SPECIAL SUPPLEMENT

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

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The Time Has Come for Congress to Take the Lead

Regina Lennox
Staff Attorney

Continuing readers have followed our suit against Delta Air Lines. On October 15, 2015, Conservation Force, Dallas and Houston Safari Clubs, Corey Knowlton, CAMPFIRE, and the Tanzania Hunting Operators Association sued Delta to challenge its ban on the transport of Big Five trophies.

Delta moved to dismiss the complaint in late December 2015. After briefing, in June 2016, the district court granted Delta's motion in its entirety. In July, Conservation Force appealed the district court's ruling. Intensive briefing followed. On March 8, 2017, we finally argued our case before the US Court of Appeals for the Fifth Circuit in New Orleans.

Before a panel including Judges Barksdale, Graves, and Higginson, we argued three primary points. First, this case impacts the conservation system of southern Africa, which relies on licensed, regulated hunting to generate the conservation incentives that have helped the wildlife to recover. Delta's embargo threatens this system. It violates the "enhancement" policy made clear in the Endangered Species Act. A common carrier—a public servant—cannot take a position against public policy, which is exactly what Delta's ban is doing.

A common carrier also cannot pick and choose among the specific items that it carries. It must treat all shippers indiscriminately, and it must carry similar articles within a class of goods. A carrier may change the scope of its services only with a good faith showing and operational need. But here, Delta has not offered a good faith reason. It admits it made a "business decision" in the immediate wake of the allegedly illegal hunt of "Cecil the lion," a mere three months after confirming it would continue to carry hunting trophies. Delta basically pandered to Facebook activism, and that decision was not made in good faith and for any reason besides publicity.

We pointed out to the court, in a hypothetical one judge called "intriguing," it would be very difficult to draw a line if a carrier can impose a ban facially targeted at cargo, but really intended to impact people. For example, the current President is hotly debated on social media. Whether Delta chose to demonstrate its support for him, by banning the transport of goods from companies that have spoken out against his policies, or whether Delta chose to ban the transport of Trump-branded products, either ban would facially target cargo. However, in both cases, Delta would really aim at influencing public policy. Similarly here, Delta's ban on Big Five trophies right after "Cecil" is obviously intended to punish Big Five hunters. It is not aimed at goods, but at the people transporting them.

Conservation Force staff attorneys Matt Boguslawski and Regina Lennox argued the case against Delta Airlines before the Court of Appeals of the Fifth Circuit.

We also argued that Delta's ban violates a section of the federal aviation law that prohibits "unreasonable discrimination against persons, places, ports, and types of traffic in foreign air transportation." The district court dismissed on the grounds a private plaintiff cannot enforce this section. But we pointed out that numerous courts had allowed private plaintiffs to enforce this section between 1956 and 1978. It was removed in the 1978 Airline Deregulation Act, but Delta conceded this section was added back and reincorporated in a 1994 law "codifying" the transportation law, "without substantive change." In so doing, Congress explicitly stated its intent not to change prior judicial interpretations of this provision, *which recognized the right of private plaintiffs to sue*. Therefore, plaintiffs should have an action against Delta under this section.

We very briefly argued that the district court read our tortious interference claim too narrowly. Delta's announcement of the embargo went further, and also implied a problem with the legality of hunting trophies. That implication was not related to Delta's "services," but to *plaintiffs'* interests in lawful hunting. At the least, we pointed out that the district court should have permitted an amendment to our complaint to make this allegation clearer.

The judges questioned me extensively. Among other things, they were concerned that Conservation Force and Corey Knowlton had filed an administrative complaint against Delta with the Secretary of Transportation under the statutory non-discrimination provision. Nothing has happened with that complaint—no action has been taken by the Secretary's office. We also pointed out that the federal statute allowing an administrative complaint had existed when courts had allowed private plaintiffs to enforce the statutory non-discrimination provision. The cases did not require exhaustion of adminis-

trative remedies or impose any barrier to bringing a private claim. Therefore, the plaintiffs should be allowed to proceed in both their civil and administrative actions.

The judges also asked about the common-law duty of non-discrimination. We were advocating for a broader interpretation than the district court had found, and apparently, broader than the circuit court wants to go. Essentially, we argued that the common law requires Delta to carry cargo and not to change its services except with good reason because Delta stands in a special relationship with the public. The district court allows Delta to change its services whenever and however it wants. One judge specifically stated he believed Delta could make a business decision to alter its services however. Although we pointed out cases to the contrary, the judge did not seem amenable to enforcing the broad common-law duty.

That was our general feeling after the argument. The court did not seem particularly open to requiring common carriers to act within their broad common-law duty of non-discrimination. We cited numerous cases to support our position that the common law only allowed carriers to change their services in certain circumstances. However, the court seemed more likely to conclude Delta could make a "business decision," even one motivated by a desire to cater to anti-hunting sentiment expressed on social media, and stop carrying Big Five trophies whenever it wished. The court did not seem open to requiring Delta to provide an operational justification for the change in services, even though there were cases on this point.

We hope the Fifth Circuit will *at least* require the district court to allow the plaintiffs to amend our complaint. We could try to plead a bad-faith motivation by Delta and discrimination very specifically against Big Five shippers, and we could definitely re-plead our second (tortious interference) claim.

But here is the bottom line. Conservation Force and our partners have done our best to hold Delta to its duties. We have invested days on days in the research and presentation of our claim. Our argument is sound and backed up by common-law cases. Although the common law limited a carrier's ability to make a "business decision" in bad faith or without a reasonable basis, courts seem to wish to allow an air carrier to do as it chooses. The courts have not displayed a willingness to embrace the broad common-law requirement. This may be because air carriers were extensively "de-regulated" in the late 1970s, and have had something of a favored status among carriers. The duties on airlines have been lesser than those on railroads and motor carriers. (Delta claims that "deregulation" included a protective regulation exempting airlines from the common law duty not to discriminate.)

Now is the time for Congress to act. If the courts are not willing to uphold the ancient common law of a strict duty of non-discrimination, Congress must make the law modern. It must enact a statute to hold air carriers accountable. It must put air carriers in a position where they are required to treat the public fairly. They cannot be allowed to be swayed by changes in public opinion.

Congress must also make much clearer its intent to give injured plaintiffs a federal statutory right to challenge discriminatory practices. This law was clear before deregulation in the late 1970s, but time and de-regulation altered the strength of the precedent. In a few sentences, Congress can keep air carriers honest by not allowing them to discriminate, and giving private plaintiffs the unquestionable right to sue.

As we argued in the Fifth Circuit, shippers and passengers are now essentially in a dependent relationship with the airlines. We are used to being able to send things wherever we wish, or to go wherever we wish. The world has shrunk as our options have expanded. But when an airline is permitted to cut off an option suddenly, for no good reason except a shipper is currently disfavored, shippers are being left with no remedy. They have few options. Even though air carriers have a monopoly over the sky—and entry costs are prohibitive for competitors—air carriers would be allowed to dictate public morality. Facebook activists will have won the day. As we pointed out to the court, there is a real danger in allowing an

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airline to change the scope of its services based on whatever is "trending" on social media.

This would not be the case for a railroad or truck carrier, which are more extensively regulated. It is time for Congress to cut back Delta's and other airlines' favored statuses. They should be made to treat the public fairly, no matter what. If a US state enacted a ban like Delta's obstructing federally issued "enhancement" based import permits it would be prohibited under the ESA's preemption clause. Delta and other carriers should not be permitted to substitute their judgment for Congress'. Protective regulations that unwittingly enable airlines to knowingly discriminate against foreign countries' conservation programs and USFWS issued findings and import permits without recourse need to be reformed.

Perhaps most importantly, the Fifth Circuit did not seem interested in our main point. The conservation system of southern Africa is at risk from Delta's ban. The courts are allowing Delta to counteract the public policy made clear in the ESA and the Convention on International Trade in Endangered Species. International trade in hunting trophies is *favored* under these laws. The benefits of licensed, regulated hunting have been repeatedly recognized by the FWS, and "enhancement" has been repeatedly found. Bans like Delta's obstruct this enhancement.

As we successfully argued in the New Jersey litigation, a state cannot substitute its judgment for the FWS'. But Delta, an airline with no knowledge of listed species, is being allowed to do this! It is being allowed to ban the transport of lawfully hunted and enhancement-permitted species. We hope Congress will rectify this inconsistency as soon as possible, and hold Delta accountable and within the policy of the ESA. ■

Renee Snider Joins Conservation Force Board of Directors

By John J. Jackson, III

In March Renee Snider was elected to the Board of Directors of Conservation Force. We are so pleased to have a hunter with her level of personal achievement, unequaled experience in hunting world-wide (all six continents), and devotion to nature, people, and the hunting community. She adds unmatchable and up-to-date knowledge to the Conservation Force team and is an excellent addition to our "Leadership" and "Think Tank" components.

There is no substitute for first-hand knowledge from the field. Renee's volunteer service on the Board will help keep the Force up-to-date and provide first-hand insight that can only come from experience afield and a lifetime of dedication. She truly has a PhD in the hunting world. The following are some of her awards in chronological order.

J. Alain Smith (left) and Jim Shockey (right) present Renee Snieder with award.

In 2006 she was the first woman to receive the Golden Malik Award for taking all big game species found in the South Pacific "free range and on-foot."

In 2012 Renee received SCI's prestigious Diana Award, presented to women who excel in international big game hunting, show exemplary ethics in the field, and devote time and energy to enhance wildlife conservation and education.

In 2013 Renee was the first woman to receive the OVIS Award, the highest award Grand Slam/Ovis gives to wild sheep and wild goat hunters.

In 2014 Renee was the first female Weatherby Award winner and had the highest tally of big game taken worldwide of any recipient in the 57-year history of the award! Also, in 2014 she received the Ullman Magnum Award for collecting all European big game species.

Additionally in 2014, four days before the Weatherby Award, Renee became the only woman inducted into the Wild Sheep Foundation's Mountain Hall of Fame. That is the WSF's most prestigious award reserved for a few who are recognized as true "icons" in the sheep hunting community.

John J. Jackson, III, with Renee Sneider.

In 2015 Renee received SCI's World Conservation and Hunting Award for not just the number and quality of her trophies, hunts and countries, but for her conservation work.

In 2016 Renee became the first female hunter to receive the Pantheon Award, jointly awarded by GSCO and SCI. The criteria are the collection of the Grand Slam of North American, Capra World Slam Super 30 of the wild goats of the world, OVIS World Slam Super 30 of the wild sheep of the world, and the SCI World Conservation and Hunting Award.

In 2017 Renee received the International Hunting Award that was established by SCI "to honor the great hunters of the world."

She also became the first woman

to receive the Conklin Award "for her dedication of pursuing big game in the most rugged terrain under the most difficult and demanding conditions while maintaining the highest standard of ethics, adhering to the rules of fair chase, and showing a true conservation stewardship for the big game animals of the world."

The Conklin Award Committee correctly said, "She might be the most accomplished hunter in history, man or woman."

This year she also received the Super 40 Capra and Super 39 Ovis awards from GSCO for her wild goats and sheep from the mountains of the world.

Renee serves on the Board of Directors of a number of organizations, including the River Oak Center for Children, Help-A-Child Foundation, Conklin Foundation, and Weatherby Foundation International.

Renee has been a friend and contributing supporter of Conservation Force for nearly two decades. Please thank Renee for serving on the Board when you see her. ■

FWS Finally Acts on Certain Zimbabwe Elephant Permits

On February 23, the FWS denied two permits Conservation Force had filed to import elephant trophies from Zimbabwe. These elephants were hunted in February and early March, 2015.

In denying the applications, the FWS cited its March 26, 2015 negative enhancement finding. Conservation Force had submitted extensive documentation questioning and challenging this March 26, 2015 enhancement finding. (This is the last finding the FWS had made for Zimbabwe. It followed the April 2014 announcement of the import suspension on elephant trophies from Zimbabwe and Tanzania, and the July 2014 finding, which revised the initial April 2014 negative enhancement finding based on comments from Conservation Force and ZimParks.)

Any hunter who filed an application to import an elephant hunted in Zimbabwe in 2015, and whose application has been denied, should get in touch with Conservation Force as soon as possible. We are submitting a request for reconsideration based on the thousands of pages of updated information provided to the FWS. The FWS did not consider this data in its March 26, 2015 negative enhancement finding. But the FWS should have! In that March finding, the FWS left open the opportunity for applicants to submit additional data. It stated: "The suspension … of trophies taken during calendar year 2015 or future hunting seasons could be lifted if additional information on the status and management of elephants in Zimbabwe becomes available…" Apparently, the FWS did not consider the extensive additional information provided in denying these permits. We have a strong request for reconsideration, and we remain hopeful that we can establish imports for the 2015 hunting season (as well as 2016 and beyond). ■

Moving Ahead with Conservation Force's Land Conservation Program

Conservation Force is the holder of 22 conservation easements. A conservation easement is a legal restriction a landowner voluntarily places on his or her property. It prohibits certain development activities and preserves the conservation values of the land. The right to enforce these restrictions is transferred to a non-profit like Conservation Force, which is also tasked with monitoring the landowner's compliance. The landowner keeps other rights to the land and may benefit from a tax deduction. To obtain an easement, the landowner obtains a baseline survey of the property and executes a servitude agreement with Conservation Force.

The purpose of our easements is to preserve the land as wild, for the benefit of wildlife populations and recreational use, including hunting, fishing and trapping. And they clearly benefit game and other species by protecting the documented conservation values of the land, forever.

Danny Moran.

Our easements are in three states and total over 4,870 acres. We were recently admitted to the Texas Land Trust Council. To help us continue to grow this portfolio and protect more habitat, we have a new volunteer Director of Land Conservation. Danny Moran is one of the founding Directors of Ecosystem Renewal, a company that establishes wetlands mitigation banks in Texas and Louisiana. He has over 31 years' experience in this field. Danny will be a great help in obtaining new easements and building a base of protected, private wildlife habitat across the southeast. ■

Conservation Force Sponsor

Grand Slam Club/Ovis generously pays all of the costs associated with the publishing of this bulletin. Founded in 1956, Grand Slam Club/Ovis is an organization of hunter/conservationists dedicated to improving wild sheep and goat populations worldwide by contributing to game and wildlife agencies or other non-profit wildlife conservation organizations. GSCO has agreed to sponsor **Conservation Force Bulletin** *in order to help international hunters keep abreast of hunting-related wildlife news. For more information, please visit www.wildsheep.org.*

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