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| **UNITED STATES DISTRICT COURT**  **EASTERN DISTRICT OF NEW YORK** | |  | | Electronically Served on April \_\_\_\_\_, 2010 | |
| UNITED STATES OF AMERICA,  Plaintiff,  vs.  ONE ETCHED IVORY TUSK OF AFRICAN ELEPHANT (*Loxodonta africana*),  Defendant. | )  )  )  )  )  )  )  )  )  )  ) | | Case Number: 10-cv-0308-NGG-SMG  **MEMORANDUM IN SUPPORT OF CLAIMANT’S MOTION TO**  **DISMISS PLAINTIFF’S VERIFIED COMPLAINT *IN REM* / MOTION FOR SUMMARY JUDGMENT** | |
| GRAHAM KENT FULLER,  Claimant. | )  )  ) | |  | |

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**I. STATEMENT OF ISSUES TO BE DECIDED**

Did the Notice of Seizure include the African Elephant Conservation Act violation now alleged in the Complaint? Does Section 9 (c)(2) of the Endangered Species Act (16 U.S.C. § 1538 (c)(2)) prohibit the Government’s seizure and claim for forfeiture? Does the African Elephant Conservation Act’s exemption for sport-hunted ivory preclude the Government’s claim? Does the manner in which the Government seeks to apply the regulation purportedly violated expand its scope beyond that adopted in a proper rulemaking and render the regulation void for vagueness? Does the Government seek an application of the regulations contrary to the Government’s own regulations and practices? Do the Convention on International Trade in Endangered Species Appendix II listing and Resolutions defining ivory prohibit the claim? Does the complaint fail to state an enforceable violation of law or regulation upon which relief can be granted? Does the complaint fail due to insufficiency of notice or process?

**II. STATUTORY AND REGULATORY BACKGROUND**

**A. The Convention on International Trade in Endangered Species (CITES)**

The United States is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). This international treaty aims to protect wildlife by regulating trade of those particular species which are listed on one of its three Appendices. 27 U.S.T. 1087; T.I.A.S. 8249, Mar. 3, 1973. Species listed on Appendix I are all threatened with extinction. *Id*., art. II(1). Species listed on Appendix II are not currently threatened with extinction, but may become so if trade in their specimens is not regulated so as to keep that trade from becoming excessive. *Id*., art. II(2). A two-thirds vote of the Parties to CITES is necessary to list or change the listing of a species; one Party may not do so unilaterally. *Id*., art X.V. The elephants in Zimbabwe have been on Appendix II of CITES since the Tenth Conference of the Parties (“CoP10”) held in June 1997. An express annotation in that Appendix permits trophy trade of sport-hunted tusks. In fact, the Zimbabwe elephant was downlisted nearly a decade and a half ago for the very reason of facilitating the trade in sport-hunted elephant trophies. Sport hunting is of great importance to the conservation of elephants in Zimbabwe. CITES Prop. 10.27, attached.

At that same Tenth Conference, the Parties adopted CITES Resolution 10.10 to comprehensively address trade in elephant specimens and ivory. *Trade in elephant specimens, regarding definitions (a) and (b)*, (1997) and Res. Conf. 10.10 (Rev. CoP14), both attached. Resolution 10.10 defines “raw ivory” as *“all whole elephant tusks . . .* ***in any form whatsoever****.” Id*., emphasis added. In contrast, the CITES definition of “worked ivory” expressly excludes “whole tusks in any form.” *Id*. This has remained the agreed definition at all times since 1997. Applying this well established CITES definition, Claimant’s tusk at issue is unquestionably “raw ivory,” not “worked ivory.” To assure proper identification, all whole tusks are marked with a code for the country of origin, the year, the quota number for that particular tusk, and the tusk’s weight in kilograms. *Id*. The tusk at issue is so marked. The same identical numerical identification numbering as that on the Claimant’s tusk also appears on the CITES Export Permit, issued by the Zimbabwe CITES Authorities. That permit accompanied the shipment when it was unlawfully seized in New York by Plaintiff.

Under U.S. Fish and Wildlife Service CITES regulations, “[*p*]*ersonal use* means use that is . . . for an individual’s own consumption or enjoyment.” 50 C.F.R. § 23.5 (2007). “*Non-commercial* includes personal use.” *Id*. Also, “[*r*]*eadily recognizable* means any specimen that appears from a visual . . . examination[;] an accompanying document, packaging, mark or label; or any other circumstances to be a part, product, or derivative of any CITES wildlife . . . unless such part . . . is specifically exempt from the provisions of CITES or this part.” *Id*. Claimant’s tusk at issue fits squarely within these regulatory definitions.

In 2007 the U.S. Fish and Wildlife Service adopted 92 pages of new CITES regulations to “implement” the Resolutions and Decisions adopted by the CITES Parties. 72 FR 48402. It took license and added a definition of “trophy” when none had ever been adopted by CITES. The definition of “sport-hunted trophy” provides:

Sport-hunted trophy means raw or tanned parts of a specimen that was taken by a hunter, who is also the importer, exporter, or re-exporter, **during a sport hunt for personal use**. It may include the bones, claws, hair, head, hide, hooves, horns, meat, skull, teeth, **tusks**, or **any taxidermied part**, including, but not limited to, a rug or taxidermied head, shoulder, or full mount. It does not include articles made from a trophy, such as worked, manufactured, or handicraft items for use as clothing, curios, **ornamentation**, jewelry, or other **utilitarian** items.

50 C.F.R. § 23.74(b), 2007 (emphasis added). This is contrary to CITES itself.

This definition was not based upon any CITES Resolution at the time of its proposal or adoption. Although CITES has various measures favoring trade in sport-hunting trophies (Quota Resolutions, Res. 2.11 exempting hunting trophies from the Appendix I ban on trade, downlisting with annotations for trophies) there was no existing CITES definition. Thus the FWS went beyond implementing any CITES Resolution or Decision of the Parties. It was also contrary to common practice and understanding particularly for items taxidermied in developing countries where trophies are commonly made into many utilitarian items such as bookends, knife sheaths, footstools, rifle bags and other items that hunters care to make permanent parts of their personal lives after their hunts. This narrow and ambiguous definition has since caused innumerable problems and seizures. That consequently lead to a new “interpretive” Resolution addition at the recent Fifteenth Conference of the Parties, CoP15.

At the CITES Fifteenth Conference of the Parties (“CoP15”) held in Doha, Qatar, in March of 2010, the Parties revised Resolution 12.3 to define “hunting trophy” for the first time. That definition expressly includes “manufactured items” made from the sport-hunted animal. Attached. The definition now reads in full as follows:

The term “hunting trophy,” as used in this Resolution, means a whole animal, or a readily recognizable part of derivative of an animal, specified on any accompanying CITES permit or certificate, that:

i) is raw, processed, or **manufactured**,

ii) was legally obtained by the hunter through hunting for the hunter’s personal use; and

iii) is being imported, exported, or re-exported by or on behalf of the hunter, as part of the transfer from its country of origin, ultimately to the hunter’s State of usual residence.

Res. Conf. 12.3 (Rev. CoP15). Emphasis added. (The final version is not yet published but includes “manufactured” items.)

The trophy definition addition to the Resolution passed by consensus. *See* CITES Summary Records of Committee II, Sessions 4-7, 9, 10, and 12, March 13-25, 2010, attached.

The FWS definition does not expressly refer to elephant ivory. When and if applied to sport-hunted elephant ivory, it contradicts the sport-hunted exemption in the AECA and is beyond the Special Rule for import of elephant “parts and products” that by regulation trumps all other regulations for elephant.

**B. The Endangered Species Act (ESA)**

In the United States, the CITES accord has been implemented through the Endangered Species Act (“ESA”). That law prohibits “trade in any specimens contrary to the provisions of [CITES].” 16 U.S.C. §§ 1531, 1531(b) and 1538(c). Significantly, any noncommercial importation into the United States of an Appendix II species which otherwise conforms to the applicable CITES requirements is “presumed to be an importation not in violation of any provisions of [the ESA] or any regulation issued pursuant to [the ESA].” *Id*., § 1538(c)(2). *Prohibited Acts,* (c) *Violation of Convention.* This presumption has always been understood to exempt from regulation the import of sport-hunted trophies of species listed on Appendix II, such as the Zimbabwe elephant, unless there is a specific fact-based rulemaking finding to rebut the presumption. A regulation prohibiting import of elephant ivory of an Appendix II elephant listed as threatened would itself violate 9(c)(2).

“[T]he purpose of [the section at issue, ESA § 9(c)(2), 16 U.S.C. § 1538(c)(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. House Merchant Marine and Fisheries Committee, Report No. 93-412, 93rd Congress, First Session, July 27, 1973.

The exception to that exemption is intended to apply country-wide, not to a particular trophy.

Under the Endangered Species Act, import of elephant “parts and products” is governed by a Special Rule, 50 C.F.R. § 17.40(e). This special rule is exclusive if an elephant is on Appendix I; otherwise, elephant trophies are exempt from regulation as provided in 9(c)(2) of the ESA above. “Whenever a special rule in Section 17.40 . . . applies to a threatened species, none of the provisions of . . . [50 C.F.R. § 17.31, *Prohibitions*] will apply. The special rule will contain all of the applicable provisions and exceptions.” 50 C.F.R. § 17.31(c).

Section 17.40 (e), in fact, has its own definition section providing that “[r]aw ivory means . . . tusks . . . minimally carved” and “[w]orked ivory means . . . tusks which are not raw ivory.” 50 C.F.R.§ 17.40(e)(1)(ii-iii). That regulation for Appendix I elephants further provides, however, for the import of elephant hunting trophies regardless of whether the tusks are raw or worked ivory, thus those distinctions are not relevant to elephant trophies. *Id*. § 17.40 (e)(3) *Exceptions*. No rulemaking has taken place to amend this Special Regulation. It has never before been cited as a basis for seizure because ivory trophies were scrimshawed.

In addition, the Endangered Species Act provides that any regulations implementing protection of a listed species must first be noticed in the Federal Register for comment before adoption. The proposed regulations must then be re-noticed not less than 90 days before their effective date. 16 U.S.C. § 1533 (5).

**C. The African Elephant Conservation Act (AECA)**

Congress adopted the African Elephant Conservation Act (“AECA”) in 1989 in an effort to “perpetuate healthy populations of African elephants.” 16 U.S.C. § 4201. The AECA authorizes a moratorium on importation of ivory from any ivory-producing country when a determination has been made that the country’s elephant conservation program is inferior. *Id*., § 4222(a). Sport-hunting of elephants, however, was viewed by Congress as helping to “perpetuate healthy populations.” For this reason a moratorium may not be established under the AECA on trophies from sport-hunted elephants that have been legally taken in a country that has submitted an ivory quota. *Id*., § 4222(e). The FWS confirmed the exemption for sport-taken ivory in the very same notice in which it imposed the moratorium on all other ivory. 54 FR 24758, attached.

The *Statement of Policy* of the AECA for the sport-hunting program for elephant provides that:

It is the policy of the United States . . . to assist in the conservation and protection of the African elephant by supporting the conservation programs of African countries and the CITES Secretariat[.]

16 U.S.C. § 4203.

The AECA articulates Congress’s stance regarding sport-hunting’s role in elephant conservation:

Congress finds [that] [t]here 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 (9). Zimbabwe is an African nation that uses tourist sport hunting as an integral part of its elephant conservation program.

Section 4222(e) of the AECA expressly prohibits any moratorium on the importation of sport-hunted ivory trophies from elephants. This exemption, allowing the importation of all sport-hunted trophies, is repeated in the AECA’s *Prohibition* section, 16 U.S.C. § 4223. The exemption is based on the nature and benefits of sport-hunting. How the hunter ultimately chooses to display his trophies for his personal use is of no consequence. Section 4222(e) reads:

(e) Sport-hunted trophies

Individuals may import sport-hunted elephant trophies that they have legally taken. . . . The Secretary shall not establish any moratorium under this section, pursuant to a petition or otherwise, 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).

The AECA does prohibit import of ivory in some instances, whether “raw or worked ivory,” both alike. Sport-hunted trophies are nevertheless exempted in the first line of the *Prohibition* section from this ban on importation. *See Id*., § 4223 (“Except as provided in 4222(e) of this title, it is unlawful . . .”). Claimant Fuller is not aware of the Government having previously interpreted the AECA to prohibit the import of any sport-hunted ivory trophies that were scrimshawed. No duly-adopted implementing regulation has been promulgated to that effect. It is an Act of Congress, not a mere regulation and its exemption is express. Moreover, the embargo under the AECA does not distinguish between worked and raw ivory. Both are equally prohibited from import unless they are taken sport-hunting.

**D. Wildlife Seizure and Forfeiture Requirements**

In the United States, one of the essential freedoms afforded to our citizens is that their property will not be seized or detained without just cause, notice, and hearing. The rationale behind any seizure must be timely communicated to the property owner. With regard to imported wildlife and hunting trophies, these inherent procedural safeguards as to notice have been codified in 50 C.F.R. § 14.53 (The Government must explicitly provide the legal reason for detention of property.) and 50 C.F.R. § 12.11 (The explicit reason for seizure must appear in the Notice of Seizure.). Due process requires no less. An agency must follow its own rules. *Lyng v. Payne,* 476 U.S. 926, 934 (1986). In the case at bar, however, the Notice of Seizure provided to Claimant Fuller fails to mention or specify any violation of the AECA.

**E. Impropriety of applying regulations retroactively**

Historically, the retroactive application of rules and regulations has been greatly disfavored. “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted.” *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 265, (1994), citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). “[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). Retroactive legislation presents serious problems of unfairness “because it can deprive citizens of legitimate expectations and upset settled transactions.” *Gen. Motors*, 503 U.S. at 191. “[T]he principal that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (Scalia, J., concurring). This principal has been applied for at least two hundred years. *See, e.g.,* *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811) (“It is a principal of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have retrospective effect.”). In addition, the Due Process Clause “protects the interests in fair notice and repose that may be compromised by retroactive legislation.” *Landgraf*, 503 U.S. at 266.

**F. Proper Rule Making and Vagueness**

In a similar fashion, the Administrative Procedures Act (“APA”), 5 U.S.C. § 552 and 553; the Endangered Species Act, 16 U.S.C. § 1533 (b)(5); the Federal Register Act, 44 U.S.C. §§ 1503, 1505; and Due Process all require regulations to be noticed for comment and again re-noticed a minimum of 30 (APA) to 90 (ESA) days before the regulations may become effective. Consequently, conduct that regulations seek to limit, proscribe, or promote remains unaffected until those regulations have validly taken effect.

Regulations are also subject to the void-for-vagueness doctrine, which provides:

[a] law is unconstitutionally vague if people of common intelligence must guess at its meaning and differ as to its application…. An individual is entitled to fair notice or a warning of what constitutes prohibited activity….

*Shamloo v. Miss. State Bd. of Trustees*, 620 F.3d 516, 523 (1980).

**III. FACTUAL BACKGROUND**

At issue is one of the two tusks from a sport-hunted African elephant (*Loxodonta africana*). The elephant was taken in April of 2007 by Claimant Graham Kent Fuller during a licensed sport hunt in the country of Zimbabwe. The hunt was conducted in full conformity with and as part of that country’s conservation plan. Sport-hunted Zimbabwe elephants have been listed on Appendix II of CITES since CITES CoP10, held in 1997. Consistent with CITES Resolution 10.10, following the hunt, the tusks from Claimant Fuller’s elephant were each permanently marked for identification with the code for the country of origin, the year, the serial number, and the tusk’s weight in kilograms. As is customary, Claimant Fuller also had the elephant taxidermied in Zimbabwe, the elephant’s country of origin. Specifically, the hide was tanned and the tusks were prepared for eventual display in Claimant’s home. This included pencil grafting a picture of the “big five” on one side of the larger tusk. The other tusk was broken and less than half a tusk. Throughout the process, which was completed by June 2007, both tusks remained whole and of their original size, weight, shape and dimension. The scrimshawing is no more than pencil etching on part of one surface of the tusks. It can be sanded off and polished. The etching is only surface deep and does not obscure or affect the CITES markings on the tusk. Those markings precisely match all information on the export permit. The export permit was issued by the Zimbabwe Wildlife Authorities to authorize a CITES Appendix II export permit with the marking numbers that appear on the tusks.

From Zimbabwe, the trophies were shipped to Claimant Fuller in the United States, where he intended to display them at his residence. Upon import at the Port of New York, however, the one etched tusk was seized by the U.S. Fish and Wildlife Service. The other tusk and all remaining trophies from the same elephant were released to Claimant Fuller.

The Notice of Seizure alleges that the import of the scrimshawed tusk was in violation of the following:

* *Endangered Species Act 16 U.S.C. 1538 (a)(1)(G); 50 C.F.R. 17.31 (a) Unlawful Import of a Threatened Species.*
* *Endangered Species Act 16 U.S.C. 1538 (a)(1)(G); 50 C.F.R. 17.40(e)(3)(iii)(D) Unlawful Import of Sport-Hunted African Elephant Trophy.*
* *Endangered Species Act 16 U.S.C. 1538 (c)(1); 50 C.F.R. 23.13 (a) CITES Violation: Unlawful Import of Appendix I Species in violation of part 23.*

No violation of the AECA, 16 USC 2202, *et seq*., was alleged. The alleged AECA violation first appeared in the Plaintiff’s Complaint.

The elephant tusk at issue is fully identifiable. It is permanently marked/numbered and those numbers correspond fully with the numbers on the Zimbabwe Appendix II export permit. Claimant Fuller is a sport hunter and paid others to hunt, *i.e*., he did not hunt for his profit, but for his personal enjoyment at considerable cost to himself. The trophy tusk is for his personal use. In fact, Claimant’s sport hunting is the very conduct that actually supports the elephant’s conservation today in full accord with the rationale behind the AECA and the Appendix II annotation.

Following the unlawful seizure of his trophy, Claimant Fuller timely filed a “claim” requesting court adjudication, seeking an opportunity to be heard, the return of his property, and a just and expeditious end to this matter. In response, the Government filed the instant action.

**IV. STANDARD OF REVIEW**

F.R.C.P. 12(b)(6) permits the Court to terminate lawsuits that are fatally flawed in their legal premises and thus to spare the litigants the burden of unnecessary pretrial and trial activity. *Neitzke v. Williams,* 490 U.S. 319, 326 (1989). To survive a motion to dismiss under Rule 12(b)(6), a plaintiff’s “[f]actual allegations must be enough to raise a right to relief above the speculative level,” and must be based on “more than labels and conclusions,” or “a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Moreover, on a Rule 12(b)(6) motion, courts “are not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain,* 478 U.S. 265, 286 (1986).

**V. ARGUMENT**

**A. The Complaint at bar must be dismissed for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6).**

**1. Plaintiff’s Complaint relies on a prohibited retroactive application of 50 C.F.R. § 23.74 to the tusk at issue.**

Statutes are retroactive when their application “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 503 U.S. at 280*.* The issue of retroactivity does not arise merely because a statute is “applied in a case arising from conduct antedating the statute’s enactment.” *Id*. at 269. Rather, to establish whether a statute is impermissibly being applied retroactively, a court must determine “whether the new provision attaches new legal consequences to events completed before its enactment.” *Id*. at 270. Here, the rule at issue most certainly attaches new consequences to an action that was completed prior to the rule’s passage. At the time Claimant Fuller took the tusk and had it partially scrimshawed, it was a trophy by every definition then existing. The etching was contracted on April 13, 2007, and completed in June of 2007. *See* Sworn Declaration of Dudley Rogers, attached. In contrast, changes to the definition of “sport-hunted trophy” in 50 C.F.R. §23.74 were not effective until September 24, 2007. The application of 50 C.F.R. § 23.74, unlawfully made effective in only 30 days, is being impermissibly applied retroactively. The etching, completely lawfully in June 2007, cannot thereafter be prohibited by a regulation enacted in September 2007. Claimant Fuller was entitled to be given fair warning before the fact. “The law does not favor retroactivity . . . . Thus, an administrative regulation will not be construed to have retroactive effect[.]” *Rhone Poulenc, Inc. v. United States,* 738 F. Supp. 541 (Ct. Int’l Trade 1990). Changing the rules retroactively violates “legal doctrine centuries older than our Republic,” *Landgraf,* 511 U.S.at 265.

Claimant acknowledges that the retroactive application of statutes may be proper in some cases. For example, a statute may be applied retroactively if it affects jurisdiction or procedure. *See, e.g.,* *Bruner v. United States*, 343 U.S. 112 (1952). In those situations, however, the retroactive application of the new rules “speaks to the ‘power of the court rather than to the rights or obligations of the parties.’” *Landgraf*, 511 U.S.at 277, quoting *Republic Nat. Bank of Miami*, 506 U.S. 80, 100 (Thomas, J., concurring). Also, a statute may be applied retroactively such an application can be supported by clear Congressional intent. *Landgraf*, 511 U.S. at 272. In this case, however, the rule at issue is not procedural; rather, it directly affects Claimant’s right to own his lawfully-acquired hunting trophy, which is exactly the sort of injustice that the prohibition of retroactivity aims to prevent. Furthermore, there exists absolutely no Congressional intent that this regulation be applied retroactively. The Government has improperly applied this rule to Claimant’s hunting trophy. Therefore, in keeping with the Supreme Court’s prior decisions regarding retroactivity, Claimant’s trophy should be returned to his possession.

**2. Plaintiff’s First and Second Claims must be dismissed because they rest on an unreasonable interpretation of 50 C.F.R. § 23.74; moreover, the tusk at issue is exempt from regulation pursuant to the Endangered Species Act.**

**a. Plaintiff’s claims rest on an unreasonable interpretation of 50 C.F.R. §23.74.**

Relying on its tortured and unreasonable interpretation of 50 C.F.R. § 23.74, the Government argues that the etching on one side of the one tusk disqualifies that tusk from classification as a “sport-hunted trophy.” Accordingly, the Government curiously asserts that this somehow transforms the elephant from which the tusk was taken into an Appendix I species. Having thus recharacterized the elephant as an Appendix I species, the Government further alleges that the tusk would require Appendix I export and import permits from Zimbabwe and the United States, respectively, in order to permit its lawful import. (Contradictorily, the Government maintains no import is lawful because it is scrimshawed.) Of course, the very same elephant’s other tusk, its hide, and other parts, were all released to Claimant Fuller, and therefore nevertheless somehow continue to be part of an Appendix II species in the eyes of the Government. In reality, all of the elephant was an Appendix II species. It was taken in a sport hunt and imported for the sole purpose of being owned and possessed by Claimant Fuller. The FWS cannot unilaterally change the listing of a species by changing a definition. Nor can it change the ESA exemption (9(c)(2)) or the AECA exemption enacted by Congress.

The scrimshawed tusk remains whole, retaining its original size, shape and weight. Under CITES, “whole tusks” are treated as raw ivory, Res. Conf. 10.10. In addition, the definition of “sport hunted trophy” adopted at the most recent CITES Conference of the Parties (at which the United States was an active participant), expressly states that hunting trophies include “raw, **processed**, **or manufactured**” parts of an animal “legally obtained by the hunter…for [his] personal use.” (emphasis added). The tusk is properly and permanently marked to comply with CITES requirements. This is all that is required by the FWS’ own elephant-specific governing special regulation which trumps all other regulations. 50 C.F.R. 17.40(e). That Special Regulation expressly provides that elephant “products” are importable. That Special Regulation contains all the regulatory provisions pertaining to elephant; therefore the definition of trophies in the Government’s CITES regulation cannot apply to elephants at all. It has not been transformed into a utilitarian item.

The tusk is merely a memorial trophy taken by Claimant Fuller on his Zimbabwe sport hunt. The tusk’s purpose for being imported is no different than that of the remaining trophies from the very same elephant, all of which passed inspection by the USF&WS. That purpose is to be displayed by Claimant Fuller as a memento of the safari on which he took them. It is, by all reasonable interpretations of the definition, a sport-hunted trophy. The absence of any Appendix I permits does not constitute a violation of any law. The Zimbabwe elephant is not an Appendix I species. No law required such a permit.

The definition provided in 50 C.F.R. § 23.74, upon which the Government relies, makes no mention of ivory or scrimshawing, and is confusing and contradictory: it allows for rugs, despite its prohibition of “utilitarian items,” and it allows for “taxidermied parts,” despite its ban on “curios” and “ornamentation.” Given its imprecise and imperfect drafting, confusion as to its application is perhaps understandable. Even setting aside these difficulties in textual construction, however, the provision’s purpose demonstrates its inapplicability to Claimant Fuller. The regulation was promulgated for the purpose of preventing the *commercial* importation of parts and other such items, disguised as personal sport-hunted trophies. 72 F.R. §48402, 48437 (Aug. 23, 2007). Undoubtedly Claimant Fuller is not a commercial importer, nor does he intend to commercially exploit the personal trophies from his sport hunt. Claimant Fuller should not be made to suffer for a poorly drafted provision, especially when he has acted at all times in strict conformity with the law’s spirit and purpose.

**b. The ESA exempts this tusk from regulation.**

Furthermore, the Endangered Species Act exempts this sport-hunted trophy from the very regulation on which the Government’s seizure and claim for forfeiture are based. ESA § 9(c)(2); 16 U.S.C. § 1538(c)(2). The African Elephant, *Loxondonta africana*, of Zimbabwe is an ESA “threatened” species and listed on CITES Appendix II when taken during the course of a licensed sport hunt. The trophy at issue is a whole tusk from the Zimbabwe population, taken in a sport hunt by Claimant Fuller and he has attempted to import it solely for his personal use. Section 9(c)(2) of the ESA dictates that species on CITES Appendix II imported for non-commercial use are presumed exempt from regulation. *Id*. The Government has not and cannot properly rebut this presumption given the facts and circumstances of this case. The Government’s seizure of this tusk was thus unlawful. Import permits are not required for Appendix II species. *See infra*, Part V.A.3. Moreover, CITES has recently added an interpretive clarification because of USF&WS’ confusion expressly defining “trophies” to include “manufactured items” from the animal taken.

For these reasons, the Government’s First and Second Claims for Relief must be dismissed.

**3. The regulation cited by Plaintiff applies to Appendix I, not Appendix II species, and even if the regulation did apply, the tusk at issue would qualify for an exception, thus Plaintiff’s Third Claim must be dismissed.**

In its Third Claim for Relief, the Government alleges that the tusk it seized from Claimant Fuller does not qualify for any exception under 50 C.F.R. § 17.40(e). The tusk is therefore purportedly subject to forfeiture. Section 17.40(e) applies to Appendix I species. The defendant tusk, being part of an Appendix II species, Section 17.40(e) is inapplicable. Notwithstanding the best of intentions, the Government may not unilaterally change the listing of a species. It is simply unlawful to apply 50 C.F.R. § 17.40(e), intended only for Appendix I species, to this Appendix II sport-hunted trophy.

Even assuming, *arguendo*, that 50 C.F.R. § 17.40(e) somehow *did* apply to the trophy tusk at issue, the tusk nevertheless qualifies for an exception. Section 17.40(e)(3)(iii) states that “sport-hunted trophies may be imported into the United States” provided that certain criteria are met. The only relevant requirement is marking. The tusk is so marked. Claimant Fuller’s tusk is a sport-hunted trophy and meets each of the specified criteria. As a Special Rule, 17.40(e), trumps the U.S. Fish and Wildlife Service’s trophy definition as Special Rules contain all the provisions for that respective species. The tusk is not properly subject to forfeiture. The Government’s Third Claim for Relief must be dismissed.

**4. The tusk at issue is a trophy, no moratorium is in effect concerning the tusk at issue, the AECA exempts the tusk from regulation and no AECA violation was alleged in the Notice of Seizure, thereby mandating that Plaintiff’s Fourth Claim be dismissed.**

In its Fourth Claim for Relief, the Government alleges that Claimant’s tusk is not a sport-hunted trophy, that its attempted import violates Section 4223(5) of the AECA, and that the tusk is therefore subject to forfeiture pursuant to the AECA and 50 C.F.R. § 1540(e)(4)(a).

First, Claimant Fuller’s tusk unquestionably *is* a sport-hunted trophy. The AECA only requires that the elephant be sport-hunted and that there be a quota for the hunting. The AECA moratorium on all other trade of ivory has always been against both raw and worked ivory alike so that distinction is not material.

The tusk is expressly exempted from moratorium by the very words of the AECA: “**Individuals may import sport-hunted trophies that they have legally taken in an ivory producing country that has submitted an ivory quota. The Secretary shall not establish any moratorium under this section, pursuant to a petition or otherwise, which prohibits the importation into the United States of sport-hunted trophies from elephants that are legally taken by the importer . . . in an ivory producing country that has submitted an ivory quota.**” 16 U.S.C. § 4222(e) (emphasis added).

Violation of the AECA was not a reason for the seizure and does not appear in the Notice of Seizure and Forfeiture. Scrimshawed elephant tusk trophies have been importable for decades. Congress has not changed the AECA and the FWS has not completed a rulemaking to change its implementation. For these reasons, Plaintiff’s Fourth Claim for relief must be dismissed.

**B. The Complaint must be dismissed because the definition of “sport-hunted trophy” articulated in 50 C.F.R. § 23.74 is unconstitutionally vague; it lacks sufficient clarity to put Claimant and others similarly situated on notice of the behavior proscribed.**

“A law is unconstitutionally vague if people of common intelligence must guess at its meaning and differ as to its application.” *Shamloo v. Miss. State Bd. of Trustees*, 620 F.3d 516, 523 (1980). In and of itself, the definition of “sport-hunted trophy” as articulated in 50 C.F.R. § 23.74 is unconstitutionally vague. It is contradictory, ambiguous, and unclear. *See supra* Part V.A.2. While the definition describes “any taxidermied part” of a specimen taken by a hunter as being a sport-hunted trophy, the very same definition excludes “items for use as … curios [or] ornamentation.” 50 C.F.R. §23.74(b). Trophies are typically mounted (“taxidermied”) for the purpose of being hung on a wall or displayed on a stand. The average person could readily conclude, therefore, that such would be “for ornamentation.” Furthermore, even if a tooth or claw or other part is not taxidermied, an average person might reasonably consider such an item to be “novel, rare, or bizarre,” which, by definition, is a “curio.” Merriam-Webster’s Collegiate Dictionary 306 (11th ed. 2009). Furthermore, the regulatory definition expressly includes rugs, but excludes “utilitarian items.” Considering that a rug is often thought to be a utilitarian item, this but further contradiction. Perhaps one might agree that the regulatory definition means to exclude rugs that would actually be used as such, but this, too, is unlikely, because, given the words of the definition, decorative rugs should also be excluded as “ornamental.” Taken as a whole, one can only conclude that the regulatory definition is confusing and contradictory. Certainly it does not make clear what items will or will not be accepted as “sport-hunted trophies.” The FWS’ own Special Regulation for elephant imports permits import of “parts and **products**” (emphasis added) if marked as they were, 50 C.F.R. 17.40(e). Moreover, as discussed above, CITES has recently issued an interpretive clarification that the term “trophy” includes items manufactured from the trophy.

**C. The Complaint must be dismissed because it cites purported violations of the AECA that were not included or referred to on the Notice of Seizure and Proposed Forfeiture.**

When the Government seeks to detain the property of a citizen, it must state the reason for the detention. 50 C.F.R. § 14.53. The same is true when it progresses to seizure. 50 C.F.R. § 12.11. In its complaint, however, the Government has attempted to rely upon an alleged violation that was never used in the detention or the subsequent seizure. The Notice of Seizure and Proposed Forfeiture, dated September 8, 2009, alleges violations of three ESA regulations: 16 U.S.C. 1538 (a)(1)(G) [50 C.F.R. 17.31(a)]; 16 U.S.C. 1538 (a)(1)(G)[50 C.F.R. 17.40(e)(3)(iii)(D)]; and 16 U.S.C. 1538 (c)(1) [50 C.F.R. 23.13(a)]. In contrast, the Verified Complaint *in Rem* alleges the violation of an additional previously unenforced provision: Section 2204(e) of the African Elephant Conservation Act of 1988, 16 U.S.C. § 4224(e). In an orderly democracy, it is expected that a citizen’s property will not be seized or detained without just cause. Furthermore, it is expected that the rationale behind the seizure or detention will be timely communicated to the property owner. *See* 50 C.F.R. § 14.53; *id*. § 12.11. The AECA has never before been interpreted or implemented as it is being interpreted and implemented here. Even seasoned, licensed customs brokers, who have dealt with the laws and regulations regarding trophy importation for decades, are taken aback by this new harsh and unusual application of the AECA. *See* Sworn Decl. of Lynley Bishop; Sworn Decl. of John Meehan.

In the case now at bar, the tusk in question is clearly exempted from each of the originally cited provisions, *by the very words of the provision itself.* The Government haphazardly assigned justifications for its seizure without having true just cause. Then, upon further review and the realization that the cited provisions were inapplicable, the Government attempted to introduce a new allegation after the fact. This conduct speaks volumes and violates both 50 C.F.R. § 14.53 and 50 C.F.R. § 12.11 which require notice of the alleged violation.

**D. The Complaint must be dismissed because it fails to meet the rulemaking and notice requirements of the ESA, the APA, and the Federal Register Act, and it violates the Due Process Clause.**

There was no duly published notice of this extreme, confusing, and contradictory application of the regulation, which interpretation conflicts with longstanding practices under the AECA, ESA and CITES. In effect, it constitutes an unpublished regulation adopted without published notice, comments, and re-notice (90 days before effective), in violation of the Administrative Procedure Act, Federal Register Act, ESA and Due Process. Since it was unlawfully made effective before 90 days, it may not even be effective today until re-noticed. Moreover, a lawful change in the implementation of the AECA and Special Rule for elephant products would require independent rulemaking.

The USF&WS has narrowed the long-standing and plain meaning of the term “trophy,” only after the hunt and scrimshawing in issue. It is being applied retroactively to Plaintiff without consideration of the inequity. Changing rules in the middle of the game is inherently unfair and unconstitutional. It is not fair play to apply it retroactively, nor is there any compelling reason to apply it retroactively in this instance.

In addition, failing to give Claimant fair warning and notice is contrary to “due process.” There was no specific notice that ivory elephant items would require an import permit or be contrary to the clear intent of the CITES Parties at multiple Conferences of the Parties. Sport-taken tusks from Zimbabwe have been on Appendix II since 1997 and import of scrimshawed tusks have been importable at all times.

Nowhere in the published definition is it stated that the partial pencil etching of tusks taken in a sport hunt will convert them from Appendix II to Appendix I. The regulation is a CITES regulation, not an ESA or AECA regulation. It was only one of 92 pages of proposed regulations, not a rulemaking beyond that purpose. As applied in this case it contradicts the AECA and Special Rule for elephant “products” that trumps.

The Special Rule exclusively governing import of elephant ivory has no restriction against etching before import. That ESA Special Rule, 50 C.F.R. § 17.40(e)(3), expressly allows the import of “worked ivory” and, furthermore, treats “minimally carved ivory” as “raw ivory.” *Id*. It allows import of elephant “products,” contrary to the Government’s general CITES trophy definition. Regardless, it does not apply those terms to trophies.

The AECA is an Act of Congress (not just a regulation) and expressly exempts sport-hunted ivory whatever its form, as does the ESA under Section 9 (c)(2) when the elephant is on Appendix II.

The reach being given to 50 C.F.R. § 23.74 conflicts with 50 C.F.R. § 17.40(e), which exclusively governs elephant trophy imports. If § 17.40(e) is supposed to exclusively govern import of elephant parts, no one would imagine that § 23.74, which does not mention elephant, would supersede § 17.40(e). Note that § 23.74 is only a CITES regulation, not a general regulation, much less elephant-specific. “Whenever a special rule in § 17.40…applies to a threatened species…[t]he special rule will contain all the applicable prohibitions and exceptions.” 50 C.F.R. § 17.31. Thus the definition of trophy in 23.74 does not even apply. It is trumped by the Special Rule for elephant “parts and products,” 17.40(e).

**E. Claimant is protected by the Civil Asset Forfeiture Reform Act (CAFRA) of 2000.**

Congress enacted CAFRA in 2000 to protect innocent owners from forfeiture. It provides that “[a]n innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute,” 18 U.S.C. § 983(d)(1).

No purpose is served by penalizing the petitioner for the harmless error if there was an error. Claimant should not be penalized for disagreement and confusion between two governments. If the Zimbabwe CITES export permit and export of the tusks failed to meet convoluted expectations and yet-unresolved interpretations, reach and expectations of the FWS, that was beyond the control or acumen of Claimant. Claimant could not have known the reach of regulation had he read the 92 pages of new regulations. It would be far fetched for Zimbabwe officials, much less Claimant, to unravel and make sense of all the contradictory regulations and legislation. Regardless, had Claimant then known what no one appreciated until this case, he had already had his tusk scrimshawed. The regulations combined are a trap for foreign authorities and laymen. It serves no purpose to apply any part of the regulations to Claimant’s situation retroactively.

Any error was an administrative or procedural misunderstanding, not substantive error by the Zimbabwe authorities.

**VI. CONCLUSION**

The Government’s Complaint must be dismissed. Each of its claims relies on regulations that are inapplicable, were improperly created or applied, or are constitutionally vague. The Endangered Species Act and the African Elephant Conservation Act expressly exempt import of the tusk at issue. The Zimbabwe elephant from which the tusk was taken is a CITES Appendix II elephant. The Government may not retroactively and unilaterally transform that species into an Appendix I elephant by a change of definition generally or at all. In addition, the definition of “sport-hunted trophy” on which the Government relies is riddled with problems (including being in direct conflict with the CITES definition of the same term and the FWS’ Special Regulation for elephant), and still could only be used to exclude Claimant’s trophy if its meaning is unreasonably distorted beyond its purpose.

Allowing this case to proceed would unjustifiably endorse the Government’s misinterpretation and manipulation of the law for its own unjustified purposes, however unintentional that may be. For the foregoing reasons, and to prevent a chilling effect on the conservation dependent upon sport-hunting that Congress and CITES have gone to such extent to foster, Claimant Fuller respectfully requests that the Court dismiss Plaintiff’s Verified Complaint *in Rem* and further prays for all equitable return of his property, as well as attorneys’ fees in accordance with 16 U.S.C. §1540 (g)(4).

Respectfully submitted this \_\_\_\_\_th day of April, 2010.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on April \_\_\_\_\_, 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.

/s/ John J. Jackson, III .