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DOES IMPORTING ENDANGERED SPECIES’ BODY PARTS HELP CONSERVATION? DISCRETION TO IMPORT TROPHIES UNDER THE TRUMP ADMINISTRATION

By Brianna Marie*

I. INTRODUCTION

While endangered species face the risk of extinction, the Trump administration reversed an Obama administration ban on the importation of sport-hunted trophies.1 Tasked with conserving endangered species, the U.S. Fish and Wildlife Service (Service) stated that beginning on March 1, 2018, it will issue permits to import sport-hunted trophies of endangered species on a case-by-case basis.2 Trophy hunting3 frequently occurs through hunting agreements that are typically between wealthy individuals from the Global North4 and locals such as guides or landowners from the Global South5 who assist with the planned hunt of rare, threatened, or endangered species.6 As an agency that frequently regulates trophy hunting imports, the Service has the authority to issue regulations under the Endangered Species Act (ESA) to conserve7 threatened and endangered species.8 The Service’s purpose includes protecting endangered species, conserving and restoring wildlife habitats, and helping foreign governments with their international conservation efforts.9

In 1972, President Nixon was dissatisfied with efforts to protect species from extinction and looked to Congress for assistance.10 Congress responded by passing the ESA of 1973.11 At that time, the ESA was the most wide-ranging legislation to aid endangered species conservation ever enacted.12 In its current form, the ESA aims to get species to the point of recovery at which protection under the ESA is no longer needed.13 Its purposes include conserving ecosystems that threatened and endangered species rely on as well as creating programs that work to conserve threatened and endangered species.14 The ESA prohibits unlawful takings of wildlife including: (1) importing or exporting; (2) possessing, receiving, or shopping in interstate or foreign commerce during a commercial activity; and (3) selling or offering for sale in interstate or foreign commerce.15 The statute applies to both dead and living animals.16 Under the ESA, the Service can issue permits to take wildlife, and regulation of these permits differs depending on whether the species is threatened or endangered.17 When a species is endangered or threatened, the Service may only issue permits for scientific research, survival, improvement of propagation, or a taking that is incidental to otherwise lawful activity.18

Because the Service can only issue permits for the listed reasons, the Service’s recent decision to import sport-hunted trophies does not comply with the ESA.19 If the Service’s rule does not comply with the ESA, it is unlawful under the Administrative Procedure Act (APA).20

Part II of this Comment discusses the purposes of the Service, the ESA, and the Service’s authority under the ESA.21 It also analyzes the Service’s actions under the Trump administration and compares these actions to the Service’s recent decision to import sport-hunted trophies.22 Part III discusses the Trump administration’s decision to import sport-hunted trophies on a case-by-case basis and how the Service was able to repeal the previous ban on trophy imports.23 Part IV explains why the Service’s decision to import sport-hunted trophies on a case-by-case basis is unlawful in addition to arbitrary and capricious under the APA.24 Lastly, Part V recommends that unless the Service can prove that trophy hunting is currently leading to species conservation, it must issue a new rule in accordance with the ESA and the APA.25

II. BACKGROUND

In 1940, Congress merged the Bureau of Fisheries and the Bureau of Biological Survey into one agency, which is now known as the U.S. Fish and Wildlife Service.26 The Service’s objectives include developing and applying an “environmental stewardship ethic” for the public based on wildlife science and moral responsibility.27 Its mission is to “conserve, protect, and enhance fish, wildlife, and plants” for the continuing benefit of our nation’s citizens.28 To fulfill its mission, the Service enforces federal wildlife laws, protects endangered species, and helps foreign governments with their international conservation efforts.29 As a part of its foreign conservation efforts, the Service has an international affairs program.30 This program aids the Service by helping to conserve at-risk species through the regulation of international trade.31 Additionally, it increases protection for species through international treaties and agreements.32

The Service and the Commerce Department’s National Marine Fisheries Service (NMFS) jointly administer the ESA.33 The Service has the authority to issue rules, but is bound by the various guidelines under the ESA.34 Congress created the ESA in part because multiple species went extinct due to development, and protection measures were needed to conserve species and habitats.35 During the Senate Commerce Committee Hearing regarding the ESA, the Committee found that 109

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A different from the recent decision to allow the importation of trophies.

The ESA functions to provide programs for the conservation of endangered and threatened species and to take measures to further the purposes of treaties and conventions. It also works to protect the ecosystems that threatened and endangered species rely on. The ESA states that federal departments should strive to conserve endangered and threatened species by utilizing their authorities under the Act. Section Four of the ESA describes different factors that determine if species are endangered or threatened such as present or threatened destruction of habitat, overutilization for commercial or educational purposes, disease or predation, the inadequacy of regulatory mechanisms, or other natural or manmade factors. It also states that the Secretary of Interior must make decisions required in subsection (a)(1) only on the basis of the best scientific evidence and commercial data available to him after reviewing the status of the species and taking into consideration efforts made by any state or foreign nation. When the Service lists a species as threatened, the Secretary may only issue regulations if he finds them necessary and advisable to conserve such species. Additionally, the Secretary cannot create recovery plans for species if he finds that a plan will not promote the conservation of a species.

Like all rulemaking actions the federal agencies undertake, these regulations are governed by the Administrative Procedures Act (APA). When an agency issues a rule and formal procedures are not required, such as the rule to ban sport-hunted trophies, an agency must follow procedures outlined in the APA. Under the APA, an agency must give the public the opportunity to participate in the rulemaking process through written data submissions, views, or arguments as a part of the notice-and-comment period. Failure to comply with the notice-and-comment rule "cannot be considered harmless if there is any uncertainty as to the effect of that failure." Section 706 of the APA states that it is unlawful for agency actions, findings, and conclusions to be arbitrary and capricious. The requirement for actions to not be arbitrary or capricious entails the Service to properly explain its results. Additionally, if the Service failed to give a reasoned explanation for its actions, the court must declare the actions as unlawful. Therefore, if the Service's rule to import sport-hunted trophies does not prove to conserve species, that rule is likely unlawful under the APA.

III. PREVIOUS ACTIONS

Some presidential administrations have been more active than others in exercising their authority under Section 4(d) of the ESA. While the Trump administration has issued rules that permit the taking of endangered wildlife, these rules are different from the recent decision to allow the importation of trophies. Under the Trump administration, the Service has issued rules that include the removal of nuisance grizzly bears, sustainable timber harvests in black bear habitat, use of northern sea otter skins by Alaskan Natives, and accidental capture of the Sonora chub as part of recreational fishing for other species. Unlike the decision to allow the importation of trophies, most special rules under this administration belong to a category of exceptions for taking wildlife that do not claim to help conserve species. Other exceptions include allowing incidental takes as a part of a conservation plan, as well as takes for scientific research purposes designed to conserve species.

IV. RECENT CHANGES UNDER THE TRUMP ADMINISTRATION

There is much debate as to whether trophy hunting promotes the conservation of a species, which is demonstrated through varying administrative decisions. On March 1, 2018, the Principal Deputy Director of the Service wrote that the Service withdrew 2014 and 2015 ESA enhancement findings for African elephant trophies taken in Zimbabwe. The Service also withdrew findings of African elephants taken in Tanzania, South Africa, Botswana, Namibia, and Zambia. Additionally, it withdrew findings for bontebok in South Africa as well as lions in South Africa and Zambia. The Service stated that this decision was in response to Safari Club International v. Zinke, a recent D.C. Circuit case involving trophy hunting. This case allowed the Service to reverse a ban on importing sport-hunted trophies due to the Obama administration's failure to use notice-and-comment rulemaking.

This decision arose from President Obama's decision to issue an executive order that stated poaching protected species created an international crisis that continuously became worse. He explained that wildlife species like elephants, rhinos, tigers, and great apes have economic, social, and environmental benefits that are important internationally. Further, he stated that wildlife trafficking reduces these benefits while fueling an illegal economy and threatening security.

Under the Obama administration, the Service was unable to make positive enhancement findings for elephants in Zimbabwe in 2014. Because of this, the Service forbade the importation of elephants until the end of the year. In 2015, the Service made negative enhancement findings and banned elephant trophies during the current hunting season in addition to future seasons. In Safari Club International, the court found that the Service's negative enhancement findings were not improper even though the findings rested on the absence of evidence that trophy hunting enhances the survival of the species. Regulations promulgated by the Service allow the importation of African elephant trophies only if the Service can find that trophy hunting enhances a species' survival.

The APA requires an agency to give the public an opportunity to participate in the rulemaking process during the notice-and-comment period. When the Service decided to forbid the importation of sport-hunted trophies in 2014, it did not invite comment from the public. Because the Court in Safari Club International found this error harmful, it remanded this case to
the District Court instructing the Service to initiate rulemaking in order to address findings for the time periods at issue in this case.\textsuperscript{78} This case essentially opened the door for the Service to create a different rule that evidently resulted in permitting sport-hunted trophies on a case-by-case basis.\textsuperscript{79}

\section*{V. Trophy Hunting Support And Opposition}

There are many different reasons scholars, organizations, and researchers support or oppose trophy hunting. A common argument in support of trophy hunting is that it supports wildlife conservation. For example, the Service references a document created by the International Union for Conservation of Nature (IUCN) which argues that trophy hunting is consistent with conservation on the basis that the social and economic benefits from trophy hunting can provide incentives to conserve species and their habitats.\textsuperscript{80} According to the IUCN, trophy hunting programs can serve as a conservation tool when programs are subject to a governance structure that allocates management responsibilities of the conservation plan.\textsuperscript{81} It further states that programs must account for all revenue in a transparent manner, ensure there is no corruption, and completely comply with national and international rules and regulations to have successful conservation programs.\textsuperscript{82} The IUCN Species Survival Commission (SSC) Caprines Specialist Group stated that trophy hunting typically generates funds that can be used for conservation activities such as habitat protection and population monitoring.\textsuperscript{83}

Additionally, the founder of Tanzania’s Ruaha Carnivore Project believes that trophy hunting might be the best way to conserve species in certain circumstances.\textsuperscript{84} The Project argues that there are no non-lethal alternatives to trophy hunting that currently exist to protect species in many hunting areas.\textsuperscript{85} Further, the Project argues that animals will die regardless of trophy hunting, such as from being poisoned by a villager or starved from lack of prey.\textsuperscript{86} Instead, there should be a greater focus on sustainable mortality rather than trophy hunting itself.\textsuperscript{87}

On the other hand, those against the Service’s decision to issue permits on a case-by-case basis oppose trophy hunting for various reasons. According to Economists at Large, trophy hunting must be well regulated to be sustainable.\textsuperscript{88} Similarly, in order for a conservation program to be effective, no corruption can occur, there must be accurate monitoring of animal populations, hunting quotas based on science, and proper regulations.\textsuperscript{89} Economists at Large believe that since those requirements are unattainable, sustainable trophy hunting cannot be guaranteed.\textsuperscript{90} Research conducted in 2015 found that just six-to-nine percent of economic benefits from trophy hunting is directed toward conservation.\textsuperscript{91}

Many organizations oppose trophy hunting, such as the Humane Society of the United States.\textsuperscript{92} As the Service continues to allow sport-hunted trophies into the United States every year, many organizations like the Humane Society work to slow down or completely stop the importation of these trophies.\textsuperscript{93} Organizations are concerned that as the number of animals that are killed increases, populations will continue to decrease.\textsuperscript{94} Data obtained from the Service shows that between 2005 and 2014, more than 1.26 million wildlife trophies were imported into the United States, including 32,500 trophies of the African Big Five species.\textsuperscript{95} According to the Great Elephant Census, the Savanna elephant population subsequently declined by thirty percent between 2007 and 2014.\textsuperscript{96}

Other prominent opposition comes from the African Wildlife Foundation, which expressed its disappointment by the lack of clarity from the Service under the Trump administration.\textsuperscript{97} Additionally, the Center for Biological Diversity found that important decisions regarding trophy importation permits should not be made “behind closed doors.”\textsuperscript{98} National Geographic also reported that money from trophy hunting is typically siphoned away from conservation efforts due to corruption.\textsuperscript{99} Given the spread of arguments for and against trophy hunting, it is conclusive that more research is needed before the Service can determine that allowing sport-hunted trophies into the United States promotes the conservation of endangered species.

\section*{VI. The Unlawful Rules}

Based on all of the opposition and support of trophy hunting, there is not a clear answer as to whether trophy hunting can promote or enhance wildlife conversation. As the idea that trophy hunting supports conservation is highly contested, the Service must not issue rules that allow the importation of sport-hunted trophies without clear evidence that the killing of these endangered species promotes conversation.\textsuperscript{100} Federal agencies must exercise their authorities in furtherance of the ESA’s purpose.\textsuperscript{101} The Service may only issue permits to take endangered species if the taking is for scientific research, survival, improvement of propagation, or taking that is incidental to otherwise lawful activity.\textsuperscript{102}

Since the Service’s new rule failed to demonstrate that it complies with the ESA, it is arbitrary and capricious under the APA. Further, keeping the Service’s rule in place would set a dangerous precedent that could permit future rules to exist that are arbitrary and capricious under the APA.

\section*{VII. The Arbitrary and Capricious Trophy Hunting Rule}

The Trump administration does not properly weigh whether trophy hunting benefits species,\textsuperscript{103} and therefore its individual permitting decisions are unlawful in addition to arbitrary and capricious. The Service stated that it would permit applications to import trophies on a case-by-case basis pursuant to its authority under the ESA.\textsuperscript{104} The Service based its decision to import trophies off of a document that included examples of two case studies neither prove trophy hunting always leads to conservation nor does it explain whether the Service’s specific action to import trophies will lead to conservation.\textsuperscript{105} Under the ESA, when a species is threatened or endangered, the Service may only issue regulations if it finds them necessary and advisable to conserve such species.\textsuperscript{106} Additionally, the Service cannot implement recovery plans for species if it finds that a plan will not promote the conservation of a species.\textsuperscript{107} Because the Service’s rule to import sport-hunted trophies failed to prove it was necessary to conserve species, that rule is likely unlawful under the APA.\textsuperscript{108}
In addition to the current rule, the Service’s individual permitting decisions likely violate the ESA and the APA as well. The Service stated that it reviews each application to import sport-hunted trophies before the application is approved, in addition to available information regarding the status and management of species and populations to ensure wildlife programs are promoting conservation of species. These guidelines are problematic, as scholars are uncertain as to whether the information that the Service is claiming to use as its permitting criteria will be available when the Service receives permit requests, as well as how much promotion of conservation is adequate to issue a permit to import a trophy under the ESA. Because decisions are being made in a way that is not certain to benefit species, the Service’s actions violated the APA. The APA states that arbitrary and capricious agency actions, findings, and conclusions are unlawful. The Service must examine relevant data and articulate a satisfactory explanation when issuing rules. A satisfactory explanation is one that demonstrates a “rational connection between the facts and the choice made.” When a court is reviewing an agency’s action, it is not substituting its judgment for that of the agency. Instead, it is looking at whether the agency considered all relevant factors and whether there was a clear judgment error.

Here, the Service failed to provide a reasoned explanation for its rule. The Service solely relied on an inconclusive document containing only two case studies. Without conclusive evidence regarding whether trophy hunting promotes conservation, the Service cannot adequately explain its reasoning to allow sport-hunted trophies into the United States. Thus, a reviewing court must find that the Service acted in violation of the APA, and the Service must go back and revise its work.

A. THE SERVICE VIOLATED THE ESA

A reviewing court must also ensure that the Service exercised a “reasoned discretion” without deviating from or ignoring the ESA when engaging in rulemaking activity. Under the ESA, when a species is endangered, the Service may only issue permits for scientific research, survival, improvement of propagation, or taking that is incidental to otherwise lawful activity. Furthermore, the court in Safari Club International determined that the importation of sport-hunted trophies is unlawful unless the Service found that killing a trophy animal enhances the survival of the species. To comply with the ESA, the Service should not issue a rule that allows individuals to import sport-hunted trophies unless the importation undoubtedly conserves or promotes the survival of the hunted species.

Rather than complying with the requirements under the ESA, the Service stated that properly regulated hunting with management programs could benefit the conservation of certain species, but did not guarantee that it will or currently does. Additionally, it stated that hunters should choose to, but are not required to hunt in countries that have strong governments and healthy wildlife populations. When justifying its decision to permit sport-hunted trophies, the Service relied on a document that discussed how trophy hunting could potentially contribute to species conservation. Because this document does not claim that the Service’s rule to import sport-hunted trophies will help conserve species, it is not consistent with the ESA as the Service’s rule is not necessary for the survival of the targeted endangered species. Furthermore, because the Service’s rule is not consistent with the ESA, it is unlawful.

VIII. RECOMMENDATION TO ENSURE ABA AND ESA COMPLIANCE

A. TO ENSURE THAT THE SERVICE IS MAKING THE MOST INFORMED DECISION, IT IS ESSENTIAL THAT THE SERVICE DILIGENTLY Follows ALL REQUIRED STEPS UNDER THE APA.

Rather than taking unlawful actions, the Service should instead follow the correct notice-and-comment rulemaking procedures under the APA. This step would allow the Service to obtain crucial public comment and adequately protect endangered species. For example, the ESA instructs federal agencies to use the best available science, but the best scientific evidence in the field of trophy hunting and conservation is often uncertain. Additionally, the “best available science” is a term that is not defined by any statute. Because of this, a reviewing court should consider the process by which decisions are made and communicated to the public when issuing its decision.

B. PUBLIC PARTICIPATION IS NECESSARY TO ENSURE THE AGENCY IS PROPERLY INFORMED ON ALL ISSUES RELATING TO THE PROPOSED RULE.

Under the APA, notice of proposed rulemaking must generally be published in the Federal Register. The notice must include a statement of the time, place, and nature of the public rulemaking proceedings. It must reference the legal authority under which the rule is proposed and include the terms or substance of the proposed rule or a description of the subjects and issues involved. The proposed rule puts the public on notice of the issue and allows the agency to benefit from the input of interested parties and educates the agency. The agency must give the public the opportunity to participate in the rulemaking process through written data submissions, views, or arguments with or without an opportunity for oral presentation. After consideration of the public’s comments, the agency shall include in the rules adopted a general statement regarding its basis and purpose. Additionally, each agency must give interested persons the right to petition the issuance, amendment, or repeal of a rule.

When creating rules about the survival of endangered species, all of these steps are crucial. Under the public trust doctrine, the government has a duty to protect wildlife for the enjoyment of all present and future citizens. Additionally, under the ESA, the government pledged itself as a sovereign state in the international community to conserve threatened and endangered species. To hold the government accountable, it is essential that the public has a right to participate in the rulemaking process. Because the survival of wildlife impacts the public as a whole, it is imperative that the public maintains its right to comment about proposed rules in addition to petition the issuance, amendment, or repeal of a rule.
C. AS THE DECISION TO IMPORT SPORT-HUNTED TROPHIES IS UNLAWFUL IN ADDITION TO ARBITRARY AND CAPRICIOUS, THE SERVICE MUST ISSUE A NEW RULE.

First, a reviewing court must find that the current rule is unlawful. To challenge the current rule, third parties can “assert a legal interest” in the protection of wildlife under the state ownership of wildlife doctrine. A party has legal standing if the party has alleged a “personal stake in the outcome of the controversy.” Additionally, a party must be affected by the opposing party’s activities or a party must use the resource it is trying to conserve in order to have standing. To have a successful claim, plaintiffs should reference data that the Service omitted from consideration when issuing its current rule about trophy hunting importation, as the ESA requires the Service to use the best available scientific data when engaging in rulemaking.

D. THE SERVICE MUST FOLLOW THE APA AND THE ESA WHEN CREATING AND PROPOSING A NEW RULE TO PERMIT OR DENY THE ENTRY OF SPORT-HUNTED TROPHIES INTO THE UNITED STATES.

When creating a new rule, in addition to following the procedures in the APA, the Service must make its decision based on whether importing trophies will enhance the survival of the targeted species. To be sustainable, trophy hunting must be well regulated. Throughout the trophy hunting process, there cannot be corruption, and there must be accurate monitoring of animal populations, hunting quotas based on science, and proper regulations. Researchers argue that the ideal conservation operating system is unattainable, and therefore the sustainability of species cannot be ensured.

The Service’s new rule should only permit trophy hunting if it is proven to enhance conservation of the targeted species. This requires concrete evidence such as where and how money is being spent, what conservation efforts are being made if the population of the targeted species is increasing due to trophy hunting, and how trophy hunting negatively impacts species. According to Safari Club International, an acceptable version of enhancement findings look to see if a country has a sustainable number of animals to support its hunting program. It also looks at the management plan, if the regulations adequately implement a hunting program, and if the participation of hunters from the United States provides a clear benefit to meet the ESA’s special rule requirement to import trophies. If there is no evidence of enhancement and the rule is not necessary for the survival of species, then the Service cannot meet the requirements of Safari Club International, and the Service should not issue a rule allowing the importation of sport-hunted trophies on a case-by-case basis. Instead, it should issue a rule that bans trophy hunting, as it is not contributing to the conservation of targeted species.

Further, the Service should reverse its current rule and issue a new rule that is in compliance with the ESA and the APA. The court reversed the rule to ban sport-hunted trophies under the Obama administration because the Service failed to use notice-and-comment rulemaking when issuing its decision. Therefore, it is imperative that the Service issues its new rule in compliance with the APA so that it is not reversed again. Additionally, the Service must comply with the ESA’s requirement to only issue permits to take endangered species if it is necessary for the survival of endangered species. Creating a legal and evidence-based rule will likely help stabilize endangered species populations and provide more evidence regarding the best way to conserve endangered species.

IX. CONCLUSION

To ensure that wildlife survives for generations to come, the public must hold the Service accountable when the agency engages in rulemaking about the taking of threatened and endangered species. The Service exists to protect, conserve, and enhance wildlife and their ecosystems for the current and future benefits of American citizens. Additionally, the ESA states that the Service should strive to conserve endangered and threatened species. Under the ESA, whenever the Service lists a species as threatened, the Service can only issue regulations if it finds them necessary and advisable to conserve such species.

Because the information the Service relied on to allow sport-hunted trophies into the United States is speculative, and there is an abundance of disagreement as to whether trophy hunting does, in fact, contribute to the conservation of species, the Service should reinstate the ban on sport-hunted trophies and reverse its current rule. The Service can only issue rules to import threatened species if it finds the rule necessary. However, since there is no concrete evidence the Service’s current rule is necessary for the conservation of species, the current rule to permit sport-hunted trophies on a case-by-case basis is unlawful.

By issuing a new rule that complies with the APA and ESA, the Service will allow the public to participate in the rulemaking process and will help create consistency for endangered species. Since the Service can only issue rules that allow the taking of endangered species when it is necessary to the survival of the species, the Service must follow that standard when creating rules that allow individuals to import trophies of endangered species. If there is no concrete evidence that hunting endangered species is necessary for their survival, the Service must create a new rule.

ENDNOTES

2 Id. (explaining how the new rule replaces an Obama Administration decision to ban sport-hunted trophies).
3 See Trophy Hunting, The Humane Soc’y of the U.S., http://www.humanesociety.org/issues/trophy_hunting/ [hereinafter Humane Society] (defining trophy hunting as the killing of wild animals for their body parts, such as the head, for display and not primarily for food or substance).

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