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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

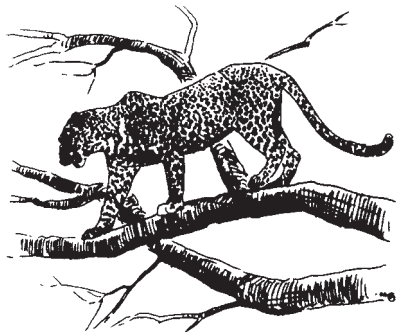
World Conservation Force Bulletin

by John J. Jackson, III

Special Report: Federal Court Rules Hunters' Interests In Trophies Not Legally Protected

■ The Chief Judge in the Federal District Court in San Francisco has finally ruled on the leopard forfeitures case and has ruled against the hunters on every issue. The Court granted the government's motion to dismiss the case in total. Point for point it agreed with the positions taken by the USF&WS. The Court agreed with the government arguments that any irregularity whatsoever "transforms" the trophy into "contraband illegal to possess," and hunters have no protection whatsoever under any provision of the US Constitution, statute or regulation regardless of the hunter's innocence or the disproportionality of the value of the trophy to the $500 civil offense or the miniscule nature of the violation. The fact that it was a government employee's clerical error in one instance, an accidental loss by the airline carrier in another, and harmless in both, made no difference whatsoever. Hunters are not protected by the Civil Assets Reform Act, CAFRA. In effect, CITES as implemented by the Endangered Species Act supersedes all protection afforded by law as if it were the supreme law of the land.

The case challenged the forfeiture of one leopard trophy from Zambia and



another from Namibia. In both cases the hunters were faultless. In the first case the airline lost the export documents, including the CITES export permit, while the leopard trophy was in transit, i.e. after export while in transit. The inspector would not accept a photocopy even when it was sworn to, nor a copy from the agency that issued it in Zambia, which of course had a copy. He also would not accept the replacement export permit issued by the exporting country's CITES Authority. When a petition for remission was filed, the Assistant Regional Solicitor was completely unsympathetic to the hunter and denied the petition that had been filed and was based upon common sense grounds advanced by the import broker. Then Conservation Force was brought in and filed a request for reconsideration of the denial. That request raised the innocent owner defense and the proportionality test provided by the Civil Assets Reform Act, CAFRA, which Congress passed to protect innocent owners of property in forfeiture cases. The Assistant Solicitor denied the reconsideration with little fanfare on the basis that hunters were not protected by CAFRA because the trophies were considered "contraband illegal to possess" if imported in

violation of CITES, regardless of the miniscule nature of the violation. Moreover, the Assistant Solicitor said that the replacement permit was technically not acceptable because the US CITES Authorities were not notified soon enough when they issued the replacement permit. In the second leopard seizure and forfeiture challenge, the Zambia CITES Authority had inserted mistaken numerals for the duration of the export permit, an obvious and undeniable typographical error, admitted the mistake and offered to issue a corrected export permit or to accept reshipment. The exporting government was wholly at fault and the typographical error was harmless.

We had a problem because the time to file a "claim" to proceed in Court, instead of before a Solicitor employed by the Department of Interior had expired while the petition for remission ran its course. Yet, the hunters were both definitely innocent, and the penalty of forfeiture was grossly greater than the maximum limit of a $500 civil offense. Plus, the hunters had not even been given the lesser alternative penalty of shipping their trophies back or paying the small civil fine. There was no question about the authenticity of the leopards or the legality of the hunts or underlying conservation benefits. Both were mishaps beyond the control of the hunters who were innocent of any wrongdoing.

Though there is generally no right to have a court review the "discretionary" decision of a Solicitor to remit or not remit seized private property, we alleged the remittance process before that Solicitor was a sham because the Solicitor, as a practice unknown to the unsuspecting trophy owners, never intended to remit trophies. She had an unknown pattern of denials in other cases. We cited two other cases that left little doubt the Assistant Solicitor was going to deny the petition for remission from the get-go. We asked that the Court review it anew, as well as other practically identical cases in which that Solicitor had demonstrated such indifference to the interests and innocence of the trophy owner. The Court denied the case entirely by holding that there was no right or cause to review the Assistant Solicitor's decision or the case anew, but the Judge went further; he reviewed each right we contended had been violated and reasoned that they did not apply to CITES listed hunting trophies.

"As a threshold matter," the Court addressed whether the trophies were considered "contraband." It ruled there are two kinds of contraband: per se and derivative. Per se contraband is illegal to posses by its nature (like illegal drugs). Derivative contraband, on the other hand, "is not inherently illegal, but becomes illegal through the manner or the intent with which it is used, possessed or acquired." The Court held that "Under CAFRA, 'contraband and other property that it is illegal to possess' includes property that becomes illegal to possess because of extrinsic circumstances." "[I]t is unlawful for any person…to import…or to possess any specimens contrary to CITES….The trophies at issue are 'derivative contraband' because without the proper permits under CITES, the trophies are illegal to bring into the United States under the ESA (Endangered Species Act)…Thus, while it is not per se illegal to import a leopard trophy, the manner in which plaintiffs brought their trophies into the United States transformed the trophies into contraband for purposes of this action." Chief Judge Vaughn R. Walker, *Conservation Force, a non-profit Corporation, Miguel Madero Blasquez, a hunter; and Colin G. Crook, a hunter, Plaintiffs v. Ken Salazar, United States Secretary of Interior; Rowan Gould, United States Fish and Wildlife Service Acting Director; Daniel G. Shilito, Pacific Southwest Region Solicitor; and Carolyn Lown, Pacific Southwest Region Assistant Solicitor, Defendants,* No. 09-1170, U.S. District Court for the Northern District of California. The decision/order can be found on Conservation Force's website at http://www.conservationforce.org/news.html which is our *News and Alerts* page.

The Court held that it could not review the Assistant Solicitor's decisions because CAFRA "provides alter-

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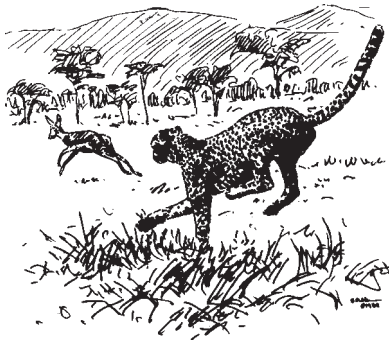
native, not sequential, administrative and legal remedies for an administrative forfeiture. This part of the decision is most certainly incorrect as a general statement. The USF&WS' own regulations expressly provide that one can still file a court claim after the petition for remission if time still remains, i.e. if the petition for remission is filed soon enough that time remains to file a court claim. In that event, the Court is not really reviewing the discretionary remittance determination made by the Solicitor. Rather, it is considering the matter as a claim, which is the alternative procedure allowed. Nevertheless, the Court never reviews the actual decision of the Solicitor, which is unreviewable and so broad that even the refusal to exercise discretion is not reviewable. (The Solicitor's discretion includes the authority not to exercise discretion.) The lesson from this is that one should file a petition for remission early enough after receiving notice of seizure that there still will be time remaining to file a claim (which is the alternative procedure) should the Solicitor just rubber stamp the seizure and order forfeiture.

The Government claimed that the alternative petition for remission process was wholly within the discretion of the Solicitor and could be arbitrary, capricious and still not be reviewable. The Court wholly agreed. Despite this, the Court went on to consider and rule out every conceivable defense raised by the lawsuit as if the case had been a claim before the Court from the origin.

The Solicitor's discretion is unlimited unless it breaches the US Constitution. Consequently, the Court still had to address the claim that the hunters were deprived of due process and the argument that the forfeiture was so excessive that it breached the excessive fines clause of the Eighth Amendment. The trophy owners claimed that the value of their trophies (cost of acquisition) greatly exceeded the maximum $500 civil penalty and that they had not been given the opportunity to pay $500 or to reship the trophy over again to correct any defect in the paperwork, both lesser and more balanced alternatives. Though the hunters strongly disagree, the Court held that the civil forfeitures were "remedial because it served to remove congressionally-defined contraband from society….Moreover, CAFRA does not permit the government to return contraband, which would be illegal to possess (in effect the Court here is saying it has less power than the Solicitors that have that discretion)…Plaintiffs therefore cannot legally possess the trophies because the trophies were imported in



violation of CITES and the ESA." (For reader information, the ESA implements CITES and prohibits its violation. Also, one wonders why a Court can't remit trophies if a Solicitor can.)

The Court went on to state "[a]dditionally, plaintiffs do not persuade the court that the forfeitures were 'grossly disproportionate' to the offenses…." CITES advances the government's compelling interest in the conservation and protection of endangered species….' Congress intended endangered species to be afforded the highest of priorities…Any wildlife imported in violation of the ESA is subject to forfeiture to the United States…Plaintiffs failed to comply with the mandates of CITES and the ESA: the resulting forfeitures are clearly within the remedial bounds as set forth by Congress. Therefore, a violation of the Eighth Amendment has not been pled."

Of course, we strongly disagree with this reasoning as the underlying trade is favored and supported by quotas set by the Parties to CITES and the enhancement finding made by the USF&WS, as the import permits conclusively demonstrate this fact. The mistakes were harmless, and the maximum penalty for the violations was $500. In one seizure it is a mere paperwork error that is correctable and in fact was cured by the issuance of a replacement permit by the very government that issued the lost export permit. This reasoning suggests that CITES overrides the US Constitution and that Congress (Lacey Act and/or ESA penalty section) can override the Constitution. That USF&WS position, now confirmed by this Court, is extreme in our view.

The hunters also claimed that the sham remission process ("trust us, we will review and remit your trophy if there are mitigating circumstances") deprived them of both procedural and substantive due process under the US Constitution. The two cases as well as two others cited in the suit, four in total, demonstrated that the particular Assistant Solicitor had a fixed position and pattern of rubber stamping seizures and ordering forfeiture. The Court denied these claims. It held, "[i]f plaintiffs were permitted to have their trophies returned or retroactive export permits issued, the underlying purpose of CITES would be undermined….Simply put, because the trophies at issue are derivative contraband and the governmental interest in conservation of endangered species is compelling, plaintiffs do not have a fundamental property

right in the trophies and their substantive due process claim cannot stand." The Court totally disregarded the positive nature of this trade and the express CITES Resolution authorizing replacement permits when one is lost, but rest assured it was in the petition, briefs and correspondence of the exporting countries Namibia and Zambia who are astounded by the USF&WS' attitude in these harmless error cases.

In denying the procedural due process claim that the whole procedure was a sham, the Court did acknowledge that "derivative contraband is susceptible to protected property rights and cannot be civilly forfeited without a modicum of due process protection," but then continued that, "[t]he strict permitting requirements of CITES and the ESA are the least restrictive means to promote the government's compelling interest in the protection and conservation of endangered species…This permitting scheme - with respect to CITES and ESA-listed species - is designed to allow for efficient review of whether the exporting country has issued valid authorization for the export of the specimens…Exceptions to the CITES regime undermine the government's ability to further its interest in protecting endangered species….As stated herein, plaintiffs do not have a constitutionally protected property right to the trophies because the trophies were illegally imported in violation of CITES and the ESA." Again, this is the extreme stance of the USF&WS, i.e. efficient review overrides property rights arising from conservation hunting even when the owner is faultless, the error is harmless and the violation is the lowest level.

Conservation Force filed a notice of appeal immediately upon the issuance of the Court decision of dismissal. We are going forward with the other cases around the country and still need to hear from lawyers willing to help in all the ports of entry in the US. Those ports are: Anchorage, AK; Atlanta, GA; Baltimore, MD; Boston, MA; Chicago, IL; Dallas/Ft. Worth, TX; Houston, TX; Honolulu, HI; Los Angeles, CA; Louisville, KY; Memphis, TN; Miami, FL; New Orleans, LA; New York, NY; Newark, NJ; Portland, OR; San Francisco, CA; and Seattle, WA. Because many of the detentions and seizures arise from the USF&WS's new CITES implementing regulations they adopted in August - September of 2007, these cases challenge the underlying regulations themselves. For example, we have had at least five seizures charging that the animal parts were not trophies because they were worked or crafted, like scrimshawed tusks, footstools and tail swishes. The Federal Court claims will test the lawfulness of the regulations that would otherwise go unchallenged, so these cases are not just about protection of hunters' private, personal property interests. Within the next year we expect to challenge every regulation that was adopted over the objection of the hunting community and

foreign nations in 2007. There are many different underlying issues in these cases. We have managed to get a great many trophies released around the country but obviously have to go the full judicial distance with others. Willing attorneys admitted to those Federal Courts, please contact undersigned at 504-837-1233 or jjw-no@att.net.

It is now time for Congressional reform of CAFRA or the related provision of the ESA. Certainly the curing of harmless mistakes should be allowed, particularly when CITES Resolutions expressly provide for "replacement" permits when permits are lost, "retrospective" permits when mistakes are made for Appendix II species, or the errors are of a mere clerical nature.

It is important to note that the Court merely accepted the position of the USF&WS on these issues. Something has happened to stop the USF&WS inspectors at ports of entry from accepting innocent and harmless mistakes. The same is true of Solicitors that have stopped exercising discretion in the remission process. Even if they are acting within the bounds of their authority, something is amiss in instances where the trophy owner is innocent, the error is cured by the real country in interest, it is a government error, and/or the error is miniscule and absolutely harmless in degree or kind.

The errors were totally harmless in the two seizures in this case. In the instance where the air carrier lost the export permit, both the hunter and the exporting government that issued the permit had copies of it and the leopard was permanently tagged with a tag number that perfectly matched the one on the copies of the export permit. This has reached the extreme that it constitutes an attack on conservation through hunting. It most certainly is having a negative impact upon those that do it and those that depend on that hunting.

The innocent owner defense should apply under CAFRA out of fairness, and the excessive punishment/proportionality test should be applied. CAFRA has a proportionality test as does the Eighth Amendment of the US Constitution. The payment of the maximum fine ($500) or the reshipment of the trophies are both fairer alternatives. In the meantime, it is best to import your trophies defensively. Have your export freight agent and foreign taxidermist use the *Problem Checklist* we provided in the last issue of this Bulletin – also available on Conservation Force's web site at http://www.conservationforce.org/pdf/Checklist.pdf. We have just circulated thousands of those at the conventions and in publications. The *Problem Checklist* is being republished in other media around the world. We are doing everything we can to attack the problem from every angle and welcome all help. We are ready and willing to fight all unwarranted forfeitures, not just roll over. Fight we must. Fight we will. – *John J. Jackson, III.*