

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
Safari Club International, et al.,)	
)	
Plaintiffs,)	
)	Case No. 14-cv-00670-ABJ
v.)	
)	
S.M.R. Jewell , in her official capacity as)	
Secretary of the United States Department of)	
Interior, <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	
)	

**FEDERAL DEFENDANTS’ SUPPLEMENTAL MOTION TO DISMISS AND
PARTIAL OPPOSITION TO MOTION TO AMEND/CORRECT**

Federal Defendants S.M.R. Jewell, in her official capacity as Secretary of the U.S. Department of the Interior, *et al.*, respectfully submit the following Supplemental Motion to Dismiss the Amended Complaint of Plaintiffs Safari Club International and the National Rifle Association (collectively “Plaintiffs”) under Federal Rule of Civil Procedure 12(b)(6) and this Court’s June 16th and 23rd, 2014 Minute Orders. Federal Defendants also partially oppose Plaintiffs’ Motion for Leave to File a Second Amended and Supplemented Complaint (ECF No. 34) (“Motion for Leave”) as some of the claims in the proposed amended and supplemented complaint would not survive a motion to dismiss and so amendment is futile.

INTRODUCTION

Federal Defendants have already demonstrated that Plaintiffs’ Complaint and Amended Complaint suffer from numerous jurisdictional defects that require dismissal of their case. Fed. Defs.’ Mot. to Dismiss, ECF No. 11 (“Motion to Dismiss” or “MTD”). Now that the Court has

indicated that the prior restrictions on briefing no longer apply, Federal Defendants are providing the Court with additional, non-jurisdictional bases for dismissal of the Amended Complaint.¹ Specifically, judicial review of Plaintiffs' Tanzania claims (Counts IV-VI) may not proceed under the Administrative Procedure Act ("APA") because those claims fail to challenge a final agency action. The U.S. Fish and Wildlife Service's ("Service") April 2014 findings regarding the importation of sport-hunted African elephant trophies from Tanzania do not mark the consummation of the agency's decision-making process, nor are they actions by which rights or obligations have been determined, or from which legal consequences will flow.² A permit is required to import a sport-hunted African elephant trophy. None of Plaintiffs' members has even alleged to have applied for such a permit, much less been denied an import permit on the basis of the agency's findings. By side-stepping the permit process that could have supplied the "final agency action" that the APA requires, Plaintiffs also have failed to exhaust their administrative remedies with respect to the Tanzania findings. For these reasons, as further explained below, the Court should dismiss Counts IV-VI in the Amended Complaint with prejudice for failure to state a claim.

¹ On August 1, 2014, Plaintiffs moved to amend and supplement their Amended Complaint to add a challenge to the Service's July 2014 final enhancement finding for Zimbabwe. ECF No. 34. Because Plaintiffs' proposed Second Amended and Supplemented Complaint ("Second Amended Complaint") retains their challenge to the April 4, 2014 interim enhancement finding for Zimbabwe and all of their Tanzania claims, this Supplemental Motion to Dismiss applies equally to the proposed Second Amended Complaint, should the Court allow Plaintiffs to further amend their complaint. *See* Defs.' Reply to Mot. to Dismiss, ECF No. 23, at 1; *compare* 2d Am. Compl. ECF No. 34-1, at ¶¶ 124-40 *with* Am. Compl., ECF No. 13, ¶¶ 103-18.

² Counts IV-VI in Plaintiffs' Amended Complaint correspond to Counts VI-VIII in Plaintiffs' Proposed Second Amended Complaint. Thus, as noted, Plaintiffs' Motion for Leave should be denied as futile as to Counts VI-VIII of the Second Amended Complaint.

Additionally, the Court should deny in part Plaintiffs' recent Motion for Leave because Plaintiffs' proposed Second Amended Complaint includes claims that are futile. Plaintiffs' proposed Second Amended Complaint improperly attempts to challenge the Service's April 4, 2014 interim enhancement finding for Zimbabwe, which has been superceded by the Service's issuance of a final enhancement finding for Zimbabwe, issued in July 2014. The proposed Second Amended Complaint also reasserts Plaintiffs' Tanzania claims. Because Plaintiffs' claims against the Zimbabwe interim finding are now moot and their Tanzania claims should be dismissed for lack of standing and other jurisdictional grounds and for failure to state a claim, any amendment or supplement to the Amended Complaint as to those claims is futile.³

BACKGROUND

To avoid unnecessary duplication, Federal Defendants incorporate by reference the statutory and procedural background provided in their Motion to Dismiss.

STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court considering a Rule 12(b)(6) motion presumes the factual allegations of the complaint to be true. *See, e.g., United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 135 (D.D.C. 2000). "To

³ In their Motion for Leave, Plaintiffs request that the Court order expeditious filing of the administrative record for the July 2014 Enhancement Finding for Zimbabwe. Federal Defendants do not oppose Plaintiffs' supplementation of the Amended Complaint with a challenge to the merits of the July 2014 Enhancement Finding for Zimbabwe. Although Federal Defendants' statute of limitations arguments in the pending Motion to Dismiss would apply with equal force to the proposed Second Amended Complaint, this does not require filing a certified index of the Administrative Record for the July 2014 finding under Local Rule 7(n). In its June 23, 2014 minute order, the Court explained that 7(n) does not apply to motions to dismiss. Federal Defendants are prepared to file a certified index of the administrative record for the July 2014 Zimbabwe Enhancement Finding six weeks after the Court addresses Plaintiffs' Motion for Leave, or by September 30, 2014, whichever is later.

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007). The court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. Dist. of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

ARGUMENT

I. THE SERVICE’S APRIL 2014 FINDINGS FOR TANZANIA ARE NOT FINAL AGENCY ACTIONS.

Plaintiffs’ Tanzania claims fail because none of Plaintiffs’ members has asked the Service to reconsider its Tanzania findings in the context of a denied application for an import permit. Under the Service’s regulations, such a permit must be obtained before an African elephant trophy sport-hunted in Tanzania may be brought into the United States. Plaintiffs’ members do not allege that their members have even applied for a permit to import an elephant trophy from Tanzania, or that the Service has denied any of their permit applications. Thus, no final agency action has occurred for Plaintiffs to challenge, since the Service has not initiated, much less consummated, a formal decision-making process with regard to any Tanzania import permit for Plaintiffs’ members. Moreover, had the Service denied such an application, the Service’s regulations require the unsuccessful applicant to appeal the denial to the Director of the Service before instituting a lawsuit such as this. Plaintiffs’ Tanzania claims therefore fail for the additional reason that Plaintiffs do not challenge final agency action, including the requirement to exhaust administrative remedies.

Plaintiffs challenge agency decisions that also do not meet the two-part test for determining finality. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An agency action is final only if it is “the consummation of the agency's decisionmaking process” and a decision by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Nat'l Min. Ass'n v. McCarthy*, No. 12-5310, -- F.3d. --, 2014 WL 3377245, at *5 (D.C. Cir. July 11, 2014) (citing *Bennett v. Spear*, 520 U.S. at 177–78). First, Plaintiffs are not challenging the culmination of the Service’s decision-making process, because they do not challenge a permit denial or the denial of a request for reconsideration of such a permit denial. *Cf. Bennett*, 520 U.S. at 177-178. Second, Plaintiffs have not shown that the Service’s findings are ones from which rights or obligations have been determined or from which legal consequences flow. Instead, the Tanzania findings that Plaintiffs challenge are merely some of the predicate findings made before the Service may issue an import permit for a sport-hunted elephant trophy from Tanzania; the findings do not have an independent legal effect. 50 C.F.R. § 17.40(e)(3)(iii)(A)-(D) (ESA special rule); 50 C.F.R. §§ 23.13-23.36 (CITES permitting requirements); *cf. Conservation Force v. Salazar*, 919 F. Supp. 2d 85, 91 (D.D.C. 2013) (permit denial is not final agency action until all appeals are complete). In sum, because they cannot meet either prong of the final agency action standard, Plaintiffs’ Tanzania claims fail to state a claim.

Moreover, Plaintiffs fail to challenge final agency action because they have not exhausted their administrative remedies. Section 704 of the Administrative Procedure Act (“APA”) permits judicial review of “final agency action” only, 5 U.S.C. § 704. Plaintiffs are not challenging final agency action and, therefore, have failed to state a claim under the APA. Agency action is not “final” until a party exhausts administrative remedies prescribed by agency rule. *Darby v. Cisneros*, 509 U.S. 137, 146 (1993); *Hidalgo v. FBI*, 344 F.3d 1256, 1258 (D.C. Cir. 2003)

(“Exhaustion of administrative remedies is generally required before filing suit in federal court so . . . agency has an opportunity to exercise its discretion and expertise on the matter”) (citations omitted). As the Supreme Court has explained:

Although § 10(a) provides the general right to judicial review of agency actions under the APA, § 10(c) establishes when such review is available. When an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is “final for the purposes of this section” and therefore “subject to judicial review” under the first sentence. . . . The last sentence of § 10(c) refers explicitly to “any form of reconsideration” and “an appeal to superior agency authority.” Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available.

Darby, 509 U.S. at 146-147. Following *Darby*, courts have recognized that “[u]nder Department of Interior regulations, if an agency decision is subject to appeal within the agency, a party must appeal the decision to the highest authority within the agency before judicial review is available.” *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10th Cir. 1994) (citation omitted).

Here, because Plaintiffs have a “form of reconsideration” and the Service’s Tanzania findings are subject to review and appeal within the agency, Plaintiffs were required to exhaust these administrative remedies by applying for permits to import sport-hunted African elephant trophies from Tanzania and appealing any denial of such a permit before suing. Specifically, section 13.29(a) of the Service’s regulations affords trophy hunters the right to “request reconsideration” of the Service’s denials, and section 13.29(e) makes the Service’s decision on reconsideration subject to appeal to the Director, whose decision “shall constitute the final administrative decision of the Department of the Interior.” 50 C.F.R § 13.29(f)(3); *see also Seiber v. United States*, 364 F.3d 1356, 1366 (Fed. Cir. 2004) (noting finality of Director’s decision).

Because Plaintiffs' members have not even begun the permitting process, which would allow them to directly challenge the Tanzania findings, Plaintiffs have not challenged final agency action. A plaintiff's decision to avoid the Service's administrative appeal process does not excuse them from exhausting their administrative remedies. For example, in a challenge to the Service's findings under the ESA/Convention on International Trade in Endangered Species ("CITES") permitting scheme, another court in this district dismissed the plaintiffs' claims challenging the denial of their permit application to import sport-hunted animal trophies from Pakistan because they had failed to exhaust their administrative remedies. *See Conservation Force v. Salazar*, 919 F. Supp. 2d 85, 91 (D.D.C. 2013) (Rothstein, J.) ("Again, if the Court were to allow Plaintiffs to circumvent the agency appeal process by simply refusing to participate, it would defeat the very purpose of the process."). Likewise, in a case involving the denial of permits to import sport-hunted African elephant trophies from Zambia, the D.C. Circuit suggested that federal defendants could have successfully moved to dismiss because the plaintiffs had not completed their administrative appeal of those denials and therefore were not challenging final agency action. *Marcum v. Salazar*, 694 F.3d 123, 128-29 (D.C. Cir. 2012).⁴

II. PLAINTIFFS' ZIMBABWE CLAIMS CHALLENGING THE SERVICE'S APRIL 2014 ENHANCEMENT FINDING ARE MOOT AND NONE OF THE EXCEPTIONS TO MOOTNESS APPLY.

The Court should dismiss Counts I through III of Plaintiffs' Amended Complaint, which challenge the Service's April 2014 interim enhancement finding for Zimbabwe, because those claims have been mooted by the Service's recent issuance in July of the final 2014 enhancement finding for Zimbabwe. For the same reason, the Court should deny as futile Plaintiffs' Motion

⁴ As explained in our Reply in Support of our Motion to Dismiss, in that opinion, the D.C. Circuit held that a challenge to a CITES and ESA permit denial is unripe until the applicant has finished the administrative review process. ECF No. 23 at 7 (citing *Id.* at 129).

for Leave to the extent that it challenges the Service's April 2014 interim enhancement finding for Zimbabwe. The Service's July 2014 final enhancement finding for Zimbabwe superceded the April finding and thus mooted any challenge to that interim finding. Thus, amendment is futile because the Court lacks jurisdiction to adjudicate moot claims.⁵

A. Plaintiffs' Zimbabwe Claims Are Moot.

Courts do not have jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). Hence, "[i]f events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot." *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001). "[A] district court may properly deny a motion to amend if the amended pleading would not survive a motion to dismiss." *In re Interbank Funding Corp. Securities Litig.*, 629 F.3d 213, 218 (D.C. Cir. 2010).

Plaintiffs' Amended Complaint contains three counts, Counts I through III, challenging the Service's April 2014 enhancement finding for Zimbabwe. ECF No. 13, ¶¶ 84-102. As relief, Plaintiffs ask the Court to declare that the Service's suspension on the importation of African elephant trophies from Zimbabwe violated the ESA and the APA, declare that the suspension

⁵ Defendants do not oppose Plaintiffs' Motion for Leave to the extent that it seeks to add a challenge to the merits of the Service's July 2014 final enhancement finding. Recognizing that the July finding supercedes the April interim finding, Defendants voluntarily withdraw those portions of their pending motions to dismiss which argued that Plaintiffs' original Zimbabwe claims were unripe or prudentially moot. Defendants do not withdraw their argument that part of Count II and all of Count III should be dismissed as time barred, *see* ECF No. 23 at 20-22. If the Court grants Plaintiffs' Motion for Leave, Defendants' statute of limitations arguments with respect to the Zimbabwe claims apply equally to Counts III and IV of the Proposed Second Amended Complaint.

was arbitrary and capricious and therefore invalid, and enjoin the Service from continuing or enforcing the suspension. *Id.*, Prayer for Relief ¶¶ 1, 3, 5. Plaintiffs' proposed Second Amended Complaint contains four counts, Counts I through IV, challenging both the April 2014 and July 2014 enhancement findings for Zimbabwe, as well as one count, Count V, challenging just the July enhancement finding. ECF No. 34-2, ¶¶ 94-123. Plaintiffs ask the Court for relief relating to the April 2014 enhancement finding. Specifically, Plaintiffs seek a declaration that the Service "violated the ESA and APA in making a temporary decision to suspend importation of sport-hunted elephants from Zimbabwe on April 4, 2014," and that the Service's "decisions to suspend the importation of legally sport-hunted African elephants from Zimbabwe on April 4, 2014 and on July 22, 2014 were arbitrary and capricious, contrary to law, and an abuse of discretion and therefore the suspension decisions were invalid." *Id.*, Prayer for Relief ¶¶ 2, 5.

Plaintiffs can no longer challenge the April 2014 enhancement finding for Zimbabwe because any such challenge was mooted by the issuance of the final enhancement finding for Zimbabwe in July 2014. The Service's July finding states that it "supercedes the April 4, 2014, 'Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe during 2014', and the April 17, 2014, revision to that previous document." Ex. 1 at 1; *see also* ECF No. 33-1 at 2 (79 Fed. Reg. 44,459 (July 31, 2014)). In addition, the July finding states that it applies retroactively to April 4, 2014:

the Service has determined that it is unable to make a finding that the killing of elephants in Zimbabwe, after April 4, 2014, whose trophies are intended for importation into the United States, would enhance the survival of the African elephant in the wild. Therefore, the trophies, part or products, of elephants taken in Zimbabwe after April 4, 2014, will not be allowed to be imported into the United States.

Ex. 1 at 1; ECF No. 33-1 at 2 (“On July 17, 2014, the [Service] made a determination that the import of sport-hunted African elephant trophies taken in Zimbabwe on or after April 4, 2014, until December 31, 2014, would be suspended.”).

Because the April 2014 finding has been superceded and is no longer in effect, nothing turns on whether that finding might have violated the Endangered Species Act or APA or been arbitrary and capricious and therefore invalid. Am. Compl., Prayer for Relief ¶¶ 1, 3; Proposed 2d Am. & Supp. Compl., Prayer for Relief ¶¶ 2, 5. If Plaintiffs’ challenge to the April 2014 finding were well-founded, the ordinary relief would be to vacate that finding and remand it to the Service to make a new finding consistent with the law. *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (“[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.”). Now that the April 2014 finding has been superceded, however, Plaintiffs have “obtained everything that [they] could recover ... by a judgment of this court in [their] favor,” thus rendering their challenge to the April interim finding moot. *California v. San Pablo & Tulare R.R.*, 149 U.S. 308, 314 (1893); see *Natural Res. Def. Council v. U.S. Nuclear Regulatory Comm’n*, 680 F.2d 810, 814-15 (D.C. Cir. 1982) (challenge to promulgation of superceded rule sought “an advisory opinion which federal courts cannot provide”).

The D.C. Circuit has found superceded agency action moot under analogous circumstances. For example, in *Fund for Animals, Inc. v. Bureau of Land Management*, 460 F.3d 13, 18-19 (D.C. Cir. 2006), the petitioner challenged an “Instruction Memorandum” issued by the Bureau of Land Management (“BLM”) to “communicate guidance and policy” regarding BLM’s treatment of wild horse populations. The memorandum was effective for a period of one year, and BLM reviewed its policy annually. Petitioner claimed that the memorandum was

issued in violation of the National Environmental Policy Act. The memorandum expired during the litigation. The Court held that, “[b]ecause the memo has expired, this claim is moot.” *Id.* at 18. The fact that the general approach set forth in the memorandum “continues to serve as guidance to the field for the conduct of specific gather and removal decisions” did not save the petitioner’s claim from mootness. *Id.* at 19. The same analysis applies here. Plaintiffs’ challenge to the April 2014 finding is moot because that finding has been replaced and is no longer in effect.⁶

B. NONE OF THE MOOTNESS EXCEPTIONS APPLIES.

The Court should reject any attempt by Plaintiffs to argue that one of the exceptions to the mootness doctrine applies here. Plaintiffs cannot rely on the “capable of repetition, yet evading review” exception, the only exception that even arguably could apply here. This exception is limited to cases where: “(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (“*Weinstein*”). *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (stating that exception “applies only in exceptional situations”). Plaintiffs cannot meet their burden to establish that either prong of the exception applies here. *See Honeywell Int’l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010) (“The initial ‘heavy burden’ of establishing mootness lies with the party asserting a case is moot, but the opposing party bears the burden of showing an exception applies.”) (internal citations omitted).

⁶ The courts apply a similar analysis to agency legislative rules, in many cases holding challenges to rules to be mooted by the subsequent revocation, revision, or expiration of the challenged rule. *See, e.g., Fund for Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005) (finding moot a challenge to Service regulations because the regulations were no longer in effect); *Ctr. for Science in the Pub. Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (issuance of new rule rendered challenge to superceded rule moot).

First, the challenged action is not too short in duration to be fully litigated. This exception applies to agency actions and orders of such short duration that potential plaintiffs would otherwise “have their rights determined . . . without a chance of redress.” *S. Pac. Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 515 (1911). While the April finding at issue in this case was valid for approximately three months, that duration is not typical of such findings. Rather, the Service typically makes enhancement findings that last for one calendar year (such as for Tanzania) or longer (such as the prior enhancement finding for Zimbabwe, which was in place from 1997 to 2014), and has stated that the July 2014 finding will be in place through 2014. Thus, Plaintiffs will have sufficient time to litigate their claims challenging the July enhancement finding. *See Southern Co. Servs. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005) (“This court has emphasized that, when reliance on the mootness exception is based on the short duration of an order, the question is whether such a short duration is ‘typical’ of the controversy.”).

Plaintiffs’ inability to meet the first *Weinstein* factor is determinative. *Alliance for Democracy v. Fed. Election Comm’n*, 335 F. Supp. 2d 39, 45-46 (D.D.C. 2004) (“[I]n order to qualify for the narrow ‘capable of repetition yet evading review’ exception, a plaintiff must be able to show both that the duration of the activity is too short and that the same party would be subjected to actions again Since plaintiffs fail on the first prong, the second prong is inconsequential.”) (internal citation omitted). However, Plaintiffs also cannot satisfy the second factor because there is no reasonable expectation that they will be subjected to the same action again. A “mere physical or theoretical possibility” is insufficient to satisfy the *Weinstein* test; rather “there must be a ‘reasonable expectation’ or a ‘demonstrated probability’ that the same controversy will recur involving the same complaining party.” *Murphy v. Hunt*, 455 U.S. 478,

482 (1982) (citing *Weinstein*, 423 U.S. 147). In this context, “same action” has been interpreted “to refer to particular agency policies, regulations, guidelines, or recurrent identical agency actions.” *Public Util. Comm’n v. FERC*, 236 F.3d 708, 715 (D.C. Cir. 2001).

Even accepting as true Plaintiffs’ allegations with respect to the Service’s April 2014 enhancement finding for Zimbabwe in Counts I through III of the Amended Complaint and Counts I through IV of the Proposed Second Amended and Supplemented Complaint, Plaintiffs cannot demonstrate “a reasonable expectation that [they] would be subjected to the same action again.” *Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (quoting *Murphy*, 455 U.S. at 482). To the contrary, the Service’s issuance of a final enhancement finding for Zimbabwe using new information it received from Zimbabwe and hunting organizations after it issued the interim April finding negates the likelihood that the Service will issue an enhancement finding without considering that additional information received from Zimbabwe and other groups. Absent any such evidence, Plaintiffs fail to show the requisite reasonable expectation of recurrence. Moreover, to the extent that the Court finds that Plaintiffs’ procedural claims are not time-barred, those claims can be brought in the context of Plaintiffs’ challenge to the July enhancement finding for Zimbabwe and so will not evade review.

Plaintiffs cannot demonstrate either prong of the “capable of repetition, yet evading review” exception, and so the Court should dismiss Counts I through III in the Amended Complaint as moot to the extent that it remains the operative complaint, and should deny as futile Plaintiffs’ Motion for Leave to the extent that proposed complaint seeks to challenge the Service’s now-obsolete April 2014 enhancement finding for Zimbabwe (Counts I-IV of the Proposed Second Amended Complaint).

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CONCLUSION

For all the foregoing reasons, as well as the reasons provided in Defendants Motion to Dismiss, Plaintiffs' Amended Complaint should be dismissed with prejudice. The Court should also deny in part Plaintiffs' Motion for Leave. The Court should deny the Motion for Leave with respect to Plaintiffs' Tanzania claims and as to Plaintiffs' Zimbabwe claims to the extent those claims challenge the Service's April 2014 interim enhancement finding for Zimbabwe.

Dated: August 8, 2014

Respectfully submitted,

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EXHIBIT 1



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AIA/DMA

Memorandum

To: The File

From: Chief, Branch of Permits 

Date: 7/22/14

Subject: Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe during 2014

[This document, originally signed on July 17, 2014, has been revised to make a technical revision to address an editorial error (pages 8 and 11 of the original finding) and to reflect ETIS data from the 16th Meeting of the Conference of Parties to CITES (page 8 of the original finding). These technical revisions did not alter the analysis or decision announced in the July 17 finding.]

This document supersedes the April 4, 2014, "Enhancement Finding for African Elephants Taken as Sport-hunted Trophies in Zimbabwe during 2014", and the April 17, 2014, revision to that previous document.

The African Elephant (*Loxodonta africana*) is listed as threatened under the U.S. Endangered Species Act with a special rule [50 CFR 17.40(e)]. The special rule gives the requirements for the import of sport-hunted trophies. Under paragraph 17.40(e)(3)(iii)(C), in order for the U.S. Fish and Wildlife Service (Service) to authorize the import of a sport-hunted elephant trophy, the Service must make a finding that the killing of the animal whose trophy is intended for import would enhance the survival of the species in the wild. In evaluating the available data on elephant hunting in Zimbabwe, the Service has determined that it is unable to make a finding that the killing of elephants in Zimbabwe, after April 4, 2014, whose trophies are intended for importation into the United States, would enhance the survival of the African elephant in the wild. Therefore, the trophies, part or products, of elephants taken in Zimbabwe after April 4, 2014, will not be allowed to be imported into the United States. This finding will be re-evaluated in December 2014 to determine if new information indicates that the killing of animals whose trophies are intended for import would enhance the survival of the species in the wild, including whether sufficient changes have been made in Zimbabwe to allow imports of trophies taken in 2015.

General considerations:

In evaluating whether sport-hunting is contributing to the enhancement of African elephants within a country, the Service looks at a number of factors. The Service evaluates whether a country has a valid national or regional management plan and if the country has the resources and political will to enact the plan. If there is a plan, what government entities implement the plan and how often is it reviewed and updated? Does the plan have clear, achievable objectives? Are the objectives measurable and are they being achieved? Is there an adaptive management approach within the plan so that enacting agencies can quickly respond to changing environmental or social issues?

The Service also evaluates the status of the elephant population and trends over time. Particularly, we are interested in population numbers, sex and age-class distribution, and mortality rates (both natural and man-induced). Are standardized surveys being conducted and, if so, what are the timing, census methodology, and coverage? Since elephant populations can move across international borders, what level of cooperation is there between neighboring countries in management and surveying efforts for shared populations? How is poaching accounted for within survey efforts?

As with any wildlife species, the policies on how the central and regional governments address management efforts, human-elephant conflicts, poaching, and sport-hunting greatly affect the long-term survival of elephant populations. While recognizing that there may be limited resources available for elephant management, the Service considers what national policies are in place to address human-elephant conflicts and problem elephant control. Is there a policy on culling surplus animals and removal of nuisance animals? Is there domestic harvesting of elephants for local consumption or use? The amount of protected area either set aside for elephants or managed for elephant populations and the level of protection provided is also important in the Service's ability to determine whether imports of trophies could be authorized.

Finally, the Service considers how the sport-hunting program has been incorporated into national/regional management strategies, particularly in light of data on population numbers and trends, levels of utilization (both legal and illegal), and ability to effectiveness of implementing hunting programs, and that the program, and therefore trophies taken in the program, meet the requirements for the import of sport-hunted trophies under paragraph 17.40(e)(3)(iii)(C). Are sufficient funds to address management needs generated through the hunting program? Are the funds dedicated to management efforts or do they go to a general treasury fund? How are hunting quotas distributed? If there are concession areas, how are they managed and allocated?

Basis for Finding for Zimbabwe:

In the April 4, 2014, finding, and the revised finding of April 17, 2014, the Service stated that it was unable to make the positive finding to allow imports primarily due to the limited information available to the Service. At that time, the Service had not received any information in writing from the Zimbabwean Government since a U.S.-inquiry in 2007. At that time, the Service

received a response consisting of three undated and unsigned papers, which seemed to rely on somewhat dated information, and a 1997 elephant management plan. Between that time and April 2014, we had received no additional written information from the Zimbabwean government, but we have received various anecdotal reports and information provided in CITES documents presented at various CITES meetings. Service representatives have met in person with Zimbabwe representatives at various times in the past 6 years, usually in the context of annual meetings of hunting organizations in the United States. Little new or additional information has been provided during those meetings. Therefore, on April 4, 2014, a letter (herein referred to as the Service inquiry) was sent to the Zimbabwe Parks & Wildlife Management Authority (ZPWMA) with a series of questions that would assist the Service in making a final determination on trophy imports. On April 14, 2014, The Director-General of ZPWMA sent a letter to the Service expressing concerns over our decision to establish a temporary suspension. On April 17, 2014, the Director-General sent a response (herein referred to as ZPWMA response) to the Service inquiry. Several weeks later, the Service received a number of additional documents, including copies of Zimbabwean laws, and other supporting documentation that was referenced in the ZPWMA response. In addition, on June 6, 2014, the Service received additional relevant information from Conservation Force, a U.S.-based conservation and hunting NGO. The Service has also received a number of comments from individuals and associations connected to the hunting industry in Zimbabwe or southern Africa. This updated finding is the result of an analysis of this more recent information from Zimbabwe and other sources.

Management Plans: In the Service inquiry, the Service asked whether Zimbabwe had a current national management plan for elephants. In the ZPWMA response, Zimbabwe responded that the management plan consisted primarily of The Policy and Plan for Elephant Management in Zimbabwe (1997) and Elephant Management in Zimbabwe, third edition (July 1996). In addition, ZPWMA stated that they also implement other plans: “The African Elephant Action Plan”(CoP15 Inf. 68), SADC Protocol on Wildlife, and Elephant and Rhino Security Plan. In the ZPWMA response, ZPWMA stated that all the protected areas with Zimbabwe have “specific aspects of elephant monitoring programs that are implemented and reviewed on an annual basis.” ZPWMA stated that information on the status of the elephant is derived from aerial surveys, water hole counts, walking transects, visitor observation, and ranger-based monitoring. In addition, through the CITES Monitoring of the Illegal Killing of Elephants (MIKE) program in two areas, ZPWMA stated that they are regularly monitoring the status of the elephant population, including poaching.

According to their response, ZPWMA is the sole legal authority, under the terms of the Parks and Wildlife Act, Chapter 20:14, for administering the management plans and overall management of elephants in Zimbabwe. Through an adaptive management approach, ZPWMA stated that aspects of the elephant management plan are “reviewed through annual stakeholder consultative national workshops” with government, NGO, local community, safari operator, and private sector participation.

In Zimbabwe, the elephants range is classified into and apparently managed in four major sub-regions: the Matebeleland north-west, Mid Zambezi Valley, Sebungwe, and South-East Lowveld.

As stated in Elephant Management in Zimbabwe, third edition, there have long been concerns that high elephant concentrations have had a great impact on Savanna ecosystems within Zimbabwe. In 1975, Zimbabwe passed the Parks and Wild Life Act that established National Parks to preserve and protect wildlife and plants and to maintain ecological stability. Until 1989, Department of National Parks, Wildlife, and Land Management (DNPWLM) managed elephant densities in protected areas through culling operations. This practice was drastically reduced due to lack of funds and possibly due to negative public opinion. In 1992-1993, Zimbabwe experienced a major elephant die-off in the Lowveld region due to severe drought conditions. A major culling operation was resumed in this area, where 350 elephants were culled. In addition, DNPWLM conducted a translocation operation where 1,400 elephants were translocated to private conservancies, and about 200 were translocated to South Africa to stock a new Game Park. Despite these efforts to reduce the Lowveld population, 1,500 elephants died due to natural mortality. In 2001, DNPWM was replaced by ZPWMA through an amendment to the Parks and Wild Life Act, Chapter 20:14.

Elephant Management in Zimbabwe provides a historical review of elephant status in Zimbabwe prior to 1996 that establishes a good baseline for ZPWMA. The document also identified three major outcomes: maintain at least four demographically and genetically viable populations; maintain numbers and densities below levels which will not compromise biodiversity; and maintain or increase elephant range at or above 1996 levels. The document, however, primarily focuses on the use of culling as the major approach to management of elephants. While the Service recognizes the value of culling as part of a management program, the current relevance of Elephant Management in Zimbabwe mostly appears to be irrelevant since its focus is primarily culling and Zimbabwe is currently unable or unwilling to implement culling operations. Further, the document does not establish specific measurables or management actions that need to be taken. Instead, it is more of a philosophical discussion on the merits of culling and efforts that must be taken to ensure that culls meet the desired management results. The document did make one relevant statement (although I am sure that there are other salient points made in the document) According to the document, in managing elephant males for sport hunting, it is essential to account for all adult males removed from a population, including animals taken through problem animal control and poaching. The document goes on to state that the “sport hunting quota should be reduced, to zero if necessary, if more than 0.75% of the populations is being killed in other ways.”

The Policy and Plan for Elephant Management in Zimbabwe was the outcome of a “Zimbabwe Elephant Management Framework” workshop held on January 13, 1997, in Harare. The document does an excellent job of summarizing the issues that were affecting elephant populations in Zimbabwe at the time, as well as establishing strong policy statements on elephant management. However, while the document makes a clear goal statement and establishes ten objectives with management actions identified, it does not sufficiently expand on any methodology to meet the objectives or complete management actions. Without a plan to take specific actions to meet the objectives, or at least a clear framework on how adaptive management efforts would be monitored to ensure that they are meeting the stated objectives, it is not clear to the Service how this document could serve as a “management plan.” Given the general level of stated objectives, it does not appear that the objectives or even the management actions of this 1997 document need

updating to be beneficial, as much as the document needs to be expanded to identify specific measurable outcomes. Further, while the material received from Conservation Force and the ZPWMA as a result of the Service inquiry provided snippets of information that indicate that some aspects of this document are being met, the Service did not receive any meaningful information or consolidated documentation that indicates, since the inception of this document in 1997, which objectives were being met or how.

Other documents provided by ZPWMA because of our inquiry “The African Elephant Action Plan”(CoP15 Inf. 68), SADC Protocol on Wildlife, and Elephant and Rhino Security Plan also establish broad policy goals and objectives, but provide very little specific management actions or measurables. The Zimbabwe Policy for Wild Life is a general framework, published in November 2000, on how ZPWMA would be managed to ensure that Zimbabwe’s wildlife and their habitats are appropriately managed. This document specifically acknowledges that “[I]t is intended that [this] policy will be followed by detailed management plans and enabling legislation for those issues which merit them.” It is not clear if detailed management plans for elephants have not been developed because ZPWMA does not believe that elephants merit such plans or if detailed plans have been developed, but were not provided to the Service.

Finally, the National Environmental Policy and Strategies, published in June 2009, is a general policy framework for all environmental issues in Zimbabwe. The document, while addressing ways to maintain environmental integrity, social issues, economic issues, and environmental management, establishes “guiding principles” and “strategic directions” for addressing biodiversity (Guiding Principle #9 and 10), flora (#11 and 12), fauna (#13), genetic resources (#14), protected areas(#15), natural resource management (#43), and wildlife and fisheries (#45). However, these guiding principles and corresponding strategic directions are only broad guidance and do not identify any specific management activities.

Without management plans with specific goals and actions that are measurable, the Service cannot determine if ZPWMA is implementing the well-articulated, but general, goals and objectives that appear in Elephant Management in Zimbabwe, The Policy and Plan for Elephant Management in Zimbabwe, and other Zimbabwean policy documents. Overall, ZPWMA did not provide, and the Service otherwise does not have, any information indicating that Zimbabwe is implementing appropriate management of the national elephant populations.

Population Status: In order to manage any population to ensure an appropriate population level and determine whether sport hunting is having a positive effect, it is vital to have sufficient data on population numbers and/or population trends to base management decisions. This is particularly the case with elephants and establishing hunting quotas. As stated in Elephant Management in Zimbabwe, sport hunting quotas should be reduced or eliminated if the overall offtake of male elephants, from all sources, is greater than 0.75% of the total population. Without current population data, it is therefore not possible to accurately determine what impact hunting, in conjunction with other offtakes, like problem animal control or poaching is having on Zimbabwe’s elephant population.

According to the IUCN SSC African Elephant Database report "2013 Africa," the elephant population in Zimbabwe in 2007 was 99,107, of which 85% (84,416) was classified as "definite" and only 0.3% (291) was classified as "speculative". While the total population in 2012 was estimated at 100,291, only 47% (47,366) was classified as "definite" and 45% (45,375) were classified as "speculative". Only 304 "definite" animals were counted by aerial or ground counts, while the remaining 41,840 "definite" animals were counted through sample counts or dung counts, a less accurate methodology than properly conducted aerial surveys, and the remainder were what the IUCN report called "other guesses". According to this report, half of the population estimates included in 2012 is older than 10 years, resulting in a degradation of the quality of data. Very few new surveys have been conducted since 2007 and of those conducted, only cover a small percentage of the overall population. Further, according to the report, only 8 of estimates used in "2013 Africa" report were the result of repeated surveys. As noted in that report, "this lack of systematic and updated monitoring data is of serious concern for possibly the third largest elephant population in Africa." While the Zimbabwe Government continues to state that elephant population estimates exceeding 100,000 elephants, this number is clearly based on outdated information.

The summary in the IUCN report indicates that, of recent surveys, only about 1% of the country has been covered by more reliable aerial or ground surveys for population estimates, while about 50% was covered by sample counts or dung counts, a less robust methodology. For a substantial portion of the country, there have been no recent surveys and most estimates are based on 2001 figures. Even areas within Zimbabwe that had expressed higher levels of poaching or human-elephant conflicts, such as Hwange National Park, do not appear to have been surveyed since 2001. Several areas that were covered in the current surveys (2006 – 2010) indicate that there has been a substantial decline in the population, whether related to habitat degradation or poaching is unknown.

Recently, according to information provided by ZPWMA, two surveys were conducted in Save Valley Conservancy and in Gonarezhou National Park (and surrounding areas). In Aerial Survey of the Larger Herbivores, Save Valley Conservancy, Zimbabwe, a report compiled in September 2013 by the Technical Advisory Committee of the Save Valley Conservancy, 1,538 elephants were counted. Based on nine years of aerial surveys (2004-2010 and 2012-2013), not all of which covered all of the Save Valley Conservancy, there does appear to be a short-term increase in elephant population density of 9.5%. However, trend analysis of the last three aerial surveys indicated a 2.2% population increase in elephants. Further, the 2012-2013 surveys were only partial surveys and conditions were such that some double counting may have occurred.

In October 2013, aerial surveys were conducted in Gonarezhou National Park, Malapati Safari Area, and adjacent communal lands. From these surveys, it was estimated that there were 10,151 elephants in the Gonarezhou National Park area, the highest estimate since sample surveys began there in 1975. The estimated total number of elephant carcasses in the entire survey was 513. The "1+2" carcass ratio (fresh carcasses (category 1) and recent carcasses (category 2), however, was 0.39% in the entire survey area. The Service recognizes that the increase in elephant population in Gonarezhou National Park is excellent news. However, a carcass ratio of less than 4%, the expected level due to natural mortality alone, is considered unrealistically low. This

unrealistically low number could be an indication that there were problems with the survey.

Figures presented at the 16th Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Bangkok, Thailand, March 3-14, 2013 (CoP16 Doc. 53.1) indicates that, from 2002 – 2010, the percentage of illegally killed elephants (PIKE) in Zimbabwe was circa 24%, whereas in 2011 that number jumped to 67%. While the numbers for 2012 and 2013 are not yet available, the trend would indicate a higher percentage of illegal killings and a population in decline.

Although the IUCN “2013 Africa” report speculates that Zimbabwe has the third-largest elephant population in Africa, without current population estimates and a better understanding of the offtake from other sources, like poaching and problem animal control, it is not possible to determine if the total offtake exceeds the recommendation in the Elephant Management in Zimbabwe of 0.75% of the males and whether the hunting quota should be adjusted. With the upcoming Pan African Elephant Aerial Survey, which would cover most of the elephant range within Zimbabwe, a more definitive population estimate can be made, and a more robust carcass ratio could be determined. In conjunction with the 2012 and 2013 PIKE data, a better understanding of the population dynamics within Zimbabwe can be developed. However to provide accurate estimates, the Pan African Elephant Aerial Survey would have to be conducted using the standardized survey protocols and incorporate modern technological improvements, including the use of the latest technological advancement with voice data recordings and geo-referenced digital photographs of all elephant and carcass sightings.

Regulations and Enforcement: Under the Parks and Wild Life Act, Zimbabwe has established the regulatory mechanism for the ZPWMA and its programs. This law includes sections on virtually every aspect of ZPWMA, including requirements for annual financial audits and reporting to the central government. The law also provides for substantial penalties for the unlawful possession of or trading in ivory. The first offense carries a minimum of 5 years and a maximum of 15 years in prison. The second offense carries a minimum prison term of 7 years and a maximum of 15 years. However, according to the response from ZPWMA to our April 4 inquiry, the General Laws Amendment Act (No. 5) of 2010 provides for a mandatory imprisonment of not less than nine years for poaching. If properly enforced, it appears these penalties would be a sufficient deterrent of poaching.

However, based on the information the Service currently has, we do not have a good understanding of the ZPWMA’ annual operational budget, how much money is generated by elephant hunting, or how these funds (or the lack of these funds) impact the ability of ZPWMA to adequately enforce the Parks and Wild Life Act, day-to-day management, or anti-poaching efforts and therefore, provide the required enhancement to the species in order for the Service to allow imports under the Elephant special rule. In January 1996, the Government of Zimbabwe approved the establishment of the Parks and Wild Life Conservation Fund, a statutory "Fund" that provides for financing operations directly from wildlife revenues. However, only revenues generated through sport-hunting conducted on state and private lands are used to finance ZPWMA and to our knowledge, no other government funding is provided and only limited outside funding from NGOs or other Governments appears to be available. The 2002 CITES Panel of Experts raised

concerns as to the status of ZPWMA relating to its weak financial base, lack of management skills, inadequate and old equipment, and poor infrastructure. No new information was provided by ZPWMA or other sources as a result of the Service's April 4 inquiry. We have no current information as to the funding level of ZPWMA or any indication that the financial base, management skills, equipment, or infrastructure have improved.

That being stated, the Service did recently receive a document written by Rowan B. Martin entitled "Ban on Import of Elephant Trophies into the USA from Tanzania and Zimbabwe: Part 1: Costs of Protection of Elephant Areas." The undated document discusses the budget requirements for protecting wildlife areas in Zimbabwe based on calculations developed by Mr. Martin in 1996 and 2004. The document states that for Zimbabwe, given the total elephant range within the areas controlled by ZPWMA, the annual budget required to protect the elephant range would be US\$21 million. In 2013, ZPWMA requested \$28 million from the Treasury, the major part of which was intended for anti-poaching efforts. They were allocated only \$1.5 million. According to Martin, this amount, along with the revenue from trophy hunting licenses, is not sufficient to provide the needed level of protection for land under ZPWMA's authority.

At the 15th Meeting of the Conference of the Parties to CITES, a report on the Elephant Trade Information System (ETIS) was presented (CoP15 Doc. 44.1 Annex). In the report, Zimbabwe was specifically identified with regards to management issues and illicit ivory trade. The report noted the existence of organized criminal activities within Zimbabwe, including reports of the involvement of politicians, military personnel, and Chinese nationals in illicit wildlife trade. The report goes on to state that the law enforcement effort ratio within the countries grouped for the analysis had dropped to 40%, a decline of 4% from the CoP14 analysis. This decline indicates a less than average performance and was attributed to the situation in Zimbabwe.

At the 16th Meeting of the Conference of the Parties to CITES, the report on ETIS (CoP16 Doc. 53.2.2) expressed concerns about Zimbabwe in regards to illegal trade in ivory. The report stated that, as a group, Zimbabwe, Botswana, and Namibia, were in the middle range, when compared to 64 other consumer or producer countries of elephant ivory, in terms of the mean number of seizures identified, but ranked fifth in the measure of scale, indicating most of the seizures were in the 10-100 kg class (i.e., an average number of seizures that were predominately smaller in size). The report noted that 65% of the ivory trade between 2006 and 2011 had occurred since 2009, indicating that illegal ivory trade is increasing. Governance indicators were mixed, with a much lower than average World Bank "rule of law" score, but the second highest law enforcement ratio of any group of countries evaluated. The report, however, supports the Service's previous concerns regarding Zimbabwe's inability in its governance by specifically identifying Zimbabwe as pulling these scores down in both cases, "especially in the "rule of law" score, indicating that far greater challenges exist in that country". The report also noted that Zimbabwe was the source of nearly two tons of worked ivory seized in Cape Town, South Africa in 2009.

In several letters sent to the Service by Zimbabwean safari outfitters and hunting guide organization, it was stated many times that the presence of hunters, specifically U.S. hunters since they appear to make up the vast majority of sport hunters in Zimbabwe, and subsequently the professional hunters and safari outfitters guiding the hunters, is the major deterrent to poaching in

Zimbabwe. Several specific incidents were reported where it was the safari outfitters and hunters, and not the ZPWMA rangers, who thwarted poachers. At least in one incident, the 2013 Hwange National Park poisoning, it was reported that the safari outfitter paid for all of the anti-poaching efforts, including paying for all transportation for the ZPWMA rangers and feeding them. It would be expected that the presence of anyone in the field, particularly armed individuals like hunters, could deter poachers from carrying out illegal activities where the likelihood of being captured is heightened. However, no evidence was presented to the Service that supports the belief that without hunters, specifically U.S. elephant hunters, that poaching in Zimbabwe would become rampant. It is not likely that legal hunting for elephants or other wildlife is not so widespread enough or at a high enough density level to significantly reduce poaching levels in and of itself. This is particularly true for national parks, since legal hunting is not allowed.

The various statements about trophy hunters and outfitters being a major deterrent to poaching does raises the Service concerns about the effectiveness of funds utilization by ZPWMA. Specifically, there are concerns that ZPWMA either is not generating sufficient funds to support adequately their stated mission or is not utilizing the available funding in a manner that supports their stated mission. Without additional information on ZPWMA's funding basis and operating expenses, the Service cannot determine that Zimbabwe has adequate mechanisms to enforce the laws and regulations currently on the books.

Sustainable Use: For the 2014 hunting season (January – December 2014), Zimbabwe again has established an export quota of 500 elephants (1000 tusks). This is the same quota that Zimbabwe has reported to the CITES Secretariat since 2004. According to available information, it does not appear that Zimbabwe actually fills this quota each year, but due to variation in how trophies are categorized in CITES trade data, it is difficult to categorically identify the actual numbers of hunted elephants that are exported each year from these data. Information provided by ZPWMA as a result of our April 4 inquiry did not identify the number of trophies exported annually. There were several statements from safari outfitters that referenced a number of approximately 160 elephants taken annually, but this number is not supported by any documentation.

There are six categories of offtake monitored by ZPWMA which include: Cropping (population control, possibly meat supply to rural communities and live animals to breeders), Natural Mortality (found dead of natural causes), Accidents (killed by trains, landmines, or vehicles), Poaching (illegal take), Problem Animals (elephants destroyed to protect human life and property), and Management Offtake (offtake due to other management decisions). Cropping presumably includes sport hunting, though that is not specifically stated in any documents provided. No information was given on the number of elephants that are taken in each of these categories. It does not appear that Zimbabwe is currently conducting any culling operations, besides trophy hunting if considered a "cull". However, culling to remove excess animals is apparently a corner stone of Zimbabwe elephant management practices.

According to information from ZPWMA, 293 elephants were poached in 2013, including the 105 elephants poisoned in Hwange National Park¹. Of the five years of data ZPWMA provided in

¹ In our April 4, 2014, finding, we incorrectly stated that over 300 elephants had been poisoned.

their response, an average of 190 elephants were identified as being poached annually. In 2009 and 2010, there was an average of 111 elephants poached; however, between 2011 and 2013, the average more than doubled to 243 elephants. It is not clear what stimulated this significant increase. Certainly there appears to have been an increase in demand, since many countries appear to have also experienced a marked increase. It is also possible that shifts in land tenure, governance, ZPWMA' limited financial resources, or economic factors contributed to the increase. Further, while the number of animals poached in Zimbabwe does not appear to be as high as in other countries, information that was presented at the 16th Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Bangkok, Thailand, March 3-14, 2013 (CoP16 Doc. 53.1) indicates that there has been a steep rise in poaching incidents. Without more accurate population data, like what is anticipated through the Pan African Aerial Elephant Survey, there is no way to determine whether these numbers, combined with other offtake, are sustainable without valid population estimates.

While the number of elephants that are taken as problem animals was not elucidated in material provided by ZPWMA, it is clear from their response and documentation provided by Conservation Force, a large number of elephants are taken each year. ZPWMA reported that in a three-year period (2009-2011), there were 372 human-elephant cases for four "hot spot" districts. It is not clear if elephants were removed in each of these cases. However, there is anecdotal evidence within the information available to the Service that the number of problem animals may equal or exceed the number of elephants taken through sport hunting.

African elephants in Zimbabwe are listed in CITES Appendix II, with an annotation that allows trade in hides. According to CITES trade data, at least 2373 hides were exported in 2010, 3204 in 2011, and 4675 in 2012. It should be noted that these numbers probably do not equate to whole animals, but are the number of parts of hides. Some of these hides may have been obtained from sport hunted trophies, problem animal control, or culling operations. Therefore, it would be impossible to speculate on the number of elephants taken besides the ones taken as trophies or problem animal control. It is clear, however, that some level of offtake in the form of commercial exports of hides is occurring.

According to information from ZPWMA, as well as information provided by many of the comments received by the Service from safari outfitters and professional hunters associations, the principle form of utilization of the elephant in Zimbabwe is sport-hunting. Quotas are apparently set to maximize the sustainable production of high-quality trophies without detriment to the population. However, it appear that the national export quota of 500 elephants is the goal to reach when establishing quotas for each hunting area, as oppose to determining the best quota to facilitate management goals for those areas. According to the material provided to the Service, it appears that the complete quota for 500 elephants is allocated to each area based on recommendations from ZPWMA ecologists, field staff, safari operators, other stakeholders, and technical specialists through "multiple stakeholders participatory quota setting." Apparently, on an annual basis, stakeholders use available population data to propose a particular quota for an area to a Quota Setting Workshop. At this workshop, it is determined if the proposed quota should be adopted or modified in relation to other proposed quotas. Factors that are apparently

considered each year include population estimates, growth rates of populations, size of hunting areas, status of habitat, and target elephant population size.

While the material provided to the Service lays out the general process, the Service did not receive any specific information on how quotas are established. ZPWMA provided the District Quota Setting Toolbox and the Quota Setting Manual, published in 2000 and 1997, respectively. While excellent resource and training material, these documents only provide a general overview of quota setting for all species in Zimbabwe. In establishing a quota, one must take into consideration not only the habitat, population size, and size of the hunting area. One must also take into consideration other offtakes that may be affecting the species you are addressing and other environmental aspects that could influence the species. Nothing that ZPWMA provided addresses these more specific elements. Further, if ZPWMA starts with the premise that the sum of all established quotas must equal the national export quota, it is not clear if the science is driving the quota setting process or the social/economic benefits derived from hunting is the driving force. Finally, without current population data and information on the distribution of elephants across the country, both of which would come from scientifically based population surveys, it would appear that establishing a scientifically viable quota, either higher or lower than previous years, would be impossible. The current quota-setting process utilized by ZPWMA may actually be a very effective system that takes into consideration all of the issues raised in this document, but without documentation of the system, the Service cannot determine if sport hunting quotas are reasonable or beneficial to elephant populations, and therefore whether sport hunting is enhancing the survival of the species.

Revenue Utilization: On communal lands in Zimbabwe, the protection of elephants falls under the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE), which encourages reductions in human-elephant conflicts through conservation-based community development. The program was established in 1989 as a means of providing an economic incentive and return to rural communities while encouraging tolerance for the elephant and sustainable use of natural resources. This program has been the model for community-based conservation efforts in several other African countries and identified as an innovative program in the past. Under this program, there are currently 29 Rural District Councils (RDCs) that have been granted Appropriate Authority status under the Parks and Wild Life Act. There are approximately 13 RDC's with exploitable wildlife resources that make up the core of the CAMPFIRE program. Revenue generated through sport hunting is spent according to decisions taken by RDCs and their constituent communities. ZPWMA provides guidelines for the distribution of these funds between administrative costs, cost of wildlife management, and returns to communities in wildlife areas.

The CAMPFIRE program has come under criticism relating to excessive retention of generated funds by district councils which has resulted in diminished benefits being realized by the communities it was designed to help. Information supplied by the CAMPFIRE Association to the CITES Panel of Experts in 2002 indicates that this situation may be improving. The information that was provided to the Service after its April 4 inquiry does not, however, support or refute this statement. Under a community-based conservation program, like CAMPFIRE, rural communities should benefit from revenue generated by sport-hunting. With increased

human-elephant conflicts on communal lands, sport-hunting may be an important tool which gives these communities a stake in sustainable management of the elephant as a natural and economic resource. However, without current information on how funds are utilized and the basis for hunting off-takes, the Service is unable to confirm this assumption.

Local conservation efforts: Much of the information provided by Conservation Force and other commenters addressed the economic impact of the suspension to local conservation efforts being carried out by individual landowners or lease-holders, safari outfitters, and conservancies. It is clear that outstanding conservation work is being carried out in some areas that is funded solely or in major portions by private individuals or companies. It is also clear that these individuals may be impacted by a suspension of elephant trophy imports. However, it is unknown whether and to what extent these individuals would reduce their conservation efforts based on the inability of U.S. hunters to import a sport-hunted trophy. In addition, the information available to the Service on the conservation works being carried out by non-governmental entities, at this time, appears to be limited to a small group of situations and is not the norm for Zimbabwe as a whole. While these pockets of conservation are greatly needed, there does not appear to be a mechanism in place, such as government support, tax incentives, or land tenure security, to promote or sustain these efforts across Zimbabwe's elephant range. Therefore, the Service cannot determine that these limited, but seemingly important, activities would provide the enhancement required under the ESA to allow imports of trophies taken throughout Zimbabwe.

Summary: When the Service announced the interim suspension on the import of elephant trophies from Zimbabwe on April 4, we based the decision on the limited information available to the Service at that time. In response to an April 4 letter to the Government of Zimbabwe, we received a large amount of information directly from ZPWMA. In addition, we received information from Conservation Force and a number of safari outfitters and professional hunter associations. Some of the information did indicate that hunting in Zimbabwe was providing a benefit to elephants, while other information raised questions that were not answered. Based on all of this information, we determined we are unable to find that the killing of an elephant whose trophy is intended for import would enhance the survival of the species in the wild due to the following factors:

- Zimbabwe's current elephant management plan consists of two primary documents drafted in 1996 and 1997. Although the documents provide a well-developed list of goals and objectives, there is no information on whether these goals and objectives have been met or could ever be met. Without information on how the strategies are being implemented, the Service cannot determine that the plans provide sufficient basis for making the required enhancement finding.
- Until the Pan African Elephant Aerial Survey is conducted to confirm or deny current population estimates, it does not appear that Zimbabwe has adequate information on elephant populations to establish scientifically defensible hunting quotas, particularly in light of the limited information on other means of offtake, such as poaching and problem animal control.

- While Zimbabwe has laws and corresponding regulations in place to address elephant management, there appears to be an inability due to either limited funding or inadequate governance to implement and enforce these laws. Further, since the central Zimbabwean Government is not allocating funding to ZPWMA and the vast majority of funding must come from hunting revenues, it appears that ZPWMA does not have the financial resources needed to adequately address elephant conservation and management needs. Lastly, it is unknown to the Service what efforts Zimbabwe is taking to rectify this situation.
- According to information provided, Zimbabwe has established hunting quotas for all areas of the country. However, the Service did not receive specific information on how these quotas are established, whether other forms of offtake, such as poaching and problem animal control, were taken into account, or what level of input biological factors are taken into consideration (as oppose to economic and societal considerations).
- While CAMPFIRE has provided strong conservation benefits in the past by promoting greater tolerance of wildlife in rural communities, the program has more recently come under criticism relating to excessive retention of generated funds by district councils, resulting in diminished benefits to communities. The information provided the Service after its April 4 inquiry did not support or refute this statement. With increased human-elephant conflicts on Communal lands, sport-hunting may be an important tool which gives these communities a stake in sustainable management of the elephant as a natural and economic resource. However, without current information on how funds are utilized and the basis for hunting off-takes, the Service is unable to confirm whether revenue generated through sport hunting actually provides an incentive to local communities to conserve elephants.
- There are clearly “bright spots” of elephant conservation efforts, carried out by non-governmental entities, scattered around Zimbabwe that are providing a benefit to elephants. However, there are not enough of these “bright spots” to overcome the problems currently facing Zimbabwe elephant populations and to support a finding that sport hunting is enhancing the survival of the species. Without more support from the Central Government and Rural District Councils, these efforts are not likely to be fully successful or to compensate for the management deficiencies described above.

Therefore, with the exception of elephants that were harvested before April 4, 2014, the date of the announcement of the temporary suspension, no elephants harvested during 2014 may be imported into the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
Safari Club International , et al.)	Case No. 14-cv-00670-ABJ
)	
Plaintiffs,)	Proposed ORDER GRANTING
)	IN PART AND DENYING IN
v.)	PART Plaintiffs’ Motion for
)	Leave to File a Second Amended
S.M.R. Jewell , in her official capacity as)	and Supplemented Complaint &
Secretary of the United States Department of)	Federal Defendants Motions to
Interior, et al.,)	Dismiss
)	
Defendants.)	
)	
)	
)	

Having considered Plaintiffs’ Motion for Leave to File a Second Amended and Supplemented Complaint, ECF No. 34, and Defendants’ Motion to Dismiss, ECF No. 11, including supplements thereto, and the parties’ briefing on those motions, the Court **GRANTS IN PART AND DENIES IN PART** the motions.

The Court **DENIES IN PART** Plaintiffs’ Motion for Leave for reasons of futility. The portions of Counts I-IV of the Second Amended and Supplemented Complaint challenging the April 2014 Enhancement Finding for Zimbabwe are moot and subject to dismissal, so leave to amend and supplement these counts as to the April 2014 Enhancement Finding is futile. Amendment as to Counts VI-VIII of the Second Amended and Supplemented Complaint challenging the Tanzania Findings is also futile as discussed below. The Clerk of Court is directed to file Plaintiffs’ Second Amended Complaint, ECF No. 34-2, which shall be considered filed for purposes of the remainder of this case.

Federal Defendants' Motion to Dismiss is **GRANTED IN PART AND DENIED IN PART**. Federal Defendants' Motion is **DENIED AS MOOT** as to arguments that Plaintiffs' Zimbabwe-related claims should be dismissed as unripe or prudentially moot.

Federal Defendants' Motion to Dismiss is **GRANTED** as to Counts III-IV and VI-VIII of Plaintiffs' Second Amended Complaint, which are **DISMISSED WITH PREJUDICE**. Counts III-IV are **DISMISSED WITH PREJUDICE** as barred by the statute of limitations. Counts VI-VIII, are **DISMISSED WITH PREJUDICE** as barred by the statute of limitations, for lack of standing, and for failing to challenge final agency action.

Thus, the remaining claims in this litigation are Claim V and Claims I-II of the Second Amended Complaint, to the extent Claims I-II challenge the July 2014 Enhancement Finding.

Dated:

IT IS SO ORDERED:

AMY BERMAN JACKSON
United States District Judge