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"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

□ On The Legal Front

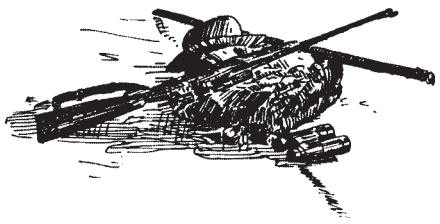
Gun Rights… Nonresident Permits… Trophy Imports

(Editor Note: This month Conservation Force Chairman John J. Jackson, III, covers developments on three legal fronts because of their significant impact on hunting. Federal courts are in the midst of determining your Second Amendment right to bear arms, your right to obtain nonresident hunting licenses and your right to import trophies of threatened species.)

Federal Circuits Split Over Right to Bear Arms

The possession and use of firearms by private individuals is under attack around the world and at every level of society. The campaign to take firearms away from private citizens is very real and not likely to end soon. This is not a warning. It is reality today.

Hopefully, some protection is afforded American hunters by the Second Amendment. That is largely dependent upon how the Second Amendment is interpreted. What is its meaning? The right of individual private citizens to bear arms has only recently been recognized in federal court – namely, in the Emerson case decided in 2001 by the federal appeals court for the 5th Circuit located in New Orleans. (U.S. v. Emerson, 270 F.3d 203, 5th Cir., 2001, cert. denied.) That court held that the purpose of the Second Amendment was to protect the private individual right to bear arms (possession) rather than a right to maintain and arm



a militia. It has since become the policy of the Bush Administration. Attorney General John Ashcroft issued a position memorandum throughout the Justice Department that the Second Amendment protects the individual right to bear arms and that the Emerson interpretation on the Amendment was correct. The U. S. Supreme Court chose not to review Emerson when application was made to it. (denied a writ)

In December, two new cases were decided that are not reassuring. The first case is directly on point. In Silveira v. Lockyer, rendered on 5 December, 2002, the Ninth Circuit Federal Court of Appeals in San Francisco squarely held that "the Second Amendment does not confer an individual right to own or possess arms." Like in the Emerson case that expressed the opposite opinion, it is a scholarly 70-page opinion that can't be taken lightly. "A robust constitutional debate is currently taking place in this nation regarding the

scope of the Second Amendment, a debate that has gained intensity over the last several years...." The belief "that the Second Amendment guarantees to individual private citizens a fundamental right to possess and use firearms...urged by the NRA and other firearms enthusiasts...has never been adopted by any court until the recent Fifth Circuit decision in United States v. Emerson.... Now, for the first time, the United States government contends that the Second Amendment establishes an individual right to possess arms in a "reversal of position by the Justice Department..." The Ninth Circuit panel complains that the new Emerson case and administration policy has "caused" all sorts of "turmoil."

The court credits "the leadership of the National Rifle Association (the NRA) with making "the disagreement over the meaning of the Second Amendment....particularly heated." It then discredits the NRA by devoting a full page to former Chief Justice Burger's view quoted from Parade Magazine, January 14, 1990. Burger is quoted as stating that the "individual rights view" of the Second Amendment was one of the greatest pieces of fraud, I repeat the word "fraud," on the American public by special interest groups that I've ever seen in my lifetime. The real purpose of the Second Amendment was to ensure that state armies - the militia - would be maintained for the defense of the state.

This confirmed split between the circuits makes acceptance of the case by the US Supreme Court more likely if the parties file a writ to seek that review. In the interval, individuals within the Fifth Circuit, which are the states of Louisiana, Texas and Mississippi, have the right to bear arms.

The second case is the Bean case on December 10. Bean was a convicted felon. He filed an application with the government (Bureau of Alcohol Tobacco and Firearms) under a federal statue that permits restoration of firearms privileges in select cases (18 U.S.C. 925(c)). That program has not been funded since 1992 so his application was returned. He filed suit and won, but the Supreme Court reversed it.

The case is noteworthy for what it might have decided, not for its opinion. Gun rights advocates followed the case closely in hopes that the US Supreme Court would finally embrace the Second Amendment issue. It did not. It rendered a short, seven-page unanimous decision without touching on the Second Amendment at all. The Court held that the statue that embodied the possession restoration procedure did not permit judicial review unless the application was really denied. In this instance, the application was not processed because the program was unfunded. It was not "denied." Our reading is that the Second Amendment was not put directly in issue. Nevertheless, the case is important to those convicted felons who had hoped to be able to go to court to have their firearms restrictions lifted.

A Nonresident License Case is Finally Won

The federal court suit challenging the 10 percent caps on elk and deer licenses in Arizona has been won. Though it was dismissed summarily in the district court, the Ninth Circuit court of appeals in San Francisco reversed that dismissal. Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. August 20, 2002). It is the first case in history to hold that the dormant Commerce Clause of the US Constitution protects nonresident hunters from discrimination when applying for recreational hunting licenses. The only prior successful case was the unpublished Terk case in New Mexico that rested on Equal Protection and narrow factorial findings. The Ninth Circuit includes Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, Guam and Hawaii.

Because of its extraordinary significance, Arizona is seeking US Supreme Court review, and we fully expect a barrage of amicus briefs by Western states and resident hunters associations. Conservation Force was initially

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the first plaintiff named in the suit, but voluntarily withdrew to reduce the cost of the suit and to permit a narrower strategy. The strategy of attorney James R. Scarantino to narrow the issues boosted the case. All recreational hunters and related organizations were dropped from the suit. Only three "professional hunters and guides" remained. They intended to use their recreational hunting licenses to take elk and deer to sell body parts out-of-state. That commercial aspect practically assured that the case would be won. Though it first appeared that it would only further the interest of hunters using recreational licenses to get and sell elk and deer antlers, skins and meat, the case has achieved much more.

The federal district court dismissed the plaintiff's dormant Commerce Clause claim. In response, the plaintiffs dropped all of their other claims and appealed the Commerce Clause claim. The district court dismissed the Commerce Clause claim on the basis that when license applications are made elk and deer are not yet taken and therefore are not yet "articles in commerce." It reasoned that only articles already in commerce invoke protection. The appeals court strongly disagreed. The appeals court held that the correct issue is whether the discrimination is "substantially affecting the interstate flow of people" because movement of people is also commerce. Moreover, even though the game is not yet taken and placed in commerce at the time of licensing, the discrimination in issuing licenses is prohibited because it "burdens interstate commerce at its point of supply."

The appeals court expressly held that game animal licenses are to be treated no differently than allocations of other natural resources that are protected by the Commerce Clause before they are "articles in commerce." For example, discriminatory allocation of petroleum and coal is prohibited at their "point of supply," before they become "articles in commerce." The appeals court also reversed the lower court's additional error that even if recreational licensing falls under the Commerce Clause, the discrimination was "even-handed." The appeals court held that the discrimination (10 percent cap) was "overt." When discrimination is legally "overt," its very purpose is to discriminate against out-of-state interest. The discrimination is not just an "incidental effect" of regulations serving some other legitimate interest. Consequently, the burden of proof and burden of defending the regulations are upon the state and the "regulation is subject to the strict scrutiny" test.

Legally, that shifts two heavy burdens to the state. Under that test, the state must prove: 1.) That there is a "legitimate purpose for the discrimination; and 2.) That there is "no less burdensome or discriminatory alternative means of achieving that legitimate end." Never before has a court held that the issuance of nonresident recreational hunting licenses affects interstate commerce and that caps on nonresidents are "overt" discrimination.

The lower court had incorrectly placed the burden of proof on the nonresident hunters and held that the state's legitimate purpose for its caps was to favor its own citizens to get their support. The appeals court wholly rejected the position that favoring one's citizens to get their support was legitimate. "[T]he State's need or desire to engender political support for its conservation programs cannot by itself justify discrimination." "Allowing the intensity of political will in a state to justify discrimination against nonresidents would radically undermine the representation-reinforcing polices (one purpose of the Commerce Clause is to protect those who are under-represented out-of-state) underlying the dormant Commerce Clause doctrine." "Arizona must show more than in-state political demand for discrimination imposed" - i.e., the resident-hunter demand to exclude nonresident hunters is not legal justification for discrimination. Arizona's own legal strategy had been just the opposite. It submitted an affidavit from a survey showing that "[a]rizona hunters are broadly supportive of the 10 percent cap and that many demand a total ban on nonresident hunting." That is not a "legitimate" reason to burden those from out-of-state who are under-represented in the political process within the state.

Arizona had cited the caps in other states as justification for their own. The lower court agreed. The appeals court held that approach would promote exactly what the Constitution was adopted to prevent, states reacting to each other's barriers with like kinds of burdens placed on the commerce of the nation. The appeals court concluded that "caps" on nonresident hunting licenses are "a severe form of discrimination in the allocation of government benefits," (emphasis added). That is an uncommonly strong statement.

The language and reasoning of the appeals court could have been lifted verbatim from one of Conservation Force's briefs on those issues. The court relied heavily upon earlier Supreme Court cases we have been citing to show that game animals are to be treated like other natural resources. They are not even owned by the state. Though their allocation is regulated by the state, regulation must be Constitutional. The court also relied upon the Camps Newfound case (520 U.S. 564) that Conservation Force has been citing. In Camps, the 1997 Supreme Court held that discrimination against nonprofit, recreational camps that cater to nonresidents traveling to the state for outdoor recreation and enjoyment of the wild violated the dormant Commerce Clause.

The success of the Arizona case is the most significant nonresident hunting rights case in 30 years. Conservation Force is accepting dedicated donations for the cost of the Supreme

Court briefing, if you wish to make a tax-deductible donation in support of the litigation. George Taulman of USO Outfitters has been sponsoring the litigation and should not have to do it alone.

Conservation Force was unsuccessful in a case in Wyoming which is a far more difficult district and appellate circuit. It became one more of a line of nonresident cases that have been unsuccessful in Wyoming. Now, a new nonresident rights case has been filed in that state by a Florida attorney in his own name. Donald J. Schutz v. The State of Wyoming, et al, 02CV165D, September 12, 2002 amended in December. It relies upon the Camps Newfound Supreme Court case and the new Ninth Circuit Arizona decision above, but has added a twist. It challenges the Wyoming "Guide Law" that requires nonresident hunters to be guided in wilderness areas.

Conservation Force is sympathetic to the guides and outfitters. They lost their own suit under the Commerce Clause to protect nonresidents and came under a lot of resident heat for bringing it. Now, a suit is being brought against their interest citing the same Commerce Clause arguments they had relied upon.

The Final Battle Is Fully Underway In The Argali Case

All sides have filed their motions and cross motions for summary judgement in the argali case. The case will be decided on those motions, so this is the final round. Replies and responses will continue into February, then the Judge will decide the case.

The issues have now crystalized. The case will in fact determine whether the US Fish & Wildlife Service can lawfully allow the importation of hunting trophies of any "threatened" species. It will also determine whether or not hunting can continue to be used as a tool to enhance recovery of foreign game species. The antis claim that hunting "take" within the US is limited by the definition clause in the Endangered Species Act (ESA) that defines "conservation" and limits it to the "exceptional case" when the listed animal's population is "excessive" and there is no other way of relieving that pressure. They claim that there is no separate definition for "conservation" of foreign species; therefore, importation of hunting trophies should only be allowed when the foreign species' population is proven to be excessive and there is no alternative way to relieve the pressure on it. USFW&S did not make and does not make such an inquiry.

The antis are also arguing that all argali subspecies should have been listed as "endangered" on the same basis. Since trophy importation should not be allowed because it promotes the prohibited "take" of a "threatened" animal that is not excessive in number, trophy hunting and alleged enhancement of the species from the hunting revenue is an invalid reason not to list the species as "endangered." They want a declaratory judgement

that trophy importation is limited to the "extraordinary case exception," and they want an injunction against future trophy imports. They are also asking that the withdrawn proposal to list the three countries' argali as "endangered" be re-determined by the USF&WS within 60 days. If they succeed with any of their claims, future importation is unlikely.

On the positive side, if we win, the suit could greatly benefit hunters and related conservation interests. The antis have been threatening the USF&WS with the same arguments made in their suit for a decade. Our success can reduce the subtle influence those threats have had. The suit has already caused the USF&WS to withdraw their proposal to list the argali in the three countries as "endangered." That rule has also been hanging over our head for a decade. Until recently, there has been internal fighting within the USF&WS whether or not to list the argali as "endangered." One draft within the Service, in fact, was to list them all as "endangered." It was written by Ron Nowak, the retired Service employee who is one of the plaintiffs in the Argali suit. He also wanted to list all elephant and grizzly as "endangered." The administrative record demonstrates how vulnerable our hunting really is. It appears that the import of trophies of other species have also been held up because of the antis' argali notice of intent to sue in 1999. The record also contains many inter-office memos from Nowak, including letters to the Director and to the Secretary of Interior. Those letters embody the very arguments he and the antis have made in their suit. Ultimately, Nowak quit the Service with a letter protesting argali issues. - *John J. Jackson, III.*

Conservation Force Sponsor

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International Foundation for the Conservation of Wildlife