude "worked" or "crafted" items. A complicating factor is that the Zimbabwe elephant was downlisted to Appendix II of CITES at CoP 10 (five CoPs back) with an annotation that it is on Appendix II for trophy hunting purposes and non-commercial trade of its skin but remains on Appendix I for all other trade.

The courtroom was full of uniformed special Law Enforcement agents and port inspectors with various attitudes. There was a surprising number of unknown spectators, a real turnout for the show. The one scrimshawed tusk was produced and on display at the Judge's request. After examination, the Judge made it clear he considered it to have been converted into a work of art.

This is the technical background that is not commonly understood: When the tusk was seized, we filed a claim challenging that seizure instead of filing a petition for remission limited to arguing mitigation before a Department of Interior Solicitor. USF&WS followed procedure by sending it to the US Attorney's Office for filing a claim for judicial forfeiture in the Federal District Court. We in turn filed a second claim in that court and an answer on behalf of the owner of the property. Literally hundreds of pages of briefs had been written by both sides by the time of the hearing. Four attorneys had worked on it in Conservation Force's Louisiana office as well as the hunter's personal attorney in Chicago and a local New York counsel. It was not reasonable or possible without the public pro bono services of Conservation Force, as the legal fees alone for the more than one year of work would have been hundreds of thousands of dollars. Although we have the largely pro bono help of more than 36 attorneys across the country, the bulk of this work is done by the skeleton legal staff at Conservation Force. The legal fees would be beyond the amount any hunter would rationally pay if Conservation Force was not providing these services as we all try to work through these issues.

My first point to the Court was that although the Government's regulations and arguments are extremely complex and convoluted and took hundreds of pages to brief, the case is quite easy to resolve. In the final Federal Register notice of its 2007 regulations the USF&WS expressly stated that the change in what is and what is not a trophy will not prevent import of CITES listed species so long as they are purpose coded "P" for personal use rather than as "H" for hunting trophies. The tusk that was seized in this case was correctly coded "P" exactly as specified. I read the statement from the Federal Register notice verbatim and gave the Court



– a hard copy of the Federal Register page with the language highlighted. I repeated that all my client did was what he was told he could do. The notice is explicit, and the Zimbabwe authorities followed it explicitly. There is

nothing in the regulation that suggests elephant ivory is to be treated any differently. This case should be over for this point alone. The hunter and the Zimbabwe wildlife authorities did exactly what the notice provides; they coded it "P" which was of little consequence to them because a trophy is a personal item and is being exported and imported for the hunter's personal purposes. They did not violate the "trophy" regulation, they complied with it.

Second, the Government alleges that the import violated the African Elephant Conservation Act, AECA, because under that Act there is a moratorium against import of all ivory except sport-hunted trophies and this is no longer considered a sport-hunted trophy by the USF&WS. This is alarming because there has been no published notice whatsoever of that change, and it is contrary to 20 years of practice. The 2007 regulations were represented by USF&WS to be a revision of the USF&WS CITES regulations, not AECA. USF&WS can't revise or change a practice or a regulation without notice. There was no notice whatsoever in the CITES regulation or even discussion of this change in the Federal Register notices.

Furthermore, the AECA exemption for sport-hunted ivory trophies is a statutory Act of Congress, not a regulation that the Agency can change even if they followed the notice and comment procedure required by the Administrative Procedures Act for all regulations. Moreover, the AECA is really an amendment to the ESA, and it expressly provides that the USF&WS shall not apply the import moratorium to sport-hunted trophies. The emphasis in the AECA history and the language make it clear that no conditions shall be placed upon import of tusks taken sport-hunting. In the initial hearings for the AECA the Chairman of the committee made it clear that no other restrictions be placed upon the import of sport-hunted trophies other than that they be taken sport-hunting. (Here I read the committee summary to the Court and gave the Judge a hard copy of that document.)

The term "sport-hunted trophy" is self-defining and has always been understood to be one sport-hunted. It is one taken by a sport hunter in a sport hunt, not the form that the part is in after the fact. The committee in the AECA hearing made this clear, but it did more. The testimony and the staff summary for the ultimate bill states that the intent was to shift scrimshawing from craftsmen in the US to Africa expressly to give the elephant more value to those African nations that must support the elephant. That is the opposite of this new, unpublished interpretation of the AECA.

Also, it is perfectly alright to have your tusk scrimshawed after import. You just can't do it before import. That is all that this case is really about, scrimshawing in the USA or in Africa, and there can be no question that one of the express purposes of the AECA was to have the scrimshawing done in Africa. That is all that was done in this instance. This is all that the hunter did wrong, but really, he did it right. The very law, the AECA, that he is alleged to have violated was intended to protect sport-hunting and scrimshawing of the ivory in Africa because of their benefits, not prohibit or condition sport-hunting and scrimshawing.

The other claims are equally illegal and actually contrary to the laws cited. The Government claims that the ivory needed a CITES Appendix I export and import permit because only trophy trade of elephant ivory from Zimbabwe is on Appendix II – since it was not a trophy it must be treated as being on Appendix I. There was no notice whatsoever of this change in practice of the new regulation. It is a real surprise to CITES experts because it takes a two-thirds vote of the participating Parties at a CoP to change the

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listing of a species. It can't be done unilaterally. Zimbabwe issued an Appendix II export permit never suspecting that the USF&WS believed its change in a definition in domestic regulations could change the Appendix listing of a species. There was no notice of that anywhere to anyone at any time. CITES has adopted a Resolution at the same time as the downlisting of the Zimbabwe elephant that expressly states ivory tusks that remain whole are by definition "raw ivory." The tusk is whole. It is the same size, shape, weight and is clearly marked for permanent identification.

The Parties to CITES have always understood a trophy to be one taken sport hunting. Now that the USF&WS has made this otherwise simple understanding an issue, it was addressed by CITES and after a working group was formed it was resolved that the term "trophy" include "manufactured" items from the parts of the animal. This tusk is a trophy and was Appendix II trade; therefore, no import permit was necessary and it was not a violation for Zimbabwe authorities to only issue an Appendix II export permit. It takes a two-thirds vote to change a listing. One party can't do it by changing its own definition of a common and simple term. In the sworn declarations we have shown that the USF&WS will not issue an Appendix I import permit for scrimshawed tusks anyway, so the claim that it should be traded as an Appendix I species by Zimbabwe and by the hunter is just a post-seizure argument of Government counsel.

Immediately after the hearing the Court ordered the Government to brief why the Court should not accept the Zimbabwe Government's determination/treatment of the tusk as being on Appendix II and as a trophy for that purpose under the Act of State Doctrine. Under that Act, the US Supreme Court has ruled that the decisions of foreign nations are to be shown deference by US agencies.

It is obvious that the Agency is violating the ESA by not implementing CITES, not the rest of the world. The USF&WS can't change the listing of a species unilaterally, did not give anybody notice of such a preposterous change and its stubborn insistence is not serving the elephant – it is hurting the species. The Parties to CITES downlisted Zimbabwe elephant to Appendix II expressly to facilitate trade of ivory trophies taken sport-hunting expressly because of the expected benefits. The convoluted application of the 2007 regulation does just the opposite. It is not in the interest of the elephant that has not been found to be threatened by sport-hunting. It is threatened by barriers to trade and devaluation to Zimbabweans who must bear its costs and provide for its conservation.

I also argued that, in addition to being contrary to custom and practice, the definition in the regulation is confusing and nonsensical. The regulation changes the common meaning from an animal part taken sport-hunting to what form the part is made into before import. It has always been defined by the underlying action/activity, not the product. The definition confusingly states that the part is not a sport-hunted trophy even when it is sport-hunted if it is crafted to be ornamental or utilitarian. The problem here is trophies generally are treated as ornaments and, according to Webster's Dictionary, being ornamental is the antithesis of utilitarian. This hunter had this one tusk pencil-etched to be hung up in his trophy room alone because the other was broken off. So, unmatched this seemed like the best thing to do to show off the one presentable tusk. It was taken sport-hunting for the hunter's personal use. It could not be re-exported for commercial trade once imported and was no different than the tusks that are scrimshawed after import.

The applications of the regulation to this tusk do not make sense in this case. The rationale for the regulation was to facilitate the identification of parts with the animal taken sport-hunting. In this case the tusk remained whole, the same size, shape, weight and was permanently marked. It is unmistakable, so what is the issue? Why be so stubborn with a sport-hunter who had it scrimshawed before the confusing regulation was adopted and who could not possibly have known that the USF&WS intended it to prevent the import of tusks that remained whole, etc.? The Agency's cited precedent from earlier polar bear regulations is also incorrect. The concern with polar bears was that one internal organ, the gall bladder, not be imported as a part of the trophy. It excluded that one organ. It did not turn the whole definition of sport-hunted trophy from all time upside-down.

I concluded with arguments about the fundamental unfairness and excessiveness of the penalty of forfeiture if there had been a violation. The Civil Assets Reform Act, CAFRA, expressly provides that "no innocent owner shall

be deprived of his property under any federal statutes or regulations," which of course applies here. One is an innocent owner if he does not know of the violation or equally if he takes immediate steps to correct the illegality upon learning of it. Both are true in this case. The USF&WS did not know what its own regulations provided, which is proven by the fact that the alleged violations have grown since the initial detention and seizure. Second, the hunter/owner offered to sand the pencil etching off to correct the illegality, but was not permitted to do so by the Agency itself.

Third, CAFRA has an express section for owners to challenge the Constitutional excessiveness of disparate forfeitures. Forfeiture in this case would be disparate because the maximum fine for the ESA civil violation is $500, and the trophy fee alone for the trophy was $10,000, or 20 times greater. The payment of the $500 maximum fine or the sanding off of the etching are far more equitable punishments for the alleged innocent offenses in this case.

At the conclusion of the arguments the Judge laid into the Government for some time. He did not like to decide cases of first impression and the very first thing he was told in Judiciary College was to mediate cases. He suggested the USF&WS was not reasonable when enforcing the new, ambiguous regulations so strictly during the transition period. They should consider rewriting and clarifying the regulation from the start instead of harsh enforcement upon the unsuspecting public. He then turned to me and reminded me as the representative of the hunter of the Chevron Rule - that the Agency expertise and its interpretations of its regulations and the underlying statutes it is charged with implementing are entitled to an inference that they are correct. He concluded by ordering the parties to attempt settlement of the case and to report the result by a certain date. Since then, that report to the court and the Judge's subsequent order requiring the Government to brief why the Act of State Doctrine does not apply has been continued twice by the Government. ■

Two Important Conservation Force Supporters Pass

Two friends and funders of Conservation Force have recently passed away: Thornton Snider and Louis Stumberg. Thornton was a Weatherby Award winner and past Chairman of that Foundation. Louis Stumberg was the owner of the Patio Ranch, one of Conservation Force's Ranching for Restoration projects.

Thornton died on April 20, 2011 at his home in Henderson, Nevada. He was 92 years old. He and Helen, his wife for 72 years, traveled the world over on hunting expeditions. Thornton, like many of the world class hunters I know, was also a businessman and civic leader. He was founder of Snider Lumber Products and partner in Lumber City Stores. He served as the President of the Exchange Club, Chamber of Commerce, the Turlock Sportsman's Club and Weatherby. His hunting most certainly lead him to have a full and happy life traveling to all the places he wanted, enjoying every minute of it and being with his friends and family.

This is what Bert and Brigitte Klineburger say about Thornton:

"Thornton Snider – truly a one-of-a-kind man. Nobody can compare to Thornton – he did it his way. His wife, Helen, who was always by his side through thick and thin, raised a fine family. He traveled the world and hunted as much as most any other man. Those of us who hunted and traveled with him are proud to call him a friend. Brigitte and I have everlasting memories of Thornton's great shooting, and of course, his insisting of having his warthog back straps with his morning eggs, so usually the first trophy of any safari was a small- to a medium-sized warthog for just that purpose.

"He was a respected member of our club and had a great many friends in our group. Thornton was a creator, and if there is hunting and fishing in the great beyond, you can be sure he will have found the best areas, and have a well organized camp set up waiting for us and, of course, a good supply of Canadian Club.

"God Bless you Ole Friend, and we are proud to call you our friend."

Louis passed away on May 3, 2011 at the age of 87. He is survived by his wife of 57 years, Mary. Louis peacefully passed away. As well as his wife Mary, he left his daughter Diana Stumberg and two sons, Herb Stumberg and Eric Stumberg and their wives and children. As well as a world class hunter, he served as an elder at First Presbyterian Church. He had served as both Chairman and Trustee of the United Way. He served as Civilian Aide to the Secretary of the Army since 1979, President of the Downtown Rotary Club of San Antonio, President of the Boy Scouts Alamo Area Council, President and Trustee of Trinity University, Chairman of the Chamber of Commerce, and more. The world is certainly a better place because of Louis. Bert reports, "Louis started hunting in Africa in 1955 and hunted most African countries. He also hunted India, Afghanistan for Marco Polo sheep, Mongolia and everywhere else." ■