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THE GRAY WOLF LISTING PING PONG MATCH IS PART OF A BIGGER GAME

Over the last decade, the gray wolves of the Western Great Lakes (WGL) have bounced back and forth from federally listed to unlisted status. The wolves of Wyoming have suffered a similar fate. Each time the U.S. Fish and Wildlife Service (FWS) has published a rule removing a wolf population from endangered status, a coalition of animal rights groups has sued and a federal court has invalidated the rule and returned the wolves to the endangered species list. Ultimately, Congress stopped the Montana and Idaho wolf ping pong match. In 2012, Congress passed a law directing the FWS to reinstate its rule to delist the wolves of Montana and Idaho. Unfortunately, the wolves of Wyoming and the WGL states are still being batted back and forth in court.

In late 2014, one D.C. federal court judge vacated the delisting of Wyoming's wolves, and another judge did the same for the WGL population. Prior to the rulings, both populations of wolves had been successfully managed by state fish and game agencies for multiple years, and both populations had been hunted without harm to the species' status. The rulings left the states, hunters and the conservation community frustrated with the courts, FWS, and Endangered Species Act (ESA).

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SCI'S ELEPHANT LITIGATION HEATS UP

On Boxing Day (December 26, 2014), a D.C. federal district court awarded SCI an early victory in our challenge to the Zimbabwe elephant importation ban. The court did the exact opposite with our Tanzania claims. In response to two motions to dismiss filed by the federal government, the court allowed us to move forward with our Zimbabwe challenges, but dismissed our Tanzania case. The ruling created a great deal of work for us as we pursue both our Zimbabwe and Tanzania challenges.

Zimbabwe:

Now that we have defeated the federal government's efforts to dismiss our case, we can finally move forward with challenges to the U.S. Fish and Wildlife Service's (FWS) April 4, 2014 importation ban and the subsequent July 30, 2014 decision to continue the ban. We now need to prove that the FWS acted arbitrarily and capriciously in concluding that the importation of elephants failed to enhance the survival of the species.

To prove our case, we need the information the FWS relied on to make its decision. Although we requested information both in April and then again in July, the agency dragged its feet in producing the documents. Ultimately, we were forced to file a Freedom of Information Act (FOIA) lawsuit against the FWS seeking all the materials in their possession that informed their decisions. Not surprisingly, the lawsuit prompted them to meet their legal obligations, and they complied by providing thousands of pages. We are now reviewing those documents to find the "gems" that will help us prove that the FWS acted illegally in banning importation.

The elephant litigation party may be getting a bit more crowded. After the court ruled to allow us to proceed with our Zimbabwe claims, two animal rights groups moved to intervene to defend the bans. Despite the lack of any support for their allegations, the groups claim that the bans are benefitting conservation. We filed a brief to undermine their arguments and oppose their intervention.

Once we resolve all the preliminary disagreements, we will finally move to the meat of the case and begin summary judgment briefing. While it is hard to predict the length of time that it will take, we expect to have oral argument on the briefing within the next six to nine months.

In the meantime, we are awaiting a new decision from the FWS on importation of elephants

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IS A LAWSUIT IN THE AFRICAN LION'S FUTURE?

The simple answer to this question is – **yes**. What remains to be seen is who will be filing the lawsuit and who will be defending against it. In October 2014, the U.S. Fish and Wildlife Service (FWS) proposed to list the African lion as a threatened species. In the case of the lion, because it is listed on CITES Appendix II, a threatened listing alone would not affect whether the species can be hunted and imported into the United States. If the FWS did nothing other than list African lions as threatened, importation of legally hunted trophies could continue just as it did before the listing.

If, however, the FWS issues a rule to control importation ("4(d) Rule"), and explains why such a rule is necessary, then conditions change. Unfortunately, that is likely to happen. The FWS has proposed a 4(d) Rule for the lion listing and has decided that individuals who want to import African lion trophies will have to submit permit applications to the FWS. This will hopefully have no major impact on whether you can import your legally hunted African lion. While permits will undoubtedly require some additional paperwork, it is unlikely that the 4(d) Rule will result in a complete ban on lion importation. This is because the FWS has made it clear that they understand that hunting plays an important role in African lion conservation. We have reason to believe that SCI members and other hunters will continue to be able to bring lion trophies home from Africa.

SCI and SCIF submitted separate comments in opposition to the proposed listing of the African lion and in opposition to the 4(d) Rule. SCI disagreed that the FWS had adequate scientific support for listing the species throughout Africa. We recommended that the FWS re-examine its species-wide listing based on the recent decision by a D.C. federal district court in the Western Great Lakes wolf case (see discussion in wolf article in this Newsletter). We also challenged the 4(d) Rule as lacking sufficient justification and recommended more information from the FWS about how it intends to use its authority to grant and deny permits. In addition, we asked the FWS, if it lists, for a grace period to give hunter/importers who had not yet imported their lions at the time the rule is finalized, a sufficient opportunity to get their trophies into the U.S.

The listing of the African lion, if it occurs, is likely to be many months away. Depending upon whether the FWS lists the lion or chooses to postpone or even not to list, someone ***will*** sue the FWS. If the FWS lists the lion as threatened or not at all, animal rights groups will likely be the ones to sue. If so, SCI is likely to join the suit to defend those parts of the decision that benefit the hunting community. However, if the FWS does not provide additional substantiation or guidance for its 4(d) Rule, it may be SCI challenging the agency's decision and the FWS and animal rights groups on the defensive together.

Regardless, litigation is far into the future for the lion. In the meantime, the African lion is not a federally listed species, and it is perfectly legal to hunt them and import them into the U.S. SCI will do everything in its power to prevent this from changing in any substantial way if and when the African lion might be listed. One thing remains certain: now is a great time to book your lion hunt and to enjoy and participate in the conservation of this remarkable species.

WOLF PING PONG

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Wyoming's wolves returned to the endangered species list because the judge rejected Wyoming's commitment to maintain a population of wolves that exceeded minimum recovery population levels. Wyoming made the commitment, but did so in an addendum to its management plan, rather than as a part of a regulation or statute. The court did not consider Wyoming's promise to be sufficiently binding and decided that Wyoming's action did not satisfy the ESA's "adequate regulatory mechanism" requirement. Although Wyoming immediately remedied the problem by adopting emergency regulations that converted its promissory commitment to a binding one, the judge refused to amend her ruling. Instead, she sent the Wyoming wolf delisting rule back to the FWS, requiring the agency to start the rulemaking process from the beginning – a process that could take years to complete.

The WGL ruling was equally frustrating, but presented a much bleaker future for the WGL wolf population, and for other species as well. In that ruling, the D.C. federal court held that the FWS lacked the authority to designate a population of a species for the purpose of delisting that population. According to the judge's view of the ESA, once the FWS lists a species as a whole, the agency may only delist the species in its entirety. In other words, according to the judge, the FWS cannot delist less than what it originally listed. The court reasoned that, because in the early 1970's the FWS listed the entire species of gray wolf throughout its range in the lower 48 states, the FWS lacked the authority to delist anything less than the entire species (such as a distinct population segment). As a result of the ruling, because the FWS will never have the ability to restore and recover wolves throughout the continental U.S., and lacks the authority to delist some portion of that species, the FWS may ***never*** be able to delist the WGL population. SCI and others are considering an appeal of this ruling.

At the time this article is being written, several federal legislators, with the encouragement of state officials and conservation-based interest groups, are drafting legislation to fix both the Wyoming and WGL wolf delistings. They are looking at "surgical" statutory fixes that will direct the FWS to reinstate the Wyoming and WGL wolf delisting regulations. Although these statutory efforts are both understandable and necessary, they fail to remedy bigger problems caused by the rulings, and could possibly make it more difficult to fix those problems. Both wolf delisting rulings – but particularly the WGL court ruling – have implications that go far beyond the listing status of wolves. The court ruled that the FWS can never recognize a recovered population of a previously listed species – and delist only that recovered population. Not only will that make it impossible for the

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FWS to delist portions of previously listed species, but it will also affect future listings. For example, if the FWS lists the greater sage grouse species as threatened or endangered as a whole, it will never have the authority to delist any portion of the species that recovers. If the greater sage grouse does not recover in its entirety, it will remain as a federally protected species in eternity. Similarly, if the FWS lists the African lion as a species throughout its range, it will never have the authority to delist individual African lion populations if and when they recover.

If the ongoing legislative efforts are successful and Wyoming's and/or the WGL's wolf delistings are reinstated, that will not remedy the bigger problems that the rulings pose for the listings and delistings of other species. And although SCI and the other groups that defended the WGL delisting in court are considering an appeal of that ruling, the surgical legislative fixes will moot that case and will likely make it impossible for us to pursue our appeal of that ruling.

The problems posed by the court rulings need a broader solution than the reinstatement of the Wyoming and WGL delisting rules. Congress needs to step in and amend the ESA to clarify how the ESA applies to both listings and delistings. When they originally drafted the ESA in 1973, Congress was focused on the listing of species and gave little consideration to the process for addressing conservation success. It is time for Congress to amend the ESA to recognize species recovery and clarify or confirm that the FWS has the authority to delist a recovered portion of a listed species, even if other populations are not ready for delisting. Without such amendments, we will face mounting frustration and eventually states and stakeholders may refuse to play any role in species conservation.

ELEPHANT LITIGATION

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for 2015. New data has recently become available that dispels many of the concerns that allegedly prompted the FWS to ban importation from Zimbabwe for 2014 and shows that the lack of American hunters is harming elephant conservation rather than helping it. We have done our best to make sure that the FWS has access to that new data in the hope that this will influence the FWS's decision. We expect the FWS to announce its decision for 2015 imminently. If that decision does not reinstate importation, we will consider filing a new legal challenge in the weeks that follow.

Tanzania:

Although disappointing, the court's decision to dismiss our Tanzania claims does not end our Tanzania lawsuit. In fact, it gives us an opportunity to bring an important question to the court of appeals that affects not only the importation of Tanzania elephants, but any species that requires a permit for importation – namely *who can challenge an importation ban*?

The district court ruled that only a permit applicant can challenge a ban on the importation of a species that requires an import permit. This means that others who are harmed by an importation ban who would never have reason to apply for a permit – such as guides and outfitters and the foreign country whose wildlife is banned from importation – are prohibited from challenging a ban. SCI wants to challenge this ruling and take this question to the court of appeals. For this reason, we recently asked the district court to certify its ruling regarding the Tanzania claims as final so that we can immediately appeal that ruling.

At the same time, we are awaiting the FWS's 2015 decision for Tanzania. If the FWS decides to continue the importation ban, we will consider filing a new lawsuit to challenge that decision.

THREAT TO LEAD AMMUNITION USE DEFEATED

On December 23, 2014, the United States Court of Appeals for the District of Columbia Circuit ruled that the Toxic Substances Control Act (TSCA) does not give the Environmental Protection Agency (EPA) authority to regulate spent lead bullets and shot from hunters and sport-shooters. In 2012, 101 different organizations, led by the animal rights and anti-hunting group Center for Biological Diversity (CBD), petitioned the EPA to regulate lead bullets and shot under the TSCA. The EPA denied the petition because it duplicated a previous petition that CBD and other groups had submitted and because the EPA concluded that it lacked authority to regulate lead bullets and shot. CBD and six of the other petitioners sued the EPA to challenge the latest denial. Safari Club International, along with the National Shooting Sports Foundation, National Rifle Association, and Association of Battery Recyclers, intervened in the case to defend the EPA's decision.

The EPA and the non-governmental intervenors prevailed in the district court. The court agreed with the EPA that the second petition was duplicative of the first and that it did not qualify as a petition that the agency needed to consider. The court dismissed the case. Dissatisfied with the lower court's ruling, CBD and several other petitioners appealed.

Once again, the government and the hunting and shooting interests prevailed. Although the appellate court disagreed with the district court's conclusion that the petition was duplicative, the court of appeals nevertheless affirmed the lower court's ruling. The appellate judges agreed with the EPA, SCI, and the other intervenors that TSCA does not give the EPA authority to regulate spent lead bullets and shot. The anti-hunters' only option now is to seek Supreme Court review, which would likely not be granted.

This ruling comes on the heels of the Consolidated and Further Continuing Appropriations Act, 2015, in which Congress specifically stated that for the period covered by the appropriations law, no federal agency can use government funds to regulate lead ammunition. The court ruling has no expiration date, of course, and now extends protection against EPA regulation of lead bullets and shot beyond the time covered by the temporary statute. This was not the first attack on lead ammunition use, and likely will not be the last, but SCI will continue to defend its use for our members and hunters everywhere.

Special Thanks to Legal Task Force Committee Members:
Rew Goodenow (Chairman), Kevin Anderson, Bruce Benson, James Berglund, Donald Black, Ryan Burt, Richard Capozza, Brent Cole, Tina Cunning (consultant), John Daly, Marc Fong, Ned Johnson, Linda Linton, John Monson, Alan Stevenson, Paul Turcke, Robert Welch, and David Willms

YOUR LITIGATION TEAM – JOIN US AT OUR MANY SEMINARS

During the 2015 Convention, SCI Litigation staff is sponsoring several opportunities for you to learn about what SCI is doing to protect your rights and opportunities to hunt. We have seminars -- for lawyers and non-lawyers -- that will address international and domestic hunting, firearms, conservation, and importation issues. Our seminars will feature presentations from the SCI Litigation staff and experts from around the country.

If you have questions about what's happening with elephant importation from Zimbabwe and Tanzania, as well as other African countries, or want information about the status of the U.S. Fish and Wildlife Service's proposal to list the African lion as a federally protected species, join us on Thursday, February 5, 2015, at 2:00 P.M. for a seminar entitled, "**The Future of Hunting African Elephants and Lions: Will I Be Able to Import My Elephant and Lion Trophies in 2015 and Beyond?**" in Jasmine D-South LV 3. Anna Seidman, SCI Director of Litigation, will discuss SCI's ongoing elephant importation ban lawsuit and SCI's actions to address the FWS's proposed rule to list the African lion.

If you are interested in recent rulings on the Western Great Lakes and Wyoming wolf delistings, SCI's lawsuit to challenge the California Mountain Lion importation ban, our recent lead ammunition legal victory and a variety of SCI's other legal battles, join SCI Litigation staff for our **Litigation Open House**, on Friday, February 6, 2015, at 10:00 A.M. in Jasmine F, South LV3. It will be your time to ask questions, raise issues of concern, or simply listen.

If you are an attorney, it is not too late to satisfy your mandatory CLE credit with a course all about what you love – hunting. SCI's annual **Wildlife Law Continuing Legal Education Course** is scheduled from 1:00-5:15 P.M. on Friday, February 6, 2015 in Palm B. Registration is $279.00 and the course includes 1 hour of ethics. SCI's CLE course has been approved by over 25 state bar CLE approval boards. For more information, contact Anna Seidman at aseidman@safariclub.org. Registration at the door will be accepted. Speakers include SCI Litigation staff as well as state and former federal attorneys who will speak about hunting, importation, federal decision-making, firearms and a variety of topics of interest to every hunter/lawyer.

If you are a resident of Colorado, Utah, Wyoming, South Dakota or Idaho, or plan to hunt in one of these states in 2015, don't miss our **Q&A with Western State Directors**, scheduled for Saturday, February 7, 2015 at 10:00 A.M. in Jasmine C- South LV3. These leaders of the fish and game authorities of western states will share their thoughts about their greatest successes and the challenges they face concerning hunting and access in the coming year. Join the discussion and come to ask questions at this unique gathering of experts.

These seminars can give you time to rest your feet because this year's SCI Convention promises to be bigger and better than ever! So join us for a break, get re-energized, and then, get back out there and have fun!

For any questions or feedback on litigation matters, please contact Anna Seidman at aseidman@safariclub.org, Doug Burdin at dburdin@safariclub.org, or Jeremy Clare at jclare@safariclub.org

CURRENT LITIGATION

SCI is currently involved or has recently been involved in the following cases:

• ***Elephant Importation Ban Challenge (SCI v. Jewell)*** – Challenge to the FWS's decision to suspend the importation of sport-hunted elephant trophies from Zimbabwe and Tanzania in 2014. Status: SCI filed suit and a motion for a preliminary injunction in April. The district court denied SCI's motion for a preliminary injunction. In late December, the court ruled in SCI's favor and denied two motions filed by the FWS to dismiss SCI's challenges to the April and July 2014 Zimbabwe importation bans. SCI did not succeed in defeating the challenges to the Tanzania bans, and we are now researching taking action so that we can immediately appeal the Tanzania ruling.

• ***Elephant Importation Ban Freedom of Information Act Request (SCI v. FWS)*** – SCI sued to challenge the FWS's failure to respond to SCI's request for documents pertaining to the July 2014 decision to ban the importation of elephants from Zimbabwe. Status: As soon as SCI filed suit, the FWS responded by providing a portion of the documents. SCI will proceed with the suit until all documents have been provided.

• ***California's Ban on Importation of Mountain Lion Trophies (SCI v. Harris)*** – Challenge to the constitutionality of a California law that bans individuals from importing or possessing trophies of mountain lions hunted outside of California. SCI claims that the California law violates the U.S. Constitution's Commerce and Equal Protection Clauses. Status: SCI filed suit on August 6, 2014. State defendants responded with a motion to dismiss. A hearing on the motion is scheduled for March 30, 2015. Over SCI's opposition, Court allowed animal rights groups to participate in the case as amicus.

• ***Wyoming Wolf Delisting Challenges (Defenders of Wildlife v. Jewell; HSUS v. U.S. FWS)*** – Defense of delisting and hunting of Wyoming portion of the NRM wolf population in D.C. federal court. SCI is a defendant-intervenor. Status: D.C. district court invalidated the rule and returned Wyoming wolves to endangered status. Wyoming adopted emergency regulations that addressed the court's one main issue of concern. The court rejected motions from Wyoming, the FWS and SCI/NRA/RMEF requesting that she amend her ruling and allow the wolves to remain delisted and under management by Wyoming. In early December 2014, the FWS filed a Notice of Appeal with the D.C. Circuit Court of Appeals, prompting all parties to do the same.

• ***Western Great Lakes Wolf Delisting Challenge (HSUS v. Jewell)*** – Defense of delisting and hunting of WGL wolf population. Status: SCI, NRA, USSAF and several other organizations intervened. The district court recently issued a ruling vacating the delisting and placing the WGL wolves back on the endangered species list. All defendants and defendant-intervenors are considering potential legislative and litigation relief, including a proposed law, similar to the one adopted to delist Montana and Idaho's wolves, as well as a possible appeal of the ruling.

• ***New Mexico Wolves (WildEarth Guardians v. Lane)*** – Defense of New Mexico officials' authorization of trapping in Mexican wolf experimental population area. Status: 10th Circuit dismissed for lack of standing. New Mexico is seeking attorneys' fees from plaintiffs. WEG apparently plans to refile their lawsuit in the future.

• ***Coyote Hunting in Red Wolf Area in North Carolina (Red Wolf Coalition v. NCWRC)*** – Defense of coyote hunting in recovery zone of nonessential experimental population of red wolves in NC. Status: SCI participated as amicus and opposed plaintiffs' motion for a preliminary injunction to stop coyote hunting in the area. The judge granted the injunction and banned coyote hunting in the area. The plaintiffs and the state reached an agreement that will lift the ban on coyote hunting but will require North Carolina to initiate rulemaking to establish several conditions designed to protect red wolves. The district court approved the agreement. Separately, the FWS is reviewing whether it should change or abandon its red wolf reintroduction project.

• ***McKittrick Policy (WildEarth Guardians v. DOJ)*** – Defense of DOJ policy to not pursue criminal prosecution of individuals who accidentally shoot members of federally protected species. Status: DOJ filed a motion to dismiss based on jurisdictional grounds. Briefing on that motion is finished. We are awaiting a ruling. If the court does not dismiss, SCI will likely move to intervene in the case.

• ***Three Antelope Cases – (FoA v. Jewell et al.)*** – In the 2014 Appropriations Law, Congress directed the FWS to reissue a 2005 permit exemption rule regarding hunting of three antelope species on ranches in the United States. After the FWS reissued the rule, FoA filed suit to challenge the constitutionality of Congress's action and the rule. Status: SCI has intervened and participated in summary judgment briefing, which is complete. We are awaiting the scheduling of oral argument or a ruling from the district court. (***SCI v. Jewell et al.)*** – SCI challenged the FWS's classification of U.S. captive populations as endangered. Status: Court upheld the legality of the listing. SCI appealed the ruling to the D.C. circuit court. Appeal has been stayed on SCI's request, pending the outcome of the constitutional challenge. (***FoA v. Ashe et al.)*** – Friends of Animals challenged permit process for culling members of captive herds of the three antelope. Status: SCI intervened and supported FWS's motion to dismiss the case. Briefing has been stayed, also pending the constitutional challenge.

• ***Big Cypress ORV/Wilderness Plan*** (***NPCA et al. v. DOI et al.)*** Defense of National Preserve (Addition Lands) Management Plan facilitating hunting and ORV use. Status: SCI intervened in case to defend plan. After extensive briefing and an all-day hearing, the Florida federal district court ruled in the NPS and SCI's favor and upheld the plan. One of the Plaintiff groups, Public Employees for Environmental Responsibility (PEER) moved for reconsideration of the judge's ruling. We are awaiting a ruling. Regardless of the outcome, appeals to the Eleventh Circuit Court of Appeals are likely.

• ***Lead Ammunition Case (CBD v. EPA***) – Defense of EPA's denial of second petition seeking to ban lead in ammunition. Status: EPA and SCI//NRA filed motions to dismiss the case. District court dismissed after oral argument. CBD appealed. The appeals court affirmed the district court ruling but on different grounds. The court of appeals determined that the EPA lacked authority under the Toxic Substances Control Act to regulate ammunition.

• ***Lead Ammunition in Kaibab National Forest (CBD v. U.S. Forest Service)*** – Defense against attempt to ban lead ammunition use in Kaibab National Forest. Status: district court granted a motion to dismiss filed by the federal government. CBD appealed decision to Ninth Circuit. SCI is participating as an amicus in the appeal. Appellate briefing is complete. We are currently awaiting a ruling or the scheduling of oral argument.

• ***Grand Teton National Park Elk Hunting (Mayo v. Jarvis)*** – Two photographers challenged the elk management program administered on Grant Teton National Park in Wyoming. This is the only hunting that occurs on a National Park. Status: Safari Club's motion to intervene was granted over the opposition of the plaintiffs. The court also refused to impose limitations on Safari Club's participation.