



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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Worked Elephant Ivory Tusks Not Importable: US Court Holds Import Violated Four Laws and Orders Forfeiture of Zimbabwe Elephant Tusk

After two years of litigation, the US District Court in the Eastern District of New York upheld seizure and ordered forfeiture of a scrimshawed elephant tusk imported from Zimbabwe. This is the definitive case on the import of worked elephant tusks under the new definition of "trophy" adopted by US Fish & Wildlife Service (USFWS) in 2007. Under that definition, you'll recall, no "worked" or embellished animal part is a trophy. The Court found import of the aforementioned tusk

DATELINE:
United States



John J. Jackson III

absolutely prohibited. Furthermore, the USFWS argued that this ivory import was four separate violations, and the Court deferred to the position and arguments of the agency on each violation.

Graham Kent Fuller took his elephant on safari in Zimbabwe before the USFWS changed its definition of "trophy" to exclude "worked" or "crafted" parts of trophies. He also had the substantially larger of the two tusks scrimshawed on one face with the "Big Five" because the tusks were not symmetrical enough for display together. This too was done before the new USFWS "trophy" definition. The Federal Register notice of the 2007 change in the definition of "trophy" states that the change does not mean the worked/crafted part can no longer be imported. Rather, it can still be imported if coded "P" for personal, non-commercial use, instead of "T" for trophy in the *Purpose* section of the CITES export permit. In a good faith effort to comply, the Zimbabwe authorities did purpose code the export permit "P," but to no avail. This case clarifies that the "P" code will not cure a worked trophy part if it is ivory.

The USFWS took the position

that even though the Zimbabwe elephant is on Appendix II of CITES, Fuller's tusk was not on Appendix II because the downlisting at CoP 9 in Harare was with an "annotation" that it was only for "trophy" trade and certain other items and for all other trade those elephants remain on Appendix I of CITES. We argued that the US could not unilaterally change the listing of a species by changing its own definition of a trophy part. The meaning of "trophy" to the Parties

to CITES governs its listing, not a later US definition. The after-the-fact US definition can't change the intent of the CoP or meaning of the Parties without the passage of a new proposal by a two-thirds vote of those voting at a CoP.

Our argument was to no avail, even though the Parties had passed a regulation at the time of downlisting that as long as a tusk remained whole it was to be treated as a raw, whole tusk – not worked ivory. Another rather ironic fact is the annotation for Zimbabwe

includes more than "trade in hunting trophies for non-commercial purposes." It includes trade in "ivory carvings for non-commercial purposes." This ivory carving annotation has existed in the listing of Zimbabwe elephant since it was first downlisted, and remained part of the annotation each time it became an issue at CoPs, including in 2000 and 2007. Thus ivory carvings from a trophy should be on Appendix II despite the seizure and Court decision.

The first violation cited by USFWS was that the Zimbabwe CITES export permit was invalid because that permit misstated the tusk was on Appendix II. The position was that the trophy had been converted by the working on the tusk. Of no avail were arguments over the position of the other 170 Parties, the long-term practice, or how the *Act of State Doctrine* required the USFWS honor the official acts of other governments, namely the act of the Zimbabwe government in this case. The Court held that the Zimbabwe export permit should have said the tusk was **Appendix I**, not Appendix II, and that was a violation that invalidated the Zimbabwe export permit.

Second, the import required a CITES import permit from USFWS because the working/crafting of the tusk converted it to an Appendix I item at the time of import. Importing without an import permit was also a violation of the Endangered Species Act that enforces CITES. The fact that the USFWS had denied import permit applications of other worked ivory was no defense. The USFWS will not grant import permits for import of worked ivory purpose coded "P" even though the Federal Register notice that accompanied the Final Rule for the 2007 regulations states the "working" will not prevent import if coded "P." The USFWS position is that the annotation in the downlisting speaks for itself, i.e. if not a "trophy" it is on Appendix I, so a USFWS import permit



is necessary even if USFWS will not grant the permit. Bottom line: You are free to have your ivory crafted after US entry, but not before the import.

The third violation was of the *Special Regulation* under the ESA for import of elephant hunting trophies. That regulation, 50 CFR 17.40(e), only allows import of elephant "trophies." Because the elephant is listed as *threatened* under the ESA, import must comply with the special regulation, i.e. it must be a "trophy" at the time of import, otherwise import is prohibited. The argument that non-commercial trade of Appendix II listed species is exempt from regulation by the ESA, section 9(c)(2), was also to no avail because the tusk had been converted to an Appendix I species by the crafting, according to USFWS. USFWS argued if on Appendix II, then the Special Regulation is not applicable, but the scrimshawing converted the tusk to Appendix I.

The fourth violation was of the *African Elephant Conservation Act* (AECA). That is the Act of Congress that prohibits all ivory imports but expressly exempts sport hunting trophies from its prohibition. Since it was no longer a trophy, import was absolutely and unconditionally prohibited. This was an even greater surprise. In the hearings to establish the AECA, the committee had made two things clear. First, they preferred that ivory tusks be worked in the African nation over the US as a conservation incentive for those who must both tolerate and protect the elephant, particularly Zimbabwe's CAMPFIRE program, as was the case with this elephant. Second, the committee outright stated that the term "trophy" was to have its ordinary meaning and not to be messed with by the USFWS, i.e. a trophy is ivory taken on a regulated safari hunt for personal use. In effect, the definition of "trophy" was changed by USFWS in the AECA contrary to decades of practice, without a rulemaking process or express notice, and contrary to the intent of Congress. Although the 2007 definition was in the CITES section of the USFWS regulations and represented to be a CITES regulation, its meaning was carried over to the AECA and made applicable to the statute of Congress. Even though Congress had chosen not to define "trophy," the USFWS did it

indirectly.

The fact that the Parties at the last CoP of CITES revised the pertinent Resolution to expressly clarify that trophies include "manufactured" (crafted/worked) parts of the animal and that the USFWS has since formally proposed returning to the customary meaning of the term was to no avail. The published proposal by the USFWS to return to the traditional definition of "trophy" does not mention elephant ivory at all, but neither did the 2007 regulation.

The fact that the tusk was whole, permanently numbered and fully identifiable with the big game hunt made no difference. It was the letter of the trophy definition regulation that governed.

No one in the industry expected that the 2007 change in definition would be used to claim changes to the listing category of the elephant or apply to the African Elephant Conservation Act and Special Rule for elephant as well as CITES. There is scant suggestion of that in the notices published in the Federal Register nor in the correspondence to Zimbabwe and other African nations.

Note that the same absolute prohibition probably applies to white rhino horn in South Africa, which is also downlisted with an annotation that trade is still on Appendix I for all other unspecified purposes other than trophies. Though there is no Special Rule or AECA for rhino horn, if it is not a trophy or non-commercial live trade, the white rhino is on Appendix I just like Zimbabwe elephant. The rhino downlisting reads: "For the exclusive purpose of allowing international trade in live animals...and in hunting trophies. All other specimens shall be deemed specimens included in Appendix I..." Unfortunately, one can't know until there is clarification or a court case for that species.

Fuller's import broker, John Meehan, had conveyed the offer to sand off the pencil etching at the point and time of seizure, but the USFWS Law Enforcement Inspector refused. After all the litigation and oral hearings, the USFWS gestured to accept the offer, but by then it was too late for the attorneys and trophy owner. The owner also had lawyers in Chicago and New York City working on the case. This did lead to settlement in a similar



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EDITOR/WRITER
John J. Jackson, III

PUBLISHER
Barbara Crown

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Conservation Force
3240 South I-10 Service Road West, Suite 200
Metairie, LA 70001
Tel. 504-837-1233 Fax 504-837-1145
www.ConservationForce.org

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case in Atlanta where the tusk owner, who was a dentist from Mississippi, personally disc-sanded off the etching on the surface in the presence of two Law Enforcement Agents in Atlanta after more than a year of litigation. In that case, we settled because the exporting country had not purpose coded the export permit "P" for personal use as the 2007 regulation requires for crafted parts. The 2007 regulation explicitly states the "P" purpose code will permit the import, but neglects to mention it does not apply to elephant ivory. This case provides that important information. The industry needs to be warned that worked ivory can't be imported into the US under any circumstances. Some tusks since 2007 have been seized because they had brass rings or the root area painted and even because they had a fancy base.

We have been able to get those released amicably thus far. Have your trophy ivory crafted after import, which is perfectly legal. (For those interested, the pertinent regulations are AECA – 16 USC 4224(e); Elephant Special Rule – 50 CFR 17.40(e); USFWS trophy definition – 50 CFR 23.74(b); 2007.)

The 25-page decision was rendered in *United States of America v. One Etched Ivory Tusk of African Elephant (Loxodonta Africana), Defendant, and Graham Kent Fuller, Claimaint*, Case No. 1:10-cv-00308, Document 41, Order filed 5/17/12.

We appealed the case in early November. Most particularly we take issue with USFWS claiming to change the meaning of "trophy" unilaterally in a downlisting passed by over 170 other countries. Second, the downlisting

annotation includes "ivory carvings." Regardless, it is fundamentally unfair to apply such an interpretation and carry the definition to other regulations and even interpretations of statutes without notice and publication. It was coded "P" and there was no notice that coding in "P" did not apply to ivory as it does other parts and species. The Federal Register explanation states crafted trophy parts can be imported if coded "P."

Once again this demonstrates a readiness on the part of Law Enforcement to punish innocent owners of trophies. In this instance the problem was caused by USFWS' ambiguity in the rulemaking compounded by complex carryover to other unmentioned laws and regulations and government-to-government disputes. ■

DATELINE: BOTSWANA

Waning Status of Hunting-Based Conservation in Botswana: Latest Developments

On November 5, 2012 the President of Botswana, Lt. General Seretse Khama Ian Khama, delivered his *State of the Nation Address 2012*. Approximately one page of his 24-page address covered *Environment & Tourism*. He described a "determination to diversify the tourism industry in partnership with communities" but that diversification omitted tourist hunting. He described the *Botswana Tourism Eco-Certification* system, which promotes environmentally friendly tourism that incorporates host communities. Then he announced the decision to "stop" most tourist hunting and why in the 124th paragraph of his address. That paragraph is quoted here in full to preserve its context, i.e. poaching and tourist hunting together.

124. *Of additional concern is the*

rise in cross border and domestic poaching incidents and trafficking of live predators, which are the subject of our new and evolving National Anti-Poaching Strategy. At the same time we have reached the decision to stop the commercial hunting of wildlife in public areas from 2014 as the shooting of wild game purely for sport and trophies is no longer compatible with our commitment to preserve local fauna as a national treasure, which should be treated as such.

Note this is a statement of intent and expression of his personal, biased belief about the value of hunting and is paragraphed with unlawful poaching. He has pledged to close tourist hunting since a young boy running around hunting safari camps and is in position to do just that. Also, the new Minister of Environment, Wildlife and Tourism is one of the two twin brothers of the President. He too admits a bias against tourist hunting and has confirmed the closure in a year. The President himself has been dictating to a line of Ministers and Directors since his Vice-Presidency. He has already marginalized the tourist hunting industry over the past 15 years.

In fact, many concessions have just been renewed for 2013 with at

least some groups of community areas renewed out through 2017. (Johan Calitz Safaris, Butler & Holbrow Safaris and Peter Holbrow or Greg Butler.) Perhaps community areas are not considered "public areas" to be closed. The allocations are to be stopped in "public areas" after 2013. The promised closure is not of resident hunting and not private ranch hunting such as exists on a large scale in RSA and Namibia. Although hunting is presently still open, the quotas are expected to be reduced. Elephant hunting quotas are also expected to be reduced and perhaps quotas issued on a case-by-case basis. That suggests that the hunting of elephant may be focused more on problem animal control than managing bull elephant to become older, larger tuskers.

The president brags of democracy in Botswana, but his tenure and devotion to duty, affected by his personal beliefs and biases, can be quite dictatorial. This devoted president means well but is seriously mistaken. His bias is affecting his wildlife management judgment and decision-making to the detriment of the people and wildlife. The hunting community has long been marginalized by his bent, but I expect hunting will nevertheless hang



on because of its inherent private, communal and conservation benefits. It does reduce poaching, particularly in areas not suitable for photographic tourism. If one leaves his house empty, thieves will move in. Moreover, the concession holders are bound by their tender agreements to maintain water holes and to control the poaching. The elephant population is the largest in the world, growing, and the conflict with local people is increasing with that growth. That said, the Botswana Wildlife Management Association is hard at work contending with the foreboding announcements. We all need to be supportive of the BWMA and behave as good tourist hunters when in the country to maintain what can be saved. Remember that Namibia's "public areas" were closed for a number of years and are now open, though the reason was not the bias of the President.

STATEMENT FROM THE BOTSWANA WILDLIFE MANAGEMENT ASSOCIATION

The Botswana Wildlife Management Association (BWMA) welcomes the recent decision by the Government of the Republic of Botswana to extend concession leases for multi-purpose (photo and hunting) use for a further year for the following concessions:

CT1: Destination South Safaris

Contact: Jeff Rann
jeffrann@yahoo.com

CT2: Johan Calitz Safaris
Contact: Johan Calitz
johan@calitzsafaris.com

CT3: Chobe Fish Eagle
Contact: Duncan Britton
duncan@chobesafarilodge.com

NG 42: Nemesis Safaris
Contact: Johan Calitz
johan@calitzsafaris.com

NG 43: Kgori Safaris
Contact: Jim Van Rensburg
hunt@kgorisafaris.com

NG 47: Safaris Botswana Bound
Contact: Graeme Pollock
saf.bots@info.bw

CH12: Bottle Pan Safaris
Contact: Mike Murray
mike@murrayranches.co.za

This extended period will allow for continued dialogue with the Ministry of Environment Wildlife and Tourism (MEWT) on national conservation strategies and to facilitate the transition of these areas from multiple use (hunting and photographic) to non-consumptive tourism.

A verbal statement was made at a recent meeting with tourism authorities that all hunting in Government concessions would cease by the year 2014: however, the BWMA do not

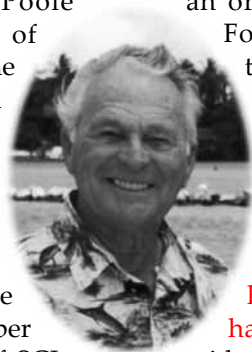
have this statement officially - our Government has continually stated that areas with existing leases will not be affected until lease expiry, so community-based concession areas, NG41 (Mababe) and CH1/2 (Chobe Enclave), which are operated by Johan Calitz Safaris (johan@calitzsafaris.com) and Butler & Holbrow Safaris (contact: Peter Holbrow (peterholbrow@gmail.com) or Greg Butler (kelly@gregbutlersafaris.com)) respectively, should not be affected by the statement made in respect of the 2014 cut-off.

The BWMA has been in negotiations with the MEWT since 2008 in an effort to rationalize the change in land use: consumptive tourism plays a critical role in securing remote wildlife areas against poaching, human and livestock encroachment, fire and supporting community-based livelihoods. With these pivotal factors in mind, the BWMA will continue to collaborate and lobby Government to recognize how hunting succeeds in maintaining wildlife functionality and habitat conservation in Botswana.

For any further information on booking hunts in the above concession areas, please contact the operators listed above or contact the BWMA Secretariat on email debbie@mochaba.net. ■

Bill Poole Enshrined Into the IGFA Fishing Hall of Fame

On October 23, 2012 Bill Poole was inducted into the Hall of Fame of the International Game Fish Association. You'll recall that Poole died in 2009; he was a great conservationist and loyal supporter of Conservation Force. He was also the 2008 Conklin Award winner, holder of the Triple Slam, founding member of the San Diego Chapter of SCI,



an original \$100,000 SCI Legacy Founding donor/member and the recognized leader of the recreational fishing industry in Southern California and Mexico. The IGFA has included a page about him and a video on its new website for the Hall of Famers. Go to <http://www.igfa.org/museum/hall-of-fame.aspx> to watch the video.

Also in April, 2012 at Fisherman's Landing, San Diego, a memorial sculpture depicting Poole on the flying bridge of his original *Polaris* charter boat was unveiled. Though he died in 2009, he is not forgotten. We covered his death in Conservation Force Bulletin (see December 2009) because of his exemplary life, inspiration to all he met and because he indeed was "a lion of a man." He was the real thing. ■

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