Public Land and Resources Law Review

Volume 0 *Case Summaries 2016-2017*

Safari Club International v. Jewell

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***Safari Club International v. Jewell*, ___ F. Supp. 3d ___, 2016 U.S. Dist. LEXIS 136235, 2016 WL 5719719 (D.D.C. September 30, 2016)**

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Safari Club International and the National Rifle Association brought this challenge to the U.S. Fish and Wildlife Service's suspension of elephant trophy imports from 2014 forward. Both parties brought cross motions for summary judgment. In a recent memorandum opinion, the D.C. Federal District Court found that, although there was a minor procedural error on the part of the Service, an extended ban on Zimbabwean elephant trophies by the U.S. Fish and Wildlife Service was in large part compliant with their mandate under the Convention on International Trade in Endangered Species of Wild Flora and Fauna and the Endangered Species Act. Therefore, the Service's findings were found not to be arbitrary and capricious under the Administrative Procedure Act.

I. INTRODUCTION

The plaintiffs in this case were Safari Club International ("Safari Club") and the National Rifle Association ("NRA"). They brought this case as a challenge to a 2014 determination by the U.S. Fish and Wildlife Service ("the Service") suspending imports of sport-hunted African elephant trophies between April 4, 2014 to the end of the year. In the same determination, the Service then extended the findings in 2015.[1] The defendant in this case was the Service, under the direction of Sally Jewell (Friends of Animals and Zimbabwe Conservation Task Force entered this case as Intervenor Defendants).[2]

The plaintiffs argued that the Service's enhancement findings in both 2014 and 2015 did not comply with various procedural regulations necessitated under the Administrative Procedure Act ("APA").[3] In particular, the plaintiffs argued that the agency violated the APA because they didn't require a comment period and they applied the wrong guidelines and standard in making the findings.[4] Further, the plaintiffs stated that the Service failed to overcome the Endangered Species Act's presumption governing imports.[5] Finally they argued that the Service failed to explain why it maintained the finding requirement after it was eliminated from international law.[6]

The plaintiffs next made procedural arguments applicable to each of the individual findings discussed further in the analysis section of this summary.[7] The Service countered that its decision was based on limited information that did not

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1 Safari Club International v. Jewell, ___ F. Supp. 3d ___, 2016 U.S. Dist. LEXIS 136235 at *3 (D.D.C. Sept. 30, 2016).

2 *Id.* at *1.

3 *Id.* at *28.

4 *Id.*

5 *Id*.

6 *Id*.

7 *Id*. at *28.

allow it to make an enhancement finding.[8] Therefore, the Service claimed that it had dispensed with its duties under the various regulatory rules.[9]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1973, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") established a treaty that regulates the international trade of protected species and plants.[10] These regulations are based on the level of protection that each species requires, and those determinations are categorized into separate appendices.[11] The United States and Zimbabwe, among others, are both signatories to the treaty.[12] The treaty requires, in part, that if a species is listed on Appendix I (covering species threatened with extinction), then those species may only be traded if both importing and exporting countries issue import and export permits.[13] Prior to issuing those permits, each country's designated authority must make numerous findings.[14] In particular, they must make a "non-detriment" finding. This determines that the trade of the species "will be for purposes which are not detrimental to the survival of the species."[15] Acting in tandem with the treaty, the Endangered Species Act ("ESA") also prohibits "takings" of species listed as either endangered or threatened as well as prohibiting importing or exporting species unless otherwise authorized by the statute.[16] The ESA also makes it unlawful to engage in trade of species in violation of CITES.[17]

In 1978, the Service listed African elephants as a threatened species under the ESA and simultaneously issued a Special Rule restricting the imports of sport-hunted trophies under certain conditions.[18] A pertinent requirement in the Special Rule is an "enhancement rule," or "enhancement finding," which requires a finding that the killing and intent to import a trophy animal would "enhance the survival of the species."[19]

This framework changed in 1997, when the signatories to CITES down-listed three African elephant populations from Zimbabwe, Botswana, and Namibia.[20] This changed the permitting requirements for hunters under CITES so that the hunters only needed to obtain an export permit from one of those three countries.[21] As a response to the down-listing, the Service proposed a rule to

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8 *Id*. at *55.
9 *Id*. at *55.
10 *Id*. at *4.
11 *Id*. at *5.
12 *Id*.
13 *Id*.
14 *Id*.
15 *Id*. (citing Convention on International Trade in Endangered Species of Wild Fauna and Flora art. III, March 1, 1973, 27 U.S.T 1087).
16 *Id*. at *7.
17 *Id*. at *36 (quoting Endangered Species Act, 16 U.S.C § 1538(c)).
18 *Id.* at *8-9 (citing 50 C.F.R. § 17.40(e) (2016)).
19 *Id*. at *9.
20 *Id*. at *9-10.
21 *Id*. at *11.

incorporate the changes in CITES but reemphasized that the requirements of the ESA and Special Rule were still in effect.[22] From 1997 forward, the Service made enhancement findings allowing for the imports of sport-hunted elephant trophies.[23]

On April 4, 2014, the Service announced that they were suspending imports of sport-hunted Zimbabwean elephants.[24] They based their determinations on limited data, including the poisoning of 300 elephants in Hwange National Park, that indicated to them that "Zimbabwe's elephants are under siege."[25] Other data considered by the Service included an International Union for Conservation of Nature Elephant Database Report that indicated that Zimbabwe's elephant population had dropped from 84,416 to 47,366 between 2007 and 2013.[26] The Zimbabwe government, on the other hand, continued to report the elephant population at 100,000 each year.[27] The report also expressed concerns with management, funding, and resources of the Zimbabwe Parks and Wildlife Management Authority ("ZPWMA").[28] Ultimately, the Service stated that they could not make a finding "based primarily on a lack of information, not on specific information that shows that Zimbabwe's management is not enhancing the survival of the species."[29] In, 2015, the Service wrote a letter to ZPWMA, and received more information and population surveys, along with third party information about ZPWMA's budget and resources. [30] The Service made two more interim findings in January of 2015 and July of 2015 that banned the importation of trophy-hunted elephants from Zimbabwe.[31]

The plaintiffs first brought this case in 2014, after the initial findings. The court found that it lacked subject matter jurisdiction and allowed the plaintiffs to amend their complaint.[32] The Service again extended the interim ban on imports, and therefore the court consolidated the 2014 challenge and the 2015 challenge.

III. ANALYSIS

The court broke its analysis into two parts, starting with the arguments made by the plaintiffs that applied to all three findings, and then addressing the individual challenges to each of the three findings.[33]

A. Determinations Applicable to All Three Findings

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22 *Id*.
23 *Id*.
24 *Id.* at *12.
25 *Id*. at *13.
26 *Id*.
27 *Id*.
28 *Id*. at *14.
29 *Id*. at *15 (citing Notice of Interim Suspension on Importation of Zimbabwean Elephant Trophies, 79 Fed. Reg. 26,986 (May 12, 2014)).
30 *Id*. at *20-23.
31 *Id.*
32 *Id*. at *24-25.
33 *Id*. at *29-30.

Starting with challenges that apply to all three findings, the court explored: (1) the notice and comment requirements under the APA; (2) the Special Rule's relationship with the ESA; (3) whether the Service failed to solicit public comment after the enhancement finding requirement was removed from CITES; and (4) if the Service applied the wrong standard in issuing enhancement findings.[34]

First, the court considered definitions of a "rule" from prior case law and the APA definition to determine if the Service was required to provide for notice and comment before issuing the enhancement findings. This would set the standard of analysis for the entire ruling. The court ultimately held that, although the findings bore certain characteristics of a rule, they did not require individual permit applications but instead affected a larger group of hunters and thus operated both prospectively and retrospectively.[35] The court then applied precedent that dictated that the rules were adjudications because they did not promulgate policy-type rules or standards, but instead adjudicated disputed facts from particular cases.[36] Therefore, the court concluded, the findings were not rules and were not subject to a notice and comment period under the APA.[37]

Second, the plaintiffs challenged the findings based on the grounds that the Service failed to rebut a statutory presumption under the ESA.[38] Basically, the plaintiffs contended that a provision in the ESA required the Service to presume that all conditions of the Special Rule are met.[39] The defendants, in turn, argued that the Special Rule rebutted the presumption.[40] The court applied the two-pronged *Chevron* test, which asks if the statute specifically addresses the issue, and then asks if an agency regulation can rebut the statutory presumption.[41] Here, the court first determined that the statute was silent on the issue of whether an agency regulation can rebut the statutory presumption.[42] Moving to the second prong, the court found that the Secretary of the Interior's interpretation of her statutorily-delegated authority to prohibit imports of all threatened species was reasonable and deserving of deference. Furthermore, it was reasonable to interpret the Special Rule as rebutting the statutory presumption.[43]

Third, the plaintiffs argued that the Service acted arbitrarily and capriciously when it decided to maintain the enhancement finding long after CITES no longer required it.[44] The court found that the Service added the

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34 *Id*. at *30-49.

35 *Id*. at *32

36 *Id*. (citing United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 at 245 (1973)).

37 *Id* at *36.

38 *Id*. at *36-37.

39 *Id*. at *37 (the applicable provision of the ESA provides: "any importation into the United States of fish or wildlife shall, if...the taking…is not contrary to the provisions of the Convention…be presumed to be an importation not in violation…" 16 U.S.C. § 1538(c)(2) (2012).

40 *Id*. at *38.

41 Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

42 *Id*. at *40.

43 *Id*.

44 *Id*. at *41.

enhancement requirement in order to not move elephants from threatened to endangered status on the ESA, and that it therefore had a remaining underlying rationale for maintaining the enhancement requirement.[45]

Finally the plaintiffs argued that the Service applied a standard requiring a showing that sport-hunting elephants in Zimbabwe *ensured* the species survival, not just *enhanced* it.[46] The plaintiffs further argued that the hunting generated hunting fees and deterred poaching, and therefore enhanced the species's survival.[47] The court determined that the plaintiffs' approach did not make an appropriate causal-link showing that those factors affected the species as a whole.[48] Therefore, the court found that the Service did not apply an improper standard when issuing the three findings.[49]

B. Individual Finding Challenges

The court only found for the plaintiffs regarding their challenge to the first finding. The plaintiffs challenged the April 2014 finding, arguing that the Service bound itself to changing the Zimbabwe enhancement finding and that it failed to comply with its commitments.[50] The court determined that the Service did bind itself, that it properly based the finding on new information, but that it failed to provide the required notice in the Federal Register before changing the Zimbabwe finding.[51] The court then ordered that, because the agency failed to live up to its commitment, the effective date of the interim suspension be moved from April 4, 2014, to May 12, 2014. If further ordered that imports of trophies in between those periods may proceed.[52]

The plaintiffs argued that even with new information in a July 2014 finding, the defendants did not change the findings and violated the 1997 commitment.[53] The court then examined how the Service based its determination on new information about population status, poaching, and Zimbabwe wildlife laws and Elephant Management Plan.[54] The court found that the Service weighed all of the competing data and reasonably determined that allowing imports of trophies would not enhance the survival of the species. Therefore, the July 2014 finding was not arbitrary and capricious.[55]

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45 *Id*. at *44.
46 *Id*. at *45.
47 *Id*. at *48.
48 For example, the court explained, these factors need to be examined to determine if the fees generated by U.S. hunters are "in fact being used to promote conservation and how they are being used under the government's management program, whether their use is improving the species' prospects for survival into the future, and how the species would fare if U.S. hunters could not import trophies." *Id*.
49 *Id*. at *49.
50 *Id*.
51 *Id*. at *49-59.
52 *Id*. at *60.
53 *Id*. at *61.
54 *Id*. at *63-73.
55 *Id*. at *73.

The 2015 finding was challenged under the same legal theory as the July 2014 finding, and the court applied the same analysis.[56] The court explained that "plaintiffs' myriad arguments, at bottom, challenge how the agency weighted competing data before it—a task that is left to the expertise of the agency."[57] Therefore, the court upheld the 2015 finding along with the 2014 finding, and stated that not only was it not arbitrary or capricious, but it was also not irrational.[58]

The court ultimately granted all of the Service's motions for summary judgment, except the order moving the effective date of the April 2014 order to May 12, 2014.[59]

IV. CONCLUSION

Despite the length of litigation, the only remedy the Safari Club International obtained was exports during the narrow period of one month, two years ago. Given the complexity and difficulty of the Zimbabwean government's ability to track elephant populations, as well as increasing problems with poaching and poison, it is likely that the Service will continue to block imports of Zimbabwean trophy elephants. However, under a new administration and new leadership in the Service, should this issue come up again there may be changes in enforcement. It is important to note how narrowly the court construed the difference between the findings and a rule, and this case furthers precedent when future courts are faced with a similar APA analysis.

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56 *Id*.
57 *Id*. at *73-74.
58 *Id*. at *81.
59 *Id.* at *82.