IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE A. FRANKS 405 W. South St. Sturgis, MI 49091	)	
STEVE SELLERS 503 Paradise Galveston, TX 77554	)	
GEORGE J. BROWN 6147 Lakeside Dr., Suite 104 Reno, NV 89511	)	
CHARLES F. ROBBINS 3586 North Gleaner Rd. Freeland, MI 48623	)	**Case No.: 1:09-CV-00942-RCL**
JESSE R. FLOWERS, JR. 74 West Lake Lee Rd. Greenville, MS 37801	)	
JACK ATCHESON **3210 Ottawa St.** **Butte, MT 59701**	)	
and	)	
CONSERVATION FORCE, INC. 3240 S. I-10 Service Rd. W Suite 200 Metairie, LA 70001	)	
Plaintiffs,	)	
v.	)	
KEN SALAZAR, United States Secretary of Interior; ROWAN GOULD, Acting Director of United States Fish & Wildlife Service, and UNITED STATES FISH & WILDLIFE SERVICE; 1849 C Street, NW Washington D.C. 20240	)	

Defendants.)
)
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_____)

[Amended portions in bold.]

AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF

ADMINISTRATIVE PROCEDURE ACT AND ESA CASE

MOZAMBIQUE ELEPHANT TROPHY IMPORTS

I. INTRODUCTION

1. This case challenges the manner of processing, the criteria used and the denial of trophy import permit applications for tourist-hunted elephant taken in Mozambique.

2. The import permit applications are for hunting trophies lawfully taken or to be taken in licensed, regulated hunts as part of Mozambique's elephant conservation strategy.

3. The denial of the permits is the final administrative action in the permit application process. The permit applications date back as far as eight (8) full years to January 2001. They were all simultaneously denied on February 23, 2009 for duplicate reasons. Other permits have been constructively denied as they are not being processed.

4. This case also includes import permits for the Niassa Game Reserve in Mozambique that defendants have neglected to process at all.

5. The primary claims are that both the treatment and denial of the permits is arbitrary, capricious, an abuse of discretion and not in accordance with CITES, the ESA, the APA, Federal Register Act and Due Process.

II. JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action under the Administrative Procedures Act (APA) 5 U.S.C. 701 – 706, (judicial review of final agency action) Federal Register Act, 44 U.S.C. 1502 et seq. and 28 U.S.C. 1331 (federal question jurisdiction). The Court can grant declaratory relief under 27 U.S.C. 1361 (mandamus), 28 U.S.C. 2201, 28 U.S.C. 2202, and 5 U.S.C. 701-706.

7. The judicial review provision of the APA waives the defendant's sovereign immunity. 5 U.S.C. 702.

III. PARTIES

8. Plaintiff Lawrence A. Franks is a U.S. citizen who took an elephant on a licensed, regulated hunt in the intensely managed Tchuma Tchato Community Project in the Tete Province of Mozambique on September 22, 2000. The hunt was part of the written elephant conservation strategy of Mozambique and part of a deminimus quota of ten (10) elephant the Mozambique Wildlife Authority had established for the whole country that year. It was one of the only two elephant actually licensed to be taken in that year as the country did not issue the full quota. Lawrence filed his trophy import permit application with the USF&WS's Division of Management Authority on January 2001.

His import application was denied simultaneously and for the same reason as those of the other plaintiffs on February 23, 2009.

9. Plaintiff Steve Sellers is a U.S. citizen that took an elephant on September 2002 in SOFALA Safari Area II in a licensed, regulated hunt that was part of the elephant conservation strategy of Mozambique and part of a deminimus quota of ten (10) for the whole of Mozambique. Only six (6) licenses were actually issued. Steve filed his trophy import application in October 2003 and received his final notice of denial on February 23, 2009 with the same date and reasons as the other plaintiffs.

10. Plaintiff George J. Brown is a U.S. citizen that took an elephant in SOFALA Safari Area II in 2002 and applied for a trophy import permit. He finally received a final denial of that application on February 23, 2009, the same date and with the same reasons as the other plaintiffs. His elephant was taken that year in a licensed, regulated hunt as part of that country's elephant conservation strategy. He also took an elephant in the Niassa Reserve of Mozambique on July 14, 2005, but the defendants have neglected to process that application at all. He also took a second elephant in Niassa Game Reserve Block "C" on June 27, 2006, but defendants have neglected to process the application. Both of the unprocessed applications were filed in late August, 2006.

11. Plaintiff Charles F. Robbins is a U.S. citizen who wishes to take an elephant in the Tchuma Tchato Community Project in Mozambique. He has filed two (2) import permit applications. The first was not processed by defendants. The second was denied on February 23, 2009 for the same reasons and at the same time as the denial of the other plaintiffs. Defendants did not show his application enough attention to even discern that he was applying in advance of having taken an elephant trophy. He has had

to cancel his safari plans on two or more occasions despite the deminimus quota in Mozambique and his selection of the celebrated Tchuma Tchato Community Project area for his hunt. He has no hope of ever getting an import permit application until the Court renders a declaratory judgment and mandamus.

12. Plaintiff Jesse R. Flowers, Jr. is a U.S. citizen who wishes to take an elephant in the Tchuma Tchato Community Project in Mozambique. In 2005 he applied for a trophy import permit in preparation for a hunt. That permit application was finally denied on February 23, 2009 for the same reasons and at the same time as the import permit applications for the other plaintiffs. He has no hope of ever getting an import permit application until the Court renders a declaratory judgment and mandamus.

13. Plaintiff Conservation Force is a non-profit 501(c)(3) foundation formed for the purpose of wildlife and habitat conservation through projects, programs and advocacy. Its name stands for the fact that the sustainable use of wildlife, most particularly in the form of recreational hunting and fishing, has been the foremost force for wildlife and habitat conservation. Hunters are the founders and funders of the most significant wildlife conservation developments for over 110 years. No sector contributes more than hunters and anglers to the conservation of wildlife and habitat. Conservation Force's mission is to better use hunting as an even greater force to conserve wildlife and wild places.

Conservation Force has wildlife conservation projects around the world to conserve, manage and protect game species that are listed on the ESA and CITES. Its leaders and officers have been participants in the ESA and CITES process since inception and also leaders in African elephant conservation. Conservation Force provides

supportive services to over 150 sportsmen's conservation organizations that in turn support it in a concerted effort to propagate and perpetuate all game animals, particularly foreign game species at risk and listed on CITES and/or the ESA and biodiversity. The conservation of those game species that are imported into the U.S. is dependant upon the revenue and incentives arising from U.S. hunters who bear the price of their hunts, which in turn pay for the conservation infrastructure of the foreign nations and the projects and programs for the hunted species, because of their expectation of importing their trophies.

For over two decades Conservation Force and/or its officers and leaders have been assisting hunters, foreign nation wildlife authorities and species conservation stakeholders to import trophies because the revenue and incentives from that hunting are the backbone of the foreign conservation strategies and regimes.

Conservation Force filed all of the permits in issue in this litigation as the authorized representative of all the plaintiff permit applicants because of the potential conservation role and value of the Mozambique program. In the initial cover letter with Lawrence Franks' permit application in 2001, Conservation Force expressly asked the FWS to process the permit application quickly because of its importance to the success of the Tchuma Tchato Community Project in which the elephant was the highest possible income generator.

Conservation Force has been assisting the Mozambique authorities, its own members and supporters and supporting organizations with establishing the import of elephant hunting trophies from Mozambique since that nation established its *Strategies for the Management of Elephant in Mozambique, 1999*, established an extremely small quota with the CITES Secretariat, and opened tourist elephant hunting as part of that

conservation strategy in 2000. Its officers helped establish the importation of leopard hunting trophy imports before that in the early 1990s. Both are crucial to fund the wildlife management infrastructure of the country.

Conservation Force leaders have a long history of supporting elephant conservation that dates back to 1989. They filed *SCI, et al v. Babbitt* which established the import of elephant hunting trophies from the Republic of South Africa, Namibia, Tanzania, Cameroon and Ethiopia.

Conservation Force appears in behalf of its own elephant conservation interests and objectives as well as those of its many supporting organizations and members. Those plaintiffs named herein are only a fraction of the interests. Many other elephant trophy import permits have been denied, disparaged or simply remain unprocessed, that have not made it to the final determination stage.

Conservation Force represents the interest of its supporting organizations and their tens of thousands of members, including Dallas Safari Club, Dallas Ecological Foundation, Houston Safari Club, African Safari Club of Florida, Shikar Safari Club International, The Wild Sheep Foundation, Grand Slam/OVIS, National Taxidermist Association, International Professional Hunters Association, Professional Hunters Association of South Africa, et al, most of which have had members or clients refused, denied or disparaged in the permitting process complained of below. The five (5) elephant trophy import permit application denials cited herein are only representative of the deprivations complained of.

For the most part, Conservation Force is representing the applicants herein and others as a pro bono public service to ensure the protected rights of the individuals, but

also because of the negative impact the illegal permit practices and denials are having on foreign nations' programs for listed game species. The only positive value those elephant populations in question have and the primary source of conservation revenue for their survival is the limited, regulated tourist hunting in issue. The licensed, regulated tourist hunting is a component part of the elephant conservation strategy of Mozambique and trophy importation is necessary for that.

13(A). Plaintiff Jack Atcheson, Sr. is a citizen of the United States and domiciled in the State of Montana. He is a supporting member of Conservation Force. He is a booking agent for American hunters who wish to safari hunt elephants in Mozambique, Jack Atcheson & Sons, Inc. Defendants' delay in processing elephant trophy import permits from Mozambique, the Tchuma Tchato Community Wildlife Project in TeTe Province and the Niassa Reserve and surrounding buffer zone and the unlawful denial of those applications for import permits have directly and significantly impacted him personally and financially. He has been and remains unable to book tourist trophy hunters in Mozambique. He also has an ardent interest as a conservationist and hunt broker in the wise management and conservation needs of the elephant in Mozambique. He has suffered and continues to suffer substantial financial loss due to Defendants' unlawful conduct.

He was also a Plaintiff in *Safari Club International et. al. v. Manuel Lujan, Jr.*, Case No. 91-2523, before Judge Lamberth and the stipulation of dismissal, which suit expressly complained of guidelines that required 'current' 'good quality' elephant population information ((b) page 9 of petition), proof of the 'elephant

population is stable or increasing' ((c) page 9 of petition), proof of 'a demonstrated capability to control poaching' ((d) page 9 of petition), 'routine biological surveys' ((e) page 9 of petition) and other criteria that are once again being used by the Defendants to delay and deny the elephant import permits from Mozambique and exemplary programs within that country.

DEFENDANTS

14. Defendant Secretary Ken Salazar is the highest ranking official within the Department of Interior, hereafter "DOI", and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

15. Defendant Rowan Gould is the Acting Director of the United States Fish & Wildlife Service. He is responsible for the administration and implementation of the ESA, and for compliance with all other federal laws applicable to the Department of the Interior. He is sued in his official capacity.

16. Defendant the United States Fish & Wildlife Service, hereinafter FWS, is the federal agency within the Department of Interior authorized and required by law to protect and manage the fish, wildlife, and native plant resources of the United States, including enforcing the ESA and its foreign provisions. The Service has been delegated authority by the Secretary of Interior to implement CITES and the ESA for the African elephant, including responsibility for permitting and promulgating regulations. The

permitting in issue herein is performed by the FWS's relatively autonomous Division of Management Authority and Division of Scientific Authority of International Affairs.

IV. STATUTORY FRAMEWORK

17. The elephant in Mozambique are listed as "threatened" on the U.S. Endangered Species Act (ESA) and on Appendix I of CITES. Consequently, an import permit is necessary for importation of trophies of those elephant.

18. CITES prohibits trade (export – import) of Appendix I species for primarily commercial purposes, but permits trophy trade because it is licensed, regulated and the tourist hunter's purpose is personal recreation and use of the trophy, not trade for commerce. Resolution 2.11 (Rev.).

19. The CITES Parties at Conferences of the Parties (CoPs) have adopted Resolutions and Decisions to facilitate and favor trophy trade and have rejected others that would unduly restrict or burden that favored type of trade. Res. Conf. 2.11 (Rev.).

20. CITES recognizes "that international cooperation is essential for the protection of certain species…" CITES, 27 U.S.T. at 1090, proclamation of the contracting state.

21. The Endangered Species Act, ESA, places a duty on the defendant Secretary to cooperate with and support foreign nations' programs for CITES and ESA listed species. 16 U.S.C. 1537, *International Cooperation* and section (b) *Encouragement of Foreign Programs* provides that "the Secretary…shall encourage…(1) foreign countries to provide for the conservation of fish and wildlife…." In *Conner v. Andrus*, 453 F. Supp. 1037 (1978), the Court held that the Secretary of the Interior has a

positive duty under the ESA not to deny a species the benefits and revenue that accrue from sport hunting. In the case of foreign species the ESA does not even provide the benefits provided domestic species.

22. CITES Resolution 9.11 (Rev.) provides that importing countries of Appendix I CITES listed species should honor the exporting nation's biological and management non-detriment findings because the exporting country has the greatest interest and is in the best position to make those kinds of findings.

23. Congress enacted Public Law No. 100-478 on October 7, 1988, a two-part Amendment to the Endangered Species Act of 1973. Title I is the Endangered Species Act of 1988, and Title II is the African Elephant Conservation Act (AECA). The AECA supplements the ESA, 16 U.S.C. 4241. That ESA supplement provides that the "Secretary shall not establish any moratorium under Section 4223…which prohibits the importation into the United States of sport-hunted trophies from elephants that are legally taken by the importer…." 16 U.S.C. 4222(e).

24. The legislative history for the AECA exception for sport-hunted elephant trophies reveals its purpose: "[W]ithout the vital infusion of capital that sport hunters provide, there would be no incentive to protect these elephants…Sport-hunted ivory, which is a miniscule percentage of ivory exports, is biologically sound and it produces by far the greatest economic return for the producing nation." 134 Cong. Rec. 21, 013 (1988) (Statement of Rep. Fields).

25. The AECA contains the express Congressional finding: "There is no evidence that sport hunting is part of the poaching that contributes to the illegal trade in African elephant ivory, and there is evidence that the proper utilization of well-managed

elephant populations provides an important source of funding for African elephant conservation programs." 16 U.S.C. 4202(g).

26. Under CITES, both the importing and exporting countries have to issue permits for trade of Appendix I species. The exporting country has to make a non-detriment determination before issuing an export permit that the export is not biologically detrimental. The import country is supposed to make a different determination that the "purpose" of the import, whether it is recreational or commercial, thus not detrimental before issuing an import permit.

27. The import and export non-detriment determinations are entirely different, but the FWS in September 2007 adopted a circular regulation that it had to duplicate the exporting country's findings by making its own biological finding before it could determine that the "purpose" of the import was not detrimental. That *ultra vires* regulation is in direct conflict with CITES and the Resolutions and Decisions of the Conferences of the Parties. That *ultra vires* regulation had not been adopted at the time these elephants were taken, these permit applications were filed or initially denied.

28. The FWS also adopted a special rule under the ESA governing import of elephant hunting trophies that requires proof that the hunting "enhances" the survival of the elephant in the country it is taken, but that special rule was based upon the FWS position at that time that enhancement had to be shown to make a CITES import non-detriment finding, 50 C.F.R. 17.40(e). The Parties to CITES have rejected that position at CoP 3 (Doc. 3.27), again at CoP 8 (Doc. 8.37) and again at CoP 9 (Resolution 2.11 [Rev.]), but the ultra vires special rule still stands without the rationale upon which it was based.

29. 16 U.S.C. 1537(b) International Cooperation (b) *Encouragement of foreign programs* provides that "the Secretary…**shall** encourage…foreign countries to provide for the conservation of wildlife…including threatened species listed pursuant to" the ESA. Congress has made it clear that means facilitating the import of hunting trophies from foreign nations' conservation programs for game species, particularly elephant hunting trophies.

V. PERMITTING PROCESS

30. The FWS has a permitting vision and action plan entitled *Leaving a Lasting Legacy: Permits as a Conservation Tool.*

31. One vision is to "provide the public with timely decisions in a clear and consistent manner." The action component calls for "recognizing permittees as partners in conservation," and processing permits consistently.

32. Another vision calls for customer service by processing "permits fairly and consistently in a timely manner." The action to be taken includes processing "applications within specific time frames."

33. The full *Permits Action Plan* includes processing permit applications based on risk, being customer friendly, recognizing permittees as partners in conservation and "the role our partners play in wildlife…management and conservation."

34. The Code of Federal Regulations expressly provides that "upon receiving an application" the Director of the FWS "will" decide whether or not a permit should be issued, 50 C.F.R. 17.22 (a) (2), and "upon receipt of a properly executed application for a permit, the Director shall issue the appropriate permit…." 50 C.F.R. 13.21 (b).

35. The Code of Federal Regulations provides that "[t]he Service will process all applications as quickly as possible," 50 C.F.R. 13.11 (c), and suggests periods of 60 and 90 days. That was not done in this case even though it began with a request that it be expedited and despite its importance to the range nation.

36. The Code of Federal Regulations also provides a two-part review procedure when a permit is denied. The first is a request for reconsideration, 50 C.F.R. 13.29, which expressly includes the "presenting of any new information or facts." 50 C.F.R. 13.29 (b) (3). In this case the FWS contradictorily said no new information could be provided, ignored what new information was provided and then erroneously claimed additional information was not provided.

37. Reconsiderations "shall be" decided within 45 days. 50 C.F.R. 13 (d).

38. Denials can then be "appealed" to the Director "and may contain any additional evidence…." 50 C.F.R. 13.29 (e) Appeal.

39. Appeals "shall" be decided within 45 days and "constitute the final administrative decision of the Department of the Interior." 50 C.F.R. 13.29 (f) (2) and (3). That was not done in this case.

VI. ADMINISTRATIVE PROCEDURES ACT (APA) AND FEDERAL REGISTER ACT

40. Permit denials that are arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law are violations of 5 U.S.C. 706 (2) (A) of the APA, *SCOPE OF REVIEW.*

41. Those that are "contrary to constitutional right…" are also prohibited by the APA. 50 C.F.R. 706 (2) (B), *SCOPE OF REVIEW*.

42. Public Federal Register notice and a comment period and public re-notice are all required before a regulation can be given effect under 5 U.S.C. 553, *Rule Making* section of the APA and 44 U.S.C. 1502, *Federal Register Act*.

43. Under the *Federal Register Act*, regulations must be published in the Federal Register, 44 U.S.C. 1505 and are not valid if they have not been published, 44 U.S.C. 1507.

44. The Administrative Procedure Act ("APA"), 5 U.S.C. 551 et seq., provides general rules governing the issuance of proposed and final regulations by federal agencies. Fundamental to the APA's procedural framework is the requirement that, absent narrow circumstances, a federal agency publish as a proposal any rule that it is considering adopting and allow the public the opportunity to submit written comments on the proposal, 5 U.S.C. 553.

45. A "rule" is defined by the APA as "the whole or part of an agency statement of general or particular applicability and future effect design to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency….", 5 U.S.C. 551(4).

46. Specifically, the APA provides that all federal agencies must give "general notice" of any "proposed rule making" to the public by publication in the Federal Register. The publication must, at a minimum, include "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority

under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. 533(b).

47. In addition, the APA requires that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose," 5 U.S.C. 553(c). Subsequent solicitation of public comments only after such a rule has taken effect cannot cure the requirement of section 553 of the APA, 5 U.S.C. 701-706.

48. An agency may only short-circuit the public notice and comment requirements of the APA if it finds, "for good cause," that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. 553(b)(B).

49. In this case the requirements that there be a specific kind of management plan for elephant, if any at all, and a nationwide population count of a specific kind rather than just the area in issue were not duly adopted regulations.

50. Even if such regulations today were adopted, they should not have retroactive application. Ex post facto regulations violate "due process" and Art. 1, section 9, cl.3, section 10, cl.1 of U.S. Constitution. Changing the rules retroactively violates "legal doctrine centuries older than our Republic," *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497, 128 L. Ed. 229 (1994).

51. Such a regulation would also be contrary to the stipulation in *SCI, et al. v. Babbitt*, infra, and Resolution 2.11(Rev.) of CITES.

52. Regulations and determinations that violate the APA are unlawful and should be set aside, APA, 5 U.S.C. 706 (2).

VII. HISTORY

53. Congress has expressly favored elephant trophy imports in the African Elephant Conservation Act (AECA) of 1989 and the hearings for that Act in 1978-79, and again in 1988-89 explicitly support and exempt elephant trophy imports.

54. In the AECA hearings in 1989, on the eve of the elephant being placed on Appendix I of CITES, the defendants testified before Congress that the pending listing would not impede the import of hunting trophies, contrary to their actions that followed. They assured the committee they would not interfere with elephant trophy imports if the elephant was listed on Appendix I of CITES.

55. The African elephant was listed on Appendix I of CITES in 1989, effective 1990. That in turn required the FWS to issue import permits before trophies could be imported.

56. Defendants did little to process the permits for nearly two years (except to send a letter of inquiry after 14 months) and used internal criteria that served as a de facto ban on imports according to elephant experts and African range nation authorities.

57. The FWS failed to process trophy import permits for Namibia, South Africa and others for nearly two years. When inquiry was made after 14 months, the Assistant Director replied in writing that it was a “low priority.”

58. Undersigned counsel filed suit in this Court in *Safari Club International, et al. v. Bruce Babbitt* (originally *Lujan*), No: 91-2523, before Senior Judge Royce C. Lamberth.

59. During the course of that case the defendants moved to dismiss the case as moot because of their assurances they would no longer use the disputed elephant trophy import criteria. While that motion was pending, they nevertheless did use some of those criteria as they are continuing today in this case, and a motion for sanctions was filed against the Secretary.

60. That case was dismissed in consideration of a written stipulation that the disputed permit criteria would no longer be used or made a requirement as it is being used in this case herein.

61. The three related criteria that are again being used are 1) the requirement that the elephant "population is stable or increasing", 2) "an infrastructure exists" to manage, and 3) that there be a "demonstrated capability to control poaching."

62. Tourist hunting funds and provides both government and citizen incentives for management infrastructure. Tourist hunting provides revenue and incentives to reduce poaching and displaces poachers. In this instance the limited tourist hunting was expressly designed to control poaching in both the National Elephant Management Strategy and in the Tchuma Tchato Community Project where most of the hunts took place or were to take place.

63. The *Order of Dismissal* in *SCI v. Babbitt* was "without prejudice," and based upon the "stipulation…that the elephant trophy import guidelines in dispute are no longer in use or to be used and their proposed adoption has been withdrawn (and that all

the permits denied be) reconsidered for issuance in accordance with the spirit and intent of the amendment to Resolution 2.11 (c) of CITES made at the 9th Conference of the Parties in November 1994…."

64. The amendment adopted by CITES made clear the distinction between the nature of the non-detriment finding of the exporting and importing countries. The exporting, not the importing, country was to make the biological and management determinations.

65. More specifically, at the 9th Conference of the Parties of CITES in November 1994, the 127 member nations unanimously deleted language in Resolution 2.11 (c) that defendants had based elephant trophy import biological guidelines and permit delays and denials upon. Defendants' stubborn elephant trophy import practices were the catalyst and direct cause of the revision of that Resolution.

66. The Secretary of Interior appeared at CoP 9 in Ft. Lauderdale, accepted the blame for delaying elephant trophy imports and promised to facilitate the import of elephant trophy imports in the future in his host country speech.

67. "There is an important difference between the finding of 'non detrimental to the survival' that is required for export permits, and the finding (FWS) of 'for the purposes not detrimental to the survival' that is required before issuance of Appendix I import permits by the receiving country. The basic biological fact-finding on Convention species is the responsibility of the exporting countries…The 'purpose not detrimental to the survival' finding…does not require the importing country to replicate the basic biological fact finding that is required of the exporting country…the importing country's approach should differ and, in particular…it should focus on the nature and quality of the

activity in the importing country….", 42 FR 42297, August 22, 1977, *Policy on Import of Appendix I Species.*

68. The Parties to CITES have repeatedly rebuffed defendant's trophy import permit practice concept when the Convention was drafted, again at CoP 3, Doc. 3.27 in 1981, and again at CoP 8, Doc. 8.37 in 1992.

VIII. FACTS

69. The Republic of Mozambique extends 801,590 square kilometers, about twice the size of California, and is heavily wooded.

70. It has more than 140,000 square kilometers of various protected areas – over 17% of the whole country.

71. Designated tourist hunting areas in the form of Coutadas, Blocks and Community Programmes like Tchuma Tchato and Chipande Chetu comprise a large segment of the habitat and biodiversity protective area system which are expected to be self-sustaining as to the operating cost of the management infrastructure and the protection of the country's biodiversity.

72. These protected hunting areas (eleven [11] enclosures or Coutadas, six [6] hunting blocks and two [2] community areas where development projects are in place) cover a total area of more than 75,000 square kilometers, which is more than half the protected area system in the country.

73. The elephant was listed on Appendix I of CITES in 1989, effective early 1990, due to trade of illegally-poached ivory. The listing was not intended to ban trade of trophies from licensed, regulated tourist hunting of elephant.

74. In October 1991, the country of Mozambique created an *Elephant Conservation Plan Mozambique* with the help of the African Elephant Conservation Coordinating Group with help from the U.S. Agency for International Development, the European Commission, the World Wildlife Fund, and the defendant FWS.

75. One of the purposes of that plan was to reestablish tourist elephant hunting that had closed when the elephant was listed in 1990. Specifically, the plan stated that there was a need for trophy elephant hunting "to make…(safari) operations economically viable (and that) [t]here is also a body of opinion which maintains that the presence of an expatriate hunting camp in the field will act as a deterrent to poachers," pg. 2.1.

76. In late 1994 a renowned group of the foremost elephant and community project experts in the world initiated the Tchuma Tchato Community Project under the auspices of the IUCN, which is the foremost conservation organization in the world.

77. At the cost of millions of dollars from defendant FWS, USAID, IUCN, the Ford Foundation, et al., the Tchuma Tchato project was established as a model program in Mozambique which itself was modeled after the CAMPFIRE Program in immediately adjacent Zimbabwe that is world acclaimed.

78. The Tchuma Tchato (which means "our wealth") Community Project was established in Tete Province (one of ten provinces in Mozambique) which is immediately adjacent to a CAMPFIRE Program area in Zimbabwe. In fact, the Tete Province is a nipple geographically protruding into Zimbabwe and elephant hunting trophies from that area of Zimbabwe have been importable into the U.S. at all times since shortly after the elephant was listed on Appendix I of CITES in 1990. Zimbabwe was the first area approved for import by the FWS because of the CAMPFIRE strategy.

79. The FWS wholly abandoned its prior basis of import in Zimbabwe in this instance, which disjunct has not been even minimally explained in the denials.

80. The CAMPFIRE (Communal Area Management Program for Indigenous Resources) Program after which the Tchuma Tchato was modeled is primarily dependant upon safari hunting of elephant by U.S. tourist hunters (69% of CAMPFIRE revenue in Zimbabwe). Most of its revenue is derived from the elephant hunting and it is renowned due to the increase in elephant numbers and the reduction in poaching arising due to the local participation, incentives and revenue it creates.

81. The Tchuma Tchato Community Project was designed from its inception by the "Father of CAMPFIRE" renowned professor and anthropologist Marshall Murphree, Ph.D. of the University of Zimbabwe and implemented by his son Michael Murphree, et al. to perform like CAMPFIRE. It is really an extension of the Communal-Based Natural Resources Program of Zimbabwe into the adjacent habitat in the next country.

82. The President of Mozambique took special interest in and regularly visited Mozambique's Tchuma Tchato project as the pride of the nation. Scientists cited it in conferences and meetings around the globe.

83. In April 1999, a workshop was held that established a *National Strategy for the Management of Elephants in Mozambique* for the whole of the country of Mozambique. The workshop was funded in part by defendant FWS, as well as WWF, IUCN and others. Its foremost goal was to establish local projects like those where the elephant hunting in issue took place or was to take place.

84. In June 1999, pursuant to that *National Strategy*, tourist elephant hunting was authorized to commence in 2000 as a step in the implementation of the *National Management Strategy*. It was limited to two (2) elephant in the Tchuma Tchato project.

85. The need for good management of Mozambique's elephant led to the establishment of that *National Elephant Management Strategy*. The main goal of the strategy is to increase the number and range of elephant in Mozambique. Tourist hunting is an "important aspect of that strategy." Four of the seven objectives of Mozambique's Elephant Management Plan include the hunting in issue as follows:

> A. As a sustainable funding mechanism to support the conservation infrastructure;
>
> B. As a means to reduce human-elephant conflicts to acceptable levels by developing the means to benefit communities most affected by the presence of elephants;
>
> C. As a means to improve the awareness of people of the value and benefits that can be derived from elephant utilization. This should follow from the development of tourism and safari hunting along with mechanisms to allow local communities to benefit directly and indirectly from wildlife utilization; and
>
> D. As a means to provide law enforcement in the field, including increases in the numbers and training of anti-poaching staff, provision of equipment and adequate budgets and the establishment of intelligence networks.

86. Mozambique's formal *Elephant Management Strategy* was completed by the foremost elephant authorities in the world who expressly recognized in that *Management Strategy* that the intended elephant hunting could provide the following:

A. High revenue "for the removal of relatively few animals;"

B. Security presence of armed safari operators within the elephant range "which discourages illegal activities" (game guard units are also funded by tourist hunting in Tchuma Tchato);

C. Income to rural communities from access fees and a percentage of trophy fees, etc. Indirect benefits include local employment, meat, etc.;

D. A "draw card" to attract visitors to other parts of the country;

E. An attraction for other investment in Mozambique; and

F. Greater short-term revenue and other benefits than general tourism.

87. In November 1999, WWF did an aerial elephant count of the Tchuma Tchato area as an extension of the survey of the CAMPFIRE area in adjacent Zimbabwe and did so in large part with FWS funds. The defendant knew of this and was repeatedly reminded of it, but acted as if it did not exist throughout the permitting process.

88. Pursuant to the *Management Strategy,* in 2000 a hunting quota was established for the whole of Mozambique by its wildlife authorities and registered with the CITES Secretariat. It was a nominal quota of ten (10) per year, but only two (2) were actually allocated.

89. The first two were allocated to the already existing Tchuma Tchato Community Project and one of those was taken by plaintiff Lawrence A. Franks in 2000. It is the first import application in issue herein.

90. Plaintiff Conservation Force sent Dr. James Teer that same year (2000) to the Tchuma Tchato Community Project in Tete Province to report on it and to furnish that report to the defendant FWS, which he did.

91. Dr. Teer's credentials are impeccable as he is the Past President of The Wildlife Society, recipient of the Aldo Leopold Award, inductee to Conservation Hall of Fame, retired Chairman of Texas A&M's Department of Wildlife Management, and much more including a past contract biologist for the defendant FWS.

92. Dr. Teer met with the FWS in Washington before he departed to ascertain their precise needs to issue an elephant trophy import permit and he collected that very same information in the Tchuma Tchato Community Project which he furnished to FWS. The denials of import permits suggest the Teer report and attachments were never read or considered.

93. Despite repeated written and verbal requests, the International Division of the FWS did not process the trophy import permit filed by Lawrence Franks. After 21 months the permit applicant and his legal representative were being told it was a "low priority" and defendant did not know when it would get to it and could not promise it would be within the next six months (27 months total).

94. Legal counsel directly complained to the Director of the FWS in September 2002 and made a written complaint to him at his suggestion on 23 October 2002.

95. The ESA and CITES import permitting for foreign species is separately administered by International Affairs, which is largely autonomous.

96. Its Director at that time, Kenneth Stansell, explained the approval or denial of the permits were not forthcoming for more than 1.5 years due to Mozambique not responding to a letter of inquiry sent to those wildlife authorities. He was mistaken.

97. The permittee was told by the FWS that a written inquiry had been sent to the Mozambique authorities and the FWS was waiting on the response. A copy was promised but never provided to the permit applicant's legal counsel.

98. When that was identified as the reason for no response from the FWS, the Mozambique authorities insisted they had not received any letter since the reopening of hunting and the taking of the elephant in issue. After painstaking inquiries at every level by Conservation Force for the letter, it was discovered that there was no such letter. Moreover, the staffer assigned the processing of the permit explained he was simply too busy, it was a "low priority", he did not know when he would get to processing the permit and could not promise it at all, much less within six more months (two years total).

99. In turn, Conservation Force complained to the Director of FWS and the Director of International Affairs, who only then sent a letter (21 months) to Mozambique on October 23, 2002.

100. The inquiry was for information already furnished to the FWS with the import permit application, in the report of Dr. James Teer and other documents and activities that the FWS had itself funded, such as the national Elephant Strategy Workshop and aerial survey performed by WWF.

101. The October 23, 2002 letter requested what the letter itself described to be "a large amount of information" and had no less than 49 separately identifiable questions

in an unitemized, rambling form. It had an appearance to all involved that it was more than a letter that would have been sent if the FWS division had done the job in the first place without the desperate complaint to the Director of FWS after 21 months and being told it was "low priority".

102. That was three years after the long awaited elephant hunting had commenced in the Tchuma Tchato project. Ultimately, the delay, more than eight years, and the denials at each step discouraged and caused the failure of the scientifically-designed, state-of-the-art program and the hunting operation as well. The project needed a "big ticket" item like the elephant to succeed, as does the CAMPFIRE Program in the adjacent country it was modeled after.

103. In December 2002, the Mozambique authorities responded to the FWS's letter and asked Conservation Force to act as the courier of the response as well. Then the waiting began anew for two more years.

104. In an attempt to get movement on the permit, on July 24, 2003 undersigned legal counsel sent the Tchuma Tchato Community Project description from the Community Development Program Officer of the Ford Foundation that described it as a community-based natural resource management (CBNRM) project modeled after CAMPFIRE, the number of game scouts funded by the hunting, the division of revenue with the community, and more about the "breakthrough" in conservation.

105. On September 5, 2003, unbeknown to Conservation Force and the import permit applicants, a second letter with follow-up questions was sent by the FWS to Mozambique. It was addressed to the Director no longer there and to a Department no

longer in charge of elephant management. Legal counsel and the permit applicants were not sent a courtesy copy nor informed more information was felt to be necessary.

106. Conservation Force, and in turn the permit applicants and appropriate Mozambique authorities, only learned of the second letter on December 15, 2004 through a FOIA request from Conservation Force.

107. In December 2003 the Mozambique authorities answered the second inquiry, but the FWS claimed not to have received it. Upon learning of this new reason for the delay through a FOIA request sent in October 2004 and response received December 15, 2004, Conservation Force got the Mozambique authorities to send the response dated January 22, 2004 again on July 19, 2005.

108. The FWS finally acted on the permits by denying them all on July 31, 2006. The permits were mistakenly denied because 1) "the Service has made repeated attempts, though several channels of communication, to obtain information from the Government of Mozambique on the benefits that sport-hunting provided elephants…." and, 2) mistakenly states that the hunters were not licensed, though this second reason was dropped.

109. To the contrary, the FWS had been furnished redundant information from all interests as to what the benefits were and why.

110. The FWS had never at any point in time communicated to the applicants that it needed any further information from them and the permit application form does not put them on notice or contain a request for any biological or management data, yet the permits were denied in large part for those reasons.

111. In the second paragraph of the denials, the DMA addressed the need to establish enhancement under the ESA Special Elephant Rule. It gave five examples of what might constitute enhancement. Though the DMA did not number them, they were:

A. hunt generated revenue supporting conservation projects

B. "…to manage elephant"

C. "improving human-wildlife conflicts"

D. "improving anti-poaching efforts"

E. "habitat conservation"

112. On page 2 the DMA again incorrectly states "there was no information to show what measures, if any, were being taken to deal with human-elephant conflicts, to reduce poaching and illegal take, or to maintain wildlife populations."

113. To the contrary, virtually every page of every document contained one or more of the itemized benefits that the DMA cited as examples of enhancement. The DMA did not discuss, acknowledge or review a single document that was provided in support of the applications. It ignored the two letters from the Mozambique authorities such as Director Cuco, including his reference to the additional information he had already given to Dr. James Teer, not to Dr. James Teer's detailed report. It ignored the letters from the local leaders within the communities. It ignored the special report by Mike Murphree. It ignored all of the pages in the *Elephant Management Strategy* that precisely explain how and why elephant hunting would generate revenue and incentives, revenue for projects and management, improve human tolerance, reduce poaching, protect habitat, and grow the elephant populations.

DSA ADVICE OF APRIL 8, 2005

114. Unbeknownst to plaintiffs, the Division of Scientific Authority (DSA) issued a negative non-detriment advice on import of trophies from Mozambique on April 8, 2005. It was erroneous. Plaintiffs' first knowledge of that advice was in the permit denials.

115. That advice did not give any consideration to the fact that the quota had been no more than 10 per annum and no more than two (2) licenses were issued per annum for the period 2000 until 2005.

116. It was a biological determination contrary to CITES Resolution 2.11(Rev.) and the stipulation in *SCI v. Babbitt.* Example: "Baseline surveys are needed to determine current population numbers and trends."

117. It erroneously stated there was "no effective elephant management plan (including determination of quotas and control of poaching)" and that "[w]e have no information on how quotas are determined." To the contrary, they had express correspondence from the Director and multiple copies of the Management Plan which explained how the miniscule quotas were determined and the second FWS letter to the Mozambique authorities did not even inquire about the manner the quotas were determined because the first response was so complete and the quota so miniscule.

118. Mozambique adopted an *Elephant Conservation Plan for Mozambique* in 1991 after all African elephant were listed on Appendix I of CITES. It adopted a more comprehensive plan with specific action steps, particularly tourist hunting, entitled *National Strategy for the Management of Elephant in Mozambique* in 1999. The quota of ten (10) elephant was one of those itemized steps.

119. On July 31, 2006 the plaintiffs' applications were denied and they jointly filed a request for reconsideration on September 8, 2006. That request for reconsideration was denied on December 29, 2006.

120. The Division of Management Authority's denial of the reconsideration was based upon the alleged failure of Mozambique to have "a comprehensive government sponsored management program for African elephants…to address the management issues for this species." "No such plan was shown to be in place, nor being implemented at the time you took your trophy….As a result the DMA is unable to find the import…would enhance the survival of species in the wild." This conflicted with the DSA advice that the National Management Strategy "is being implemented as an elephant management plan (Cuco 2002)" and the fact that FWS sent a copy to Conservation Force and even participated in and helped fund the workshop that created the plan.

121. There is no such duly adopted regulatory requirement, nor is there any regulation from which anyone, Mozambique or U.S. hunters, can distinguish between the national conservation strategy that Mozambique had, the Tchuma Tchato program that is an even more intensive plan than a national plan, the Niassa Game Reserve plan, and whatever would constitute a sufficient plan to satisfy the DMA.

122. The DMA also erroneously stated that "no data or supporting documentation was provided" with the Request for Reconsideration.

123. The DMA denial also attached a negative determination by the Division of Scientific Authority dated November 17, 2006 that cited an earlier negative determination of April 8, 2005 that had covered the period for all hunts from 2000 through 2005. That

determination was based upon management and biological data, not the "purpose" of the import, and erroneously stated "no new information" was provided. It expressly referenced a "lack of information from the Government of Mozambique…concerns about poaching levels and the lack of implementation of a countrywide elephant management plan from 2000 through 2005" and expressly stated that it had "based our advice on the biological and management status of the species at a country level rather than the evaluation of specific hunting areas." In essence, it disregarded all the relevant information as well as made a biological rather than a "purpose" of import determination.

124. No duly adopted regulation defines or specifies the requirement of an elephant plan, nor has any other country ever been required to have a plan different than that in Mozambique which the FWS itself helped draft.

125. The denial is based on biological and management considerations contrary to CITES Resolution 2.11(Rev.) and the stipulation in *SCI v. Babbitt*, supra, and had no regulatory basis.

126. The "advice" is contrary to the practice of the FWS in the other countries in which imports have been permitted and is nonsensical and irrational.

127. The "advice" does not specify what information the Mozambique authorities did not provide, nor was any such information requested from the permit application that had to struggle to even get a copy of the correspondence.

128. A management plan was in place and the Tchuma Tchato quota was in fact a part of that plan. Moreover, the national plan and the Tchuma Tchato strategy were expressly designed to reduce the poaching and the human-elephant conflict. That information had been provided but was not acknowledged.

129. The denial erroneously states that the Mozambique authorities "also did not address the problem of human-elephant conflict. One approach we could suggest would be the formulation of a comprehensive plan for community based management of natural resources that would provide local communities with a stake in the management and conservation of elephants." That is exactly what the Tchuma Tchato Community Project and Niassa Game Reserve do and that has been explained in great detail to defendants.

130. One of the new items of data attached by the applicants to their joint Request for Reconsideration was the *IUCN's African Elephant Status Report 2002* which verified that "in 1999 Mozambique adopted a comprehensive National Strategy for the Management of Elephants. The Strategy aims to devolve direct benefits of wildlife tourism to local communities, as well as establish monitoring programmes for habitats, wildlife populations and law enforcement. The strategy also aims to achieve a 20% increase in the elephant population by 2010…." Of course programs have to start and that was the Tchuma Tchato program that has been obstructed by the defendants.

131. Both the DSA and DMA claim that no additional information was furnished with the Request for Reconsideration. That is wholly incorrect but more ironic because the permitting office had illegally instructed in the original denials that no additional information could be submitted, further confusing all concerned and violating 50 C.F.R. 13.29(3).

132. The applicants also requested (FOIA) any and all DSA advice on the permits before receiving the denial so that they could address any issues, but were not furnished the negative advice until the permit was denied.

133. The applicants were not informed further information was needed. The application form for the import permit does not require any such information or otherwise put applicants on notice that the applicant must produce any biological status and management information.

134. Neither the DSA or DMA discuss, acknowledge or review a single document that was provided by Mozambique, the applicants or others that in fact contradict their advice and findings point-for-point.

135. On February 8, 2007 plaintiffs jointly filed an appeal and asked to orally argue that appeal before the Director which was done before the Director of International Affairs that oversees both the Division of Management and Division of Scientific Authorities.

136. During the oral presentation plaintiffs' legal counsel asked that the decision be made within a week or a suit for mandamus would have to be filed because the underlying denials were so disingenuous and the FWS's history of shelving those and similar applications could no longer be tolerated. The Director understood well and expressly agreed at that meeting to make a final decision within the week. That did not occur.

137. In December 2008 that Director of International Affairs, then Acting Director of the FWS at large, called and asked that all the permits be voluntarily dropped. Then on or about that same Director's retirement, these permits were denied on February 23, 2009 along with those of three other game species that had been pending for up to a decade or more, one of which was for elephant trophy imports from the country of Cameroon dating back to 1998. That final denial erroneously states "The Service

supports the formulation of a comprehensive plan for community-based management of natural resources that could provide local communities with a stake in the management and conservation of elephants. Although some community-based projects have been established and are currently operating in Mozambique, they were not functioning at the time you took your trophy…."

138. At no time in the whole permitting process did defendants explain why the Tchuma Tchato Community Project or similar projects in Mozambique did not constitute enhancement.

139. At no time in the entire process did defendants explain why and how the national Elephant Management Strategy was not adequate or satisfactory.

140. At no time in the entire permitting process did defendants call for any further information from the permit applicants or acknowledge the information it had received. Contrary to 50 C.F.R. 13.29(e), it said no additional information could be submitted.

140(a). An examination of the Administrative Record discloses a number of irregularities. First, the FWS staffer with the most up-to-date expertise in Mozambique informed the office that there were serious errors in the permit denials. Second, when the Director heard the administrative appeal he did so without the permit files. The negative decision was drafted for him before his review and ultimately executed by him as if it had been duly determined though it was pre-decided without consideration of the arguments and documents. Despite repeated requests to be copied, the permit applicants and their legal representative were not copied with correspondence to the Mozambique authorities. This was made worse

because Defendants represented they were waiting on responses to correspondence they had never prepared or sent to Mozambique.

140(b).The illegal biological and management determination was made countrywide contrary to its longstanding practice and this change in practice was unpublished.

NIASSA GAME RESERVE

141. The Niassa Game Reserve is the most important wildlife reserve in Mozambique and potentially one of the most significant conservation areas in Africa.

142. The Reserve and its buffer zones comprise 10.5 million acres of wilderness.

143. A conservation partnership among private donors, local communities and the national and provincial governments was established to oversee its management and a 10-year management plan was approved by the Council of Ministers.

144. The management is considered a conservation model that integrates the local people and the use of wildlife into a sustainable economic model that both benefits the people and the wildlife.

145. Protection of the African elephant is the centerpiece of the overall plan for the rehabilitation of the Reserve and the creation of a local economy built around wildlife/low impact tourism including hunting tourism.

146. One division of International Affairs of the FWS has supported the Reserve with multiple African Elephant Conservation Act Grant funding, but the

Division of Management Authority and Scientific Authority have refused and neglected to process elephant trophy import permits.

147. International Affairs has granted AECA funds to the Reserve for elephant aerial census work, to control poaching, and numerous other activities.

148. Like Tchuma Tchato Community Wildlife Project in Tete Province, it is supported by WWF and IUCN.

149. Through its work in Mozambique and particularly in the Niassa Game Reserve, International Affairs of FWS participated in the drafted of the *Strategy for the Management of Elephants in Mozambique* and has had a copy of that management plan and the more comprehensive plan for the Reserve as well at all material times herein, including at the same time it was asking Mozambique authorities for a copy in correspondence.

150. Elephant surveys and reports in the Reserve and throughout Mozambique have shown a more than 20% increase in elephant numbers since the *National Strategy* was written. *Strategies to Mitigate Human-Wildlife Conflicts in Mozambique*, DNFFB, page 30, September 2005.

151. The best way to reduce poaching and to mitigate human-wildlife conflict was to introduce tourist elephant hunting pursuant to the *National Strategy*.

152. The management of the Reserve today arose from *The Niassa Conservation and Community Development Program*, an intensive management strategy like that in Tchuma Tchato.

153. In 2005, an elephant hunting quota was initiated in the Reserve and the national hunting quota was increased accordingly from the maximum of 10, as it had

been since opening, to accommodate that increase in the Reserve. The quota is just a fraction of one-half of one percent (.05) of the elephant population of more than 12,000 in the Reserve and the population is increasing at a rate exceeding seven (7) percent per annum.

154. Defendants have completely neglected to process the trophy import applications of U.S. hunters that take elephant in the Reserve without explanation which has discouraged rather than encouraged elephant conservation.

155. Although the defendants' delay and irrational conduct caused the demise of the Tchuma Tchato Community Project, this larger Niassa Reserve project in northern Mozambique and in its surrounding buffer zone has since initiated tourist elephant hunting and is surviving.

156. Defendant has neglected to process those import permit applications which delay constitutes a denial and deprives all concerned interests guidance from the rationale that must be stated and explained in a legitimate denial.

157. This discourages and retards the conservation of the elephant instead of encourages and supports as request by the ESA.

158. Plaintiff George J. Brown is one of those applicants.

159. That population has been surveyed every two (2) years and its numbers have doubled.

160. The Niassa Reserve has its own comprehensive plan and management, much like the states within the U.S.A.

161. Elephant hunting in both Tchuma Tchato and Niassa Reserve are acts of implementation as expressly provided in the *National Strategy*. A more detailed national

plan would not be more intensive or comprehensive than the plan in the two hunting areas.

161(a). As a consequence of this suit, plaintiffs' import permit applications were finally processed. On September 3, 2009, the Niassa Reserve permits were all denied.

161(b). Defendants cited as justification for its actions the "fact" that it had not received "anything to substantiate that a specific elephant management plan was developed and in place in 2005 to address management issues for elephants".

161(c). To the contrary, Defendants had extensive information about precisely how the elephant management strategy has been implemented in the Niassa reserve, but disregarded all such information for purposes of its permitting decisions. Instead defendants insisted on proof of an undefined variety of national strategy that in fact would be less intensive than that existing in Niassa.

161(d). There is no such requirement in the Code of Federal Regulations nor was Mozambique properly notified of such a requirement as mandated by 16 U.S.C. 1533(b)(5) and the APA. Apparently no other elephant trophy importing country has such an undefined plan.

IX. CLAIMS

FIRST CLAIM: ARBITRARY, CAPRICIOUS AND OTHERWISE CONTRARY TO LAW

162. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

163. Defendants' findings and permit denials do not conform to the evidence presented **to them.** Whenever an agency's findings "run[] counter to the evidence before [it]", those findings are arbitrary and capricious within the meaning of 5 U.S.C. 706(2)(A).

164. Although the report of Dr. James Teer, **the Mozambique national elephant management strategy,** and documents from the community leaders and participants in the Tchuma Tchato Community Project directly address the stated reasons for the denial of the permits, they are wholly ignored as if never read or considered.

165. The statement **in the permit denials** that a community benefit program, **such as the CAMPFIRE program, constitutes enhancement is inconsistent with the finding that the virtually identical Tchuma Tchato CBNRM program, located in TeTe Province, in a directly adjacent country, does not constitute enhancement. This conclusion is even more arbitrary when one considers that the leaders of the CAMPFIRE program created CBNRM in order to utilize sport hunting as a conservation tool, which requires that the US allow elephant trophy imports.**

166. **Defendants concluded they could not make a non-detriment finding despite the fact that** the actual quota allocation was no more than two (2) male elephant per year. **This conclusion is nonsensical**, particularly in light of the offsetting benefit of the program **which was** designed as part of both the National Strategy and Tchuma Tchato Project expressly designed to reduce poaching and retaliatory killing and to make those **who** live with the elephant participants in the conservation of the elephant. **The same is true in the more recent denials of the Niassa Reserve applications.**

167. Defendants failed to acknowledge **mechanisms in place as part of the** the Tchuma Tchato Community Project **and failed to explain why participating in this program does not enhance the propagation and survival of the species. The same is true of the Niassa Reserve.**

168. Defendant failed to acknowledge the report of Dr. James Teer **and** its attachments **and failed to** explain why it **was insufficient to support a non detriment or enhancement finding.**

169. Defendant did not explain how or why the express responses of the Mozambique authorities were not satisfactory, **nor did they request more information from those authorities or the permit applicants or their representatives. Worse, they arbitrarily began ignoring and rejecting all information furnished by the applicants or their legal representative and not timely share correspondence despite repeated requests.**

170. The elephant management strategy of Mozambique is as specific and detailed as any strategy or plan **in any other country from which trophies may be imported**, if not more **specific and detailed.** The Tchuma Tchato Community Project and Niassa Game Reserve are as beneficial as steps being implemented in other countries. The two projects are far more advanced than any **other nation's** general national plan**s**. **Defendants' refusal to acknowledge this is arbitrary and capricious because it produces conclusions that run counter to the evidence before the agency**.

171. **Defendants' requirement that Mozambique conduct an "actual" rather than sample based estimated elephant count and its** apparent finding that no survey existed for the Tchuma Tchato hunting area when **at least one** had in fact been

performed **there** was arbitrary **and capricious because the conclusion directly contradicted the evidence before the agency and defendants failed to consider an important factor.**

171(a). The quota in both Mozambique and in the Niassa reserve was miniscule, less than one elephant in a thousand and limited to males which are biologically surplus from inception.

SECOND CLAIM: PROCEDURAL DUE PROCESS IN VIOLATION OF CONSTITUTION AND APA

172. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

173. The years of delay in the processing of the **Mozambique elephant import** permit **applications**, the admission **that defendants view trophy import permits as** "low priority" treatment, **the failure to inform the permit applicants or Mozambique authorities what more information was needed,** and the apparent failure of the defendants to accept information from the applicant or applicants' legal representatives, the failure of the Director to review the file and the preparation of the denials before the oral hearing, and the failure to consider the information furnished **by the applicants to address** many of the issues alleged to be in contention is contrary to the Due Process clause of the U.S. Constitution **and** 5 U.S.C. **706(2)(B) of the Administrative Procedure Act because it deprived the plaintiffs of meaningful process before the government divested them of their right to keep and enjoy their property.**

173(a). Since filing of suit it has been discovered in the Administrative Record that defendants arbitrarily refused to consider or accept information from

the applicants or their legal representatives unless it was directly from Mozambique authorities. Even though the applicants had the burden of producing information the Defendants would only accept information directly from the Mozambique authorities.

THIRD CLAIM: SUBSTANTIVE DUE PROCESS RIGHTS

174. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

175. The irrationality of the denials and total disregard of the information provided violates the Substantive Due Process protection afford by the U.S. Constitution and Section 5 U.S.C. 706 (2) (A) of the APA.

176. **Incorporated in Second Claim.**

FOURTH CLAIM: RULEMAKING

177. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

178. **5 U.S.C. 553 states that "general notice of proposed rulemaking shall be published in the Federal Register" and that after the notice is posted "the agency shall give interested persons an aopportunity to participate in the rule making through submission of written data, views, or arguments" before publishing the final rule.**

179. **The local Niassa Mozambique plan from which these applications come is intensive and state of the art, and has already achieved more specific conservation objectives than a national plan might hope to achieve**. Defendants' denial of plaintiffs' permits is contrary to the historical **treatment of sustainable use**

programs based on CAMPFIRE and the reasons provided for the denials, particularly defendants' demand that Mozambique conduct a precise individual count of elephants in their country, constitute a rule that has not been adopted according to proper notice and comment procedure under the APA.

180. **The stated mandatory requirement that there be a national population survey or an "actual" nationwide count rather than an estimated count based on sampling is not necessary to make non-detriment determinations. 16 U.S.C. 1537(c)(1). The application of this requirement to elephant import permits violates the stipulation made by the service in SCI, et. al. v. Babbitt, supra, because in that stipulation defendants agreed that it would no longer attempt to require national surveys for non-detriment determinations. The ESA itself has an express provision dispensing with the need to have a population estimate to make a CITES non-detriment finding.**

181. **Defendants' failure to follow mandatory rulemaking procedures in this case constitutes a violation of both 5 U.S.C. 552-553 and the Federal Register Act at 44 U.S.C. 1505-1507. Furthermore, it violates 16 U.S.C. 1533(b)(5)(B), which requires that the Secretary**

> **"insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon; insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon; insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon."**

181(a). Defendants failed to provide the country of Mozambique with notice, an opportunity to comment, and 90 days notice before implementing their new policy as required by the ESA at 16 U.S.C. 1533 (b)(5) ("With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall - (A) not less than 90 days before the effective date of the regulation - (i) publish a general notice and the complete text of the proposed regulation in the Federal Register")

181(b). The requirement that all information come directly from the Mozambique authorities rather than the applicant is not a published or duly adopted regulation, is a change in practice and contrary to the fact the applicant has to satisfy the permit requirements.

FIFTH CLAIM: VIOLATIONS OF LAW (CITES AND ESA)

182. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

182(a). Under 16 U.S.C. 1540(g)(1)(A) of the Endangered Species Act, a plaintiff is authorized "to enjoin any person, including the United States and any other governmental instrumentality or agency…,who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof."

182(b). The Endangered Species Act imposes a duty on the Secretary to "do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention." This duty includes the implementation of Resolutions by the CITES Conference of the Parties.

182(c). One of the Resolutions the Secretary was required to implement is Conf. 2.11 (Rev.), which reads, in pertinent part:

> **in order to achieve the envisaged complementary control of trade in Appendix-I species by the importing and exporting countries in the most effective and comprehensive manner, the Scientific Authority of the importing country accept the finding of the Scientific Authority of the exporting country that the exportation of the hunting trophy is not detrimental to the survival of the species, unless there are scientific or management data to indicate otherwise;**

Plaintiffs have violated their obligation to implement CITES under 16 U.S.C. 1537 by failing to heed the requirements of Conf. 2.11 (Rev.) of CITES when processing elephant import permit applications and Conf. Res. 6.07 to cooperate and consult before adopting stricter domestic measures that impose on another Party.

183. **Defendants'** negative CITES non-detriment determination **was** based upon **impermissible** biological considerations such as population status **and** was contrary to CITES Resolution 2.11(Rev.), the stipulation and dismissal Order in *SCI, et. Al. v. Babbitt*, **and it was** contrary to Article II of the CITES Convention, **which mandates that the importing country is to determine only** the "purpose" **of a hunt, while the** exporting country which has the greatest interest, the rightful sovereignty, **and the best knowledge of species and habitats within its borders**, is in the best position to make "biological" determinations.

183(a). Defendants' permits were submitted as part of Mozambique's elephant conservation strategy. Pursuant to Conf. 2.11 (Rev.) Defendants should have accepted Mozambique's biological findings, and confined their investigation of Plaintiffs' permit applications to determining the purpose of the requested trophy imports.

184. The absolute requirement of an actual nationwide elephant count is contrary to the ESA provision that Congress adopted that expressly provides that population estimates are not necessary, 16 U.S.C. 1537(a)(c)(1), *Convention implementation (c) Scientific Authority functions; determinations.*

185. The low priority treatment and delays were violative of the FWS regulations and the ESA duties to encourage, cooperate with and support foreign nation programs for ESA listed species. 16 U.S.C. 1537(b), **16 U.S.C. 1531(a),** 50 C.F.R. 13.21, **as well as its duty to implement CITES, 16 U.S.C. 1531(b).**

186. The low priority treatment and delays were also violative of the duty of the defendants to recover ESA listed species.

187. Defendant was sent a 60-day notice of intent to sue properly confected on November 17, 2009, for which the notice period has expired.

SIXTH CLAIM: VIOLATION OF 50 C.F.R. 13.29(e)

188. Plaintiffs incorporate by reference all of the allegations of law and fact in the preceding paragraphs.

189. **Under 5 U.S.C. 552(a)(1) of the APA, "each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contens of all papers, reports, or examinations."**

190. **Currently, 50 C.F.R. 13.29 allows an applicant to provide new information when he submits a petition for reconsideration or appeal of a permit application. Defendants, however, instructed plaintiffs tha in order to provide new**

information, they would be required to start the permit application process anew. Defendants failed to publish and duly adopt the change to 50 C.F.R. 13.29(e). Contradictorily, defendants attached a statement of rights to the denial including the right to reconsideration and that it may "contain any additional evidence or arguments to support the appeal." ***Id.***

191. **This violation of rulemaking requirements constitutes a failure to act within the meaning of 5 U.S.C. 551(13).**

192. **This failure to comply with rulemaking procedures is both "unreasonably delayed or unlawfully withheld" under 5 U.s.C. 706(1) and "arbitrary and capricious or otherwise not in accordance with the law under 5 U.S.C. 706(2)(A), and a failure to follow proper procedure under 5 U.S.C. 706(2)(C).**

193. Defendants violated their own regulations and procedural due process.

SEVENTH CLAIM: DENIAL OF NIASSA RESERVE PERMITS IS ARBITRARY AND CAPRICIOUS

194. **The Niassa Reserve is an exemplary wildlife management program that has already achieved many of its conservation goals. It is modeled on the CAMPFIRE program in Zimbabwe and that program has been treated positively by defendants insofar as they have permitted trophies taken in that program to be imported. The exemplary nature of the Niassa Reserve makes it ridiculous that defendants have denied plaintiffs' permits. The denials are yet more ridiculous because of the enormous elephant population in Niassa and the tiny quota. There are over 12,000 elephant in the Niassa Reserve and the quota has been less than ten (10) at all times in issue. The suggestion that that sort of minimal harvest is**

detrimental to the species represents either a total ignorance about the details of the program or a bias against sustainable use as a conservation tool. Defendants had ample information about the details of the Niassa program.

195. An agency action is arbitrary and capricious when the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." ***Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,*** **463 U.S. 29, 43 (1983).**

196. Defendants' denial of trophy import permits for elephants taken in the Niassa Reserve was arbitrary and capricious because it relied "on factors which Congress has not intended it to consider", "entirely failed to consider an important aspect of the problem", was implausible, and it offered an explanation that was contrary to evidence and law.

197. The Niassa reserve is the largest wildlife in Mozambique, consisting of about 10.5 million acres of wilderness. The reserve is maintained by a conservation partnership involving local communities, private donors, and national and provincial governments. The management model is considered to benefit both the wildlife and the people who manage it.

198. Elephant Surveys and reports in the Reserve have shown a 20% increase since the national strategy was implemented. The National Strategy has adopted tourist elephant hunting as the most reliable way to mitigate human-wildlife contact. This strategy has been implemented at Niassa so that the quota is

only one half of one percent of the elephant population of more than 12,000 individuals, which increases at approximately 7% per annum.

199. Defendants' finding that it "did not receive enough information to show that the import of sport-hunted elephant trophies taken during the 2005 hunting season meet the issuance criteria established by our regulations" is arbitrary and capricious for all of the reasons stated above.

EIGHTH CLAIM: ELEPHANT IMPORT PERMITS WERE "UNLAWFULLY WITHHELD OR UNREASONABLY DELAYED"

200. 5 U.S.C. 706(1) authorizes a plaintiff to sue when agency action to which he is entitled has been "unlawfully withheld or unreasonably delayed".

201. When a court is considering whether agency action was unlawfully withheld or unreasonably delayed it looks to the following factors: "(1) the time agencies take to make decisions must be governed by a 'rule of reason'; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed". *In re Am. Rivers & Idaho Rivers United,* 372 F.3d 413, 419 (2004).

202. In its denials of the Niassa reserve permits, Defendants apologized, saying that "we realize it has taken much longer than usual to act on your application and apologize for the extreme delay in responding to your request." In this instance, it took four years for Defendants to act.

203. Given the Defendants' admission and history including the prior *SCI, et. Al. v. Lujan* and a 'rule of reason' regarding the simple time period required to process a hunting permit, this Court should issue a declaratory judgment stating that the length of time that elapsed between the permit applications in this case and permit denials was unlawfully withheld AND unreasonably delayed.

NINTH CLAIM: FAILURE TO CONDUCT A JEOPARDY DETERMINATION

204. The Endangered Species Act requires that "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 USCS § 1536 (a)(2)

205. Section 7 consultations "apply to all actions in which there is discretionary Federal involvement or control." 50 CFR § 402.03.

206. The processing of a permit application to take a listed species is an action carried out and funded by an agency. Defendants' choice to delay the permit processing for 10 years before ultimately denying them is evidence that Defendants failed to perform an intra-Service jeopardy consultation, as they are required to do. Defendants' failure to consider the Jeopardy in which their actions have placed

emerging elephant populations and programs in Mozambique is a violation of the ESA.

X. PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that the **delay and** denials of the permit **applications** are contrary to CITES Art. III, Resolution 2.11 (Rev.) the stipulation in *Safari Club International, et al. v. Bruce Babbitt, et al.*, No. 91:2523, and the duty of the defendants to **properly implement CITES and** encourage and support range nation programs under the ESA;

B. Issue a declaratory judgment that the processing and denials of the permit **applications for Mozambique and the Niassa Reserve was conducted in a manner that was** contrary to the procedural Due Process clause of the Constitution and APA, 5 U.S.C. 706, 593, 551;

C. Declare the defendants have violated 16 U.S.C. 1537(b) that mandates the Secretary shall encourage foreign conservation programs and cooperate with the same, **and 16 U.S.C. 1533(b)(5) that requires the Secretary to consult foreign nations before adopting regulations for this species.**

D. Issue a declaratory judgment that the refusal to accept additional information violated 50 C.F.R. 13.29(e);

E. Issue a declaratory judgment that the denials of the permit applications for Mozambique and the Niassa Reserve were arbitrary, capricious, irrational and contrary to APA, 5 U.S.C. 706 (2);

F. Issue a declaratory judgment that the delay in permit processing and "low priority" treatment violated defendants' own regulations to process permits **"as quickly as possible", 50 C.F.R. 13.12,** and is agency action "unlawfully withheld and unreasonably delayed," 5 U.S.C. 706 of APA;

F(1). Issue a declaratory judgment that Defendants' use of biological information to make a non-detriment determination violates both the ESA and CITES.

F(2). Issue a declaratory judgment that Defendants have failed to make a Jeopardy determination and that they are required to make Jeopardy determinations for permit applications.

G. Issue a declaratory judgment that the failure to process the Niassa Reserve elephant trophy import permits was a violation of the ESA duty to support range nation programs for listed species, good faith participation in CITES, violates Resolution 2.11(Rev.), and violates the CFR and APA time delays and duties;

H. Issue a declaratory judgment that the requirements for **a certain type of** population count for the whole of Mozambique and for a specific kind of undefined elephant management plan for the whole of Mozambique is contrary to the Federal Register Act 44 U.S.C. 1505, et req. and 5 U.S.C. 553 requirements of publication, notice, comment and re-notice as well as the past accepted practice;

I. Enjoin defendants from requiring absolute nationwide counts, from mandating a nationwide action plan, from treating import permitting as a "low priority", and from substituting their biological judgment for that of the exporting

nation contrary to CITES Res. 2.11 (Rev.) and the stipulation in *Safari Club International, et al. v. Bruce Babbitt, et al.*

J. Issue an Order of Mandamus to defendants to grant the permits in issue without further delay;

J(1). **Issue an Order of Mandamus under 28 U.S.C. 1361, ordering defendants to follow notice and comment procedures to review its requirements to prove non-detriment and enhancement for sport trophy importation and to publish any changes to 50 C.F.R. 13.29(e) that eliminate the right to submit additional information at reconsideration and appeal.**

K. Award the plaintiffs their costs, expenses and reasonable attorney's fees including an addition for plaintiff counsel's extraordinary public service and the defendants' bad faith; and

L. Award such other relief in equity or law as this Court may deem just and proper.

Dated February 10, 2010

Respectfully submitted,

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