

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SAFARI CLUB INTERNATIONAL )  
 )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SALLY M. R. JEWELL, in her official )  
 capacity as Secretary of the U.S. )  
 Department of the Interior; )  
 U.S. DEPARTMENT OF THE INTERIOR, )  
 an agency of the United States; )  
 DANIEL ASHE, in his official capacity as )  
 Director of the U.S. Fish and Wildlife Service; and )  
 U.S. FISH AND WILDLIFE SERVICE, )  
 an agency of the United States, )  
 )  
 )  
 Defendants. )

Civ. No. 14-cv-00670(ABJ)

**MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION OF SAFARI CLUB INTERNATIONAL  
FOR PRELIMINARY INJUNCTION**

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**ABBREVIATIONS**

AECA	African Elephant Conservation Act
APA	Administrative Procedure Act
CAMPFIRE	Communal Area Management Programme for Indigenous Resources
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties (CITES)
DSA	Division of Scientific Authority (FWS)
ESA	Endangered Species Act
FWS	United States Fish and Wildlife Service
IUCN	International Union for Conservation of Nature
NDF	Non-Detriment Finding
ZPWMA	Zimbabwe Parks & Wildlife Management Authority

## I. INTRODUCTION

After decades of allowing the importation of sport-hunted African elephants from Zimbabwe and Tanzania, on April 4, 2014, the U.S. Fish and Wildlife Service (“FWS”) suspended such imports without warning, effective immediately. The FWS’s purported reasoning was that it believed it could not make 1) findings that the sport hunting of African elephants in Zimbabwe and Tanzania enhances the survival of the species and 2) a determination that the importation of sport-hunted elephants from Tanzania is not detrimental to the species. In doing so, the FWS and other Federal Defendants violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”) by failing to 1) consider all relevant factors related to these decisions; 2) comply with their own binding commitments concerning the making of such findings; 3) comply with APA notice and comment requirements for such decision-making; 4) provide sufficient explanation of the need for enhancement findings; and 5) adhere to their own interpretation of the correct analysis for making non-detriment findings.

In violating the ESA and APA, Federal Defendants’ determinations harmed the interests of members of Plaintiff Safari Club International (“Safari Club”) who hunt elephants in Zimbabwe and Tanzania and whose businesses rely on elephant hunting. A proper examination of all relevant factors and adherence to proper procedures would have revealed that:

- Sport hunting deters poaching:
  - Using the revenue received from U.S. hunters, safari operators, outfitters and Professional Hunters in Zimbabwe and Tanzania pay for anti-poaching patrols and equipment.
  - The presence of hunting camps and the activity of hunters in the field discourage poachers by making it more difficult for them to conduct illegal activities without notice.
  - Hunters themselves combat poaching by removing snares, destroying poaching camps, confiscating ivory and guns, and apprehending poachers.

- Sport hunting finances habitat management:
  - Revenue from hunting helps pay for bore holes and otherwise facilitates water developments, which provide reliable water sources for elephants and other species.
- Sport hunting brings resources into local communities and increases social tolerance for elephants:
  - U.S. hunters' desire to hunt elephants increases the value of elephants (above their value as food and/or a source of ivory). Because of that value, local communities are more willing to tolerate the damage that elephants cause to local agriculture.
  - Hunters donate the meat from their legally hunted elephants to local communities, supplying them with a valuable source of protein.
  - Hunting businesses employ locals as guides, scouts, camp employees, and laborers, and bring more revenue into local economies.

By helping to decrease poaching, enrich habitat, and improve social tolerance for elephants, U.S. hunters enhance the survival of the species. Because the ability to import sport-hunted elephants into the U.S. increases the value of the species and reduces the incidences of death of elephants by other means, that importation poses no detriment to the species' survival. Federal Defendants arbitrarily and capriciously failed to reach these conclusions. These facts also demonstrate Safari Club's irreparable harm and the public interest in allowing imports.

## **II. RELEVANT FACTS**

### **A. The Regulatory History and Current Legal Status of African Elephants in Zimbabwe and Tanzania**

African elephants (*loxodonta Africana*) are found throughout much of Africa, but the majority live in southern and eastern Africa, including Zimbabwe and Tanzania. African elephants in Zimbabwe, Namibia, South Africa and Botswana are listed on Appendix II of the Convention on International Trade of Endangered Species of Fauna and Flora ("CITES"). All other African elephants, including those in Tanzania, are listed on Appendix I of CITES.

In 1978, the FWS listed all African elephants as threatened under the ESA. 43 Fed. Reg. 20499 (May 12, 1978); 50 C.F.R. § 17.11. With the listing, the FWS adopted a rule that provides criteria for the importation of legally hunted African elephants. 50 C.F.R. § 17.40(e) (“special rule”). At the seventh CITES Conference of the Parties (“COP”) in 1989, CITES transferred all African elephants from Appendix II to Appendix I. 55 Fed. Reg. 5847 (Feb. 20, 1990). Pursuant to the CITES Treaty, a country allowing the importation of an Appendix I species must make a finding that the “import will be for purposes which are not detrimental to the survival of the species involved.” (“Non-detriment finding” or “NDF”). CITES text, Article III.

In 1992, the FWS amended the special rule to include a provision that allowed the importation of sport-hunted elephants as long as CITES requirements were fulfilled and the elephant was appropriately marked. 57 Fed. Reg. 35473, 35485 (Aug. 10, 1992). At the time, the parties to CITES required that an enhancement of survival determination be made by the importing country for species listed on Appendix I, including elephants. The FWS’s special rule matched the CITES enhancement of survival requirement. *Id.*<sup>1</sup>

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.

57 Fed. Reg. at 35485; Res. Conf. 2.11. (Annex 1), Ex. AAA.

At the CITES COP 9 in 1994, the parties to CITES amended Res. Conf. 2.11 and removed the enhancement of survival requirement from the resolution. Ex. BBB. From that point forward, CITES no longer imposed enhancement of survival requirements for the

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<sup>1</sup> The Federal Register notice accompanying the special rule noted that sport-hunting “provide[s] important revenues for elephant conservation to range states.” 57 Fed. Reg. at 35485.

importation of species on either Appendix I or II and consequently still does not require enhancement findings for the importation of African elephants from Zimbabwe or Tanzania.

The FWS failed to make a parallel change to its special rule's enhancement of survival finding requirement for the importation of elephants. The FWS has retained the enhancement of survival requirement for both Appendix I and II species despite the fact that the criteria upon which the FWS based its finding requirement have all disappeared. The FWS has never explained why its retention of the enhancement requirement remains necessary or advisable for the conservation of elephants listed on Appendix I or II of CITES. The FWS has also never offered the public an opportunity to comment on the retention of the enhancement of survival requirement, despite the apparent change in circumstances underlying the rationale for this requirement.

At the tenth COP in 1997, the parties to CITES downlisted Zimbabwe's elephants from Appendix I to Appendix II. The FWS adopted this change in 1998. 63 Fed. Reg. 63210 (Nov. 12, 1998); 62 Fed. Reg. 44627 (Aug. 22, 1997).

In a Federal Register notice published in 1997, the FWS announced that it had made an enhancement finding for African elephants from Zimbabwe. Further, the notice stated that the enhancement finding for importation of sport-hunted elephants from Zimbabwe would "remain in effect until the Service finds, based on new information, that the conditions of the special rule are no longer met and has published notice of any change in the Federal Register." 62 Fed. Reg. 44627, 44633 (Aug. 22, 1997). As of the filing of this motion, the FWS has never published such a notice in the Federal Register.

The FWS's Division of Scientific Authority ("DSA") is the designated CITES "Scientific Authority" for the United States. Before the FWS issues a permit for the importation of an

Appendix I species, the DSA makes a non-detriment finding called an “advice.” The DSA gives the advice to the FWS’s Division of Management Authority, which makes the decision whether or not to grant the permit. At least as early as 1993, the DSA issued general non-detriment advices for African elephants taken from Zimbabwe and South Africa and the FWS allowed the importation of legally taken sport-hunted elephants into the United States. The DSA also issued non-detriment advices for African elephants taken from Tanzania, Namibia and Cameroon and allowed the importation of legally taken sport-hunted elephants into the United States. 60 Fed. Reg. 12969, 12969-70 (Mar. 9, 1995).

Until 2014, the FWS allowed the importation of African elephant sport-hunted elephants from Zimbabwe, Namibia, South Africa, Botswana and Tanzania. The FWS never changed or showed any signs of changing its long-held position that the sport-hunting of elephants in Zimbabwe and Tanzania enhanced the survival of the species. The FWS also consistently made NDFs for the importation of sport-hunted elephants from Tanzania.

## **B. The African Elephant Importation Bans**

### **1. Zimbabwe**

On April 4, 2014, the FWS announced, in a press release posted on the FWS website, an immediate suspension of the importation of sport-hunted African elephants taken in Tanzania and Zimbabwe during the 2014 calendar year. Ex. A. The FWS gave no prior notice of this decision to the public. The FWS did not publish notice of the suspension in the Federal Register and did not provide a comment opportunity. Neither the press release nor a brief Question and Answer (“Q and A”) webpage that the FWS published on the same day analyzed the role that hunting plays in the conservation of Zimbabwe’s elephants. Ex. B. Neither the FWS’s press

release nor the Q and A indicated that the FWS had obtained any data or evidence for Zimbabwe's suspension from the Scientific or Management Authorities of Zimbabwe.

On April 18, 2014, the FWS announced a modification. In a letter to Safari Club, the FWS explained that Federal Defendants had removed the portion of the ban that prohibited the importation of elephants taken during the period between January 1, 2014 and April 4, 2014. Letter, dated April 18, 2014, from Robert R. Gabel, Chief, Division of Management Authority, U.S. Fish and Wildlife Service to Nelson Freeman, Deputy Director of Governmental Affairs, Safari Club International. Ex. C. The April 18, 2014 letter confirmed that the FWS had imposed the ban without obtaining information about the status of elephants or the conservation benefits of sport hunting from the Scientific and/or Management authorities of Zimbabwe. *Id.*

Instead, Federal Defendants based their importation ban for Zimbabwe on an April 4, 2014 document entitled "Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe during 2014" ("Enhancement Finding") made by the FWS Management Authority (Branch of Permits).<sup>2</sup> Ex. D. The Enhancement Finding's bibliography listed only two anonymous 2009 publications. *Id.* at 6. The only other source of information cited in the Enhancement Finding was an IUCN SSC African Elephant Database report "2013 Africa" ("IUCN Report"). *Id.* at 3.

According to the Enhancement Finding, since 1997 the FWS has received "very limited" information from Zimbabwe Parks & Wildlife Management Authority ("ZPWMA"). *Id.* at 2. The Enhancement Finding admitted that the FWS has not made any type of formal request for

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<sup>2</sup> The document bears the date 4/17/14. A parenthetical at the beginning of the document states that the finding was originally signed on April 4, 2014, but was then revised on April 17, 2014. To Safari Club's knowledge the Zimbabwe Enhancement Finding has not been published in the Federal Register and appeared for the first time on the FWS's website, on or around April 21, 2014.

information from ZPWMA since sending a letter seven years ago, on March 21, 2007. *Id.* at 3. Instead the FWS waited until April 4, 2014 to request the “the most current information on African elephants” from the ZPWMA. On that date, Timothy Van Norman, Chief, Branch of Permits, Division of Management Authority, FWS, sent a letter to the Government of Zimbabwe asking for answers to a list of questions regarding the status of African elephants and the role that sport hunting plays in elephant conservation. Letter from Edson Chidziya to Timothy Van Norman, Ex. E; Questions to Address Endangered Species Act Import Criteria, Ex. F. The ZPWMA responded promptly on April 17, 2014 with a 32-page report entitled “Response to Questions Raised by the United States Fish and Wildlife Service to Address the USA Endangered Species Act” (“ZPWMA Response”). Ex. G. The ZPWMA Response referenced multiple attachments, including aerial surveys, management plans, statutes and regulations.

Instead of waiting the less than two weeks ZPWMA needed to provide its data, Federal Defendants based their Enhancement Finding almost exclusively on the IUCN Report. Ex. H. The authors of the IUCN Report apparently failed to consult with ZPWMA for current data, as the report’s analyses are based on outdated information. For example, the IUCN Report relies on a population estimate of 527 elephants for the Save Valley Conservancy based on a 2003 aerial survey. *Id.* The IUCN Report fails to acknowledge that “[t]he Save Valley Conservancy has been conducting annual surveys since 2002.” ZPWMA Response at 8, Ex. G. It also fails to reference a recent population estimate of 1,538 based on a 2013 aerial survey – a number three times the outdated estimate reported by the IUCN. *Id.* Similarly, the IUCN Report relied on 2001 data and a population estimate of 53 elephants for the Bubi (also referred to as Bubi) Valley Conservancy instead of a 2013 aerial survey that showed an elephant population of 540. IUCN Report, Ex. H; ZPWMA Response at 8, Ex. G. The IUCN Report also relied on data from

2009 for its population estimate for Gonarezhou National Park (IUCN Report, Ex. H) and failed to consider or report data from a 2013 aerial survey that demonstrated a population increase and an estimate of 10,151 elephants. ZPWMA Response at 8, Ex. G. These discrepancies, resulting from the outdated information upon which the IUCN Report was based, undermine the credibility of the IUCN's population estimate of 47,366 elephants in Zimbabwe and its conclusion that the population of Zimbabwe's elephants is in decline. IUCN Report, Ex. H.

The ZPWMA Response also demonstrated the inaccuracy of other assumptions upon which the FWS based its Enhancement Finding. For example, the Enhancement Finding indicated that the FWS's decision to suspend the importation of sport-hunted elephants from Zimbabwe was based in part on a "widely publicized poisoning last year of 300 elephants in Hwange National Park." Enhancement Finding at 2, Ex. D. The information about the incident was both incorrect and incomplete. In contrast to the 300 elephant estimate announced by the FWS, the ZPWMA Response identified the number of elephants poached as 105. ZPWMA Response at 12, Ex. G. In addition, neither the FWS's press release nor the Enhancement Finding mentioned, and apparently Federal Defendants did not take into account, the fact that it was sport-hunting outfitters in Zimbabwe who discovered the poaching and helped finance the effort to capture the poachers. The ZPWMA Response did address this fact:

The Government of Zimbabwe reacted swiftly to the unprecedented elephant poisoning incident in Hwange National Park in 2013. *A private sector driven fund raising initiative was set up* which has to date managed to mobilize 21 vehicles, communication and field equipment for enhanced law enforcement. The ZPWMA has increased manpower level for Hwange and other protected areas through a massive recruitment drive. The police and the judiciary also actively collaborated with the ZPWMA in apprehending all 35 poachers that were involved in the elephant poisoning.

ZPWMA Response at 13, Ex. G (emphasis added).

The Enhancement Finding cited a lack of “current data” on population numbers and trends, government efforts to manage elephant populations and address human-elephant conflicts and poaching, and the state of the hunting program as the reason Federal Defendants could not make a positive enhancement finding. Ex. D. The lack of current data was attributable to a lack of effort on the FWS’s behalf. “Current data” was available from Zimbabwe but the FWS did not request it. Instead, they waited to directly request this data from Zimbabwe until the very date that they imposed the importation ban. Within less than two weeks, the ZPWMA responded to all of the FWS’s questions and provided information on all of the subjects that the FWS stated it needed to make a positive finding.

## **2. Tanzania**

Federal Defendants based their trophy importation ban for Tanzania on a February 21, 2014 determination from the Scientific Authority of the FWS not to issue an NDF (“Tanzania NDF,” Ex. I) and a March 27, 2014 determination from the FWS Management Authority (Branch of Permits) that the importation of sport-hunted trophies from Tanzania is not likely to enhance the survival of the species. (“Tanzania Enhancement Finding,” Ex. J). The Tanzania NDF discussed sport hunting but did not base its conclusion on “a consideration of purpose for which the specimen will be used upon import into the United States.” Neither the documents nor the import ban decision was offered to the public for review and comment and neither was published in the Federal Register.

Instead of determining if the importation of sport-hunted elephants for the personal use of the hunters would pose a detriment to the species, the Tanzania NDF focused on the take of elephants generally, both for legal and illegal purposes.

We recognize that sport-hunting, as part of a sound management program, can provide benefits to wildlife conservation and that sport-hunting of

elephants is not the primary cause of the decline of elephant populations in Tanzania. However, given the significant decline in the elephant population due to uncontrolled poaching and questionable management and governance, we are concerned that additional killing of elephants, even if legal, is not sustainable and will not support effective elephant population recovery efforts in Tanzania.

*Id.* The Tanzania NDF failed to examine the role that sport hunting plays in decreasing and discouraging poaching in Tanzania. The Tanzania NDF did not address how the presence of hunters, outfitters and their staff in the field provides a deterrent to poachers or how the infusion of revenue generated by the hunting and other activities of U.S. hunters encourages local communities to guard against poaching. The Tanzania NDF completely avoided this analysis and merely addressed sport hunting as an “additional” source of take. The Tanzania NDF also failed to analyze the impact a trophy importation ban would have on elephant conservation in Tanzania. The Tanzania NDF offered no discussion of the detriment of removing a major source of conservation funding for the country’s elephants or depriving the country of hunters whose very presence deters and discourages poaching, at a time when the elephant population might be in greatest need of such resources.

### **III. RELEVANT LAW**

#### **A. The ESA and CITES**

The ESA provides the FWS with the authority to classify African elephants, including those from Zimbabwe and Tanzania, as a threatened species. 16 U.S.C. § 1533(a)(1). The statute does not prohibit the importation of sport-hunted animals from species designated as threatened. *Id.* § 1538(a)(1)(A). Instead, the ESA prohibits the violation of any regulation pertaining to threatened or endangered species. *Id.* § 1538(a)(1)(G) Specifically, the ESA authorizes the FWS to issue regulations pertaining to threatened species under limited circumstances. “Whenever any species is listed as a threatened species pursuant to subsection

(c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” *Id.* § 1533(d). Accordingly, the FWS may not issue regulations for threatened species without specifically determining that the regulations are “necessary and advisable” for conservation.

Congress passed specific legislation intended to focus on the conservation of African elephants. 16 U.S.C. § 4201 *et seq.* In the African Elephant Conservation Act (“AECA”), Congress directed the FWS to impose moratoriums against the importation of ivory from countries that did not meet certain criteria, but prohibited the FWS from issuing moratoriums against the importation of sport-hunted elephants:

Individuals may import sport-hunted elephant 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 or the importer's principal in an ivory producing country that has submitted an ivory quota.

*Id.* § 4222(e) (emphasis added). Congress found that “[t]here is evidence that the proper utilization of well-managed elephant populations provides an important source of funding for African elephant conservation programs.” *Id.* § 4202(9).

The FWS does not rely on the AECA for its authority to regulate the importation of African elephants but instead claims that authority from the ESA. *See id.* § 4241. In addition, the FWS relies on decisions made by the parties to CITES for requirements pertaining to the importation of species that are listed on CITES Appendix I or II. 50 C.F.R. § 23.1.

CITES is an international treaty between governments. During conferences held between the party members to the agreement, the parties make decisions and adopt resolutions designed

to prevent international trade in animals and plants from threatening the survival of those species. The United States, Zimbabwe and Tanzania are all parties to CITES.

Appendix I includes species that the parties to CITES have determined are threatened with extinction and that are or may be affected by trade of that species. Appendix II includes species that are not presently threatened with extinction, but may become so if their trade is not regulated. 50 C.F.R. § 23.4.

The ESA and CITES direct the FWS to treat species classified as “threatened” in different ways, depending on whether the species are listed on CITES Appendix I or II. Article III of the CITES Treaty and CITES Resolution Conf. 10.3 recommend that, for species that are listed on CITES Appendix I, the importing country must make its own NDF for each species. The FWS has promulgated regulations that require it to make NDFs for the importation of Appendix I species. 50 C.F.R. § 23.61.

The FWS has determined that it is required to make different types of NDFs, depending on whether the species in question is being imported or exported. For exported species, the FWS examines the potential detriment that could be caused by the “take” of the species from the wild. In contrast, for imported species the FWS must examine the potential detriment that could be caused by the purpose for which the animal is being imported into the United States. The FWS has explained that “[t]he finding for the import of an Appendix-I species is based on a consideration of purpose for which the specimen will be used upon import into the United States.” 71 Fed. Reg. 20168, 20195 (Apr. 19, 2006). Neither CITES nor the FWS requires an NDF for a species on Appendix II.

The ESA states that, for species classified as threatened, that are listed on CITES Appendix II, and where the take and exportation of the species comply with all CITES

provisions and requirements, a presumption exists that the importation of the species for non-commercial purposes does not violate federal statute or regulation. 16 U.S.C. § 1538(c).

Although the FWS does not require an NDF for threatened species listed on Appendix II, the FWS has, by regulation, imposed additional requirements for the importation of sport-hunted elephants. The FWS applies the rule to all elephants, whether they are listed on CITES Appendix I or II (“special rule”):

Sport-hunted trophies may be imported into the United States provided:

- (A) The trophy originates in a country for which the Service has received notice of that country's African elephant ivory quota for the year of export;
- (B) All of the permit requirements of 50 CFR parts 13 and 23 have been complied with;
- (C) A determination is made that the killing of the animal whose trophy is intended for import would enhance survival of the species; and
- (D) The trophy is legibly marked . . . .

50 C.F.R. § 17.40(e)(3)(iii).

## **B. The APA**

The APA provides for judicial review of final agency action by persons “aggrieved” by the action. 5 U.S.C. § 702. It also provides the standards that apply when a federal agency proposes and adopts final rules and regulations. Those standards include formal notice of the proposed rulemaking and an opportunity to participate in the rulemaking by providing comments through the submission of data, views and/or arguments. *Id.* § 553; *id.* § 551(4).

When an aggrieved party challenges an agency’s action, the APA authorizes a reviewing court to:

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
  - a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

*Id.* § 706. A court reviewing the FWS’s administration of the ESA, such as its decision-making regarding the importation of threatened species, must satisfy itself that the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Conservation Force v. Salazar*, 851 F. Supp. 2d 39, 45 (D.D.C. 2012) (FWS violated ESA and APA by failing to provide explanation for denial of permits to import sport-hunted wood bison), *quoting Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

### **C. Requirements for Preliminary Injunctive Relief**

A plaintiff seeking preliminary injunctive relief must demonstrate that 1) it is likely to succeed on the merits of its claim; 2) it is likely to suffer irreparable harm in the absence of the requested preliminary relief; 3) that the balance of equities tips in its favor; and 4) that the injunctive relief sought is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). “The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation.” *District 50, United Mine Workers of Am. v. Int’l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969).

Prior to the U.S. Supreme Court’s ruling in *Winter*, courts assessed a movant’s ability to establish the four requisites for preliminary injunctive relief on a “sliding scale,” where an unusually strong demonstration of one of the four factors potentially lessened the showing needed for another factor. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291–92 (D.C. Cir. 2009) (citing *Davenport v. Int’l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999)). In *Winter*, the Supreme Court indicated that the movant must show that, without the requested relief, his irreparable injury is likely, rather than a possibility. 555 U.S. at 20-21. As a result of the *Winter* ruling, the circuit courts have been left to determine whether the sliding scale is still a

viable means of evaluating a movant's entitlement to preliminary injunctive relief. As of yet, this Circuit has declined to make that decision. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011). Regardless of whether the sliding scale approach did survive the *Winter* decision, Safari Club is entitled to preliminary injunctive relief because Safari Club is likely to succeed on the merits and to suffer irreparable harm if preliminary injunctive relief is not granted. In addition, the equities tip in Safari Club's favor and granting injunctive relief will further the public interest in elephant conservation.

#### **IV. ARGUMENT**

##### **A. The Importation Bans Have Caused Irreparable Harm**

###### **1. Harm to Safari Club Members – The Zimbabwe Ban**

The elephant importation ban applicable to Zimbabwe has harmed many hunter/conservationist members of Safari Club.<sup>3</sup> Safari Club members who planned to hunt elephants in Zimbabwe in 2014 have already placed deposits and made other expenditures, such as airline tickets, firearms, ammunition, training and video equipment.<sup>4</sup> Many plan to take

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<sup>3</sup> See generally Declarations of Jerry Edgar Beardmore, Jr., Ex. L; Anthony John Didado, Ex. M; Atlas Lawrence Cheek III, Ex. N; Gary L. Bailey, Ex. O; James Stephen Rawson, Ex. P; Jason Garic Ingersoll, Ex. Q; John Holdridge, Ex. R; John W. Berry, Ex. S; Kenneth Eric Buch, Ex. T; Michael Hugh Grieb, Ex. U; Michael J. Condon, Ex. V; Michael Barry Nice, Ex. W; Patrick Joseph Cooley, Ex. X; Paul K. Monsen, Ex. Y; Richard David Netzley Jr., Ex. Z; Richard Raymond Capozza, Ex. AA; Robert Bruce Rhyne, Ex. BB; Robert Loren Bridges, Ex. CC; Ronald Wilson Taylor, Ex. DD; Scott Michael Dinger, Ex. EE; Thomas Little Whaley Jr., Ex. FF; Troy James Perry, Ex. GG; Wayne Scott McCall, Ex. HH; Martin Gregory Vick, Ex. II; Craig M. McDonnold, Ex. JJ; Grant F. Dennison, Ex. KK; and David J. Adams, Ex. ZZ.

<sup>4</sup> Didado Decl., Ex. M, ¶ 12; Cheek Decl., Ex. N, ¶¶ 9, 13; Rawson Decl., Ex. P, ¶ 16; Ingersoll Decl., Ex. Q, ¶ 8; Berry Decl., Ex. S, ¶ 8; Buch Decl., Ex. T, ¶ 17; Condon Decl., Ex. V, ¶¶ 17, 18; Cooley Decl., Ex. X, ¶ 18; Netzley Decl., Ex. Z, ¶ 9; Dinger Decl., Ex. EE, ¶ 8; Adams Decl., Ex. ZZ, ¶ 13.

family members with them on their hunts.<sup>5</sup> Some have saved for this particular hunt for several years, and fear that if they lose some or all of their investment due to non-refundable payments, they will never again have the funds to arrange such a trip. Dennison Decl., Ex. KK, ¶ 9.

Some have already cancelled their trips because of the importation ban. Capozza Decl., Ex. AA, ¶ 10. Many have already been informed that they if they choose to cancel their bookings, they will be unable to obtain refunds of all or a portion of their hunts. “The Safari operator has already given the deposit to government officials for the hunt and has told me that it is unlikely that they will be willing to return it to him.” Cooley Decl., Ex. X, ¶ 18; *see also* Monsen Decl., Ex. Y, ¶¶ 9, 10; Rhyne Decl., Ex. BB, ¶ 11.

For some Safari Club members, cancellation is not an option. They were already in Zimbabwe hunting elephant on the date that the FWS announced and immediately implemented the elephant importation ban. Michael Grieb started his hunt in Zimbabwe just prior to April 4, 2014. When he started his hunt it was legal to import a sport-hunted African elephant from Zimbabwe and the FWS had given no indication that it was planning to ban imports. He took his African elephant on April 7, 2014, unaware of the FWS new rule making it impossible for him to import it into the U.S. Upon returning from the field, on April 8, he discovered that the law had completely changed and that he had been deprived of his right to import his trophy without notice or an opportunity to comment in opposition to this decision. Grieb Decl., Ex. U, ¶ 7; *see also* Whaley Decl., Ex. FF, ¶¶ 10, 16-17 (commenced hunt on April 1 and finished on April 24, spending approximately \$100,000 but now unable to import trophy)

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<sup>5</sup> Beardmore Decl., Ex. L, ¶ 19 (taking son as birthday celebration); Didado Decl., Ex. M, ¶ 12; Condon Decl., Ex. V, ¶ 12; Nice Decl., Ex. W, ¶ 10; Bridges Decl., Ex. CC, ¶ 10; Taylor Decl., Ex. DD, ¶ 19; Perry Decl., Ex. GG, ¶ 9; Adams Decl., Ex. ZZ, ¶ 13.

For many, the ability to successfully hunt an African elephant is an enduring ambition that combines adventure, physical exertion, a demonstration of proficiency and a contribution to the conservation of the species.

It has been a lifelong dream of mine to hunt an African elephant on a fair chase basis in the wilds of Africa. I selected Zimbabwe for several reasons – I know the safari operator, observed firsthand the benefits of their anti-poaching efforts, saw the number of elephants that frequented their concessions, and I am familiar with the benefits that elephant hunting has for local communities, including meat and revenues. Operators like Charlton McCallum Safaris provide 50% of elephant trophy fees to the community. The community share is around \$228,000.00 per year. I also understand the need to manage elephant herds to avoid habitat degradation and minimize wildlife-human conflict.

Capozza Decl., Ex. AA, ¶ 17; *see also* Beardmore Decl., Ex. L, ¶ 17; Ingersoll Decl., Ex. Q, ¶ 7.

Some older Safari Club members are concerned that even if the FWS does not extend the ban beyond 2014, the effect for them will be permanent. Due to the strenuous physical requirements of an elephant hunt, 2014 may be the last time they will be able to make such a hunt. Berry Decl., Ex. S, ¶ 10.

The ability to bring home the elephant from a successful hunt is a valuable part of that hunt for many Safari Club members. Without that ability, the value of their hunt diminishes greatly. Rawson Decl., Ex. P, ¶ 17; Berry Decl., Ex. S, ¶ 7; Buch Decl., Ex. T, ¶ 17; Perry Decl., Ex. GG, ¶ 9; McCall Dec., Ex. HH, ¶ 7.

Hunting elephant and importing a sport-hunted elephant trophy has been a dream of mine for years. I believe it is the classic African safari experience. To be able to participate in one of the greatest hunting experiences that has been the subject of so much history and literature has been a lifelong aspiration. I never imaged that I would not be able to have the elephant trophy as a permanent reminder of that experience. Without the trophy, my experience will be diminished.

Dinger Decl., Ex. EE, ¶ 10; *see also* Cooley Decl., Ex. X, ¶ 19.

Despite the loss, some have decided to go on their hunts regardless of the ban, but will still be harmed by the inability to import any trophy.

Although the government has deprived me and my son of our ability to import our elephant from our hunt, I refuse to seek refunds. I signed a binding contract with CMS, and the recent, irrational decision by U.S. FWS is my cross to bear, not CMS's. CMS has done nothing wrong, and the hunt I paid for is still perfectly legal and absolutely necessary. It is my own government that has jeopardized the long-term survival of the African Elephant. Furthermore, I have a commitment with my son who has been practicing, studying and preparing since 2012. I consider a man's word one of his most important attributes, and I will not compromise mine.

Beardmore Decl., Ex. L, ¶ 24.

I will still hunt elephant and just not bring home the trophy. Although I will be deprived of an important aspect of my experience, I will be doing my best to support the protection of the elephant population in Zimbabwe . . . .

Netzley Decl., Ex. Z, ¶ 10; *see also* Cheek Decl., Ex. N, ¶ 13; Vick Decl., Ex. II, ¶ 17.

In addition to their financial losses and inability to import their sport-hunted elephants, Safari Club members suffer irreparable harm to their conservation interests because the importation ban is a severe threat to African elephant conservation.

My concern is not only for my economic loss. Even if the ban is only temporary, the harm that it will do to the elephant population may be long-term, if not permanent. The inability to import successfully hunted elephants will diminish the value of the hunt to most hunters and will discourage many from booking hunts at all. The economic impact of the trophy fees is vital to the survival of the elephant.

Berry Decl., Ex. S, ¶ 11; *see also* Condon Decl., Ex. V, ¶ 21.

Although hunting does involve the removal of individual elephants, it does not damage the sustainability of the population. "When I hunt elephants, I look for the older bulls and am not interested in the younger males. Hunters remove "post mature" elephants that are not significant contributors to elephant propagation." Rawson Decl., Ex. P, ¶ 12; *see also* Buch Decl., Ex. T, ¶ 15.

While hunting has no detrimental effects, it has many positive outcomes. Hunting brings revenue into Zimbabwe and into the communities located within elephant range. For some

communities elephants are a nuisance that cause damage to crops, livestock and people. Safari Club members have personally participated in hunts that have increased local tolerance for the damage and expense that elephants cause to local villages and agricultural efforts:

During my [2003 elephant] hunt, after being told of damage done to a maize field by a herd of elephants, villagers took me to the field, where we picked up the track of the herd. After tracking for some time, I successfully hunted a bull elephant. We then went to the nearest village and told the locals that we successfully took an elephant. Men were sent to take the meat from the elephant, which then went to the villagers. I kept the hide and tusks. It was a win-win for all. The village was benefitted by the fresh meat and sorely needed source of protein; an elephant that caused damage to the agricultural field was removed from the population, and I was able to participate in a successful and sustainable hunt of an African elephant.

Cheek Decl., Ex. N, ¶ 12. Hunters further improve social tolerance by donating the meat from their successful hunts to the local communities to help supplement their food sources.

I personally witnessed how elephant hunting benefits local communities, combats poaching and increases local tolerance for the species. Due to the arrangement in the Omay Concession, the locals received the trophy fee and all the meat from the elephants taken. As a result, they tolerated the presence of elephants in their fields. Martin Pieters, the outfitter employed a dedicated anti-poaching team and charged hunters a specific daily rate to support this effort. Most hunters, like myself, contributed funds above and beyond Martin's daily charge to ensure this effort remained staffed and effective. I watched my elephant be reduced to a wet spot on the ground as locals descended on the animal and made use of all the available meat.

Beardmore Decl., Ex. L, ¶ 11; *see also* Buch Decl., Ex. T, ¶ 11.

Anti-poaching efforts are a major component of elephant conservation. While hunting elephants in Zimbabwe and elsewhere, Safari Club members have contributed to and participated in anti-poaching activities. Grieb Decl., Ex. U, ¶ 9. The presence of hunters in the field, frightens off poachers and often helps in locating and apprehending poachers:

Well-armed safari operators and their clients are huge deterrents to poachers. I have personally engaged fleeing poachers on several occasions and have been involved in the capture and delivery of poachers to local authorities. The game officers told me that without the help of hunters, their jobs would be impossible.

Cooley Decl., Ex. X, ¶ 15.

In 19 safaris since 1995, I have seen the benefits of sport hunting and the impact it has on poaching. I have arrested poachers (of plains game) and burned their camps. I have removed their snares and traps in Tanzania and found plains game dead as a result of poachers. I have seen anti-poaching operations funded and conducted by professional hunters and outfitters in Zimbabwe.

Nice Decl., Ex. W, ¶ 7.

All hunting safaris on government land in Zimbabwe are accompanied by an armed game scout. The presence of these safaris is, in my opinion, the only thing that deters poachers from Zambia crossing the Zambesi River. A poacher had been killed by a game scout accompanying a safari not long before my safari in 2007. My professional hunter told me in 2007 that my monetary tip to the game scout represented two months' salary for him and that without safaris and the associated tips they bring, the game scouts sometimes are not paid for months. Without this monetary benefit, these scouts have little incentive to protect the game. In addition, the game meat from animals shot on the safari not only feeds the hunter and safari crew but the game scouts and their families.

Netzley Decl., Ex. Z, ¶ 7; *see also* Condon Decl., Ex. V, ¶ 13; Bridges Decl., Ex. CC, ¶ 9.

The importation ban also harms Safari Club members who are in the business of providing and booking elephant hunts in Zimbabwe.<sup>6</sup> As indicated above, for many if not most U.S. hunters, the value of their hunt diminishes greatly by the loss of the ability to import their sport-hunted elephant. Many hunters already have or are considering cancelling their hunts. Safari operators, booking agents, outfitters and professional hunters must now deal with multiple cancellations in a hunting season that is already well underway. Barth Decl., Ex. OO, ¶ 13; Cooke Decl., Ex. QQ, ¶ 17. These Safari Club members consider it unlikely that they will be able to resell or book future Zimbabwe elephant hunts at the same prices they received when the elephants could be imported into the U.S. These businesses and professionals are losing and will

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<sup>6</sup> *See generally* Declarations of Alistair Pole (Zambezi Hunters), Ex. LL; Frederick Oosterhuis (Hunting Legends International Pty Ltd.), Ex. MM; Ivan Murray Carter, Ex. NN; John C. Barth, Ex. OO; Martin Pieters, Ex. PP; Richard Stuart Cooke, Ex. QQ; Gary Michiel Duckworth (Mokore Safaris), Ex. RR; and Hermanus Abraham De Vries, Ex. SS.

continue to lose income. Pole Decl., Ex. LL, ¶ 11; De Vries Decl., Ex. SS, ¶ 14. Some fear that the bans could put them entirely out of business. Barth Decl., Ex. OO, ¶ 13.

Those who provide hunts in Zimbabwe plan to attempt to resell cancelled hunts and sell future hunts to non-U.S. hunters.<sup>7</sup> Safari operators and booking agents expect that they likely will have to cut their prices in order to sell the hunts to these non-U.S. residents. Cooke Decl., Ex. QQ, ¶ 19; De Vries Decl., Ex. SS, ¶ 15. This is so, at least in part, because they will be competing in a crowded market with many other outfitters who will also have to scramble to sell and resell elephant hunts. Pole Decl., Ex. LL, ¶ 13; Carter Decl., Ex. NN, ¶ 18. Their experience in the hunting markets tells them that U.S. hunters are generally likely to pay more for hunts than their Western European, Russian, and Chinese counterparts, and that U.S. hunters are also willing to spend more money than non-U.S. hunters on incidental items in the camps and in the villages. Carter Decl., Ex. NN, ¶ 18; Barth Decl., Ex. OO, ¶ 14; Pieters Decl., Ex. PP, ¶ 17; Cooke Decl., Ex. QQ, ¶ 15.

With less income from hunting and hunters, Safari Club members who operate hunting businesses will lose the elephants that are the focus of their businesses and their conservation efforts. A loss of U.S. hunters (and/or a reduction in the prices that U.S. hunters are willing to pay if they are unable to import their elephants) will reduce the revenue that the hunt operators and outfitters can invest in anti-poaching efforts and actions that benefit local communities. Pole Decl., Ex. LL, ¶ 12; Carter Decl., Ex. NN, ¶¶ 16, 17; Duckworth Decl., Ex. RR, ¶ 14.

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<sup>7</sup> They can do so because the U.S. importation ban has no impact on the number of elephant hunts that can take place in Zimbabwe. It only affects whether those legally sport-hunted elephants can enter the U.S. The number of elephants that may be hunted in Zimbabwe is regulated by the Zimbabwe government and that management authority has not imposed any new restrictions on elephant hunting.

Anti-poaching efforts represent a key component of elephant conservation. Safari operators, outfitters and professional hunters pay significant sums for the patrols, which accompany hunting parties, to search for and apprehend poachers. Mokore Safaris, for example, reports that it alone spends about \$75,000 per year on anti-poaching efforts. Duckworth Decl., Ex. RR, ¶ 14. Hermanus De Vries reports that the company with which he works spent \$100,000 alone in an effort to catch a band of poachers in Hwange National Park. De Vries Decl., Ex. SS, ¶ 11.

The safari operators also confirm that hunting decreases poaching. “Poaching activity only really happens when hunts are not in progress, because the hunters and their Professional Hunters and others with the hunt make it impossible for the poachers to operate without notice.” Cooke Decl., Ex. QQ, ¶ 14; *see also* Carter Decl., Ex. NN, ¶ 16; Pieters Decl., Ex. PP, ¶ 14.

Safari Club members who conduct hunting businesses in Zimbabwe have themselves become part of the anti-poaching effort.

[W]e have been actively combating the poaching since we started hunting [in the Sengwa Research Area] in 2013. We assist the Parks Department there. In 2013, we had three separate contacts with elephant poachers. We recovered a set of ivory tusks the first time. The second time, we recovered a rifle and set of tusks. In the third instance, we recovered two rifles, killed one poacher, wounded and arrested one, and arrested another.

Duckworth Decl., Ex. RR, ¶ 9. In fact, Safari Club members that guide and/or provide hunts near Hwange National Park were instrumental in discovering and apprehending the poachers responsible for a mass poisoning of elephants in the Park. The FWS relied on this poaching incident as a reason for instituting the elephant importation ban. However, the FWS failed to disclose an important part of the story – that it was professional hunters who discovered and helped apprehend the poachers responsible for the incident.

The company that I work with actually uncovered the cyanide poison poaching that occurred in Hwange National Park. Our scouts detected the poachers that were poaching with cyanide. We have 25 permanent scouts between our two areas that patrol on a daily basis. They quickly discovered the source of the poaching and limited the damage done to the elephant herd.

De Vries Decl., Ex. SS, ¶ 10; *see also* Barth Decl., Ex. OO, ¶ 10. Without the funds paid by U.S. hunters, the safari operator would not have had the resources to carry out the surveillance that led to the capture of the Hwange National Park perpetrators.

Although FWS cited the Hwange National Park incident as a basis for the importation ban, the FWS apparently relied on incorrect and incomplete evidence about the incident in making that decision. The safari operators tell a more complete and accurate story:

I find it ironic that the anecdotal evidence on which the U.S. Fish and Wildlife Service relied to implement the importation ban came from our guides. The Fish and Wildlife Service cited the Hwange National Park cyanide poisoning as anecdotal evidence; although, they incorrectly stated that 300 elephants were killed. It was actually a little over 100 elephants. The company that I work with uncovered this horrific incident. Within 24 hours of seeing the first tracks of the poachers, we had arrested the poachers and the buyers. The company that I work with funded the entire operation to catch them. We paid for the vehicles, fuel, food, camping gear, etc. We hired the helicopter to do aerial reconnaissance, for transport to remote areas, and to get the exact number of elephants poached. It cost us around \$100,000 for the operation. Without the U.S. hunters that pay a premium to hunt elephants, we would not have had enough money to fund this operation. We also would not have been in the area to uncover the incident. Hunters and hunting operators are the first line of defense in the fight against poaching. Without hunters and hunting operators in the field, poachers will get a free pass to slaughter elephants at will.

De Vries Decl., Ex. SS, ¶ 11. The funds generated by U.S. hunters for elephant hunting made the discovery and apprehension of the perpetrators of this horrific crime possible. The same is true of anti-poaching efforts throughout elephant range in Zimbabwe. Without or with reduced hunter generated revenue, the safari businesses will lose the resources to combat poaching.

It is difficult enough for us, the Professional Hunters and Safari Operators, who care about the elephants, to impose some measures of control on poaching and elephant conservation, when we have the help of income from U.S. elephant

hunters. Without that income, it will be almost impossible to keep the poachers from taking Zimbabwe's elephants.

Cooke Decl., Ex. QQ, ¶ 21.

Elephant conservation also requires habitat improvement. For that reason, several Safari operators in Zimbabwe provide funds for water pumping developments to create reliable water sources for elephants and other wildlife. Cooke Decl., Ex. QQ, ¶ 5; Barth Decl., Ex. OO, ¶ 9; Pieters Decl., Ex. PP, ¶ 16.

As indicated above, hunting business also invest sport hunting revenue from U.S. elephant hunters into projects designed to improve local social tolerance for elephants. Safari Club members who run these businesses confirm that their investments encourage local communities to co-exist with the species, in spite of the damage that elephants cause to local farms and crops and the danger the elephants pose to the residents themselves.

The fact that the locals get some benefits from elephant hunting helps alleviate the problems and ensures that the human-elephant conflicts don't become so many that the people try to destroy the elephants in the area. My company spends a lot of time, effort and resources chasing elephants out of the fields from February to May when crops are growing in the fields.

Pole Decl., Ex. LL, ¶ 8; *see also* De Vries Decl., Ex. SS, ¶ 9; Oosterhuis Decl., Ex. MM, ¶ 10; Carter Decl., Ex. NN, ¶ 14; Barth Decl., Ex. OO, ¶ 9; Duckworth Decl., Ex. RR, ¶ 13.

Some Safari Club members in Zimbabwe operate CAMPFIRE Areas (Communal Area Management Programme for Indigenous Resources). Pieters Decl., Ex. PP, ¶ 12. In CAMPFIRE operations, the local communities are encouraged to live in harmony with elephants because those communities derive direct benefits in the form of payments and meat donated from the hunts. Pieters Decl., Ex. PP, ¶ 12; De Vries Decl., Ex. SS, ¶ 13 (70% of hunting revenues from CAMPFIRE areas go to communities as direct payments or social benefits).

Hunting operations also employ members of the local communities as trackers and guides. These individuals bring money into their communities, which further increases the value of the elephants to those communities. Oosterhuis Decl., Ex. MM, ¶ 8. Without these resources, the elephants' value decreases, as does local tolerance for the elephants' destructive behaviors.

The loss of American hunters will also take away employment from professional hunters, staff and general laborers, again detrimentally impacting the communities. The locals, in turn, will want elephants even less.

Duckworth Decl., Ex. RR, ¶ 16.

Presently, Safari Club members who hunt and who operate hunting-related businesses in Zimbabwe make every effort to conserve elephants. Soon they will be unable to do so. Without sufficient hunter-generated dollars, they will lack the funds to finance anti-poaching efforts, invest in habitat management, contribute to community projects, hire local employees and encourage local social tolerance for elephants. A loss of these essential conservation tools translates to increased poaching, insufficient habitat and communities that need to kill elephants to protect their crops. Federal Defendants' sport-hunted elephant importation ban has irreparably harmed these Safari Club members. This harm will increase if the importation ban is not immediately enjoined.

## **2. Harm to Safari Club Members – The Tanzania Ban**

The elephant importation ban also has harmed hunter/conservationist members of Safari Club who booked elephant hunts for 2014 in Tanzania.<sup>8</sup> They have already paid deposits and bought plane tickets. Tarpley Decl., Ex. TT, ¶ 6; Petty Decl., Ex. UU, ¶¶ 12, 15; Johnson Decl., Ex. VV, ¶ 11; Sakuta Decl., Ex. WW, ¶ 6. In many cases, their significant investments in their hunts cannot be recovered. *See, e.g.*, Sakuta Decl., Ex. WW, ¶ 8.

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<sup>8</sup> *See generally* Declarations of Robert Joseph Johnson, Ex. VV; Robert Allen Sakuta, Ex. WW; Walter Allen Tarpley, Ex. TT; Scott Petty Jr., Ex. UU.

Their losses are not simply financial. These Safari Club members consider the ability to import their sport-hunted elephants to be of great significance. Tarpley Decl., Ex. TT, ¶ 7; Petty Decl., Ex. UU, ¶ 16; Johnson Decl., Ex. VV, ¶ 12. The loss of that ability significantly diminishes the value of their hunt and may lead to not going at all. For some, this is an experience of a lifetime. Sakuta Decl., Ex. WW, ¶ 7. Others may never have the chance to make this hunt again. Petty Decl., Ex. UU, ¶ 14.

The importation ban harms their interests in elephant conservation. By discouraging U.S. hunters from elephant hunting in Tanzania, Federal Defendants have deprived Tanzania and those who operate hunting businesses in Tanzania of the resources to conserve the African elephant. Hunting revenues, particularly from higher paying U.S. hunters, finance, in significant part, anti-poaching efforts in Tanzania. Petty Decl., Ex. UU, ¶ 13.

The mere presence of hunters in the field deters poachers. In addition, hunting parties often participate in anti-poaching efforts. Petty Decl., Ex. UU, ¶ 13.

First, if hunters find poaching camps, the camps are destroyed. Second, professional hunters and trackers employed by the hunters always talk to the local communities about poaching and where it might be happening. Third, everyone in hunting groups look out for non-hunting activities in the areas in which they hunt. Fourth, government game scouts, paid for by the hunter, accompany all hunts.

Johnson Decl., Ex. VV, ¶ 9; *see also* McDonnold Decl., Ex. JJ, ¶ 6 (SCI member and his hunting group caught six poachers in one trip).

Elephant hunting in Tanzania also brings important resources into the local communities, including the elephant meat donated by the hunters. Tarpley Decl., Ex. TT, ¶ 9. Other resources include funding for schools and wells. *Id.* These resources encourage local communities to peacefully exist with the animal, despite the elephant's destructive tendencies.

The importation ban has also harmed Safari Club members who operate businesses in Tanzania. Declarations of Derek Anthony Hurt (Robin Hurt Limited), Ex. XX; Michael Andrew Angelides, Ex. YY. These businesses participate in a variety of elephant conservation strategies. For example, the Robin Hurt Wildlife Foundation is engaged in anti-poaching efforts and works with the Tanzanian government's anti-poaching efforts. Hurt Decl., Ex. XX, ¶ 5. The Foundation is involved in a community benefits program that improves local social tolerance for the elephant:

Because these communities are beneficiaries of revenue generated by hunted animals, they have a vested interest in those animals, and are pro-wildlife conservation for all species in respective areas. Without benefit schemes such as ours, communities are not usually tolerant of direct wildlife clashes that cause crop and livestock damage. Hunting and the revenue hunting brings contribute to help pacify those feelings.

Hurt Decl., Ex. XX, ¶ 9; *see also* Angelides Decl., Ex. YY, ¶¶ 8-9. Both anti-poaching efforts and community benefits programs are a product of the revenue that U.S. hunters bring to Tanzania to hunt elephants. The importation ban's effect of discouraging U.S. hunters from going to Tanzania for their elephant hunts will remove the tools that have proved to be effective for elephant conservation.

Hunters are the only ones in the remote wilderness areas who can deter poachers. The hunting business is a huge employer and provider to the local economies. For this reason, Tanzania can justify keeping wilderness as wilderness and therefore a home for all wildlife. By depriving U.S. hunters of an important element of the elephant's value, the U.S. government has all but taken the hunter out of the field. By removing the hunter and the money he brings into Tanzania, the U.S. government respectively reduces our financial ability to patrol and manage these areas.

Hurt Decl., Ex. XX, ¶ 11; *see also* Angelides Decl., Ex. YY, ¶¶ 11, 15.

Safari Club members who plan to hunt elephants in Tanzania and those who operate hunting-related businesses there have been irreparably harmed by the importation ban. The

value of the hunt has diminished due to the inability to import legally sport-hunted elephants. The hunters have suffered financial losses as have the businesses that provide those hunts. In addition, the bans have decreased revenues that contribute to elephant conservation. Without sufficient hunter-generated dollars, the anti-poaching efforts, habitat management, and local community projects designed to improve social tolerance for elephants will disappear. Federal Defendants' sport-hunted elephant importation ban has irreparably harmed these Safari Club members. This harm will increase if the importation ban is not immediately enjoined.

### **3. Harm to Safari Club**

As an organization, Safari Club has suffered irreparable harm from the elephant importation bans. Safari Club represents approximately 50,000 members worldwide with the combined mission of protecting the rights of the hunter and the conservation of wildlife. Declaration of Rew Goodenow, Ex. K, ¶¶ 4, 5. Safari Club supports "sustainable use" conservation – an approach that recognizes that the utilization of wildlife often produces benefits and provides incentives for conservation. *Id.*, ¶ 7. African elephant hunting in Zimbabwe and Tanzania are prime examples of that sustainable use model. Because the bans have discouraged U.S. hunters from visiting Zimbabwe and Tanzania for elephant hunting and have decreased the value of those hunts generally, Safari Club is harmed and will continue to be harmed by the increased poaching, loss of habitat and social intolerance that will ensue. *Id.*, ¶ 15.

#### **B. Safari Club Will Succeed on the Merits of Its Claims**

##### **1. Federal Defendants Illegally Failed to Consider Relevant Factors in Making the Decision to Suspend Elephant Importation from Zimbabwe**

In the Enhancement Finding for Zimbabwe, the FWS rationalized that it was unable to make a finding that sport-hunting of elephants enhances the survival of the species, because it

lacked sufficient information to do so. Ex. D. The FWS asserted this justification despite being well aware of the source and availability of that information. In fact, on April 4, 2014 – the very day that it suspended importation from Zimbabwe – the FWS sent a formal request for such information to ZPWMA. The failure to obtain and consider this most current and relevant data violates the ESA and APA.

The FWS's April 4, 2014 request to Zimbabwe represented the first time in seven years that the agency formally solicited information from Zimbabwe about its elephants. While the FWS may not have known the nature of the information possessed by Zimbabwe, it was well aware that whatever data was in Zimbabwe's possession would be relevant to its decision.

The FWS's decision to impose the importation ban without first obtaining data from Zimbabwe also deprived the FWS of information that demonstrated the significant role that U.S. sport-hunting revenues play in deterring illegal killings, apprehending poachers and improving local community tolerance. As a result, the FWS's decision was made without consideration of how the loss of revenue from U.S. hunters would harm elephant conservation in Zimbabwe. Even though the Enhancement Finding did make some references to the fact that sport-hunted revenue may be the main, if not the only, source of funding for some elephant conservation strategies, the FWS never considered the ramifications of removing this revenue source.

However, only revenues generated through sport-hunting conducted on state and private lands are used to finance ZimParks and to our knowledge, no other government funding is provided.

Enhancement Finding at 4, Ex. D. Despite expressing concern over the lack of funding for elephant conservation and anti-poaching efforts, and despite acknowledging that sport-hunting may alone finance some of these efforts, the FWS never considered how the loss of sport-hunting revenue would impact Zimbabwe's efforts to conserve and protect elephants.

Instead of considering the benefits that sport hunting represent for elephant conservation, the FWS focused on legal hunting as a source of “additional” take of elephants, over elephant mortality caused by poaching, accidental means and natural causes. The Enhancement Finding completely failed to address the fact that an importation ban likely will have little to no impact on the number of elephants hunted in Zimbabwe. The Zimbabwean authorities establish hunting quotas, and if U.S. hunters are discouraged from visiting Zimbabwe for elephant hunting, the safari operators, and booking agents will make every attempt to sell those hunts to non-U.S. hunters. Cooke Decl., Ex. QQ, ¶ 19; De Vries Decl., Ex. SS, ¶ 15.<sup>9</sup>

Although the number of elephants hunted may not change, the nationality of the hunters will. According to the outfitters and professional hunters who provide hunts in Zimbabwe, U.S. hunters generally pay more for hunts than their counterparts from other countries. Carter Decl., Ex. NN, ¶ 18; Barth Decl., Ex. OO, ¶ 14; Pieters Decl., Ex. PP, ¶ 17; Cooke Decl., Ex. QQ, ¶ 15. Consequently, in making the Enhancement Finding, the FWS failed to consider the fact that the importation ban likely will not reduce the number of elephants taken by hunters (or at least not significantly), but will nevertheless reduce the revenue that flows to elephant conservation.

The availability of the most current data and the consequences of an importation ban were both factors relevant to the decision to suspend imports. An agency violates the APA by failing to consider factors relevant (and crucial) to its determination. 5 U.S.C. §706(2)(a); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (agency acts in an arbitrary and capricious manner by making a choice without considering the relevant factors). Even if

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<sup>9</sup> This Court has already acknowledged that U.S. importation bans on foreign sport-hunted species do not necessarily result in fewer animals hunted. *Fund for Animals v. Norton*, 295 F. Supp. 2d 1, 7 (D.D.C. 2001) (Court dismissed challenge to U.S. importation of sport-hunted argali sheep from Mongolia, Tajikistan and Kyrgyzstan based on lack of standing because importation ban would not stop countries from authorizing the hunting of argali by non-U.S. residents).

deferential review applies, the Court cannot uphold a decision if the agency did not consider all the relevant concerns in reaching that decision. *ITT World Commc'ns Inc., v. FCC*, 725 F.2d 732, 741–42, 755 (D.C. Cir. 1984) (court overturned FCC decision related to sale of satellite time based on agency's failure to consider relevant issues).

By making a decision prior to even giving Zimbabwe an opportunity to respond to its information request and by failing to consider the consequences of removing U.S. hunters and U.S. sport-hunting revenues from the Zimbabwean economy, the FWS violated the APA in failing to consider factors relevant to its determination.

**2. Federal Defendants Violated the ESA and APA By Illegally Failing to Follow Their Own and/or APA Procedures For Reversing Zimbabwe's Enhancement Finding**

Federal Defendants announced and implemented the Zimbabwe elephant importation ban in a press release published on the FWS website on April 4, 2014. As indicated in the section above, Federal Defendants based the importation ban on a “lack of recent data.” Enhancement Finding at 6, Ex. D. By relying on the absence of information, choosing not to wait to implement the importation ban until it could publish it in the Federal Register, failing to publish the decision in the Federal Register, and deciding not to afford the public an opportunity to comment and provide data to inform the Enhancement Finding and importation decision, Federal Defendants violated both the ESA and APA.

In doing so, the Federal Defendants failed to comply with a self-pronounced policy for reversing the finding that the sport hunting of African elephants enhances the survival of the species. In an August 22, 1997 Federal Register Notice, the FWS explained that it had made an Enhancement Finding for Zimbabwe and that the finding would “remain in effect until the Service finds, based on new information, that the conditions of the special rule are no longer met

and has published a notice of any change in the Federal Register.” 62 Fed. Reg. 44627, 44633 (Aug. 22, 1997).<sup>10</sup> The FWS made three commitments to the public; 1) to base any change to the Enhancement Finding and/or to compliance with the conditions of the special rule on “new information”; 2) to keep the 1997 Enhancement Finding and importation authorization in effect until the FWS published a change in the Federal Register; and 3) to use the Federal Register to announce any change. The FWS failed to comply with all of these commitments. The FWS 1) based its reversal of the 1997 Enhancement Finding on a lack of information rather than on new information; 2) reversed the 1997 Enhancement Finding and its position on the legality of elephant importation from Zimbabwe before publishing the reversal of the decision in the Federal Register; and 3) failed to ever publish a notice of the change in the Federal Register.

The language of the 1997 Federal Register Notice constitutes a binding agency commitment. “It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion.” *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) *citing Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959). The language used by the FWS and the implications of its promise, combined with the prominent publication of the pronouncement and the reliance of the regulated public on the pronouncement, all elevate it to the level of an agency obligation. Whether an agency pronouncement constitutes a binding agency commitment is “ascertained by an examination of the statement's language, the context, and any available extrinsic evidence.” *Padula v. Webster*, 82 F.2d at 100 *quoting Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977) (court considered whether FBI statements constituted binding nondiscrimination commitments).

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<sup>10</sup> The FWS repeated this same language in the 2001 Final Rule that announced an enhancement finding for the African elephants of South Africa. 66 Fed. Reg. 27601, 27609 (May 18, 2001).

Often, it is the very language of the pronouncement that informs the court's decision as to whether the commitment should be classified as "binding."

Our cases "make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C.Cir.2002) (internal citation omitted); *see also Chamber of Commerce*, 174 F.3d at 212–13. It is enough for the agency's statement to "purport to bind" those subject to it, that is, to be cast in "mandatory language" so "the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences." *Gen. Elec.*, 290 F.3d at 383–84.

*Elec. Priv. Inf. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) (imposition of new TSA screening technology that would project unclothed image of airline passengers had sufficient impact on privacy interests of public to invoke APA requirements). The 1997 Federal Register Notice used mandatory as opposed to discretionary terms. It did not offer the FWS options to consider or implement when reversing an Enhancement Finding or importation decision. In addition, the 1997 Federal Register Notice provided the public with information about the only published source of data on which the hunting community could reasonably rely for making advance plans to travel to Zimbabwe for elephant hunting.

Similarly, because the 1997 Federal Register Notice concerning the FWS's means of reversing an Enhancement Finding and importation decision affected the substantive rights of hunters, any change to that commitment cannot be made without adherence to APA rulemaking procedures. "Substantive or legislative rules are those that 'grant rights, impose obligations, or produce other significant effects on private interests,' *Batterton v. Marshall*, 648 F.2d 694, 701–02 (D.C. Cir. 1980) (citations omitted), or which 'effect a change in existing law or policy,' *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir.1984) (quotations omitted)." *Bimini Superfast Operations LLC v. Winkowski*, 2014 WL 92897 (D.D.C. Jan. 10, 2014). Substantive or legislative rules have the force of law. *Guardian Fed. Savings and Loan Assn. v. Fed. Savings*

*and Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978). If the rulemaking imposes some sort of “substantive impact” on the public, it will require notice and comment rulemaking procedures. *Elec. Priv. Inf.Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

Finally, the 1997 pronouncement represents a definitive interpretation of the regulation that requires an enhancement finding, which interpretation the FWS has now significantly revised by removing the requirement for “new information.” As such, the FWS cannot make this change without notice and comment under the APA. *Mortg. Bankers Ass’n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013). As explained by the D.C. Circuit, “[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment.” *Id.*, quoting *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). As explained above, the U.S. hunters and African outfitters and guides relied to their detriment on this interpretation that a change would only come with new information and notice to the public. *Mortg. Bankers Ass’n*, 720 at 970 (reliance is a factor to guide a court in determining whether interpretation was definitive, but is not a separate requirement).

For all these reasons, the 1997 pronouncement established the prerequisites to a change in hunters’ ability to import their sport-hunted elephants from Zimbabwe. It altered the rights and interests of members of the hunting community. It dictated the nature of information that would trigger the FWS’s reversal of the Enhancement Finding and importation decision. Hunters could and did rely on the FWS’s promise that it would not reverse the legality of importation until it received new information and published its decision in the Federal Register. The unilateral withdrawal of that promise deprived Safari Club members of the ability to decide whether or not to arrange elephant hunts in Zimbabwe (or to choose to book hunts in other

countries) and to protect themselves from suffering financial and emotional losses. Federal Defendants' decision to change the criteria and mechanism for reversing Zimbabwe's Enhancement Finding and importation determination violated the APA and ESA and should be enjoined.

**3. Federal Defendants Illegally Failed to Provide An Adequate Explanation for Imposing an Enhancement of Survival Finding Requirement in the Special Rule Pertaining to Trophy Importation of African Elephants on CITES Appendix II**

Federal Defendants have never explained why the special rule for the importation of sport-hunted African elephants on Appendix II continues to require a finding that the take of the elephant enhances the survival of the species. 50 C.F.R. § 17.40(e)(3)(iii). Federal Defendants have also never given the public the opportunity to comment on the requirement. The unexplained retention of this requirement is arbitrary and capricious because the underlying basis for the requirement no longer exists. Federal Defendants' actions violate the ESA and the APA.

Federal Defendants instituted the enhancement of survival finding requirement for elephants on August 10, 1992, to match a CITES resolution in effect at the time that imposed the same obligation. 57 Fed. Reg. 35473, 35485 (Aug. 10, 1992). In 1992, all African elephants, including Zimbabwe's, were listed on CITES Appendix I. The version of CITES Res. Conf. 2.11. (Annex 1) that was in effect at the time required an enhancement finding for the importation of Appendix I species. Ex. AAA.

In 1994, CITES revised its resolution and removed the enhancement of survival finding requirement for Appendix I species. Ex. BBB. Had Federal Defendants made a parallel change to the special rule, an enhancement finding would not have been required for Zimbabwe's elephants, despite their Appendix I status at the time. Federal Defendants retained the regulatory requirement, but never offered an explanation as to why the requirement remained necessary.

Then in 1997, CITES downlisted African elephants from Zimbabwe from Appendix I to Appendix II, making the FWS's enhancement requirement even less appropriate for Zimbabwe's elephants, since CITES had *never* imposed an enhancement requirement for Appendix II species. Again, the FWS retained the requirement without explanation.

Although Federal Defendants originally justified the inclusion of the enhancement requirement in the special rule as an effort to coordinate with CITES, Federal Defendants failed to delete the special rule's enhancement of survival finding requirement when CITES withdrew the requirement and changed the Appendix status of Zimbabwe's elephants. The underlying purpose of the special rule no longer exists and the FWS now is applying the rule in a way that CITES never intended or required. In fact, the special rule is now inconsistent with the CITES requirements. Nevertheless, Federal Defendants have never changed the special rule or explained why they refuse to remove the requirement.

The ESA authorizes Federal Defendants to issue only those regulations that are deemed "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). By retaining the enhancement of survival requirement for Appendix II elephants, Federal Defendants implicitly adopted a new conclusion that the finding was necessary and advisable for the conservation of elephants, simply due to their threatened status. Without the enhancement requirement, the FWS has no reason or basis for prohibiting elephant imports from Zimbabwe, especially because importation of threatened species on Appendix II of CITES is "presumed" not to violate the ESA or ESA regulations. 16 U.S.C. § 1538(c). That presumption helps establish that Federal Defendants' unexplained retention of the enhancement finding for elephants listed on Appendix II is not "necessary and advisable" for African elephant conservation.

Inadequately explained agency action qualifies as arbitrary and capricious conduct. *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir.1986). In rulemaking, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Mfrs. Assn. of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962). The same standard applies when the agency changes an existing rule.

To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.

*FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009) (discussing nature of the explanation needed for new agency policy), citing *United States v. Nixon*, 418 U.S. 683, 696 (1974). The agency may not, by its silence, deprive the public of its right to an explanation of an agency’s shift in position, or to the opportunity to comment on the reasons for that shift.

[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from tolerably terse to intolerably mute.

*Greater Boston Television Corp., v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

Federal Defendants have never published a public notice explaining their new reasons for the enhancement of survival requirement for African elephants listed on Appendix II or offered the public the opportunity to comment on why the requirement is or is not “necessary and advisable.”<sup>11</sup> When it originally proposed to promulgate the special rule, the FWS provided

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<sup>11</sup> Although the August 22, 1997 Federal Register notice was a proposed rule on which the FWS solicited public comment, the comment opportunity applied to changes to the Appendix listing for species and not to the FWS’s retention of the enhancement of survival finding requirements of the special rule.

notice in the Federal Register and an opportunity for public comment. 56 Fed. Reg. 11392 (March 18, 1991). If the original rule required adherence to the APA notice and comment requirements, an amendment of the rule requires the same. By failing to follow such procedures, Federal Defendants have violated 5 U.S.C. §§ 553 and 706. Federal Defendants' failure to adequately explain the necessity and advisability and to offer the public the opportunity to provide data to dispute or support the requirement, qualifies as arbitrary and capricious conduct, is contrary to law and merits preliminary injunctive relief.

**4. Federal Defendants Illegally Failed to Provide the Public with Notice and the Opportunity to Comment on the Trophy Importation Ban for Tanzania**

When Federal Defendants announced the elephant importation ban for Tanzania in a press release published on the FWS's website, without giving the public prior notice or an opportunity to offer data to inform the decision, they violated the rulemaking requirements of the APA. The elephant importation ban for Tanzania relied on the DSA's February 21, 2014 refusal to make an NDF for the importation of elephants and the FWS's Management Authority's March 27, 2014 decision that it could not make a positive enhancement finding. For the first time in more than two decades, the FWS did not make a positive NDF or enhancement finding for Tanzania's elephants. For those twenty-plus years, the Service's consistent approach to the NDF and enhancement findings for Tanzania had afforded hunters the ability to plan and invest in future elephant hunts and had enabled safari business to book clients and prepare for their hunts.

When Federal Defendants abruptly suspended importation, it ignored that reliance and denied hunters the ability to import their legally sport-hunted elephants. The importation ban also deprived hunters and hunting businesses of a significant portion of the value of the hunts. The importation ban also impacted all Safari Club members by diminishing resources necessary

for the conservation and protection of Tanzania's elephants. The Tanzania importation ban was a decision that had a detrimental impact on the private interests of many members of the hunting community and, therefore, qualifies as substantive or legislative rulemaking. *Batterton v. Marshall*, 648 F.2d 694, 701–02 (D.C. Cir. 1980). Because substantive rulemaking may not be finalized without public notice and the opportunity for comment, the importation ban violated the rulemaking requirements of the APA and must be set aside. 5 U.S.C. § 553; *Elec. Priv. Inf. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011).

**5. Federal Defendants Illegally Failed to Adequately Explain the Retention of the Enhancement of Survival Finding Requirement for the Importation of African Elephants from Tanzania**

For many of the same reasons this brief addresses in Section IV.B.3, concerning the legality of the enhancement of survival requirement for Zimbabwe's elephants, a similar requirement for Tanzania's elephants is illegal. Federal Defendants have never explained why the special rule for the importation of sport-hunted African elephants on Appendix I continues to require a finding that the take of the elephant enhances the survival of the species. 50 C.F.R. § 17.40(e)(3)(iii). Federal Defendants have also never given the public the opportunity to comment on the requirement.

Federal Defendants instituted the enhancement of survival requirement for elephants on August 10, 1992, to match a CITES resolution that imposed the same obligation. 57 Fed. Reg. 35473, 35485 (Aug. 10, 1992). The version of CITES Res. Conf. 2.11. (Annex 1) in effect at the time required an enhancement finding for the importation of Appendix I species. Ex. AAA. In 1994, CITES revised its resolution to remove the enhancement of survival finding requirement for Appendix I species. Ex. BBB. Had Federal Defendants made a parallel change to the special rule, an enhancement finding would no longer be required for Tanzania's elephants. Instead,

Federal Defendants retained the enhancement requirement, but never offered an explanation as to why the requirement remained necessary. Although Federal Defendants originally justified the special rule's inclusion of the enhancement requirement as an effort to coordinate with CITES, Federal Defendants failed to delete the requirement when CITES withdrew it for Appendix I species. The underlying purpose of the special rule no longer exists and Federal Defendants are now, without explanation or a sound reason, applying the rule in a way that CITES does not require.

The unexplained and unwarranted retention of the requirement for Tanzania's elephants is contrary to ESA Section 4, which authorizes Federal Defendants to issue only regulations that are deemed "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). By retaining the enhancement of survival requirement for Appendix I elephants from Tanzania, despite CITES withdrawal of that requirement, Federal Defendants implicitly adopted a new conclusion that the finding was necessary and advisable for the conservation of elephants, simply due to their threatened status.

But Federal Defendants never explained the basis for retaining the requirement despite changes to the underlying rationale. Inadequately explained agency action qualifies as arbitrary and capricious conduct. *Motor Vehicles Mfrs. Assn. of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962); *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986). The same standard applies when the agency changes an existing rule. *FCC v. Fox Television Stations Inc.*, 556 U.S. 502 (2009) (discussing nature of the explanation needed for new agency policy), citing *United States v. Nixon*, 418 U.S. 683, 696 (1974).

Federal Defendants' failure to adequately explain the necessity and advisability and to offer the public the opportunity to provide comments and data to dispute or support the requirement, violates both the ESA and APA and merits preliminary injunctive relief.

**6. Federal Defendants Illegally Applied the Incorrect Non-Detriment Finding Standard to the Importation of African Elephant Trophies from Tanzania**

Federal Defendants require an NDF for both the import and export of an Appendix I species. 50 C.F.R. § 23.61. Although the regulation does not differentiate between the types of NDFs required for import vs. export, the FWS has interpreted its regulation to require different NDFs for the two scenarios. For exported species, the FWS examines the potential detriment that could be caused by the "take" of the species from the wild. In contrast, for imported species the FWS must examine the potential detriment that could be caused by the purpose for which the animal is being imported into the United States.<sup>12</sup> The FWS has explained that "[t]he finding for the import of an Appendix-I species is based on a consideration of the purpose for which the specimen will be used upon import into the United States." 71 Fed. Reg. 20168, 20195 (Apr. 19, 2006).

Despite its published determination differentiating between the two NDFs, Federal Defendants applied the wrong NDF analysis to its consideration of elephant importation from Tanzania. Federal Defendants applied the analysis authorized for exportation, rather than importation. The basis for Federal Defendant's professed inability to make an NDF finding was:

We recognize that sport-hunting, as part of a sound management program, can provide benefits to wildlife conservation and that sport-hunting of elephants is not the primary cause of the decline of elephant populations in Tanzania. However, given the significant decline in the elephant population due to uncontrolled

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<sup>12</sup> The FWS's interpretation of the different requirements for export and import NDFs is consistent with the language of CITES Article III, which regulates trade in specimens of species included in Appendix I.

poaching and questionable management and governance, we are concerned that additional killing of elephants, even if legal, is not sustainable and will not support effective elephant population recovery efforts in Tanzania.

Tanzania Enhancement Finding at 11, Ex. J. Contrary to Federal Defendants' own interpretation of the requirements for making a NDF for species importation, Federal Defendants did not base its decision on "the purpose for which the specimen will be used upon import into the United States" – namely the personal ownership by the U.S. hunter. 71 Fed. Reg. at 20195. Instead, Federal Defendants examined the detriment caused by the purported "additional killing of elephants" – an analysis restricted by Federal Defendants' own regulatory interpretation to NDFs for exporting an animal from the U.S.

The 2006 Federal Register notice presented the agency's definitive interpretation of 50 C.F.R. § 23.61. By applying the NDF analysis for exportation instead of importation, the FWS either rejected or revised the interpretation applicable to imports. In either case, the APA prohibits the FWS from unfairly surprising the public by making such an interpretive change without providing proper notice and an opportunity for comment pursuant to APA requirements. *Comcast Cable Commc'ns LLC. v. FCC*, 717 F.3d 982, 1006-07 (D.C. Cir. 2013); 5 U.S.C. § 553; *see also Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013). Federal Defendants' illegal actions merit an injunction to prevent further harm.

### **C. Balance of Harms**

The balance of harms supports enjoining the importation bans during the pendency of this case. The harm suffered by Safari Club members from the importation bans exceeds the harm that Federal Defendants would sustain if the bans were removed. A preliminary injunction would restore the status quo of over two decades, in which the FWS allowed U.S. hunters to import elephants hunted in Zimbabwe and Tanzania. The Irreparable Harm and Facts sections

above explain in detail the harms to Safari Club and its members (and other members of the hunting and conservation community) that have occurred and will continue to occur and grow if the importation bans stay in place.

Federal Defendants' harm from an injunction temporarily setting aside the importation bans would be the continued legal take of elephants in Zimbabwe and Tanzania by U.S. hunters. U.S. hunters would not be discouraged from hunting elephants in these countries and would be able to import as they did prior to April 4, 2014. While Federal Defendants presumably speculate that the importation bans will reduce the number of elephants hunted in these countries, the available evidence suggests otherwise. First, the outfitters and professional hunters have stated that they will certainly try and may be able to replace most or all of the U.S. hunters that cancelled their hunts, albeit likely at lower prices. Second, the loss of revenue to combat poaching and possibly hunter presence in the field likely will increase poaching, resulting in either greater or at least not significantly less overall elephant mortality. In other words, if reducing elephant mortality is the Federal Defendants' goal, it is unlikely that the goal will be achieved by the importation bans. For that reason, granting an injunction is likely to have little adverse impact on Federal Defendants' interests.

In short, the conservation purposes of both Safari Club and Federal Defendants are better served by enjoining the bans than by keeping them in place.

**D. The Public Interest Supports Injunctive Relief**

The public interest is also furthered by enjoining the bans. The public, composed of both members who hunt and those who do not, has an interest in the conservation of the African elephant. Sport hunting, fueled by U.S. hunters wanting to import their elephants into the U.S., generates significant and necessary revenue for anti-poaching, habitat improvement and the

encouragement of social tolerance, all of which contribute to the conservation of the species. The Irreparable Harm section above and declarations attached as exhibits to this brief detail in depth the many benefits of allowing U.S. hunters to hunt and import elephants from Zimbabwe and Tanzania.

Removing the bans during this litigation will allow the U.S. hunters to stay in the field, fulfill their already booked hunts, and, most importantly, continue to contribute to elephant conservation. The importation bans can do nothing more than limit the number of elephants being imported into the U.S. The bans cannot dictate the number of elephants hunted and, if anything, will increase the number of elephants illegally taken by poachers. As Safari Club has demonstrated in dozens of declarations and as reflected in Zimbabwe's response to the FWS, loss of U.S. hunters and their dollars will undermine Zimbabwe's and Tanzania's ability to combat poaching and reduce social intolerance for the species. Enjoining the importation bans will serve the public's interest in conserving the elephants – an interest shared by all.

## **V. CONCLUSION**

Safari Club has demonstrated that: 1) in the absence of preliminary injunctive relief, Safari Club and its members will suffer irreparable harm for the duration of this litigation; 2) Safari Club is likely to succeed on the merits of its claims; 3) the balance of harms weighs in favor of the Court granting preliminary injunctive relief; and 4) the public interest will be served by a temporary reversal of the elephant importation bans. Therefore, Safari Club requests that this Court immediately enjoin the elephant importation bans until this matter is fully litigated.

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Respectfully submitted,

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