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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

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Wyoming Decision Against Nonresidents

(Editor Note: For more than a year now, Conservation Force's John J. Jackson, III has been on the cutting edge of one of the most important battles in US hunting - namely, the fight to restore fairness to the way Western states allocate hunting privileges to nonresidents. The key battleground has been the State of Wyoming, where Jackson filed suit in June 1998 against the Wyoming Fish and Game Department on behalf of nonresidents and their outfitters. Here is an update on that suit and the decision that has now been rendered on it.)

This past month, the Cheyenne, Wyoming, Federal District Court dismissed Conservation Force's nonresident license allocation lawsuit. It took the local court 15 months to render its 72-page decision. The purpose of the suit was to have the court declare that Wyoming's discriminatory elk and deer license allocation system for nonresidents was in violation of the Dormant Commerce Clause and/or Equal Protection Clause of the U.S. Constitution.

In Wyoming, there is no limit to the number of licenses available to resident hunters over-the-counter, but nonresidents have to enter a draw capped at 7,250 elk licenses. The elk numbers have been "above management objective" for many years but the cap on nonresidents has been frozen for 14 years because of intentional resident resistance to issuing more licenses to nonresidents. The trial court dismissed the individual outfitters and the Wyoming Outfitters and Guides Association on the threshold issue that they had "no standing" to be in the suit because they had not proven they would get more clients if the allocation system was less discriminatory. More specifically, they had not proven that the allocation system was the "sole" cause of their injuries. In a convoluted analysis, the local court gave no weight to the fact that the outfitters' pool of potential clients would more than double if residents and nonresidents could draw alike in one pool or that all their clients would draw if they were treated like residents whoare guaranteed a license.

The judge did reach the merits of the case for the individual nonresident hunters who had not drawn licenses. Why there was standing for the nonresident clients but not the outfitters who are wholly dependent upon the nonresidents' drawing is not clear and is appealable.

The judge held that although the allocation system was discriminatory it was legal because there was a legitimate basis for the discrimination.

Any potential legitimate purpose, the court held, would be sufficient under the Equal Protection Clause even if it was not in fact the reason. He held that the state purposely favored residents over nonresidents to get their support and participation in the system and that was legitimate reason enough. He wholly disregarded without mention the legal requirement that the reason for the discrimination must be "independent" of the discrimination itself.

The judge only lightly touched upon the Dormant Commerce Clause claim even though it is the most important part of the case. He ruled that game meat is not an article of commerce because its sale is prohibited, though that was not our claim. He largely ignored the argument that license sales to nonresidents is interstate commerce, which is our case. He ruled with little explanation or analysis that the system is only indirectly discriminatory; therefore, it is not subject to the "strict scrutiny" test used by the U.S. Supreme Court. Also the discrimination against nonresidents has only a "de minimus effect" on interstate commerce and the preferences for residents are legally justified because the motive was to get the support and participation of residents that are being favored by the allocation system. He cited low level cases based upon the state ownership theory, i.e., the state owns the game, therefore is duty bound to favor its citizens over others. That clearly is no longer the law and should be reversed on appeal.

Though we hoped to win at the local trial level, we did not expect to. The state had to create a patchwork, byzantine argument to defend its discriminatory system. Much of the defense and the court decision is contradictory and is conspicuous for the legal issues and undisputed facts it did not and could not address and the outdated cases relied upon.

This case will be appealed. And it is there - on the appellate level - that the various issues this case raises will be resolved. Is the interstate hunting industry and the sale of licenses to nonresidents interstate commerce? Of course it is. Is the effect "de minimus" as the court held, or does it deserve constitutional protection because one of seven hunters hunts out-of-state

Idaho Nonresident Moose Licenses It's Time to Sue!

■ Another flashpoint issue between resident and nonresident hunters has been the State of Idaho's refusal to issue any moose permits at all to nonresidents. For a while, it appeared the state was going to rectify this problem on its own. The Commission, it seems, on the advice of the Fish and Game Department and its legal counsel, began to seriously consider issuing nonresident moose hunting licenses. But then, just as the issue was to be favorably decided, resident hunters campaigned and thousands protested in a petition to the Commission. Consequently, the issue was taken off the agenda at the commission's nonpublic May Executive Session.

Unfortunately, time has now run out for Idaho to voluntarily begin issuing nonresident moose hunting licenses. Every effort has been made to resolve the issue amicably. It is a pity but a suit is necessary.

We are looking for plaintiffs at this time, as well as support, to proceed with this case. We need nonresident hunters who would apply if licenses were available; nonresidents who own property in Idaho who cannot get moose licenses; and hunting outfitters who have been injured because their clients, or potential clients, cannot get licenses. Willing plaintiffs should send a fax to John J. Jackson, III, at 504-837-1145. The phone number is 504-837-1233. The fax should contain your phone number, fax number, your e-mail address (if any) and your mailing address. Indicate whether you are a nonresident hunter, a nonresident landowner in Idaho, or an outfitter serving nonresidents.

JOHN J. JACKSON, III
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(two million per year), and because it provides 85 percent of the license revenue in Wyoming? Is it constitutional for a state to discriminate on the basis that it wants the support of those being favored over others; or does there have to be other "independent" reasons legitimate in themselves?

The law is clear that the reason for discrimination must be "independent" of the discrimination. Is a system that purposely guarantees elk licenses to all residents but treats a smaller number of nonresidents separately and denies most of them a license facially discriminatory, thus subject to the "strict scrutiny" test; or is it only incidentally a preference? We maintain it is purposeful discrimination and the motive is illegal.

The 72-page decision demonstrates the length the state had to go to defend the discriminatory system. The court has the decision on its website at www.ck10.uscourts.gov/wyoming/district/htmlpages/pubdocs.html Be forewarned, you can't analyze the case upon the decision without the hundreds of pages of exhibits and briefs.

We feel stronger about most parts of the case than when we started. For example, the court never mentions, much less distinguishes, the *Terk v. New Mexico* case we won two years ago that ruled in favor of nonresidents on the same facts. In many respects, the Wyoming case is stronger than the *Terk v. New Mexico* case.

We need more support for this effort. I personally expended more than 800 hours of uncompensated time on this case at the trial level. Very little support has been received by Conservation Force or the Wyoming Outfitters and Guides Association that has borne all of the direct out-of-pocket costs and local heat. Conservation Force's biggest supporter for the nonresident hunter fight, David Terk, has passed away. Terk's name can be found throughout the Cheyenne decision but conspicuously the court does not address the case he won that bears his name in New Mexico.

Briefly Noted

• **Trophy Imports Threatened by Change in the Definition of "Trophy":** At the suggestions of anti-hunting groups, the US Fish and Wildlife Service is proposing that parts of animals taken by sport hunters have to be in a certain form to be considered trophies. The underlying purpose is to narrow the meaning of the term from its common use. The proposal states that a "sport-hunted trophy. . . .does not include articles made from a trophy such as worked, manufactured, or handcrafted items for use as clothing, curios, ornamentation, jewelry or other utilitarian items." The form of the trophy and its utilitarian value will determine if a trophy is a trophy. This is to be a change in the definition of substance, a narrowing, not just a definition.

The proposed change would immediately prohibit the import of all such items of game animals listed on Appendix I of CITES (leopard, elephant, rhino, etc.) and could affect the import of all Appendix II species that are also listed as threatened on the US Endangered Species Act - species such as argali, and elephant trophies from the Republic of South Africa, Namibia, Zimbabwe and Botswana. It means elephant-hair bracelets, elephant-ear tables, leopard-tooth jewelry, floating-bone necklaces, gun racks made of markhor feet and all such items will no longer have trophy treatment simply because of the form they are in. It will affect both import and export.

Conservation Force and the National Taxidermy Association, one of our important "supporting" organizations, have filed comments and are taking many steps to oppose the proposal to take our rights away.

For more than two decades, hunting trophies have been treated as exempt from the total prohibition against trade that Appendix I species of CITES are subject to. Even the US Endangered Species Act has an import presumption for threatened species listed on Appendix II of CITES that favors trophy imports. Also, at the 9th Conference of the Parties of CITES in Fort Lauderdale, we clarified the CITES exemption for trophies. Yet, our job is never done. They now want to adopt a definition of "trophy" when there has never been a need for one, and want it to be narrower than it has been from the inception. Imagine changing the common meaning of the term! Where is the U.S. Fish and Wildlife coming from? This is just one issue in 125 pages of proposed US regulations, many of which could impact hunting.

• **Iran Hunting Transactions Still Illegal:** There have been many inquiries about whether it is legal for United States hunters to transact hunts in Iran since the lessening of sanctions (trade restrictions) against Iran by the Clinton Administration. Conservation Force has official word from the US Department of the Treasury, Office of Foreign Assets Control, which administers the sanction, that there is still an absolute prohibition against hunting transactions in Iran. It is illegal to contract a hunt there, pay for licenses and hunting services and export a trophy from Iran. It is a felony punishable by up to 10 years in jail and $250,000 in penalties. The prohibition only applies to transactions by a United States person or transactions in or from the United States by anyone.

The Office of Foreign Assets Con-

trol, we have learned, will not even approve a "license" for a museum or other nonprofit educational institution to conduct a hunt to collect a museum specimen in Iran though we have tried. Congress is considering further easing of trade restrictions but only for export of agricultural products from the United States to help United States agricultural interests. Hunting is not being considered at all.

• **Make-A-Wish Foundation of America Changes Its Policy:** The Make-A-Wish Foundation of America has instituted a new policy that it will no longer grant any wish that involves the use of firearms or archery equipment. No more hunting wishes will be granted to youngsters suffering life-threatening health conditions. The reason is supposed to be the risks arising from hunting, but in fact hunting risks are lower than other common recreational activities. We have written the Foundation but they have not replied. The hunting community has given a great deal of support to the Foundation since 1996, when it arranged a controversial bear hunt for a teenager with a brain tumor who wanted to hunt in Alaska with his dad. The anti-hunters are claiming it to be their success.

• **Baca Ranch Sold:** Congress has authorized the purchase of famed New Mexico elk property, Baca Ranch, for $101 million, and President Clinton signed the bill on July 25, 2000. The bill authorizes the US Forest Service to purchase the property, and it will be operated by a trust for multiple use. Ironically, the Baca may become another example of the conflict between resident and nonresident hunters on federal lands. While privately owned, the Baca had long been an elk hunter's haven, and the price had risen over the years as a consequence. Nonresidents willingly paid the higher prices, dominated the trophy hunts and had "private landowner tags." Now, Baca will no longer be private land and private landowner tags for nonresidents may not be available.

Before it was sold, resident hunters were already clamoring that the prices should come down and a different system should be adopted. At this point it is possible that nonresidents may have seen the last of the Baca, despite the fact that it was purchased with public funds. Nonresidents may not be able to get licenses at all. We urged key congressmen to settle this before the legislation passed to no avail. Hopefully, there will be some parity between residents and nonresidents.

• **Gray Wolf:** The US Fish and Wildlife Service has published a 90-page proposal to plan the conservation and the downlisting of the gray wolf, covering the entire lower 48 states. The proposal contains a surprise. The Minnesota wolf that the Service Director and Secretary of Interior promised would be completely taken off the list several years ago is to remain "threatened." That population of 2,445 wolves in 385 packs is the largest in the lower 48 states, is growing at four to five percent and its range has increased 47 percent in nine years. There has been similar but lesser success in the other Western Great Lake states of Michigan and Wisconsin. The Service has decided that it will not delist any of those populations until the Minnesota legislature adopts "an adequate state wolf management plan and regulatory bill." Ironically, the Service is satisfied with state plans in Michigan and Wisconsin but won't downlist the wolf in those jurisdictions until it is satisfied with Minnesota's plan as well. The proposal can be found at 65 FR 43449 and comments are due by November 13, 2000.

• **Prairie Dogs on Candidate Waiting List:** There is confusion about the pending Endangered Species Act listing of prairie dogs. In February, the US Fish and Wildlife Service issued a finding that the listing of the Black-Tailed Prairie Dog as "threatened" was "warranted throughout its range." It was not listed then because the listing was "precluded by other higher priority actions." Region 6, it seems, had nine candidate species that were in more immediate need of protection. Instead, it was added to the "Candidate species list."

Normally it is just a short wait before such species are placed on the real list. In this case, it is to be "reevaluated" in one year and presumably listed at that time unless the status changes. That is less than six months from now! If and when it is listed as threatened, all recreational hunting will be prohibited by law. Has sport hunting contributed to this status? The notice of finding states that "we do not believe that this factor (recreational varmint shooting) is responsible for significant range-wide declines in this species population; however, it may be important locally. . . the popularity of shooting has increased appreciably in recent years . . . (and) many states do not require hunting licenses and have no bag limits or seasonal restrictions . . . ." The three primary threats were found to be loss of habitat, large-scale control actions and the introduction of sylvatic plague from the Old World, in that order. - *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 20 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.

International Foundation for the Conservation of Wildlife