SPECIAL SUPPLEMENT

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

World Conservation Force Bulletin

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District Court Denies Relief In Zambia and Mozambique Elephant Import Suits

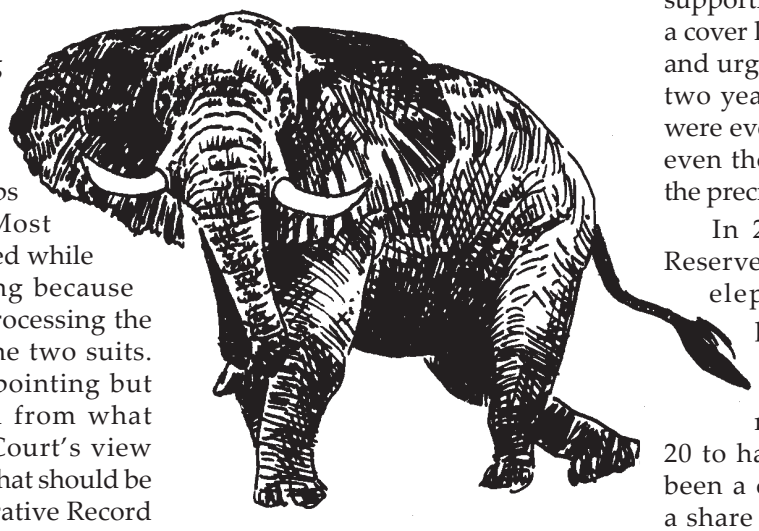
On August 30, Judge Royce C. Lamberth, Chief United States District Judge for the District of Columbia, rendered judgment in the suit over the import of elephant hunting trophies from Zambia for the 2005 and 2006 seasons. On October 6th, the same judge decided the Mozambique elephant trophy import case. That was for 2000-2003 hunts and Niassa Reserve hunts in 2005-2006. Both suits were about the unfair treatment of the permit applicants in the permitting process, unheralded delays and neglect, irrational decision-making and the legality of the steps and criteria imposed. Most relief was denied or mooted while the cases were processing because of the USF&WS finally processing the permits in response to the two suits. The decisions are disappointing but not entirely unexpected from what was gleaned about the Court's view during the motions over what should be included in the Administrative Record for consideration as the facts of the case. The earlier motions were contests over what should be in the Administrative Record and the rulings suggested that the Court was not going to hold the FWS to its agreements in the elephant suit of the early 90s that led to the imports from RSA, Namibia and Tanzania, as well as Ethiopia and Cameroon for a short time.

As of this writing, we expect to appeal and overturn the negative decisions. This Bulletin summarizes some of the most important aspects of these unprecedented cases about imports of elephant that have already been taken in those countries and then turns to the developments for imports of elephant being taken now and in the future. The permitting application process, and now the litigation, serves to define what more needs to be done to establish imports. It is fundamental that you must know a problem to solve it, but there have been forces within the USFW&S that have retarded the application process so much that even the problems could not be identified.

DATELINE: Africa

NEWS...NEWS...NEWS

John J. Jackson III



MOZAMBIQUE

Mozambique adopted a formal national conservation strategy for its elephant in 2000, which included the reopening of tourist elephant hunting for its particularized conservation benefits, such as reduction of poaching, community incentives and tolerance, etc. – all of which was spelled out in detail. The USF&WS was a participant in the drafting workshop as were some of the foremost elephant specialists in the world. The initial quota was only ten (10) elephant and only for specially designed community management project areas that had been readied with their own intensive plans. Consequently, only two to five licenses were actually allocated in each of the years in the suit, and they were only issued in CBNRM projects designed by renowned experts at the purposeful expense of foundations and international donor agencies. It had taken years to get the projects up and running, so we filed the first permit applications with four inches of supporting data and expert reports and a cover letter explaining the importance and urgency. It was shelved for nearly two years, and none of the materials were ever part of the decision-making, even though the materials addressed the precise issues that arose.

In 2005, the enormous Niassa Reserve and its buffer zones opened elephant hunting pursuant to precise planning and years of preparation. Consequently, Mozambique increased the national quota from 10 to 20 to have 10 for Niassa, which had been a closed area and did not have a share of the initial quota of 10. The import applications for Niassa were not processed by USF&WS at all for four years until after suit was filed. They were then denied for entirely irrational reasons that were contrary to the undisputable but wholly ignored documents and expert reports in the record.

The processing of the original permit for the 2000 hunt was not begun for nearly two years. When asked the reason for the delay, the assigned

USF&WS personnel explained the permits were a "low priority," were not on the work schedule to be processed at all and they could not promise to start the processing within six months, which bordered on three years. It was not scheduled at all. In short, it was never to be done. There was no regard for Mozambique's conservation strategy or the needs of the dependent community projects. That means the conservation of those elephant and the means and methods of conserving them were not really of enough concern. The real irony is the USF&WS later feigned concern for a conservation strategy and communal-based programs all the while wholly ignoring the voluminous documentation and expert reports of both. Mozambique elephant imports were never on the USF&WS agenda, and they just wanted the chore to go away. The whole time the potential benefits for the elephant and conservation strategy waited. When inquiry was made about the delay, the Service did not treat or recognize the application as being only for a few permits in a special communal project. As if to teach us to leave them alone, USF&WS created a roadblock like none ever before. USF&WS sent a rambling letter with 49 questions that had to be painfully separated.

In February 2009 (nine years) the retiring Director of USF&WS had those below him write a denial of the permits just to clean house - all but the Niassa applications that had not progressed at all in four years. We had no choice. We could either turn our back on the community projects and the Niassa Reserve applications that were in limbo too, or file suit. We had to file suit.

ZAMBIA

Like Mozambique, Zambia only had a quota of 20 male elephant out of a total population of 26,000 allocated to only a few select communities for strategic recovery purposes. The hunting was not for itself, but part of a well-conceived conservation plan. Zambia reopened its elephant hunting in 2005 as part of its formally planned conservation strategy with the advice and support of the foremost experts in the world. It was strictly limited to three select communal areas expressly to reduce elephant-human conflict and provide benefits to those who had to tolerate the elephant.

As has become the practice, the permit applicants who have the burden of proof were kept out of the process and information exchange. The USF&WS would not keep the permit applicants advised of the criteria and issues and worse, sent incorrect responses in response to Freedom of Information Act requests about the processing. As in Mozambique, correspondence with Zambia was lost or not sent as represented (all on the part of the USF&WS), and Conservation Force had to discover the hold-up and get the documents resent. In time, Zambia was sent inquiries that they had already answered in 2004 in preparation for and before opening the hunting. The assigned biologist within USF&WS internally complemented Zambia's detailed responses for their "impressive thoroughness," while simultaneously others did not know of the responses and sent the same inquiries over and over again. Each time they were re-answered but not taken into consideration at all. The answers went into limbo. On one occasion when the intermediary US Embassy in Mozambique received the questions for transmittal to Zambia, it recognized the letter of questions for what it was and asked if it could be simplified – to which it received no response. Nevertheless, Zambia made a quick and thorough response that would have been more than sufficient under all past practices (Zimbabwe, RSA, Namibia, Tanzania, etc.). Only after suit was filed, the permits were processed and denied. The Court has now rested part of its decision on Zambia's failure to respond at all because USF&WS's trial counsel argued and the Court adopted his argument that the USF&WS gave Zambia three repeated chances. In reality, the particular questions were answered from the get-go and again and again and again - three times - with "impressive thoroughness." The USF&WS had made a negative determination in 2004 that was kept from the applicants in their FOIA requests. The repeated answers to the questions were never considered until after suit and after the permits were denied.

In both Zambia and Mozambique the quota of 10 or 20 was less than a

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fraction of one percent of the elephant population. Moreover, males are biologically surplus. In both cases the quota allocation in issue was exclusively in CBNRM programs custom designed for conservation and dependent upon the elephant hunting that the USF&WS was holding hostage.

We filed the Zambia suit initially for the simple failure to complete the permitting process for four (4) years and for the dysfunction of the processing system. Then when the permits were denied in March 2010, we amended the suit to challenge the reasonableness of those denials and the legality of the undisclosed criteria that kept changing.

With that and worse, how could the Court deny relief in the cases? The first reason is the judicially created Chevron Doctrine. That is where the US Supreme Court set out that courts should defer to the expertise of administrative agencies of the Executive Branch of Government, which deference has since become an almost irrefutable presumption. Only in the rarest of cases will a District Court overturn a decision within the area of the agency's presumed expertise. The Court in the two elephant cases seems to have extended that presumption of correctness to the Defendants' legal arguments too, i.e. it adopted the USF&WS attorney's statement of facts and arguments almost verbatim as controlling even though they sidestepped the actual record and issues. In fact, the Court did not address many of the most telling issues.

The Courts in these and other cases also don't seem to fathom the role of the hunting-based programs. They are easily confused by the apparent paradox that conflicts with the very concept of sustainable use, i.e. they can't reconcile the killing of a listed species to save it. Who can blame the judiciary when the USF&WS itself, the "expert" agency, shows such little regard and respect for sustainable use based programs?

The Court primarily deferred to the expertise of the agency and, I must add, the post hoc arguments of their legal counsel. The initial paragraphs of both decisions provide insight behind the decisions. The Zambia memorandum opinion starts off:

> *Plaintiffs paid a princely sum for the opportunity to shoot African elephants in Zambia and then they wanted to import the animals' corpses back to the United States. The trouble is that plaintiffs' attempts at post-mortem importation run up against some complex law. The United States is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), a multilateral treaty that protects wildlife vulnerable to trade, including African elephants. 27 U.S.T. 1087; T.I.A.S. 8249, Mar. 3, 1973. It implements CITES through the Endangered Species Act ("ESA") – "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tenn. Valley Auth. V. Hill, 437 U.S. 153, 180 (1978). Both prioritize plaintiffs' prey as a protected species, entangling it in the sprawling machinations of international environmental law. Plaintiffs' desire to keep these corporal mementos from their African adventures doesn't trump the law….*

In the Mozambique case the opinion starts out as follows:

> *Thrill-seeking safari hunters willingly pay thousands of dollars for the privilege of shooting an African elephant. Sport hunting is legal in many African countries and can often benefit threatened elephant populations where the practice is carefully managed and revenue from hunting licenses is recycled into conservation programs. Without an effective wildlife management plan, however, the haphazard sport-killing of elephants may – intuitively enough – be detrimental to their survival as a species. For this and other reasons, the United States Fish & Wildlife Service ("the Service") determined that sport hunting in Mozambique would not "enhance" the survival of African elephants in that country – a prerequisite for allowing the import of a sport-hunted trophy into the United States.*

The terms "princely sum," "corpses," "post-mortem," "plaintiffs' prey," "corporal mementos," all in the very first paragraph do not appear anywhere in the legal briefs. Neither does "[t]hrill-seeking safari hunters" and "haphazard sport-killing" in the first paragraph of the Mozambique opinion.

The Court's verbiage was wholly irrelevant to the litigation, which was about carrying out the goals and purpose of the ESA and CITES and maintaining a reasonable and responsible permitting system. The suits were not about the right to hunt. There was nothing in the Administrative Record reflecting why elephant hunting means so much to those that care so very much about it. That was never the issue. The only rights addressed was the right to fair treatment in having one's permit processed, which never bordered on the right and reasons to go on safari.

To the contrary, the suits are about furthering the goals and purpose of the Endangered Species Act and CITES, i.e. maintaining and restoring the species. The conduct of the USF&WS is contrary to the survival and perpetuation of the elephant. It is jeopardizing the recovery of the elephant. That is the underlying and important reason we have worked on this for two decades. Almost all the courts in the recent cases have recognized that import permit processing and ESA implementation by

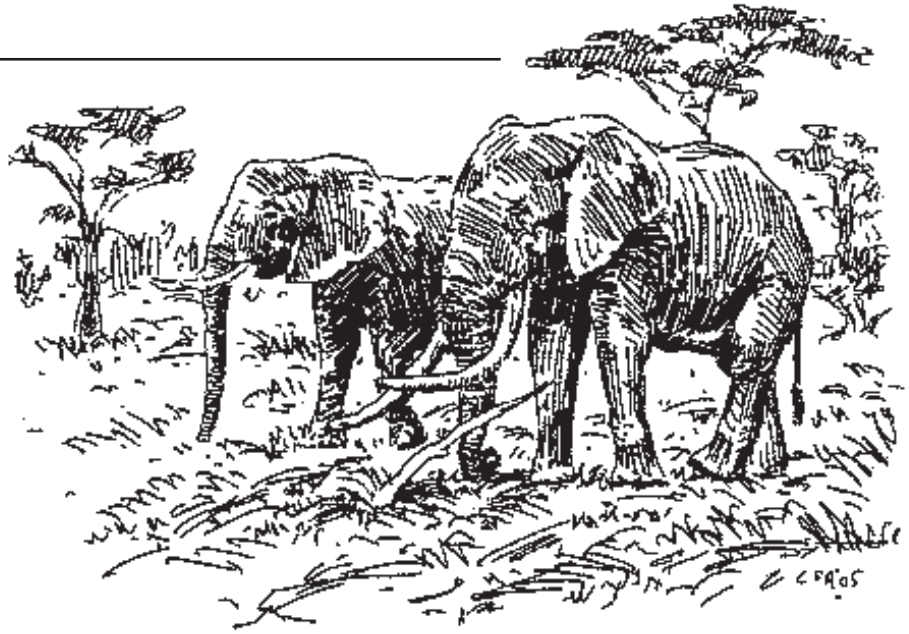
the International Section of USF&WS is "maladministration" and contrary to the "aspirational provisions" of the ESA. Even though the suits have been "mooted" by changes of conduct after filed and the courts have held that citizen suits can't be brought for enforcement of mandates that are broad and discretionary in nature, it is the agency that is remiss in its mission. The underlying conservation projects are only grains of sand on an endless beach. If the barriers they must overcome are continually raised, holding them hostage for a decade or more, there is little chance for the resource. What a shame.

The criteria for issuance of the permits was changed and raised over the past decade. Worse, it was without notice, comment and re-notice. The Court held, to our horror, that the "required criteria" that the applicant had the burden to satisfy did not have to be made known to the applicant who had the burden and, worse, even though it constituted changes in practice (a raising of the bar.) In short, the Court held that the agency has broad discretion because of its expertise, it is against judicial policy to intervene, and the "aspirational" sections of the ESA intended for recovery of foreign species are all within the discretionary area that can't be enforced through citizen suits. Although the ESA states that the USF&WS "shall" do certain things, it does not specify exactly "how," thus it falls within the "discretion" of the agency, which the Court is loath to disturb. In the two cases the agency had changed its criteria, ignored the reports and documents submitted, excluded the applicants who had the burden of proof from the process, and did not track its own actions and the responses.

FUTURE PROSPECTS

We must appeal the two cases because of far too many issues to even list in this Bulletin. Those issues are of enormous importance to using hunting as a force for conservation and to the fair treatment of permit applicants. So, what about import of the elephant being taken now and in the future?

For import of elephant trophies from Mozambique, the two big remaining obstacles, other than the



USF&WS neglect itself, is the need for a total, actual nationwide elephant count and second, an unspecified kind of national action plan. The EU paid two million dollars for a nationwide count of all animals including elephant, so that has been achieved. The USF&WS itself co-funded a workshop to draft a national action plan for elephant in Mozambique. That plan was drafted and sent to USF&WS many months back and will be adopted and implemented once approved by USF&WS. Typically, the USF&WS is late in responding. It is time to file permit applications for 2011 and 2012. Without applicants no determination is made.

The USF&WS has promised to approve Zambia permits for 2011 and for 2010 but had no applications for 2010 to approve. We have helped submit applications to them for 2011. In March 2011, the Division of Scientific Authority (DSA) made the long awaited positive non-detriment finding for 2011. It cited the CITES Panel of Experts conclusion that a quota of over 130 elephant per year would be sustainable if the quota were that high, though it remains at 20. It is only a determination for 2011 and the DSA states it must be redone beyond, year-by-year. The hold-up is the Division of Management Authority (DMA), which makes the enhancement determination, has not done their part as they promised they would. Just this week we received a 500-page response to our FOIA request on the status within the DSA and DMA. Ninety-nine percent of the documents are those we have submitted, but the DSA and DMA's own documents are revealing. It seems the federal judge was mistaken when he dismissed the claims as moot because the failure to process was not likely to reoccur. We are trying to work it out amicably, but if suit must be filed again, the judge may not presume in favor of the USF&WS for repeated disregard on the heels of the earlier cases. The season is practically over now as this is being written, but apparently the promised DSA approval is not even scheduled. Hopefully, it will be forthcoming, though late. ■