IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH M. MARCUM
200 Commerce Drive
Pelham, AL 35124-4829

WALT MAXIMUCK
29 Kingwood Stockton Rd.
Stockton, NJ 08559

EARL L. SLUSSER
55 West 22nd St.
West Hazelton, PA 18201-1536

DEAN MORI
304 Todd Farm Rd.
Belle Vernon, PA 15012

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; SAM D. HAMILTON, Director of United States Fish & Wildlife Service, and UNITED STATES FISH & WILDLIFE SERVICE;
1849 C Street, NW
Washington D.C. 20240

Defendants.

Case No. 1:09-cv-01912-RCL

PLAINTIFF'S AMENDED COMPLAINT FOR DECLARATORY, INJUNTCTIVE AND MANDAMUS RELIEF, ADMINISTRATIVE PROCEDURE ACT AND ESA CASE FOR PERMIT DENIALS

(Amendments are bolded.)

AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND MANDAMUS RELIEF, ADMINISTRATIVE PROCEDURE ACT AND ESA CASE FOR PERMIT DENIALS

ADMINISTRATIVE PROCEDURE ACT AND ESA CASE

ZAMBIA ELEPHANT TROPHY IMPORTS

I. INTRODUCTION

1. This case challenges the constructive denial and improperly conducted evaluation of import permit applications for tourist-hunted elephant taken in Zambia. The applications have not been processed.

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

3. The permit applications date back four (4) full years to hunts taken in January 2005. The applications have been constructively denied as they are not being processed.

4. The primary claims are that the treatment and constructive denial of the applications is arbitrary, capricious, an abuse of discretion and not in accordance with CITES, the ESA and the APA.

5. On March 10, 2010 the Defendants denied all the pending permits. The suit now challenges those denials.

II. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action under the Administrative Procedures Act (APA) 5 U.S.C. 706, (judicial review of agency actions unlawfully withheld) 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. 706.

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

III. PARTIES

7. Plaintiff Ralph M. Marcum is a U.S. citizen who took an elephant on a licensed, regulated hunt in Zambia in September 2005. The hunt was part of the elephant conservation strategy of Zambia and part of a deminimus quota of 20 elephant the Zambia Wildlife Authority (ZAWA) had established for the whole country that year. Ralph filed his trophy import permit application with the USF&WS's Division of Management Authority on June 16, 2005 (PRT US106973/9). His import application **had** never been processed. The Defendant misinformed him the process would take 30 to 90 days as it did each of the below applicants. **His permit was denied on March 10, 2010.**

9. Plaintiff Dean Mori is a U.S. citizen who took an elephant in Zambia on August 16, 2005. He filed an import permit application in August 2005 (PRT US120088/9). The application has not been processed by defendants. **His permit was denied on March 10, 2010.**

10. Plaintiff Earl Slusser is a U.S. citizen that took an elephant in Zambia on July 18, 2005 and applied for a trophy import permit. His elephant was taken that year in a licensed, regulated hunt as part of that country's elephant conservation strategy. 50% of his $30,000 trophy fee went to the local village people in a conservation strategy to increase tolerance of conflicts with the elephant. Defendants **had** neglected to process the application he filed on December 27, 2005. **His permit was denied on March 10, 2010.**

11. Plaintiff Walt Maximuck is a U.S. citizen that took an elephant in August 2006 in a licensed, regulated hunt that was part of the elephant conservation strategy of Zambia. Walt filed his trophy import application but it **had not** been processed. **On March 10, 2010, it was denied.**

12. 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 180 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 Zambia program.

Conservation Force has been assisting the Zambia authorities, its own members and supporters and supporting organizations with establishing the import of elephant hunting trophies from Zambia.

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. The four (4) elephant trophy import permit applications 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 Zambia and trophy importation is necessary for that.

DEFENDANTS

13. 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.

14. Defendant Sam D. Hamilton is the 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.

15. 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

16. The elephant in Zambia are listed as "threatened" under the U.S. Endangered Species Act (ESA) and on Appendix I of CITES. Consequently, an import permit is necessary for importation of sport-hunted elephant trophies.

17. 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.).

18. 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.).

19. 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.

20. The Endangered Species Act, ESA, places a duty on the defendant Secretary to recover species, not to jeopardize recovery, and 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.

21. CITES Resolution 2.11 (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.

22. 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).

23. 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).

24. 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).

25. 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.

26. 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.

27. 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.

28. 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

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

30. 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.

31. 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."

32. 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."

33. 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).

34. 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.

VI. ADMINISTRATIVE PROCEDURES ACT (APA)

35. Permit delays that are arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law, and the delay in processing is a violation of 5 U.S.C. 706 (2) (A) of the APA, *SCOPE OF REVIEW.*

35a. 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.

35b. 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.

35c. 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).

35d. 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).

35e. 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. 533(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.

35f. 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).

35g. 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.

35h. 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).

35i. Such a regulation would also be contrary to the stipulation in *SCI, et al. v. Babbitt,* infra, and Resolution 2.11 (Rev.) of CITES.

35j. Regulations and determinations that violate the APA are unlawful and should be set aside, APA, 5 U.S.C. 706 (2).

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

VII. HISTORY

37. 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.

38. In the AECA hearings in 1989, on the eve of the elephant being placed on Appendix I of CITES, the defendants assured the committee they would not interfere with elephant trophy imports if the elephant was listed on Appendix I of CITES – a position belied by their subsequent actions.

39. The African elephant was listed on Appendix I of CITES in 1989, effective 1990, but the African elephant in southern Africa were not thought to be in danger. That in turn required the FWS to issue import permits before trophies could be imported.

40. 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.

41. 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."

42. 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.

43. 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.

44. 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.

45. Tourist hunting funds and provides both government and citizen incentives for management infrastructure. Tourist hunting provides revenue and incentives to reduce poaching and displace poachers. In this instance the limited tourist hunting was expressly designed to control poaching.

46. 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…."

47. 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.

48. 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.

49. 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.

50. "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.*

51. 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.

51a. In the denial of the permits herein the Defendants have admitted to the Director General of ZAWA that "We recognize that other Parties do not interpret the Convention and Resolution Conf. 2.11 in the same manner as the United States," Bates No. 649, but also admit they don't have time or prioritization

to complete their self-imposed extra criteria. Only recently has Defendant adopted a regulation that permits it to go behind the non-detriment findings of the exporting country and that regulation is ultra vires.

51b. Zambia made timely and extraordinary efforts to respond to multiple and repetitive, burdensome information requests of Defendants and was contradictorily recognized for its impressive thoroughness in its responses, Bates No. 410, and then told it had not responded at all to the same request, Bates No. 494, and many other irregularities.

VIII. FACTS

52. 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.

53. The elephant population is increasing in Zambia and all African elephant have been lowered to "vulnerable" from "threatened" by the IUCN and African Elephant Specialist Group. Zambia has only had an elephant quota of 20 per year, which number is less than one hundredth of one percent and is deminimus.

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

55. The Zambia authorities explained in detail how the hunting and related revenue was needed to reduce the growing elephant conflict with the local people.

56. In 2004, Zambia established a quota of 20 elephant per year and it wrote USF&WS International Affairs explaining that "proceeds from elephant sport hunting

will be re-invested into elephant conservation and sustainable development in local communities…."

57. On May 29, 2009, Conservation Force filed a 60-day notice of intent to sue under the ESA for the failure to process the permit applications.

58. Plaintiff Conservation Force did a FOIA request for any and all findings by the Division of Scientific Authority of USF&WS from 2004 to August 2009 and the response was that no finding has been made even though the applications have been pending for years.

58a. As a consequence of this suit, Plaintiffs' import permit applications were finally processed. On March 10, 2010 all permits were denied.

58b. Defendants cited as one primary justification for its actions that Zambia have a national action plan in place and apparently would not accept its adoption by the appropriate Minster and implementation by ZAWA.

58c. There is no such requirement in the Code of Federal Regulations nor were the import permit applicants or Zambia 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: VIOLATION OF APA

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

60. Plaintiffs are persons "adversely affected" by the Secretary's failure to act within the meaning of 5 U.S.C. 702.

61. The Secretary's failure to process permits for the importation of elephant trophies represents "final agency action" under 5 U.S.C. 551(13).

62. The Secretary's failure to process permits for the importation of elephant trophies is a failure to follow a "rule" within the meaning of 5 U.S.C. 551(13).

63. The Secretary's failure to process permits for the importation of elephant trophies is a violation of his responsibilities under 50 C.F.R. 13.21, which mandates that "the director *shall* issue the permit" unless an application has failed to meet requisite standards.

64. Plaintiffs have completed all the requirements for a legitimate permit application under 50 C.F.R. 22 and 13.21.

65. Defendants are required to "process all applications as quickly as possible" and have failed to do so. 50 C.F.R. 13.11.

66. The Secretary's failure to process import permits for four years is actionable under the APA and constitutes both action "unlawfully withheld or unreasonably delayed" and behavior that is "arbitrary and capricious" and "a failure to follow proper procedure" within the meaning of 5 U.S.C. 706.

66a. The denial of the applications was arbitrary, capricious, an abuse of discretion and not in accordance of law. 5 U.S.C. 706(2)(A).

SECOND CLAIM: VIOLATION OF ESA BUNDLE OF DUTIES

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

68. A plaintiff who sues under Section 11(g)(1)(A) of the Endangered Species Act 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."

69. Section 8A of the ESA states that "the Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention."

70. The permits were submitted as part of the elephant conservation strategy of Zambia and pursuant to Resolution 2.11 of CITES. Defendants' neglect of this Resolution is a violation of the ESA duty to implement CITES.

71. The Secretary has violated his duties to foreign species by indefinitely delaying the processing of permits, ignoring CITES Resolutions, and by treating permitting as a low priority because his behavior represents a failure to encourage and promote recovery of foreign species, cooperate with range nation programs, and to consider range nation programs in any actions that might affect those programs and consequently the endangered species in question. *See*, 16 U.S.C. 1537. Defendants have harmed the Zambian elephant and impeded recovery efforts by refusing to implement these duties.

72. By harming the elephant in this manner, the Secretary has fialed in his duty under 16 U.S.C. 1536(a)(2) to insure that "each federal agency shall…insure that any action authorized, funded or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species."

73. Defendants' behavior should be declared a violation of the ESA's mandate to cooperate with and encourage foreign conservation programs and avoid jeopardizing the continued health of an endangered species.

THIRD CLAIM: DEPRIVATION OF DUE PROCESS AND VIOLATION OF THE APA

74. Plaintiffs re-allege and incorporate by reference all the allegations set forth above as though fully set forth below.

75. By failing to consider plaintiffs' enhancement permits and violating their codified evaluation procedures, defendants have constructively deprived plaintiffs of the enjoyment and possession of their property.

76. When a person is deprived of his property by the government, the due process clause of the 5th Amendment mandates that he receive, at a minimum, some sort of review of that government action. See *U.S. v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency,* 461 U.S. 555, 556-7 (1983).

77. Defendants' lengthy failure to consider and process plaintiffs' enhancement permits constitutes a deprivation of constitutionally mandated process and is therefore in violation of both the due process clause of the 5th Amendment and Section 706(2)(b) of the APA.

78. Due to the ESA implications, the processing of plaintiffs' enhancement permits remains the appropriate review for the deprivation of plaintiffs' property and defendants should be compelled to complete their review with all appropriate haste.

FOURTH CLAIM: ARBITRARY AND CAPRICIOUS DENIAL OF APPLICATIONS IN VIOLATION OF THE APA (5 U.S.C. 706(2)

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

80. The CBNRM Program in Zambia 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 Program makes it ridiculous that defendants have denied plaintiffs' permits. The denials are yet more ridiculous because of the tiny quota of males. The suggestion that that sort of minimal harvest is detrimental to the species represents either a total ignorance about the details of the program and biology of elephant or a bias against sustainable use as a conservation tool. Defendants had ample information about the details of the Program.

81. 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).

82. Defendants' denial of trophy import permits for elephants 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 program", was implausible, and it offered an explanation that was contrary to evidence and law.

83. The CBNRM Program maintained in 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.

84. Elephant surveys and reports have shown a stable or increasing trend. The national strategy adopted tourist elephant hunting as the most reliable way to mitigate human-wildlife contact, generating local revenue and reducing poaching. The delays and denials have discouraged and disrupted that strategy.

FIFTH CLAIM: RULEMAKING

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

86. 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 opportunity to participate in the rulemaking through submission of written data, views, or arguments" before publishing the final rule.

87. The requirements or criteria mandated by Defendants in the permitting denials have not been duly adopted as a matter of law or regulation and are contrary to CITES Resolutions.

88. There is no regulatory requirement for a national action plan or one of any particular kind.

89. The stated mandatory requirement that there be a national population survey 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.

90. 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 on 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 in believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon."**

91. Defendants failed to provide the country of Zambia 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")

SIXTH CLAIM: VIOLATION OF CITES AND ESA

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

93. 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."

94. 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.

95. 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 adopted stricter domestic measures that impose on another Party.

96. 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.

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

98. 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.*

99. 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).

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

X. PRAYER FOR RELIEF

101. WHEREFORE, the plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment that the delay in permit processing and treatment of the applications violated defendants' own regulations to process permits within 90 days or less and is agency action "unlawfully withheld and unreasonably delayed," 5 U.S.C. 706 of APA and 50 C.F.R. 13.21.

B. Issue a declaratory judgment that the failure to **timely and properly** process the applications of the elephant trophy import permits is a violation of the ESA duty to recover species, not jeopardize species, and to support range nation programs violates Resolution 2.11(Rev.), and violates the CFR and APA time delays and duties;

C. **Issue a declaratory judgment that the denials of the permit applications were arbitrary, capricious, irrational, in violation of law and contrary to the ESA and APA.**

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

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

Dated April 14, 2010

Respectfully submitted,

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