

# SAFARI CLUB INTERNATIONAL

## Litigation Newsletter, May 2014 Vol. VIII, No. II

### SCI'S LAWSUIT CHALLENGING THE ELEPHANT IMPORTATION BAN: LITIGATION BY NUMBERS

By: Anna Seidman

On April 4, 2014, the U.S. Fish and Wildlife Service announced a complete ban on importation of elephants hunted in 2014 in Zimbabwe and Tanzania. SCI swiftly filed suit challenging the bans on April 21, 2014. Just over a week later, SCI filed a motion for a preliminary injunction asking the Court to immediately lift the bans while we litigate the case. SCI filed the lawsuit and PI motion to prevent the importation bans from harming SCI members who have elephant hunts booked in the two countries this year. SCI also seeks to prevent harm to African elephant conservation caused by the loss of revenues coming from U.S. hunter payments, some of which would benefit the local communities that live alongside the elephant.

In preparation for the suit, SCI attorneys sent an alert out to the SCI membership, asking for input from members affected by the importation bans. The response was overwhelming – perhaps the largest in SCI litigation history. SCI attorneys put those responses to excellent use by requesting sworn statements from hunters, outfitters, Professional Hunters, and booking agents who could demonstrate harm from the inability to import legally hunted elephants into the United States. For the PI motion, SCI converted those statements into a compelling narrative that

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# LESSER PRAIRIE-CHICKEN ESA LISTING IS HARBINGER OF THINGS TO COME

By: Doug Burdin

The recent decision of the U.S. Fish and Wildlife Service (FWS) to list the lesser prairie-chicken (LPC), a game bird, as a “threatened” species demonstrates the harm caused by the multi-species settlement agreements entered into in 2011 by the FWS and two animal rights groups – WildEarth Guardians (WEG) and Center for Biological Diversity (CBD). The LPC listing also heralds similar premature and potentially harmful listings for many other species during the next few years, including at least two other game species.

Three years ago, SCI was the only group that attempted to challenge these massive settlement agreements. SCI argued that the settlements illegally eliminate the FWS’s statutory authority to continue to make “warranted but precluded” (sometimes referred to as “candidate”) findings for 260 species. A candidate finding means the species might warrant a proposal to list, but the FWS has higher listing priorities. Candidate species receive no ESA protections, but their special status offers some strong conservation benefits. For example, states and other stakeholders are encouraged to enter into special agreements and other arrangements to conserve the species in order to avoid the listing altogether.

The parties to the settlements – the FWS, CBD, and WEG – fought to silence SCI’s challenge to the settlements. The courts agreed and refused to listen to SCI’s objections. Without even considering the illegalities involved in making these settlements, the court rubber stamped the agreements.

In late 2012, when the deadline for the LPC listing arrived, the commitments imposed by the settlements forced the FWS to ignore tremendous conservation efforts made by the five affected states and other stakeholders. Instead

of finding that the proposed listing of the LPC was still warranted but precluded by higher listing priorities – the finding the FWS had made annually since 1998 – the FWS proposed to list the species as threatened. The FWS should have at least considered whether the efforts made by the states and stakeholders had lessened the alleged threats to the species. In addition, the FWS should have considered whether it should devote its extremely limited resources to other species with greater need for listing protections. Because of the closed-door agreements reached with special interest ESA litigants, the FWS could not.

Eighteen months later, the FWS finalized a rule to list the LPC. The listing ended sustainable hunting of the species in Kansas. While hundreds of species have been listed due to the settlements (and hundreds more will be), the LPC is the first game species to suffer the impact of the agreements. Others are on the way. By September 2015, the settlements will force the FWS to propose a rule to list the greater sage grouse (an even wider ranging species) and the New England cottontail, unless the FWS concludes that a proposed listing is no longer warranted at all. The conservation efforts for both species, designed to avoid a listing, will likely be wasted because the FWS gave up its statutory discretion to private interests.

When 2016 rolls around and these settlements terminate, the FWS likely will find itself in the same situation – unable to process all the listing petitions, constantly losing lawsuits over missed deadlines, and at the mercy of litigious special interest groups. What a boondoggle for animal rights groups and a blow to those who are more interested in conservation than listing. Could another closed door settlement be far behind?



# SCI'S LAWSUIT CHALLENGING THE ELEPHANT IMPORTATION BAN: LITIGATION BY NUMBERS

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described how the bans on importation 1) reduced the value of the hunts, 2) discouraged hunters from traveling to Zimbabwe and Tanzania for elephant hunting, 3) deprived hunters of a valued symbol of a successful hunt, 4) reduced payments going to hunting businesses in the two countries, and 5) took away important sources of funding for anti-poaching efforts, habitat restoration and community projects designed to increase local community tolerance for elephants' destructive tendencies. SCI hopes that its Complaint and PI motion will demonstrate to the court that the government violated the law with its abrupt and groundless suspension of elephant importation and that the bans have seriously undermined elephant conservation.

When a lawsuit is filed, the public often sees only the finished documents or final outcome. In contrast, the attorneys who work on the case often see the lawsuit in terms of numbers. Here are some of the key numbers relevant to SCI's elephant lawsuit:

No. of days notice the FWS gave the public before implementing the ban	0
No. of changes that the FWS has already made to the importation ban	1
No. of SCI attorneys needed for the preparation of the Complaint and PI Motion	3
No. of defendants SCI sued (Jewell, Ashe, DOI and FWS)	4
No. of days on which Anna stated "Today is the day we will file the PI Motion"	6
No. of days that the FWS attorneys are given, by law, to answer the PI Motion	7
No. of days it took SCI to prepare the Preliminary Injunction Motion	9
No. of hours Anna slept during the three nights prior to filing the PI Motion	10
No. of days it took Zimbabwe to respond to the FWS's request for information	13
No. of days following the ban announcement that it took SCI to file the Complaint	17
No. of declarations completed by SCI members for support of the PI Motion	42
No. of pages in SCI's Preliminary Injunction Motion	45
No. of exhibits SCI attached to the Preliminary Injunction Motion	54
No. of SCI members that completed questionnaires to assist with litigation	64
No. of paragraphs in the Complaint	111
No. of SCI members who shared their stories about how the ban hurts them	130

Now that the preliminary injunction motion has been filed, a new flurry of activity has begun. The court has set a briefing schedule for further argument on the question of whether Safari Club and its members have suffered sufficient irreparable harm from the bans to merit emergency relief. The government's brief is due on May 13<sup>th</sup> and Safari Club will have a reply brief on the issue to file on May 16<sup>th</sup>. After this question is resolved, the Court will set scheduling for the completion of the briefing on the remainder of the arguments in SCI's case. Stay tuned to SCI's electronic media for further updates on developments in this case.





# ONCE MORE INTO THE FRAY – FOR THREE ANTELOPE CONSERVATION

By: Anna Seidman

**Once more into the fray...  
Into the last good fight I'll ever know...  
Live and die on this day...  
Live and die on this day...**

*from: The Grey, 2011 (a movie about  
wolves behaving like wolves)*

For the fourth time, SCI has entered the judicial fray to try to conserve the scimitar-horned oryx, dama gazelle and addax. Once again, animal rights groups are attempting to undermine the invaluable role that hunting has successfully played in increasing the population levels and numbers of herds of the three antelope species on private ranches in the United States. This time the groups have targeted a new enemy – Congress. Friends of Animals (FoA) filed suit in March 2014 to challenge the constitutionality of a law that Congress enacted as part of the 2014 Consolidated Appropriations Act (three antelope law). That law directed the U.S. Fish and Wildlife Service (FWS) to reissue a 2005 regulation that exempts U.S. members of the three antelope species from Endangered Species Act permit requirements. FoA's latest suit claims that, in passing the three antelope law, Congress violated the constitutional separation of powers doctrine by allegedly interfering with the judicial branch's jurisdiction over ongoing litigation.

The ongoing litigation underlying FoA's constitutional challenge includes

SCI's lawsuit against the FWS for listing the three antelope species in the U.S. as endangered and another lawsuit, also brought by FoA, that challenges the FWS's process for issuing permits for the take of members of the three species. Both of these cases have been placed on hold pending the outcome of the constitutional challenge case. If the Court upholds the three antelope law, it may resolve or moot some or all of the issues in the other two cases.

Shortly after FoA filed its latest suit, SCI joined as an intervenor. This is not the first time that SCI has defended against a claim that Congress has illegally interfered with the power of the Courts. In 2012, SCI joined litigation to defend against a constitutional challenge to legislation that directed the FWS to delist the wolves of Montana and Idaho. The Montana District Court and the Ninth Circuit promptly rejected that challenge and the law has remained in effect without further legal challenge. Hopefully, the D.C. Courts will do the same for the three antelope law.

Although Congress's effort to legislate a permit exemption inspired hope that the endless litigation over the three antelope species would

finally come to an end, the reality is that more litigation is at hand. And so, Safari Club has ventured "once more into the fray" in the hope that this will be "the last good fight we'll ever know" or have to know for the scimitar-horned oryx, dama gazelle and addax.



# WHAT IS THE BEST CLE COURSE EVER, ALEX?

By: Jeremy Clare

Every year at SCI's Annual Convention, Safari Club's Litigation Staff co-sponsors a Continuing Legal Education (CLE) course with the State Bar of Nevada. This year's CLE course was perhaps our most successful yet. A diverse group of attorneys from approximately 25 different states (and one from Quebec) attended. The course has been accredited by an unprecedented 27 different state bar associations!

This year's course covered many topics: recent legal developments in Alaska; trophy ownership and transfer in the U.S.; determining the value of lost or damaged trophies; an update on recent wildlife conservation and outdoor recreation law; President Obama's executive order for combatting wildlife trafficking; and ethics for the wildlife law practitioner. The presenters included SCI's very own Anna Seidman, Doug Burdin, Jeremy Clare, and Rick Parsons; Kent Sullivan, Assistant Attorney General in Alaska; David Willms, Associate at Dray, Dyekman, Reed and Healey, PC; and Chief William Woody, Assistant Director for Law Enforcement of the U.S. Fish and Wildlife Service.

Attendees gave particularly glowing reviews of the Wildlife Law in Jeopardy game created by Safari Club's Litigation Staff. The Jeopardy-style game, hosted by Jeremy Clare, tested the knowledge of three of SCI's Legal Task Force members – Linda Linton, David Willms, and Paul Turcke – on various wildlife law topics. Needless to say, it was great fun for all. We have already promised to create a similar game next year – does anyone want to be a Wildlife Law Millionaire? Tip: topics covered in our newsletters will likely show up in next year's game.

The CLE course attendees were also treated to an original theatrical production of "Ethics in the Use of Technology for the Wildlife Law Practitioner," acted out by your very own Litigation Staff and friends. This year's ethics skit followed the bumbling attempts by a new attorney to create a website, operate a law office out of a coffee bar, attract clients and --- stay out of trouble. We do our best to make ethics interesting. Ask anyone who attends – these are no ordinary CLE courses.

If you are an attorney who plans to attend next year's Convention, this is a great way to fulfill your CLE credit and enjoy the camaraderie of your fellow SCI attorneys. Stay tuned to SCI's blog and Crosshairs for details about our course in 2015. Safari Club would like to thank all of our presenters and Wildlife Law Jeopardy contestants. We look forward to many more successful CLE courses for years to come. See you all next year!

## Special Thanks to Legal Task Force Committee Members:

**Rew Goodenow (Chairman), Kevin Anderson, James Berglund, Donald Black, Ryan Burt, Brent Cole, John Daly, Marc Fong, Ned Johnson, Linda Linton, John Monson, Alan Stevenson, Paul Turcke, and David Willms**

*For any questions or feedback on litigation matters, please contact Anna Seidman at [aseidman@safariclub.org](mailto:aseidman@safariclub.org), Doug Burdin at [dburdin@safariclub.org](mailto:dburdin@safariclub.org), or Jeremy Clare at [jclare@safariclub.org](mailto: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 et al.*)** – SCI challenged the FWS’s decision to suspend the importation of sport hunted elephant trophies from Zimbabwe and Tanzania in 2014. Status: SCI has filed a complaint and motion for a preliminary injunction. A hearing on the motion has been scheduled for late May.
- **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. and Wyoming federal courts. SCI is a defendant-intervenor. Status: D.C. Court – Oral argument held in December 2013. Awaiting a ruling. Wyoming Court – Plaintiffs filed a notice of voluntary dismissal that was opposed by defendants and defendant-intervenor. Awaiting a ruling.
- **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. Briefing is finished. Awaiting a hearing and/or 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.
- **Wisconsin Wolves (*Wisconsin Federated Humane Societies v. Stepp*)** – Defense of statutorily authorized use of dogs for wolf hunting. Status: Judge issued a partial ruling in favor of the state and SCI/USSA intervenor group. Plaintiffs appealed and SCI filed a cross appeal. Awaiting a ruling.
- **Wolf Cull for Predator-Prey Balance in Idaho (*Maughan v. Vilsack et al.*)** – Defense of Idaho’s decision to cull two wolf packs from the Frank Church-River of No Return Wilderness Area. Status: District Court denied plaintiffs’ motion for preliminary injunction and temporary restraining order. SCI has moved to intervene.
- **Coyote Hunting in Red Wolf Area in NC (*Red Wolf Coalition v. NCWRC*)** – Defense of coyote hunting in recovery zone of nonessential experimental population of red wolves in NC. Status: SCI is participating as amicus and has opposed plaintiffs’ motion for a preliminary injunction to stop coyote hunting in the area. The Court has appointed a special master (expert) to help resolve factual questions.
- **Three Antelope Cases – (*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. (***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. (***FoA v. Jewell et al.***) In the 2014 Appropriations Law, Congress directed the FWS to reissue the 2005 permit exemption rule. After the FWS reissued the rule, FoA filed another lawsuit challenging constitutionality of Congress’s action and the rule. Status: SCI has intervened.
- **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: Magistrate judge issued a “Report and Recommendation” to uphold the plan (which SCI supported). Awaiting final ruling on recommendation from District Court judge after parties submitted additional briefing regarding plaintiffs’ standing to sue.
- **Twin Peaks (*California/Nevada*) Horse Gather Litigation (*In Defense of Animals v. Jewell*)** – Defense of BLM wild horse gather. Status: Ruling in SCI’s favor issued by California federal district court. Plaintiffs filed an appeal to the Ninth Circuit. Briefing is complete and oral argument was held August 29, 2013. Awaiting a ruling.
- **Triple B (*Nevada*) Horse Gather Litigation (*Cloud Foundation v. Jewell*)** – Defense of BLM wild horse gather. Status: On March 26, the District court ruled in favor of SCI and the BLM on all claims. Horse advocates appealed to Ninth Circuit. SCI is participating in the appeal, but it has been put on hold pending resolution of the Twin Peaks appeal (above).
- **Lead Ammunition Case (*CBD v. EPA*)** – Defending 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. Briefing in appeal is complete. Awaiting a ruling.
- **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. Awaiting a ruling.
- **Virginia Sunday Hunting (*SCI v. Commonwealth of Virginia*)** – SCI has challenged a Virginia law that prohibits hunting of wild animals on Sundays. Status: In 2014, Virginia enacted a new law that allows Sunday hunting on private land with some exceptions. SCI is evaluating the impact of the new law and new regulations and will decide if and how to proceed.
- **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: We are waiting for the Court to rule on DOJ’s motion to transfer the case from Arizona to D.C. or New Mexico. Once decided, SCI will move to intervene in the case.
- **California’s Ban on Importation of Mountain Lion Trophies** – SCI is developing a case to challenge the constitutionality of a California law that bans individuals from possessing or importing trophies of mountain lions taken in another state. Suit will likely be filed in late spring or summer of 2014.
- **Forest Road Closure (*County of Shoshone v. U.S. Department of Agriculture*)** – SCI filed an amicus brief to explain how a road closure in a National Forest would undermine adaptive management practices and prevent hunters from being able to access preferred hunting areas and from retrieving game.