

February 8, 2007

Dale Hall
Director of USF&WS
Through DMA
4401 Fairfax Drive
Room 700
Arlington, VA 22203

RE: Appeal of PRT 040961, 072461, 074828, 088338 and 090854

Dear Director:

This is an appeal pursuant to 50 CFR 13.29 (4) (e) of the above captioned and below described elephant trophy import permits from Mozambique. It is an appeal of the original denials and the subsequent denials of the request for reconsideration.

This is also a request for oral argument before the Director pursuant to 50 CFR 13.29 (4) (f).

The denials are contrary to law and regulation, irrational, and are arbitrary and capricious. It is contrary to CITES, the ESA, the AECA and the Administrative Procedures Act.

The permits being appealed are as follows:

Taken

1. Lawrence A. Franks, PRT-040961

First bull elephant taken upon the reopening of Mozambique. Taken with Safari de Mocambique in the intensively managed Tchuma Tchato Project area in Tete Province. One of the only two bull allocated by Mozambique Authorities from its lodged CITES quota of a total of 10 in 2000. Taken on 22 September, 2000. Permit application was filed in January 2001.

2. Steve Sellers, PRT-072461

Bull elephant that was taken in September 2002 in SOFALA Safari Area II with Zambeze Delta Safaris, Lda. One of less than 10 on quota in the whole of Mozambique.

3. George J. Brown, PRT-074828

Bull elephant taken in 2002 in SOFALA Safari Area II with Saalman Hunting Safaris. One of less than 10 on quota in the whole of Mozambique.

To Be Taken

4. Charles F. Robbins, PRT-088338

For bull elephant to be taken in Tchuma Tchato Community Project if and when USF&WS issues an import permit. This is his second such permit application (first was PRT-062957) for elephant to be taken in that project. The denial incorrectly states that he took an elephant in 2005.

The denial makes an issue of the fact that “DMA” has received no information from DNFFB on whether licenses to take bull elephant were issued 2003-2005. That is a false issue as applicant has not gone to the expense of booking the hunt and purchasing the limited license and will not until his import permit is granted. Regardless, the DMA made no inquiry of Mozambique nor is there a legal requirement of verification.

5. Jesse R. Flowers, Jr., PRT-090854

Bull elephant to be taken in Tchuma Tchato Community Project Area if and when permit is granted. The denial incorrectly states that the elephant has already been taken and falsely raises the issue that the DNFFB has not verified his licensing. The purchase of a license would be premature as this applicant like others is awaiting an import permit from the USF&WS before incurring the expenses of the hunt and related license.

The Request for Reconsideration thoroughly addressed the underlying issues. This appeal carries those issues over that were not addressed by the Service in the Reconsideration denial and expressly addresses the new or repeated issues cited in the denial of the Reconsideration of the permits. The appealing applicants reiterate every argument made in their Request for Reconsideration, most of which were not addressed by the Service. The reasons for denial of the Request for Reconsideration are far narrower than those originally stated in the denials.

Reconsideration Issues and Reasons

Documents

The Reconsideration denial states that “no data or supporting documents was (were) provided to substantiate” counsel’s statements in the Reconsideration. Ditto the original permit denials. To the contrary, substantial documents were attached to the original permits. Other documents were added as supplements to the applications. Some further documents were attached to the Request for Reconsideration. Still all other referenced documents have previously been submitted in prior permit applications and are well known matters of record like the expert reports in *SCI v. Lujan* and the comments filed in passage. Moreover, the applicants were told in the original denials that they could not submit any additional information. We have attached hereto various

documents demonstrating that the taking of two or even ten male elephants is not likely to be detrimental and other supporting matters. This is perplexing because the reviewers did not taken cognizance of the documents attached to the original petition that was referenced by all subsequent applicants. For example, the denials state that there was no documentation demonstrating community benefits from the underlying elephant hunting when in fact reports from Dr. James Teer expressly detail those benefits, a letter from the local community leader (Council President) details the benefits, an article by Mike Murphee explains the program and the *National Strategy for the Management of Elephants in Mozambique* expresses it as well. Enhancement should not have been an issue for the DMA. What can we say? Consequently we are attaching again those and other documents that clearly demonstrate enhancement certainly in the Tete Province/Tchuma Tchato Project which are PRT-040961, 088338 and 090854. It should also be pointed out that the Request for Reconsideration was verified and that Conservation Force itself is a fully qualified authority on African elephant and the related programs described. Its statement of facts and opinion certainly should be accorded some weight.

The DMA failed to find enhancement under the ESA special rule for quite another reason. It mandated that Mozambique had to have a “National Management Plan.” It would not accept the *Elephant Conservation Plan for Mozambique* of 1991 nor the *National Strategy for the Management of Elephants in Mozambique* of 1999. Those it stated in the Reconsideration “can only be considered a first step in developing a national strategy and management plan.” It gave no weight to the fact that the elephant hunting, particularly in the Tete Province, went beyond and above any such national plan. This is a violation of law for three reasons. First, it is arbitrary and capricious in that a “national plan” would not be expected to improve upon the tourist hunting strategy and the tourist hunting is more intensive implementation than such a required national plan. The hunting is the epitome of enhancement in fact and would be no different if there was a national plan broader in scope. The 1999 strategy even expressly provides for action plans such as tourist hunting on a local level which is how it has been implemented. Secondly, no such requirement has so inflexibly been duly adopted as a regulation after publication, comment and republication under the APA. Third, under the AECA any such special regulation is prohibited. The AECA was adopted as an amendment to the ESA even though separately codified. It supersedes the more general preexisting provisions of the ESA. It expressly prohibits the special rule relied upon for elephant trophies that itself was illegally adopted to discourage range nation complaints against the USF&WS.

The tourist elephant hunting has not been judged on its merits because the programs and purposes have not even been acknowledged by the DMA and DSA to exist. In all the hunting areas the elephant numbers are growing as well as related human-elephant conflicts. Under the National Strategy the DSA and DMA fail to acknowledge much less address the tourist hunting that is fulfilling its intended purpose of reducing that human-elephant conflict.

DSA – Non-detriment Determinations

The DSA's failure to make a non-detriment determination is equally illegal. The DSA misconstrued Resolution 2.11 (Rev.) as requiring it to make and substitute its own biological and management determination which it was unable to do ("must still make an independent non-detriment finding" instead of accepting the biological quota of the exporting countries – in this case 2 or 3 out of a possible 10 per annum). This directly flies in the face of the revision of Resolution 2.11 that was aimed at such practices with elephant permits of the U.S. in the early 90's. The DSA admits "we (it) based our advice on the biological and management status of the species..." which is not the "purpose of the import" in the realm of the importing country's determinations. Worse, its biological and management determination is irrational at best. Too few elephant were taken to be of biological significance and the hunting conforms with the conservation strategies set out by all relevant authorities and experts in the *Strategy* which is one of the most specific and demanding in the world.

Second, the DSA compounds that error by insisting on remaking the exporting country's determination "at a country level rather than the evaluation of specific hunting areas." This is completely out-of-the-blue. Never have regional and area programs been denied on such a basis. There is no such rule or regulation. To the contrary, it is nonsensical. It is arbitrary, capricious, ultra-vires and in violation of the APA mandate to publish for comment and republish all in the Federal Register. The DSA reasons are all flawed if only because of the miniscule number of male elephant involved. It has illegally made a biological and management finding that is patently unsound. It contradicts the elephant strategy that the USF&WS itself helped draft and financially cosponsored and basic elephant and management science. Take a case in point. Lawrence Frank took one of the only two elephant allocated on quota in 2000. It was part of the world-renown Tchuma Tchato Community Based Project in Tete Province that surveys demonstrate had and continues to have a growing elephant population increasing. (More than 20% country wide, much less in Tete.) Most of that permit applicant's payment went to the community to reduce conflict and increase tolerance of the elephant pursuant to the express management strategy drafted by the AESG of IUCN, the USF&WS, the Mozambique authorities and others. The Tchuma Tchato project was first established in 1994 and is a project modeled after CAMPFIRE and instituted at the cost of over a million U.S. Dollars by Mike Murphee, the son of Marshal Murphee, the "father" of CAMPFIRE (established in 1994). According to Mozambique's response to the Service's second letter the "Tchuma Tchato in Tete is the pilot" project in CBNRM and a model being followed - but for the USF&WS. That denial is not rational and proof of that fact is the DSA has never taken such an unusual position before. There are few if any programs in all of Africa equal to the Tchuma Tchato project. No national plan is likely to improve upon it. It carries out the existing national strategy and is a model to emulate. The other elephant were taken or to be taken in part of the Sofala Integrated Management Area Project (NSIMA).

The Service has treated the three permits for that area and all others as a "low priority", then denies them all when the biological quota is deminimus. The "low priority" treatment of the permits, six years of processing, and unsound biological

findings are precisely why the Parties of CITES revised Res. 2.11 (Rev.). See attached documents.

Original Denials

It is unnecessary to repeat here what is contained in the Request for Reconsideration except briefly.

The Service's original denials state that "there is apparently no scientific basis upon which these quotas have been established each year and the actual elephant population in Mozambique is currently not known." To the contrary, there is no scientific basis to deny the permits. First, the elephant hunting areas have been surveyed – even in part with USF&WS funding. There was only a nominal quota of ten elephants for 1999 through 2004. Eight of the nine permits denied were requested when there was only an annual quota of ten and only a fraction of those ten were actually allocated. Added together, a total of ten were not allocated during all the years in issue. The quotas served as a maximum number to be allocated but never were. If all had been taken in one hunting concession it would have been less than one percent of the surveyed population estimates in any one of the hunting areas. Moreover, the wildlife authorities did not allocate the possible ten. They allocated no more than one or two per block per year. For example, in the first year only two were allocated for the entire country. There is no scientific support for the view that the taking of two bull elephant in a year is biologically significant! The failure to make a non-detrimental finding is incredulous.

The Service also did not find that the hunting "enhanced the survival of the elephant in Mozambique," yet it stated that a program "that would provide local communities with a stake in the management and conservation of elephant" could be enhancement. That is exactly what exists in Mozambique. The elephant were taken in project areas established at the cost of millions of dollars in which the entire trophy fee goes to the local villages. The Service neglected to even acknowledge the existence of letters from the village chiefs and the articles and reports of the project authors. The hunting areas are modeled after CAMPFIRE. It is a model communal based natural resource management plan.

The reason for the denials are rambling and confusing, but the salient points are most conspicuous for the information ignored. In one instance, the Service states that "there is no information to show what measures, if any, were being taken to deal with human-elephant conflict, to reduce poaching and illegal take, or to maintain wildlife populations." That is exactly what Mozambique's written *National Elephant Management Strategy* explains it expects and intends from tourist elephant hunting. The delay and denials of these permits are in direct conflict with the strategy drafted and being implemented in key areas of Mozambique.

Elephant Not Yet Taken

In another unprecedented decision beyond any regulatory authority properly adopted pursuant to the APA and contrary to past practices, the DMA would not reconsider the permit applications where the hunt and elephant trophy was not yet taken.

Those permit applicants should not have to start all over again year after year and then be denied their appeal rights because the DMA did not timely process their applications. The DMA treated their permits as a “low priority” and took no action on them at all in some cases for more than a year or more. On such a basis the DMA should be estopped from denying reconsideration and appeal. The range nation officials, the hunting operators and the whole industry have been made to wait and there are no assurances subsequent permits will be handled any more fairly. Although the DMA may say that Mozambique authorities themselves were responsible for the delays that is absolutely not true. Again, the permits were treated as a “low priority” by the USF&WS, not anyone else.

Certification

I hereby certify that I have read and am familiar with the regulations contained in title 50, part 13 of the Code of Federal Regulations and the other applicable parts in subchapter B of chapter 1 or title 50 Code of Federal Regulations, and I further certify that the information submitted in this appeal is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may cause the suspension or revocation of the permits and subject me to the criminal penalties of 18 U.S.C. 1001.

John J. Jackson, III
Attorney for Conservation Force and Applicants