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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

The Antis' Argali Suit Has Been Dismissed

On July 31, 2003, the Federal District Judge in the United States District Court for the District of Columbia dismissed *The Fund for Animals, et al versus Gale Norton, et al.* She dismissed the case on the threshold issue that the plaintiffs did not have the standing required by the U.S. Constitution to bring the suit. Though she did not reach the merits of the case, her "overview" of the facts and the law was also an absolute contrast to some of the principal arguments and theories of the case presented by the anti-hunters. This article will describe the court's opinion on "standing" and the other equally insightful parts of the opinion rejecting plaintiffs' claims. All are precedent-setting and of enormous importance to hunters, particularly hunters who travel. It is the first and most important case of its kind.

The intervenors filed the motions that the court granted. The U.S. government defendants, the Secretary of Interior and Director of the US Fish & Wildlife Service, did not raise the standing issue, nor did they join in or support the intervenors' motions. The government focused its defense solely on its interpretation of the law and the record. Conservation Force and its allied organizations, Foundation for North American Wild Sheep, Grand Slam/OVIS, Mongolia, et al, were the first to raise the deciding issues, as well as to support it with citations to specific pages in the volumes of records and in a collection of sworn affidavits and declarations from authorities around the world. We felt that every effort should be made to stop the antis at the threshold, unless they had something to add to the conservation of the species in the foreign countries in which they had no programs. This case is the first ever filed by the antis to stop the importation of hunting trophies. Why should they be allowed to interfere with programs in foreign lands under the pretense of saving listed species? A judgment in their favor would most likely impair the conservation of the species. The antis' suit was the threat, not the solution.

After prodding, we were able to get the other intervenors to file a memorandum in support of our motion to dismiss on standing. Ultimately, the other intervenors, Safari Club International and the U.S. Sportsmen's Alliance Foundation, et al, filed their own nearly identical motion. Together, the motions highlighted and emphasized the standing issue. Nevertheless, the Court did not grant the two motions to dismiss when they were first filed. The Judge dismissed the motions at the suggestion of the anti-hunting plaintiffs upon the rationale that they were dismissed without prejudice and could be re-submitted when all of the argu-

ments were made in cross motions for summary judgment for final determination. This deferral dismayed the intervenors. It appeared to favor the anti-hunting plaintiffs. It also meant that all the laborious weeks of brief-writing and replying to the antis' responses had to be repeated. Knowing the need to keep the anti-hunters out of our backyard if and when we can, we did not back down. Both intervenor groups re-filed their standing arguments. We fortified the motions with additional affidavits and citations to the record and even new citations to the "supplemental record." The antis had persuaded the government to provide an updated "supplemental record" to the Court in the interval of time. The new motions were in the form of motions for summary judgment at that stage, instead of stand-alone motions to dismiss.

Simultaneously, Conservation Force was pursuing an appeal on behalf of Mongolia to reverse the Trial Judge's denial of Mongolia's intervention. In that appeal, we emphasized that if Mongolia did not have standing why should the anti-hunters. Conservation Force won. The Federal Appellate Court reversed the Trial Court and ordered that Mongolia be permitted to intervene as a matter of right because it had standing. The Endangered Species Act (ESA) expressly provides that foreign programs should be "considered" and "encouraged" in the listing and permitting process, respectively. The Appellate Court adopted our argument that Mongolia was the "owner" of the resource which interest speaks for itself. In oral argument, I personally promised the Appellate Court panel that if Mongolia was permitted to intervene, we would not file any additional brief or take any action that might delay the case at that late date. We did just as promised. The antis could have used any action on our part to file a response and re-open issues already briefed to our satisfaction. When that time expired in the Trial Court for Mongolia to submit an additional brief, the Trial Judge issued her decision dismissing the antis' case and citing her reasons.

The Trial Judge held as follows: "[A]s a threshold matter, intervenors contend that Plaintiffs do not have standing to raise these claims. In *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), the Supreme Court held that, to establish the 'irreducible constitutional minimum' for Article III standing, a party must show that it has suffered an injury in fact, that there exists a casual connection between that injury and the conduct complained of, and that a favorable decision on the merits will likely redress the injury." Although we argued that the plaintiffs did not satisfy any of those three parts, the Court found it sufficient to rely upon only one of the standing issues we raised. The Court held that the denial of trophy import permits would not redress the claimed injury. "Because the court concludes that plaintiffs have not satisfied the redressablity component of *Lujan* it need not address Intevenors' additional argument that plaintiffs have not suffered any injury in fact…. Plaintiffs' purported injuries result from the sport hunting of argali in Kyrgyzstan, Mongolia, and Tajikistan. Plaintiffs have not established, however, that these injuries will be redressed by success in this litigation. FWS' import permits and related threatened listing of argali do not authorize the killing of argali that Plaintiffs challenge. Instead, it is the governments of Kyrgyzstan, Mongolia, and Tajikistan that authorize the hunting and killing of argali; the Service's permit program merely authorizes the import into the United States of those trophies…. Thus, even if the Service allowed no import permits, the three governments would remain as free as they now are to permit the sporthunting of argali in their own countries. Indeed, even if the argali in these countries were listed as endangered under the ESA, that listing would not prohibit the three governments from authorizing the hunting or killing of argali because the ESA specifically limits its prohibition against takings to the United States, its territorial seas, or the high seas; the ESA's prohibition does not extend to foreign countries…. Plaintiffs here have … failed to meet

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their burden of demonstrating that those choices, which can only be made by the governments of Kyrgyzstan, Mongolia, and Tajikistan, have been or will be made in such a manner as to reduce the sporthunting and killing of argali…. In fact, there is evidence that, when the United States previously banned imports from Tajikistan, the government did not limit sporthunting, and the killing of argali continued by virtue of hunting by non-U.S. citizens and increased poaching…. The evidence further reveals that, because U.S. hunters generally pay the highest prices for hunting permits issued by the Tajikistan government, the absence of legal U.S. hunting substantially decreased the permit revenues received by the Tajikistan government. Because permit revenues were used in part for conservation and to 'convince the local population not to poach' the decreased revenue actually resulted in increasing the amount of poaching in the region…. While Intervenors have offered evidence that the hunting and killing of argali will not decrease as a result of a U.S. ban on imports, Plaintiffs have only offered speculation that, because the majority of hunting permits issued by Kyrgyzstan, Mongolia, and Tajikistan have been issued to U.S. hunters, the Service's prohibition on imports will likely decease the hunting of argali. Although U.S. hunters currently comprise the majority of argali hunters in these countries, the evidence also reveals that, if U.S. hunters were prohibited from hunting argali, hunters from other countries and increased poaching would take their place…. In sum, Plaintiffs' redress depends on the intervening actions of the governments of Kyrgyzstan, Mongolia, and Tajikistan — namely, their decision whether to limit the hunting and killing of argali in their respective countries. Because a prohibition on the importation of argali into the United States and a listing of the argali in those countries as endangered under the ESA would not prohibit those governments from issuing hunting permits, and because prior U.S. import restrictions did not decrease the hunting and poaching of argali, Plaintiffs have failed to demonstrate that they will likely obtain redress from a favorable decision on the merits."

In its 19-page memorandum opinion, the Court rejected other arguments upon which the antis' relied. Instead, the Court adopted the Service's interpretation of the ESA and special regulations for argali trophy import permitting. The Court held that "[t]he Act expressly prohibits the importation of 'endangered' species…but authorizes a limited exception… for scientific purposes or to enhance the propagation or survival of the affected species…" "By contrast, the ESA contains no express prohibition on the importation of 'threatened' species. It does, however, contain a provision that requires the Secretary to ensure that all regulations issued concerning 'threatened' species are issued for 'the conservation of such species; the ESA also allows the Secretary to afford threatened species that same protection afforded to endangered species regarding…imports."

By regulation the Secretary has done that. The Service requires proof of enhancement for import of threatened species like the ESA does for those listed as endangered. For argali trophy imports, the Secretary has issued a "Special Rule" or regulation. That "Special Rule" provides two options for a permit. The permit applicant can proceed under the general regulation requiring proof of enhancement and a finding by the Service of no jeopardy. That is what the Service has been doing when it has issued permits. Second, no permit may be required at all "if the countries from which argali trophies are imported provide certain 'certification' and documentation regarding the argali populations and their management in their country…," the Court ruled. The antis have been arguing that under the "Special Rule" or regulation "certification," of the status and management of the argali should be fully satisfied before trophy import permits can be lawfully granted by the Service. To the contrary, the Court accepted the government and intervenors' position that import permits can be lawfully based upon either, alternatively. The information required for the "certification" option is equivalent to information that would warrant delisting the species. In our judgment that is an impossibility in a developing country. That position is equivalent to arguing that argali cannot be imported if it is listed because the "certification" test for permitting is higher than that called for in the listing or downlisting of the species. The impossibility of that "certification" option under the "Special Rule" is what led to the first unsuccessful argali suit yours truly filed in 1992 on behalf of Safari Club International.

In its "overview," the Court flatly rejected the argument that the impossible "certification" was a minimal requirement. Even though the record clearly established that the Service makes both an "enhancement" finding and a separate "no jeopardy" finding each year separately for each of the three countries (Mongolia, Tajikistan, and Kyrgyzstan), the Service has admitted that the sheep status and documentation does not rise to the level of satisfying the second, "certification" alternative the Service created by "Special Rule." In effect, this interpretation of the ESA and argali regulations by the Court would have deprived the antis of a great deal of their case had the Judge reached the merits.

The antis have also been arguing that the issuance of import permits is constructively illegal. They claim that it is in effect approval of the taking of a listed species, which has been found to be illegal for domestic game that is listed. The Court wholly rejected that argument. The judge concluded that "the ESA specifically limits its prohi-

bition against takings to the United States, its territorial seas, or the high seas; the ESA's prohibition does not extend to foreign countries." The prohibition against "take" in the *Minnesota Wolf* and *Montana Grizzly* decisions don't apply.

The antis had also argued that every permit application should be published in the Federal Register and open to public comment before issuance. The Court held that "[p]laintiffs are not statutorily entitled to the information they seek or to a notice and comment period." The ESA only requires that for "endangered" species permits, not "threatened." "Plaintiffs cannot use their claim that the argali should be listed as endangered" to get publication before it is in fact listed as "endangered."

We fully expect the antis to appeal. In fact, they have already filed a Motion for Reconsideration and request for an oral hearing to which we are preparing a response as I write this. The antis are now arguing that they do have standing because the three countries can be forced to adopt better conservation practices if higher-paying U.S. hunters are denied permits. The countries will have an incentive to adopt better (more expensive) practices if they are deprived of that revenue. In effect, they are now arguing that the Service should deprive the countries of the source of higher revenue (and we might add, the documented enhancement each year) until the countries satisfy the higher "certification" permitting option. They claim that a judgment in their favor would do that, *i.e.*, provide them redress, therefore they do have standing. It is not over, until it is over.

We want to thank those that have acted as intervenors. That includes the coalition of wild sheep conservation interests that Conservation Force formed and represented, which are the Foundation for North American Wild Sheep, Grand Slam/OVIS, Conservation Force, Dr. Raul Valdez, Dr. Bart O'Gara (deceased Conservation Force Board member), Dr. James Teer, Douglas C. Stromberg, Ron Bartels, Ben Seale, Clark S. Ullom, Lee G. Lipscomb, and Mongolia. The African Safari Club of Florida, Kyrgyzstan, Weatherby Foundation, and many other organizations and individuals offered to participate or helped our effort, but are too numerous to list here. We also thank Safari Club International and the U.S. Sportsmen's Alliance Foundation and the individual hunters in that complementary intervention

for joining the challenge to the antis standing.

A great debt is owed to those who signed sworn affidavits or sworn declarations in support of Conservation Force's attack on the standing of the anti-hunters. Each of these individuals swore to the standing facts and those affidavits were attached to Conservation Force's two motions challenging the standing. Those individuals are Dennis Campbell, Pat Federick, Harv Hollek, Raymond Lee, Dr. Bart O'Gara (deceased Conservation Force Board member), Gretchen Stark, Dr. James Teer, Dr. Raul Valdez, and Wang Wei.

□

Urgently Noted

■ The USF&WS has proposed listing scimitar-horned oryx, addax, and Dama gazelle as endangered

The proposal is really the reopening of a proposal first made on November 5, 1991, (56FR56491). The "primary author" of the proposed rule was Ronald M. Nowak. That is the same staffer in the Office of Scientific Authority that is a plaintiff in the *Argali suit*, above, which he instigated. The proposal he authorized actually blames hunting. It states that "[a]n important new problem has been the arrival of non-resident sport hunters…. Now... nations are seeing the remains of their once abundant fauna squandered to satisfy the whims of a privileged and irresponsible minority…. [N]ations have found it difficult to withstand the pressure from the powerful outside interests that now are carrying out excessive hunts…."

He authored this within months of the 1992 argali listing he also authored under the same sentiment. Though he is now retired from the Service, his resentment of wealthy hunters and legacy remain. The re-proposed rule was published on July 24, 2003, at 142 FR 43706-43707. Public comments are being accepted until October 22, 2003. They should be sent to Chief of DSA, USF&WS, 4401 N. Fairfax Drive, Rm. 750, Arlington, VA 22203, or by fax 703-358-2276, or by email: ScientificAuthority@fws.gov.

If listed, U.S. hunters are unlikely to ever be able to import these species again into the USA. By "ever" we mean forever. Those breeding the species in Texas and elsewhere within the U.S. would no longer be able to freely own, manage, breed, or cull the species without permits and anti-hunting harassment. US hunters can provide the most revenue and incentive for reintroduction. – *John J. Jackson, III.*

Conservation Force Sponsor

The Hunting Report and Conservation Force would like to thank International Foundation for the Conservation of Wildlife (IGF) for generously agreeing to pay all of the costs associated with the publishing of this bulletin. IGF was created by Weatherby Award Winner H.I.H Prince Abdorreza of Iran 25 years ago. Initially called The International Foundation for the Conservation of Game, IGF was already promoting sustainable use of wildlife and conservation of biodiversity 15 years before the UN Rio Conference, which brought these matters to widespread public attention. The foundation has agreed to sponsor *Conservation Force Bulletin* in order to help international hunters keep abreast of hunting-related wildlife news. Conservation Force's John J. Jackson, III, is a member of the board of IGF and Bertrand des Clers, its director, is a member of the Board of Directors of Conservation Force.

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