

The International Trophy Hunting Controversy and Its Toll on ESA-Listed African Species

VERONICA GUERRA



WRITER'S COMMENT: As a Junior, I took Water Law to fulfill one of my minor requirements. I enjoyed the class so much that I enrolled in Environmental Law the following year. We were encouraged early on to think about topics for our law paper, which was to cover an ongoing environmental law controversy. The topic that came to mind is one that breaks my heart every time I see it pop up in the media—the hunting of exotic animals for sport. As I was researching, I was fascinated by the intricacies of this controversy and just how secretive the U.S. is in the way it regulates trophy hunting. I hope that this paper not only raises awareness of some current issues in our government, but also encourages students to feel free to explore a little outside of their main area of study. I never would have delved into something like this in my geology coursework and am so glad that I had the opportunity. I thank Professor Winsor and my TAs for their support throughout the quarter.

INSTRUCTOR'S COMMENT: In ESP 161 (Environmental Law), students work on a research paper about a current environmental law controversy throughout the quarter. In the paper, we ask that they introduce and explain the importance of the controversy they have selected, describe the parties involved, identify the relevant laws, and evaluate the likely outcome of the controversy. Students are expected to research and identify a topic, then analyze relevant laws, articles, and court documents to support their final paper.

Veronica's International Trophy Hunting paper is a testament to her resilience, work ethic, and intellectual curiosity. Veronica was thrown into a remote learning environment with 141 classmates in the spring 2020 Environmental Law class. Despite the challenges of remote learning, from her paper topic through the final paper, her analysis of the issues presented by the

current federal administration's International Trophy Hunting permit regime demonstrated excellent reasoning and organization. In both her written submissions and verbal contributions to discussions in class, she engaged the course material through independent thinking and analysis of the legal issues presented. Her instructor and TAs are delighted to hear her paper has been accepted for publication by Prized Writing.

—Tracy Winsor, *Department of Environmental Science & Policy*

I. Introduction

The international trophy hunting industry has become a major source of income and recreation on almost every continent on Earth (Ref. 1). Lawsuits, policy changes, and media coverage over the last decade have also made it a major source of controversy in the United States. Trophy hunting is the recreational killing of animals and subsequent collection of “trophies,” or body parts such as antlers, horns, skin, or teeth (Ref. 1). Trophy hunting regulations are created and enforced by the range country, where the hunted species resides (Refs. 1, 2). While this means that other countries cannot directly regulate trophy hunting, they can instead regulate trophy imports (Refs. 1, 2). The United States is no exception, leading with more trophy imports than any other country in the world (Ref. 1). However, recent changes under the Trump administration have raised questions about the U.S. Fish and Wildlife Service’s (FWS) trophy import decision-making process and the conservation of the species involved.

Much of the controversy surrounds trophy imports of species listed under the Endangered Species Act (ESA). Under Sections 9 and 10 of the ESA, species that are listed as threatened or endangered cannot be imported unless permitted by FWS (Ref. 3). Imports may only be permitted if the hunts are carried out for scientific purposes or if they somehow enhance the species’ survival or conservation (Ref. 3). However, after a recent change to trophy import decision-making, it is unclear if FWS is currently adhering to this statute. Since 2018, FWS has evaluated applications and processed permits for trophy imports on a case-by-case basis (Ref. 4). This approach enables FWS to make decisions without public input, raising concerns about the agency’s transparency and the reliability of the science that it bases its decisions on (Ref. 5). In response,

several organizations over the years have asked FWS to release records from their trophy import decisions under the Freedom of Information Act (Ref. 6). FWS occasionally releases requested records online, but many requests are ignored or avoided altogether without explanation (Ref. 6), keeping the public out.

The international trophy hunting controversy is a challenging issue because of the indirectness by which the U.S. can regulate species kills in other countries and ensure their conservation. It is therefore crucial that trophy import decisions are based on reliable science and proof of conservation efforts made by the range country, which can only be verified if these decisions are open to comment from scientists and the general public. Otherwise, we risk greater species losses amidst already declining populations in the wild, especially for African species. The population of African lions, one of the top five trophy-hunted animals in Africa (Ref. 1), has dwindled from about 200,000 individuals to 20,000 over the last century (Ref. 7). Even so, trophy hunting persists.

But not without criticism. The controversial killing of Cecil the lion in Zimbabwe in 2015 prompted the U.S. to establish greater protections for lions under the ESA (Ref. 7). Now, there is no way to tell if import decisions are mindful of such protections, especially with the recent lift on the Zimbabwe elephant trophy ban and approved imports in 2019 for a rhino trophy from Namibia and a lion trophy from Tanzania for the first time in years (Ref. 2). If trophy imports continue to be approved without first ensuring some benefit to wildlife conservation, then species that are already experiencing population declines may continue to dwindle until perhaps there are none left.

The fate of this controversy may depend on the outcome of an ongoing lawsuit. On March 20, 2018, four animal protection and conservation groups filed suit against FWS and its parent agency, the U.S. Department of the Interior (Refs. 6, 8). The lawsuit addresses the lack of trophy import records available to the public (Ref. 6), which may prompt changes in FWS' decision-making process in the future.

II. Parties and Issue Description

A. Parties

The parties involved in the aforementioned case, *Humane Society of the United States*, *Humane Society International*, *Center for Biological*

Diversity, and Born Free USA v. U.S. Fish and Wildlife and U.S. Department of the Interior, are as follows (Ref. 6):

Plaintiffs

1. Humane Society of the United States (HSUS) is a non-profit organization devoted to “ensuring the humane treatment and continued survival” of endangered species around the world, in particular African wildlife. It often sends information to FWS about the negative effects of trophy hunting. HSUS uses trophy import applications and related documents to act on behalf of its members, which FWS has not made accessible (Ref. 6).
2. Humane Society International (HSI) is a global non-profit organization that promotes animal protection and welfare, sometimes working with African range state authorities to improve the welfare of local elephants and lions. HSI also informs the public of wildlife issues, including trophy hunting, making the documents at issue especially relevant to their mission (Ref. 6).
3. Center for Biological Diversity (CBD) is an Internal Revenue Service Code §501(c)(3) corporation that works to “secure a future for all species” nearing extinction. It advocates for greater protections of African elephants and lions. CBD also informs its members and the public of conservation issues like trophy hunting (Ref. 6).
4. Born Free USA (BFUSA) is a non-profit organization for animal welfare and conservation. It campaigns against trophy hunting and “successfully petitioned the Department of the Interior to list lions under the [ESA].” BFUSA needs access to trophy import applications and supporting documents to influence government decisions in the future (Ref. 6).

Defendants

5. United States Fish and Wildlife Service (FWS) is a federal agency within the United States Department of the Interior. It enforces the ESA together with the Department of the Interior and processes trophy import applications of threatened species. It has possession of the records at issue in this lawsuit (Ref. 6).
6. United States Department of the Interior (DOI) is a federal agency that is responsible for implementing the ESA and for

FWS' compliance with the Freedom of Information Act (Ref. 6).

B. Issue Description

The issues associated with this controversy arguably began with the court ruling on *Safari Club International et al. v. Zinke et al.* On December 22, 2017, the U.S. Court of Appeals ruled that FWS was required to follow the “notice-and-comment” procedures under 5. U.S.C. § 553 whenever it issued enhancement findings (Ref. 9), findings that the killing of an animal will enhance its species' survival (Ref. 4). FWS responded with a memo that was quietly released in early 2018 (Ref. 8). The memo announced the recall of several ESA enhancement findings and other findings for African elephants, lions, and bontebok (Ref. 4). Moreover, it announced that trophy import applications would begin being processed on an individual basis—that is, without input from the public (Ref. 4).

At issue in this case are records of trophy import decisions. Each of the plaintiffs has “routinely” requested that FWS post the following under the Freedom of Information Act: applications filed under the ESA for trophy imports of African elephants and lions; copies of the permits issued for approved imports; and the enhancement findings made by FWS (Ref. 6). Despite these continual requests, FWS has failed to make the majority of requested documents available to the plaintiffs (Ref. 6). The basic facts underlying this controversy are FWS's new policy of approving elephant and lion trophy imports without public input and, correspondingly, its refusal to regularly post requested records in compliance with the Freedom of Information Act.

III. Relevant Laws

The trophy hunting controversy calls attention to two environmental laws: the Endangered Species Act (ESA) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The ESA is a federal statute that restricts the import of species listed as either endangered or threatened, including animals relevant to this controversy such as the African elephant (endangered), a subspecies of white rhinoceros (endangered), and two subspecies of lion (one

endangered, one threatened) (Ref. 10). Section 9 of the ESA makes it unlawful to import any endangered species of fish or wildlife or to “violate any regulations” for threatened species (Ref. 3). Under Section 10, the Secretary of the DOI may permit such actions if they are carried out for scientific purposes or enhance the species’ propagation or survival (Ref. 3). A permit will only be issued if the applicant submits a conservation plan detailing the impact of the action, mitigation measures they will take, and their reasons for not pursuing alternative actions (Ref. 3). If the terms and conditions of the permit are not followed, the Secretary may revoke the permit after giving the public the opportunity to comment (Ref. 3). This means that FWS must confirm that trophy hunts ensure the conservation of the imported species and allow the public to review trophy import decisions before issuing a permit.

CITES is an international treaty designed to ensure that international trade of plants and animals does not threaten their survival (Ref. 11). Appendix I of the treaty requires both the importing and exporting countries to make a “non-detriment finding,” a finding that the trade does not harm the species’ survival (Ref. 11). It applies to all species “threatened with extinction” and which are or could be affected by trade, including the majority of African elephants (Ref. 11). For species listed under Appendix II, which includes African elephants from four particular countries and all African lions, only the exporting country must make a non-detriment finding (Ref. 11). 183 countries, or “Parties,” have agreed to be bound by CITES, including the United States and major African countries for trophy imports such as Botswana, Mozambique, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe (Refs. 1, 11, 12). Consequently, to import trophies of species listed under Appendix I into the United States, the U.S. would need to make a non-detriment finding beforehand.

FWS’ current practice of processing trophy import applications without public review has necessitated action pursuant to the Freedom of Information Act (FOIA). The FOIA allows citizens to request access to records from any federal agency, which the agency must disclose unless the records fall under one of the statute’s listed exemptions (Ref. 6). It also requires agencies to make certain categories of records public by posting them online without waiting for a request (Ref. 6). These include the following: (1) final opinions and orders; (2) “statements of policy and interpretations . . . adopted by the agency and are not published

in the Federal Register”; and (3) copies of all records that (i) have been released to anyone under a FOIA request, and (ii) that (a) have become, or will likely become, the subject of similarly-requested records, or (b) have been requested at least three times (Ref. 6). Despite receiving several requests from the plaintiffs in the aforementioned lawsuit, FWS refused to post several records of trophy import applications, permits, and related documents (Ref. 6). It is therefore impossible to tell if FWS is complying with ESA Section 9, Section 10, or CITES.

To address this issue, the House of Representatives introduced the Conserving Ecosystems by Ceasing the Importation of Large Animal Trophies Act, or CECIL Act, so named in honor of Cecil the lion (Refs. 5, 13). Proposed in April 2019, this bill would amend the ESA by creating tighter restrictions and ensuring conservation efforts and transparency (Ref. 14). ESA Section 9 would expressly prohibit trophy imports of threatened as well as endangered species without a permit, as outlined in Section 10 (Ref. 14). Section 10 would also be amended to require the Secretary of the DOI, after public notice and comment, to make the following determinations before issuing a permit: (1) the range country has a “management plan for that species based on the best available science” that is “being actively implemented”; (2) the range country can verifiably demonstrate that the benefits of the trophy hunt “directly and substantially” aid the species’ conservation; and (3) the hunting of the species enhances its propagation or survival in the range country (Ref. 14). Most recently, in September 2019, the CECIL Act was ordered reported and will be voted on by the House at a future date (Ref. 14).

IV. Evaluation

It seems almost certain that FWS will be found in violation of the FOIA for continuously refusing to make trophy import records available to the public. The essence of this controversy, though, lies in whether FWS is ensuring the conservation and survival of endangered and threatened species imported into the U.S., notifying the public of trophy import decisions, and opening these decisions for public comment. This controversy will likely not be resolved for many years; the current lawsuit against FWS is just one step in the right direction.

It is uncertain whether FWS will be found in violation of the ESA because of the statute’s somewhat ambiguous wording. The ESA

prohibits the import of endangered species but does not explicitly protect threatened species from being imported. This would mean that a trophy import permit is required for many, but not necessarily all, animals relevant to this lawsuit. The issue then is whether FWS is ensuring that permitted trophy imports benefit the hunted species' survival and that the permittees provide acceptable conservation plans. This will likely not be found out until the Supreme Court reviews the current lawsuit against FWS, unless the agency posts the documents at issue sooner. Once the documents are made accessible, the public will be able to see if FWS is permitting trophy imports on the basis that they enhance the species' conservation or survival, as well as the science which these decisions are based on, and if their logic is consistent between different trophy import cases for the same species. The current lawsuit, however, is primarily concerned with FWS and DOI's violation of the FOIA. If, upon release of the documents, FWS is thought to be in violation of the ESA, it will take another lawsuit and potentially several more years before a court can issue a writ of mandamus if this relief is sought.

It will also likely be many years before a formal determination is made regarding FWS' compliance or violation of CITES. CITES' wording is less ambiguous than the ESA regarding which species cannot be imported because there are no classifications like "endangered" or "threatened"; rather, there is one large list of species protected by the treaty. However, not all species relevant to this controversy require the U.S. to make a non-detriment finding, as outlined in Appendix II, which includes African lions and some African elephants. For FWS to be responsible for ensuring the conservation of these species at all, the species may need to be explicitly listed as "endangered" under the ESA, given the current ambiguity. If these species are not listed as such, then a permit may not be required to import them, putting their conservation at risk. Of course, it would take a follow-up lawsuit to address any alleged violations with CITES, as with the ESA.

The CECIL Act may be the best way of resolving the issues at hand. The act would remove the ambiguity of whether species listed as "threatened" require a permit under the ESA by explicitly prohibiting import of threatened species. It would also provide clear guidelines for FWS to follow in order to determine if the species' range country is adequately providing for its conservation and survival, while simultaneously requiring the public to be allowed to comment in the

process. The CECIL Act gets to the heart of the issue by creating a system that requires FWS to be transparent with the public, base trophy import decisions on reliable science as verified by the public, and ensure the conservation of the species by examining the actions and arguments made by the range country. Of course, as with any other bill, the CECIL Act needs to be passed by the House of Representatives, the Senate, and the President before it is implemented. It will take widespread agreement for FWS to fundamentally change its trophy import decision process in the interest of the people and the species at risk.

V. Conclusion

The international trophy hunting controversy admittedly goes beyond the conservation and well-being of species listed under the ESA; it addresses issues in our government's infrastructure and stresses the need for transparency and international cooperation. Many trophy import decisions are a mystery because of the lack of public involvement in FWS' current trophy import decision-making process, a grave issue when the populations of many listed African species are declining. While the current lawsuit against FWS addresses the agency's noncompliance with the FOIA, FWS is not being explicitly investigated for noncompliance with the ESA or CITES, which directly pertain to species conservation. The outcome of the lawsuit is likely to pave the way for much-needed change by revealing some documentation from their trophy import decisions. Going forward, though, it is uncertain if FWS would begin to regularly publicize trophy import documents and decisions, which is critical for checking FWS's adherence to the ESA. Perhaps the best chance of securing a future where trophy imports are mindful of species conservation is support for the CECIL Act. The bill would redefine the trophy import permit process by explicitly protecting all species listed under the ESA and providing clear guidelines to ensure that trophy hunts benefit the species' conservation. There may still be many steps to take before the trophy hunting controversy is effectively resolved in the U.S., but with the current court case underway and the CECIL Act in consideration, the time in which this happens will hopefully be soon enough for us to see positive change for the world's rarest and most vulnerable species.

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