UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)) Plaintiff,)) vs.)) TWO SCRIMSHAWED ELEPHANT) TUSKS,)) Defendant.)))	Civil Action No. 1:09-cv-3591-TCB **CLAIMANT'S REPLY TO PLAINTIFF'S RESPONSE TO CLAIMANT'S MOTION TO DISMISS**

In reply Claimant reiterates by reference its original Motion to Dismiss in full. The Government's brief is nearly twice the length permitted, particularly with its many pages of single spaced footnotes. We hope to simplify the matter in this reply.

This is believed to be the first sport-hunted ivory trophies seized because they are scrimshawed on any part of their surface. The Special Rule governing import of ivory trophies, 50 CFR 17.40(e) (1992) and the African Elephant Conservation Act, AECA (1988), are longstanding but have never before been said to prevent the import of sport-hunted ivory trophies because they were scrimshawed in part or whole. On their face neither prohibit scrimshawed trophies. There has been no Act of Congress, APA rulemaking or CITES Resolution to change the AECA enacted by Congress or the Special Regulation.

In 2007 the FWS adopted approximately 100 pages of regulations to "implement" CITES Resolutions and decisions. The regulations are not about ivory per se. One and only one of the regulations defines "trophies" for the purpose of CITES. 50 CFR 23.74 (2007). It does not include any mention of "ivory" or "scrimshawing." It does cite tusks as an example of a trophy and ivory is one kind of tusk. CITES, on the other hand, already has a clear Resolution that ivory shall not be considered worked ivory if it remains whole, Res. Conf. 10.10.

> AGREES that:
> a) the term 'raw ivory' shall include *all whole elephant tusks*, polished or unpolished and *in any form whatsoever*, and all elephant ivory in cut pieces, polished or unpolished and howsoever changed from its original form, except for 'worked ivory'; and
> b) 'worked ivory' shall be considered readily recognizable and that this term shall cover all items made of ivory for jewellery, adornment, art, utility or musical instruments (*but not including whole tusks in any form*, except where the whole surface has been carved), provided that such items are clearly recognizable as such and in forms requiring no further carving, crafting or manufacture to effect their purpose.
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> Res. Conf. 10.10 - emphasis added

Moreover, the Resolution was repeatedly referenced when Zimbabwe elephant were downlisted to Appendix II to facilitate trophy trade. In fact, Res. Conf. 10.10 is referenced no less than 17 times in the latest proposal governing the downlisting of Zimbabwe elephant, CoP14, Prop. 4, including

> (2) Trade in raw ivory…will be managed in accordance with the requirements of Resolution Conf. 10.10 (Rev. CoP12) concerning manufacturing and trade….
> c. hunting trophies for non-commercial purposes (subject to an annual export quota established by the individual Parties pursuant to Resolution Conf. 10.10 (Rev.))

That resolution makes it clear that identification ("compliance verification") of ivory is to be controlled and regulated by the marking system and accompanying export permit. In Proposition 12.10 (2001) Zimbabwe stated,

> 4.3 Control Measures
>
> 4.31 International Trade
>
> Zimbabwe agrees to…operate in accordance with the Resolution Conf. 10.10 (Rev.).

The NOTICE OF SEIZURE AND PROPOSED FORFEITURE in this case states that the import was an unlawful violation of 50 CFR 23.7, not the AECA or 50 CFR 17.40(e). Upon receiving that notice Claimant filed a Petition for Remission for release of his trophies challenging the application of the FWS' new 2007 CITES trophy definition to his ivory tusks, 50 CFR

23.74. In violation of regulations the Solicitor did not act on it for 10 months (December, 2008 - September, 2009) so Claimant resorted to filing a claim for judicial resolution. When the Government responded with its petition for forfeiture it was based upon two wholly new violations, a violation of the moratorium intended to prohibit commercial trade under the AECA, allegedly because the sport-hunted tusks were partially scrimshawed, 16 USC 4224, which for the first time it claimed was more than "minimally carved" and 50 CFR 17.40(e), Special Rule. Claimant respectfully suggests that the change in alleged violations, the delay and the voluminous response brief speak for themselves. The forfeiture proceedings should be dismissed.

The AECA expressly exempts sport-hunted tusks from the embargo provisions applicable to non-sport-hunted ivory imports. It has been enforced that way for 20 years and there has been no rulemaking to apply the AECA differently that would notice the public of such a gross change. The clear emphasis of the AECA is on the nature of sport-hunting and the conservation role it plays, not the form of the tusks. It would be a poor basis for reducing the revenue benefits of sport-hunting to the exporting nation by eliminating trade of trophies in any particular form. The AECA exemption for ivory trophies was expressly intended to secure the revenue from sport-hunting activities, including taxidermy work in those exporting countries.

In the Final Rule for the Special Rule for ivory imports, 17.40(e), the FWS noted:

> The AECA specifically allows individuals to import sport-hunted elephant trophies that have been legally taken in an

ivory producing country that has submitted an ivory quota, even if a moratorium on ivory imports from that country has been established under the AECA. The Service notes that both this form of consumptive utilization, as well as forms of non-consumption utilization, as well as forms of non-consumptive utilization, provide important revenues for elephant conservation to range states. The proposed revised special rule allowed the import of sport-hunted elephant trophies from threatened populations if general Act permit procedures and CITES requirements were met. CITES requirements included a determination that the killing of elephants for sport-hunting enhances the survival of the species by providing financial support programs for elephant conservation. This requirement is retained in the final revised special rule for the import of sport-hunted trophies from threatened populations *that are on CITES appendix I.* A CITES appendix I import permit is required and can only be issued after the Service has determined that the import is non-detrimental to the species and that the killing of the animal whose trophy is intended for import would enhance the survival of the species. A separate permit under the Act is not required. No specific criteria for satisfying the CITES I import requirements are listed in the final revised special rule and the criteria listed in the proposed revised special rule have been deleted. The final revised special rule contains an

> exception to the import prohibition which allows the import of sport-hunted trophies when the following conditions have been met: (1) The trophy was taken in a country that has established a sport-hunting quota for the year of export; (2) a CITES appendix I import permit has been provided after all necessary requirements have been fulfilled; and (3) *the trophy has been legibly marked.* The sale or offer for sale of such trophies is prohibited by permit conditions.
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> 57 FR 35473 at 35484-35485, 1992
>
> Emphasis added.

As a matter of law, trophies are exempt under the AECA so the "minimally carved" language was never intended to cover trophies and it so much as states that. Even if the AECA "minimally carved" terminology was applicable to trophies, the tusks in issue are only pencil-etched on part of one surface. Describing that pencil etching to be a three-dimensional carving is a stretch. The scrimshawing can be sanded off and polished out. These facts are not in dispute, thus the remaining issue is one of law that can be disposed of here and now in this motion.

The AECA has not been applied this way since its adoption in 1988. The fact that the Notice of Seizure does not include a violation of the AECA speaks volumes. There must be a rulemaking under the AECA that is ivory-specific for such a change in practice, particularly since it conflicts with the clear and express Congressional intent of the AECA.

The Government has also added after the fact a violation of the Special Rule governing the issuance of import permits of elephant trophies which was adopted in 1992 after the elephant was uplisted to Appendix I of CITES, 50 CFR 17.40(e). First, that regulation has never before been implemented to prevent the import of scrimshawed ivory trophies, in part or in whole. There has been no rulemaking to change its enforcement and put the public on notice. Second, trophies of elephant taken sport-hunting were downlisted to Appendix II at CoP10, decades ago. No import permits have been required since that time, nor has any import permit been required of elephant taken sport-hunting in other downlisted countries such as Botswana, South Africa and Namibia. The Government's after-the-fact argument is contrary to more than a decade of practices and understanding. Third, none of the provisions of 17.40(e) have been violated.

The Special Regulation, 17.40(e), obviously still applies to elephant remaining on Appendix I but it expressly allows the import of "worked ivory" and even treats "minimally carved ivory" as "raw ivory," 17.40(e)(ii). It allows the import of "any part or product" of an elephant if the conditions such as marking are complied with. 17.40(e)(i). Those elephant require the issuance of an import permit and the requirement for that is proof of enhancement as provided in 17.40(e) for trophy imports. That said, scrimshawed tusks have never before been denied import for Appendix I elephant, much less Zimbabwe elephant since they were downlisted in 1997 at CoP10.

The Special Rule expressly states that "African elephant" includes "any part or product thereof," 17.40(e)(i). The section dealing with trade of "raw or worked ivory" is for "other than sport-hunted trophies, *not*

trophies." 17.40(e)(ii). The sport-hunted trophies (iii) section has no prohibition against worked ivory whatsoever. Like CITES Resolution 10.10, it merely requires the tusks be marked at the lip. That Special Rule overrides all other regulations. It does not contain a provision that tusks be minimally carved, worked or raw to be trophies. That Special Rule itself has to be amended through a rulemaking process for such a requirement. At this time it only places "4 prescribed conditions," one of which is marking and none of which concern being worked or not being worked.

The presumption in Section 9(c)(2) of the ESA automatically dispensed with the applicability of the Special Rule to Zimbabwe elephant trophies when it was downlisted to Appendix II. That has been a fact since CITES CoP10 when it was downlisted. No argument can change that fact. The Government's argument that 9(c)(2) is only a presumption that can be rebutted is correct, but it has not been rebutted. Rebuttal would require a Zimbabwe-specific rulemaking and fact-finding that has not occurred or even begun. In one rare instance with argali, the FWS adopted a Special Rule contrary to the 9(c)(2) presumption against regulations restricting trophy importation of a threatened listed species on Appendix II of CITES. The important distinction in that instance is that the FWS made species- and country-specific findings in a rulemaking process that has not occurred in this instance with the Zimbabwe elephant. The authority to override a Congressionally created presumption against regulatory restriction after a rulemaking determination and the act of doing so are entirely distinct. Of course, there is a difference between conditional authority and the actual act of meeting that condition. When H.R. 37 (9 (c)(2)) was reported out of the House Merchant Marine and Fisheries Committee, the House Report which

accompanied H.R. 37 (Report No. 93-412, 93d Congress, First Session, July 27, 1973) said:

> These bills…were before the Committee when it held hearings…on March 15, 26 and 27, 1973.
>
> These hearings were held on the heels of an international meeting of technical experts and international representatives in Washington on these and similar questions in February and March….The result of the meeting was the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed March 3, 1973 - a Convention which has been widely acclaimed as eminently successful in devising forceful and practical mechanisms for controlling these problems. (There follows a description of the CITES Appendices.)
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> This paragraph (referring to 9(b)(2)) provides that an export permit covering the shipment of non-endangered species on Appendix II of the Convention will be presumed to be valid and issued in good faith *unless the Secretary has reliable evidence to offset the presumption of validity.* In all other respects, of course, the requirements and regulations of the Act, including the requirement that such goods be brought in through designated ports of entry, accompanied by appropriate documentation, must be followed by the

> importer; the purpose of paragraph (b)(2) is to allow the Secretary to look behind an export permit *only where he has evidence that it does not correctly reflect the situation in the country in which the animal or plant was originally taken*, or that the permit itself is not valid. (Emphasis added.)

The emphasized (italics) portions of House Report No. 93-412 make it clear that the presumption operates in favor of the validity of foreign export permits. The Secretary must have "reliable evidence to offset the presumption of validity," and may only look behind the export permit "where he has evidence that it does not correctly reflect the situation." The FWS should have accepted the import in this instance.

The citation of the wolf and grizzly bear Special Rules adds nothing to the Government's argument as neither species is a foreign species being imported, so 9(c)(2) has no application to them whatsoever. Those Special Rules serve an entirely different "special" purpose.

The assertion that the Special Rule, 50 CFR 17.40(e), governs in this instance is a gross error. If it was applicable, then as an applicable Special Rule it would supersede the FWS' general CITES trophy definition, 50 CFR 23.74(b), 2007, which was the noticed basis of the seizure, because the FWS' own regulations state that Special Regulations trump all other regulations. 50 CFR 17.31. But, of course, it would not trump Acts of Congress such as the AECA trophy exemption and 16 USC 1538(c)(2). "Whenever a special rule in 17.40…applies to threatened species….[t]he

special rule will contain all the applicable prohibitions and exceptions." 17.31, *Prohibitions*,

The Zimbabwe elephant was ultimately downlisted at CoP10, held June 9-26, 1997. At that time FWS published its *Final Rule* to "implement" and "incorporate" that downlisting, among other things. Therein, the FWS stated, "Since these populations are in Appendix II, no FWS import permit is required under CITES, and the decision on commerciality…will be made by the exporting country. 63 FR 63210 at 63211 (1998), i.e. the Special Rule no longer applied to that population.

The Government fully ignored the CITES Resolution Conference 10.10 explicit provision that "whole tusks" are not to be considered "worked." It does not address that issue at all in its response. It failed to explain why the alleged AECA, 16 USC 4224, violation was not cited in the Notice of Seizure. It failed to address why the alleged violation of the Special Rule, 50 CFR 17.40(e), was not cited in the Notice of Violation. It has not explained why the tusks are not adequately identifiable by the Zimbabwe government markings on their bases and repeated on the export permit. The tusks are whole, i.e. the same size, shape, weight and dimensions, and are fully marked pursuant to Res. Conf. 10.10 (Rev.). The rationale for the adoption of the FWS' definition of trophies does not apply to "marked" ivory that is identifiable.

The Government can't change the delisting 20 years after the fact or unilaterally. Scrimshawed elephant tusk trophies were being exported and imported in the United States at the time (1997) that Zimbabwe's elephant were downlisted by the Parties to CITES and Res. Conf. 10.10 which passed at the same Conference of the Parties as the initial downlisting is clear that

tusks which remain whole are not to be treated as "worked" ivory. The FWS can't unilaterally change that downlisting through the back door, nor can it change the AECA exemption by redefining ivory trophies. Moreover, the most recent CITES CoP has for the first time defined what the sport-hunted trophy term is to be understood to mean hereinafter, attached. Trophies are now expressly defined to include items "manufactured" from the animal taken sport-hunting. The Parties have responded.

It is the FWS that is in violation of law and regulations. Its confusing positions are contrary to four CITES positions. To be exact, it conflicts with Resolution 10.10 that "whole tusks" not be considered "worked," the downlisting of Zimbabwe's elephant to Appendix II to facilitate trade and revenue derived from elephant sport-hunting and the recent CoP15 (March 2010) definition of trophies to include "manufactured" items from the animal taken on the hunt. It also conflicts with Res. Conf. 6.7 for adopting a stricter domestic measure without prior notice to Zimbabwe before its application to Zimbabwe's ivory imports.

Congress and CITES have made it clear that elephant sport-hunting is to be fostered for a number of explicit reasons ultimately coming down to the incentive-based conservation of the elephant by U.S. sport hunters and those that receive revenue from that activity in Zimbabwe. The purpose of the downlisting of the elephant by the Parties was to eliminate the kind of problems demonstrated here. The purpose of 9(c)(2) of the ESA was the same, as was the sport-hunted exemption in the AECA to protect the hunters and the foreign nations from this capricious behavior.

Zimbabwe's Prop. 12.10, page 6, stated "recreational hunting…can add a great deal of value to elephant populations."

> Elephant hunting contributes about 64% of the total income earned by Rural District Councils involved in CAMPFIRE (19) and about 50% of the income earned from recreational hunting on state safari areas.

The Government takes issue with Claimant's statement that a regulation implementing the listing of a species requires 90-day notice. 16 USC 533(5) applies that notice period for "any regulation proposed…to implement a determination…." The regulations in issue implement the listing. Regardless, publication, public comment and republication of no less than 30 days notice is necessary for rulemaking under the APA if the ESA period provision is not applicable. There has been neither a 30 nor a 90-day notice of any rulemaking under the AECA change or the Special Regulation for elephant because such rulemaking has never been initiated.

The only reason given for CFR 23.74 is a short statement cited from a House Report that "Trophies normally constitute the hide, hair, skull teeth and claws of the animal...." That stated basis is wholly out of context, not exclusive, and unrelated to the ESA or CITES. That was a House Report in 1994 concerning an amendment to the MMPA. The purpose of its inclusion in the Report was solely to distinguish external parts from internal organs (gall bladder). Moreover, the report states teeth are "normally external parts considered trophies," not exclusively the only external trophy parts. It included teeth as trophies, which is what the tusks in issue are. At no time did that unrelated Report even suggest that etched teeth were not trophies or

converted if etched. Moreover, it was a Report on an amendment of the MMPA, not CITES regulations.

The Parties to CITES clearly intended these tusks to be on Appendix II. The AECA also clearly exempts elephant tusks taken by sport hunters from import restriction and is an amendment to the ESA. The ESA exempts Appendix II threatened, listed species from USF&WS restrictions. The regulation in issue adds a condition that is contrary to the intent of CITES, the spirit of the AECA and the 9(c)(2) exception of the ESA. It is a unilateral invention contrary to law that cannot be implemented by an unsupported change in definition that is contrary to the popular and historical understanding of the term "trophy."

Clearly that Report statement about the wholly unrelated MMPA had not ever been given the meaning it is being given in the new regulation nearly 12 years later (1995-2007). The new regulation is contrary to all custom and practices up to this date. For a fact it is baffling to the Zimbabwe experts, much less petitioner who had to rely upon the best judgment of the experts and the Zimbabwe CITES authorities.

The second stated rationale for 23.74 is that manufacturing into a utilitarian item prevents tracing the part to the animal. That does not rationally apply in this case since the tusks remain fully identifiable and are merely etched on one surface. The new rule should not be applied in this instance.

As well as not recognizing that its CITES regulation Section 17.44 does not expressly apply to elephant ivory or prohibit scrimshawing, the Government does not acknowledge the obvious ambiguity in its wording. Trophies are by their nature intended for decorative or ornamental display.

By definition "utilitarian items" are more than "ornamental." The Government's definition uses both "utilitarian" and "ornamentation" to be one and the same. Its conversion to pool balls might be utilitarian, but a base stand and pencil etching of the Big Five make it a more perfect trophy for display. The application of contradictory wording and regulations does not facilitate the trade that Congress, the 177 Parties to CITES and Zimbabwe desire and need. It is not fair warning and notice to the Claimant.

Claimant requests oral argument.

Respectfully submitted this 26th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26th, 2010, I caused the foregoing to be electronically filed with the Clerk of Court via the CM/ECF system, which will send notification of such to the attorneys of record.

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