IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS

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 Reply in Support of their Supplemental Motion to Dismiss the Amended Complaint of Plaintiffs Safari Club International and the National Rifle Association (collectively "Plaintiffs").

INTRODUCTION

Through their supplemental motion to dismiss, Defendants have provided the Court with additional reasons to dismiss Plaintiffs' Amended Complaint. In addition to lacking standing to bring their Tanzania-related claims and some claims being untimely, Plaintiffs' Tanzania-related claims fail to challenge a final agency action. As for Plaintiffs' Zimbabwe-related claims challenging the U.S. Fish and Wildlife Service's ("Service") April 2014 Enhancement finding, in addition to some claims being untimely, all of Plaintiffs' challenges to the April 2014 finding have been mooted by the Service's issuance of a final Enhancement finding in July 2014.

Consequently, for the reasons provided in this supplemental motion to dismiss, in addition to the arguments presented in our initial motion to dismiss, Plaintiffs' Amended Complaint must be dismissed, and Plaintiffs' Motion for Leave to File a Second Amended Complaint should be denied as futile as to all claims except for parts of Claims I-II and Claim V which challenge the substance of the July 2014 Enhancement finding for Zimbabwe.[1]

ARGUMENT

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

A. Plaintiffs' Claims Challenging the Tanzania Findings Must be Dismissed Because Plaintiffs Do Not Challenge Final Agency Action and They Do Not Meaningfully Distinguish the On-Point Cases in This Circuit.

The Tanzania findings do not constitute final agency action because they do not meet the Supreme Court's two-pronged test for finality, as explained in our Supplemental Motion to Dismiss. Defs.' Supp. MTD, ECF No. 36, at 4-7. An action is "final agency action" "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.'" Defs.' Supp. MTD at 5 (citing *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014)). In short, Plaintiffs do not challenge final agency action because they have failed to even begin the permitting process (thus under the first prong of the test, the Service's permit decisionmaking process is not completed). And thus the Service has not determined whether Plaintiffs' members

[1] In our supplemental Motion to Dismiss, we explained that the Service would produce the administrative record for the July finding for Zimbabwe within six weeks after the Court addressed Plaintiffs' Motion for leave to file a second amended complaint, or by September 30, whichever is later. *See* Defs.' Supp. MTD at 3 n.3. Because many of the documents that will comprise this supplemental record must be scanned from paper copies, the Service is already compiling the documents for this record. However, the record will not be ready for filing by September 30, 2014. Instead, the Service will be prepared to file the record within six weeks after the Court's order on the motion for leave.

will receive a permit (*i.e.*, determined their legal rights) to import any sport-hunted African elephant trophies their members may garner from Tanzania. Furthermore, no legal consequences flow from the Tanzania findings themselves; legal consequences flow only from a decision to grant or deny a permit. For these reasons, Plaintiffs' Tanzania-related claims must be dismissed for failure to state a claim for relief under the Administrative Procedure Act ("APA").

In their Opposition to our Supplemental Motion to Dismiss ("Pls.' Supp. MTD Opp.," ECF No. 40), Plaintiffs argue that their Tanzania-related claims challenge final agency action because, in an apparent change from prior practice, the agency is now "passively accept[ing] additional data" regarding its Tanzania findings, Pls.' Supp. MTD Opp. at 6, and "[a]s of April 4, 2014, Federal Defendants shifted the obligation to produce this information to each individual permit applicant." *Id.* at 7; *see also id.* at 10-11 (explaining that previously the Service did not impose an individual evidentiary burden on permit applicants to overcome the Service's negative findings). Plaintiffs' characterize this allegedly new practice as a new "binding norm." *Id.* at 7-9 (arguing that this "binding norm," meets both prongs of the final agency action test).[2]

[2] The "binding norm" test that Plaintiffs cite in their arguments on final agency action is the D.C. Circuit's analysis for whether an agency's non-adjudicatory action is an unreviewable statement of general policy or a rule that should have been subject to notice and comment. *Cf.* Pls.' Supp. MTD Opp. at 5-9. This test analyzes whether the action imposed any "rights and obligations" (if it does impose them, then the action is a rule) which is similar to the second prong of the final agency action test, *i.e.*, whether the action is one by which "rights and obligations have been determined or from which legal consequences flow." *See Ctr. for Auto Safety*, 452 F.3d at 806 (noting that if the court holds that challenged policy guidelines are a rule that holding "would implicitly prove" that the guidelines constitute final agency action under the APA) (quotations omitted). Several of Plaintiffs' merits claims involve allegations that the "importation ban" should have been subject to notice and comment. Thus, Plaintiffs appear to be asking the Court to address the merits of whether the "importation ban" or the agencies' findings are rules that should have been subject to notice and comment. If Plaintiffs' Tanzania claims are not dismissed, Federal Defendants will be prepared to argue that the Tanzania findings are part of an informal adjudication, as other D.C. district courts have found, and so by their nature are backwards looking because they are an adjudication of particular facts at a particular point in time, and not a rulemaking subject to notice and comment. *See, e.g.*, *Franks v. Salazar*, 816 F.

Plaintiffs' arguments must be rejected. The Service has always placed the burden on the applicant to provide the Service information to support his or her application for a permit to import sport-hunted elephant trophies. *See* Defs.' MTD Reply, ECF No. 23, at 8 n.3; *Franks v. Salazar*, 816 F. Supp. 2d at 61 ("[T]he permit applicant bears the burden of providing sufficient information to support a non-detriment finding. [50 C.F.R.] § 23.61(c)."); 50 C.F.R. § 23.35(c)(1) (When applying for an import permit for an Appendix I species, the *applicant* "must provide sufficient information for [the Service] to find that . . . [t]he proposed import would be for purposes that are not detrimental to the survival of the species."); *see also* CITES art III, ¶ 3(a), 27 U.S.T. 1087, 1093. The regulations summarize the types of information that applicants should submit to the Service. *Id.* § 23.61(c), (e). Consequently, the agency established no new "binding norm."

Defendants have already demonstrated that, because the Service's Tanzania findings could be revised through individual permit applications, Plaintiffs do not challenge final agency action. *See* Defs.' Supp. MTD at 6 (explaining that the findings do not constitute final agency action because Plaintiffs' members have a "form of reconsideration"). Plaintiffs appear to acknowledge that the Service could revise the Tanzania findings in the context of a permit decision, yet Plaintiffs still contend that the findings are final agency action. *See* Pls.' Supp. MTD Opp. at 7. Plaintiffs' argument requires that the Court disregard the Service's statements that the findings inform, but do not control, its decision on any individual permit application. Other district courts in this Circuit have explained that, until an applicant exhausts its

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Supp. 2d 49, 59 (D.D.C. 2011) (addressing the argument that the Service should have conducted notice-and-comment on some of the agency statements made in the context of denials of permit applications for importing sport-hunted elephant trophies from Mozambique). The Court need not reach this merits question because the Tanzania findings do not constitute final agency action under the Supreme Court's test and, even if they are final agency action, they are not rules subject to notice and comment.

administrative appeals, any administrative steps taken in addressing a permit application to import sport-hunted trophies are non-final for purposes of judicial review. *See Conservation Force v. Salazar*, 919 F. Supp. 2d 85, 91 (D.D.C. 2013); *cf. Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012) ("The Government certainly could have filed a motion with the District Court to have Appellants' case dismissed on grounds of finality."). The *Conservation Force* court explained that exhaustion is particularly important where allowing permit applicants to present the agency with their arguments in the first instance could allow the agency to change its mind:

> Moreover the Court finds that requiring exhaustion is particularly important in this case. Here, the Service found that the information provided by Plaintiffs was insufficient to allow the Service to make an enhancement finding (*i.e.* a finding that sport-hunting of markhors would "enhance" the survival of the species—a prerequisite for allowing the import of the trophies into the United States). *See e.g.* SAC at ¶¶ 65(b), 67(a). If Plaintiffs had requested reconsideration and/or appealed the inferior level decision and supplemented their applications with further evidence, the agency may have altered the decision in some manner. Or it may not have. Unfortunately, because Plaintiffs failed to exhaust the administrative remedies available to them, it is impossible to know what the agency would have done.

919 F. Supp. 2d at 92.

Plaintiffs attempt to distinguish *Conservation Force* and *Marcum v. Salazar* by arguing that it is their prerogative to avoid the permitting process, explaining that "the greatest contrast between the instant matter and *Marcum* is the fact that the plaintiffs in *Marcum* had initiated the administrative process by applying for permits." Pls.' Supp. MTD Opp. at 15. Plaintiffs cannot avoid the process, however, and thereby seek impermissible early judicial review. *See, e.g.*, *Conservation Force v. Salazar*, 919 F. Supp. 2d at 91-92 ("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."). Based on the well-reasoned decisions of other courts in this district, Plaintiffs' Tanzania claims do not constitute final agency action and therefore must be dismissed for failure to state a claim.

Plaintiffs also suggest that a permitting process cannot render an otherwise final agency action non-final, citing *National Mining Association v. Jackson*. Pls.' Supp. MTD Opp. at 9-10. That case is not only factually and legally distinguishable but the district court's reasoning also was not upheld on appeal. Plaintiffs cite the district court's opinion denying a motion to dismiss and a preliminary injunction in support of their arguments for the "legal consequences" prong of the final agency action test. Pls.' Supp. MTD Opp. at 9-10. As Plaintiffs note, however, the D.C. Circuit in *National Mining Association* ultimately held that a final guidance document at issue was *not* final agency action, and it applied a different analysis than did the district court in its summary judgment opinion addressing the same final guidance.[3] *See National Mining Ass'n v. McCarthy*, 880 F. Supp. 2d 119, 127 (D.D.C. 2012), *rev'd by National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014). For example, the District Court described the "legal consequences" prong of the final agency action test as whether the document at issue, even "if facially nonbinding, [ ] has been applied by the regional field offices in their review of draft permits in a manner that has had the *practical* effect of changing the obligations of the state permitting authorities." *National Mining Ass'n*, 880 F. Supp. 2d at 132 (emphasis added).[4] The D.C. Circuit instead held (apparently notwithstanding this "practical effect") that, even though

[3] The district court's preliminary injunction opinion addressed the same coordination memo as did the D.C. Circuit. Plaintiffs note that the summary judgment opinion and the D.C. Circuit addressed a different version of the guidance document than did the preliminary injunction opinion. But this distinction is irrelevant. The district court applied the same test to all documents, and its reasoning was not upheld on appeal.

[4] The D.C. Circuit has clarified that examining the "practical effect" of an agency's acts to determine if they constitute final agency action is relevant insofar as the effect constitutes "a certain change in the legal obligations of a party." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("Nevertheless, if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.") (citing *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996)).

the guidance "may signal likely future permit denials …," 758 F.3d at 252, or even though "the writing [was] on the wall about what [would] be needed to obtain a permit", *id.* at 253, it was still not final agency action because it "merely explain[ed] how the agency will enforce a statute or regulation." *Id*. at 252. In arriving at this conclusion, the D.C. Circuit found relevant that "permit applicants ultimately may be able to obtain permits even if they do not meet the recommendations in the Final Guidance." *Id.* at 253. Such is the case here—because the applicant has always borne the burden to support its permit application, the findings merely demonstrate how the Service is likely to apply its statutes and regulations to any future applications for import permits for sport-hunted elephant trophies, but are not binding on the agency or the applicant.

Moreover, the Service's actions in this case fall even further from meeting the requirements for finality than the agency guidance considered by the D.C. Circuit in *National Mining Association*. The guidance document at issue in *National Mining Association* applied generally across multiple permitting scenarios. *See* 758 F.3d at 248. This case, on the other hand, involves findings that the Service makes *within* the context of a process for obtaining permits that apply to a particular time in a particular country (*i.e.*, an adjudication). *See Franks v. Salazar*, 816 F. Supp. 2d at 59. Plaintiffs have not shown that any of their members has availed themselves of that process. The Tanzania findings are simply not the last word on whether Plaintiffs may ultimately obtain import permits for sport-hunted elephant trophies from Tanzania. Plaintiffs' attempts to argue otherwise are unavailing because they cannot refute that simple fact.

Upon scrutiny, the cases Plaintiffs cite further reveal why the Tanzania findings are *not* final agency action. Plaintiffs' cases involve ultimate decision-making actions, such as a final

decision of the Federal Labor Relations Authority adjudicating a purported violation of statutory bargaining rights, a record of decision obligating an agency to convey a property, a rulemaking requiring regulated entities to make new labels on their products, or a directive restricting the agency from considering particular sources of information in rulemaking. *See National Treasury Emps. Union v. Federal Labor Relations Auth.*, 745 F.3d 1219, 1222-23 (D.C. Cir. 2014) (holding that the Authority's decision on the merits of a labor violation was final even though the attorneys' fee provision of the decision had been remanded for further consideration); *Role Models Am., Inc. v. White*, 317 F.3d 327, 332 (D.C. Cir. 2003) (record of decision obligating agency to convey a property was final agency action; Court did not need to wait to review the action until the property was actually conveyed); *Abbott Labs. v. Gardner*, 387 U.S. 136, 137-38, 151-52 (1967) (a notice and comment regulation requiring drug makers to print the non-generic name of a drug on all drug labels was final agency action). *See also CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003) (holding that a directive that provides that "the Agency will not consider or rely on any [third-party] human studies in its regulatory decision making[,]" is "finally determinative of the issues or rights to which it is addressed") (citation omitted); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000) (holding that a document requiring states to add additional monitoring requirements to emission standards for Title V Clean Air Act permits was final agency action). Unlike where an agency is making its ultimate decision, the challenged findings are more closely analogized to the agency action in *Conservation Force* and *Marcum v. Salazar* (where the Court found the agency's interim actions unripe for judicial review rather than non-final agency action) and other cases where the plaintiffs have an opportunity to present information and arguments to the agency and the agency makes decisions on a case-by-case basis. *See DRG Funding Corp.*, 76 F.3d at 1214 ("courts have

defined a nonfinal agency order as one, for instance, that 'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'") (citation omitted). Recourse to the permit process distinguishes this case from others where the challenged agency action was the end of the administrative process. *Cf. Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012) (holding that compliance order, that was not subject to further agency review, determining that landowners must restore their property was final agency action). Here, the permit process has not been initiated, much less concluded, and thus any guidance or findings to which Plaintiffs may point are necessarily interim in nature and non-final.

B. The Court Should Not Waive the Administrative Exhaustion Requirements Because Exhaustion is Not Futile.

Next, Plaintiffs contend that participation "in and/or exhaustion of" the Service's administrative process for granting or denying import permits for sport-hunted African elephant trophies would be futile. Pls.' Supp. MTD Opp. at 12-16. Another district court has held that the exhaustion requirements at issue here are mandatory and cannot be waived even if exceptional circumstances apply, *i.e.*, even if futile. That is, exhaustion is mandatory because the only action deemed "final" by the Service's regulations is a decision of a superior administrative authority (here, the Director). *See Conservation Force*, 919 F. Supp. 2d at 91. The *Conservation Force* court held that, even if the exhaustion requirements were subject to waiver, the court would decline to exercise its discretion to waive exhaustion. *Id.*

Even assuming that the exhaustion requirements are waivable, this Court must find that it is presented with an "exceptional case or particular circumstances … where injustice might otherwise result." *See* Pls.' Supp. MTD Opp. at 12-13 (collecting cases). As the D.C. Circuit has explained, the futility exception to administrative exhaustion applies only where resort to the

agency would be "clearly useless" because of "*certainty* of an adverse decision." *See Tesoro Ref. & Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (citations omitted). "The mere probability of administrative denial of the relief requested does not excuse failure to pursue administrative remedies … ; rather plaintiffs must show that it is certain that their claim will be denied." *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Board of Trustees of Univ. of D.C.*, 56 F.3d 1469, 1475 (D.C. Cir. 1995) (internal quotation marks and citations omitted). Plaintiffs therefore must make a "substantial showing" of futility by citing to "evidence" that the agency would have summarily rejected any permit application. *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013); *see also Madsen v. Boise State Univ.*, 976 F.2d 1219, 1222 (9th Cir. 1992).

Plaintiffs have not presented any compelling evidence that this is an "exceptional" case that meets this high standard for waiver of the administrative exhaustion requirements. *Cf.* Pls.' Supp. MTD Opp. at 12-16. In support of their futility argument, Plaintiffs cite a letter from the Assistant Director for the International Affairs Program of the Service. Pls.' Supp. MTD Opp. at 13 (citing a document included in ECF No. 28). This letter to Tanzania explained that, to make the requisite findings to allow import permits for sport-hunted elephant trophies from Tanzania, the poaching rate should be reduced. *Id*. Plaintiffs then misconstrue the letter to be an "ultimatum" from all Federal Defendants that Tanzania "modify its management approach in order to reduce the number of elephants poached," which allegedly demonstrates that all permit applications will be denied. Pls.' Supp. MTD Opp. at 13-14. A review of the letter shows that there is no such ultimatum. The letter merely points to sources of information or data that would indicate poaching of African elephants has been reduced, suggesting various ways that Tanzania or a permit applicant could demonstrate that the poaching rate was lower than that found by the

Service when it made its findings for Tanzania. The types of information the Service pointed to in its letter were clearly results-based data that could be used to show an improved situation for African elephants in Tanzania, in other words, illustrative examples that could assist the applicant, not prescriptive management requirements. More importantly, however, this letter contains statements of an Assistant Director at the Service, but is not an official statement of a final Service action and does not dictate the outcome of the Service's permitting process. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("An agency action is not final if it is only the ruling of a subordinate official.") (internal quotation, marks, and citation omitted); *DTCC Data Repository (U.S.) LLC v. U.S. Commodity Futures Trading Comm'n*, No. CV 13-0624 (ABJ), 2014 WL 905810, at *4 (D.D.C. Mar. 10, 2014).

Plaintiffs have failed to demonstrate that administrative exhaustion is futile and, therefore, the requirement should not be waived. Plaintiffs' members claim to have better information than the Service regarding elephant conservation in Tanzania, and Plaintiffs have not shown that the Service would disregard that information if the hunters submitted it. Their recourse to the courts before applying for permits from the Service consumes unnecessary judicial resources. The Tanzania findings themselves are not the final word of the Service, and in fact describe how they could be modified upon the receipt of new or different information. *See, e.g.*, Pl. Mot. for Prelim. Inj. (ECF No. 4), Ex. I (Tanzania finding) ("If permit applications are received that include new or additional information showing that elephant management practices by the Government of Tanzania have led to the sustainability of its elephant population on a nation-wide basis, these applications should be referred to the Division of Scientific Authority for consideration on a case-by-case basis"); *cf. Nat'l Ass'n of Home Builders*, 415 F.3d at 14 ("An agency's past characterization of its own action, while not decisive, is entitled to respect in

a finality analysis."). The Service's statements also refute any finality argument: "Despite the suspension and permit denials, individual permit applications under both the Convention on International Trade in Endangered Species ("CITES") and the Endangered Species Act ("ESA") to import sport-hunted elephant trophies from Tanzania will be considered on a case-by-case basis for 2014 and permits will be granted if the applicants can provide evidence that the findings under both laws can be made." Van Norman Decl. at ¶ 21, ECF No. 11-1; *see also* Defs.' MTD, ECF No. 11 at 12 n.3.

C. The Tanzania Findings Do Not Constitute "Final Agency Action" Simply Because Some of Plaintiffs' Members Are Not Directly Subject to the Service's Permitting Process.

Finally, Plaintiffs claim that, because some of their members are professional hunting operators who do not "want" or "require" permits to import sport-hunted elephant trophies from Tanzania, the "importation ban" must have a "binding impact" on those operators now. Pls.' Supp. MTD Opp. at 11. This attempt to circumvent the exhaustion requirement by proffering a member who is outside of the administrative scheme fails. *Cf. Sackett v. EPA*, 132 S. Ct. at 1374 (explaining that "[w]here a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong"); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348 (1984) ("Allowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme. It would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies."). Moreover, the hunting operators' claims are derivative of the hunters who are allegedly unable to import sport-hunted elephant trophies because of the Service's findings. Of course, the Service has not prevented anyone from hunting

African elephants. Instead, the operators are affected only by the actions of their hunter-clients, some of whom may elect to cancel elephant hunts despite having never applied for import permits. Importantly none of the hunting operators has identified any client who canceled a trip because he applied and was denied an import permit. Consequently, any harm to the operators flows not from a final agency action of the Service, but from the independent choices of the hunters, who have not exhausted their claims. No one in this lawsuit challenges final agency action.

Moreover, the Service's findings do not magically become final agency action simply because someone else who is unable to apply for a permit challenges those findings. There are limited circumstances where someone may sidestep an administrative process for review because otherwise they would be unable to seek judicial review. But this is not that case. Plaintiffs may have their day in court. Plaintiffs' members need to apply for permits to import sport-hunted African elephant trophies from Tanzania. If those applications are denied by the Director of the Service, then any parties adversely affected by that final agency action may attempt to challenge those denials. Until that day, however, Plaintiffs' Tanzania-related claims must be dismissed.

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

A. Plaintiffs' Zimbabwe Claims Are Moot.

Defendants demonstrated in their opening brief that the Service's issuance of a final enhancement finding for Zimbabwe in July 2014 mooted Plaintiffs' claims challenging the Service's April 2014 interim enhancement finding for Zimbabwe. The July finding supercedes and replaces the April finding. Consequently, the April finding is no longer operative, to the extent that Plaintiffs may be entitled to relief, and there is no additional effective relief related to

the April finding that the Court could grant Plaintiffs if they successfully challenged the July finding.

Plaintiffs respond with two arguments. First, Plaintiffs contend that their challenge to the April finding is not moot because the Service voluntarily ceased its allegedly unlawful conduct. Pls.' Supp. MTD Opp. at 17. Plaintiffs are confusing the question of whether their claims are moot with the secondary question of whether the "voluntary cessation" exception to mootness applies. "Voluntary cessation" is one of two principal exceptions to mootness, along with the "capable of repetition yet evading review" exception. *American Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011). Whether an exception to mootness applies does not determine whether Plaintiffs' claims are moot in the first instance. Consequently, we will address Plaintiffs' first argument in the next section regarding the exceptions to mootness.

Second, Plaintiffs argue that their challenge to the April finding is still viable because the Court must accept as true Plaintiffs' legal theory that the Service lacks the authority to make the July finding retroactive back to April 4, 2014. Pls.' Supp. MTD Opp. at 18-19, 21. If the Court must accept this theory as true, Plaintiffs argue, their challenge to the April finding is not moot because otherwise they will not be able to obtain relief with respect to sport-hunted elephant trophies harvested between April 4 and July 31, 2014. *Id.* at 23.

There are at least two flaws in this argument. To begin with, Plaintiffs' argument that the Court must accept their legal theories as true when determining whether their claims are moot lacks any support. Plaintiffs attempt to analogize to the standing context as support for their argument. *Id.* at 18-19. In that context, courts assume that a plaintiff will succeed on the merits for the purposes of determining whether the plaintiff's alleged injury is redressible. However,

Plaintiffs cite to no authority for the proposition that courts follow the same rule in the mootness context.

Moreover, Plaintiffs have not actually alleged that the Service lacks the authority to make the July finding retroactive, so the Court does not have to accept this legal theory as true even if Plaintiffs were correct that this is the law in the mootness context. Plaintiffs' Amended Complaint contains no allegation that the Service lacks the authority to make its enhancement findings retroactive. Plaintiffs do contend that in Count I of the Proposed Second Amended Complaint they "assert and imply that Federal Defendants lack authority to make a so-called 'temporary' decision that can be replaced retroactively by a later determination." Pls.' Supp. MTD Opp. at 21 (citing Proposed 2d Am. Compl. ¶¶ 96, 99). However, contrary to Plaintiffs' attempted characterization, these paragraphs do not allege that the Service lacks the authority to make its enhancement findings retroactive. Instead, in Paragraph 96, Plaintiffs allege that the Service lacked the authority to make a "temporary" or "interim" decision (in April) and deprive Plaintiffs of their ability to import elephant trophies from Zimbabwe because the Service had not obtained the "new" information necessary to make an enhancement finding as required by the special 4(d) rule. In Paragraph 99, Plaintiffs allege that the Court should enjoin the April finding and that this will redress Plaintiffs' injuries.

Plaintiffs also separately point to their allegations that the Service's April finding is a "rule" under the APA that was purportedly promulgated without notice and an opportunity to comment. Pls.' Supp. MTD Opp. at 20 n.10 (citing Amended Complaint, ECF No. 13, ¶¶ 94, 99 and Proposed Second Amended Complaint, ECF No. 34-2, ¶¶ 108, 114). An allegation that the April finding is a "rule" under the APA is not the same as an allegation that the Service lacked the authority to make the July finding retroactive. Plaintiffs have not alleged that the Service

lacks the authority to make the July finding retroactive and Plaintiffs cannot amend their pleading to do so through an argument made in a legal brief. *Singh v. District of Columbia*, --- F.Supp.2d ----, No. 10-cv-1615 RC, 2014 WL 3057564, *10 (D.D.C. July 8, 2014) ("It is axiomatic that a party may not amend his complaint through an opposition brief.") (citation and quotation marks omitted).

Even if Plaintiffs' complaints could be construed to allege that the July finding is a "rule" under the APA and so the Service lacks the authority to make the July finding retroactive, this does not mean that the Court must make a premature ruling on the merits of Plaintiffs' claim in order to find Plaintiffs' challenge to the April finding moot.[5] *See* Pls.' Supp. MTD Opp. at 21. The Court need only determine whether adjudicating Plaintiffs' challenge to the April finding continues to be necessary to provide Plaintiffs with effective relief. *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) ("Even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' 'rights nor have a more-than-speculative chance of affecting them in the future.'") (citations omitted); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726-27 (2013) ("A case becomes moot - and therefore no longer a 'Case' or

[5] On the merits, Defendants intend to argue that the Service's enhancement findings under the special 4(d) rule for African elephants are "adjudications" and not "rules" under the APA. *See supra* n.2. Nevertheless, Defendants agree that the Court should not prematurely resolve this question. Defendants note, however, that Plaintiffs have mischaracterized the statement in Defendants' Answering Brief to the D.C. Circuit. Pls.' Supp. MTD Opp. at 22. Plaintiffs argue that Defendants "admitted that they changed their April 4 ban to prospective application in order to 'avoid retroactivity concerns.'" *Id.* (citing Case No. 14-5152 (D.C. Cir.), Federal Appellees' Answering Brief (ECF No. 1508081) at 10 n.8). Contrary to Plaintiffs' mischaracterization, the Service did not alter the effective date of its finding because it was concerned about its authority to make its enhancement findings retroactive. Instead, the Service merely exercised its discretion not to make the April 4 enhancement finding apply from January 1, 2014 and thereby avoid the issue. That same concern was not present for the July finding because it was replacing the April finding, which already had the effect of suspending the importation of sport-hunted elephant trophies from Zimbabwe.

'Controversy' for purposes of Article III - when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (citation omitted).

Here, retaining Plaintiffs' challenge to the April finding is not necessary to provide Plaintiffs with effective relief. Plaintiffs ask the Court to enjoin Defendants "from continuing and/or enforcing the ban on importation of legally sport-hunted elephants from Zimbabwe in 2014." Proposed 2d Am. Compl., Prayer for Relief ¶ 7. To the extent Plaintiffs may be entitled to injunctive relief, the Court can provide Plaintiffs with that relief by adjudicating the merits of the July finding. If, contrary to our position, the Court were to conclude that the July finding is a "rule" under the APA and that the Service lacked the authority to make the July finding retroactive, it could then grant Plaintiffs any appropriate injunctive relief for the period of time between April 4 and July 31 through its equitable powers. *See Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("[T]here is no doubt that § 702 [of the APA] waives the Government's immunity from actions seeking relief other than money damages.") (internal quotation marks and citations omitted). The Service, of course, does not concede that any injunctive relief would be appropriate in this case. Rather, our point is that, even if such injunctive relief were appropriate, it would be available if Plaintiffs were to succeed on their claims concerning the July finding. Consequently, this Court need not adjudicate the merits of Plaintiffs' claims concerning the superceded April finding.

Plaintiffs also ask the Court for declaratory relief with respect to the April finding. Proposed 2d Am. Compl., Prayer for Relief ¶¶ 1-3, 5. However, it is not necessary for the Court to adjudicate the merits of the April finding in order to provide Plaintiffs with effective declaratory relief because there is no difference between Plaintiffs' challenge to the Service's April and July findings, so Plaintiffs can obtain all effective relief to which they might be

entitled by challenging the July finding. Each of the first four Counts in Plaintiffs' Proposed Amended Complaint alleges that both the April and July findings violate the ESA and APA for the same reason. For example, in Count I of the Proposed Second Amended Complaint, Plaintiffs allege that both the April and July findings violate the ESA and APA because the Service based the findings on "limited" data and "anecdotal evidence" rather than "new" information. Similarly, Count II alleges that both the April and July findings violate the ESA and APA because the Service failed to fully analyze the role that the presence of sport hunters plays in reducing and discouraging poaching and the economic role played by U.S. hunters in providing Zimbabwe with the financial resources to combat poaching.

Furthermore, Plaintiffs are not entitled to declaratory relief for the April finding because there is no live, ongoing controversy. The D.C. Circuit has made clear that the Article III case or controversy requirement applies to declaratory judgments, and the fact that a plaintiff "also seek[s] declaratory relief does not affect [the Court's] mootness determination." *Conyers v. Reagan*, 765 F.2d 1124, 1127 (D.C. Cir. 1985). *See also Rubins Contractors, Inc. v. Lumbermens Mut. Ins. Co.*, 821 F.2d 671, 673 n.2 (D.C. Cir. 1987) ("Congress has empowered federal courts to award declaratory relief, with narrow exceptions, in any Article III 'case of actual controversy within its jurisdiction.'") (quoting 28 U.S.C. § 2201). To present a live controversy justiciable under Article III of the Constitution, a dispute must be "'definite and concrete, touching the legal relations of parties having adverse legal interests'; and ... 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)). "Basically, the question in each case is whether the facts alleged, under all

the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc.*, 549 U.S. at 127 (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). *See also Conyers*, 765 F.2d at 1128 (holding that "the issues raised by appellants are no longer part of a controversy of 'sufficient immediacy and reality' to warrant declaratory relief") (citation omitted); *Vanover v. Hantman*, 77 F. Supp. 2d 91, 100 (D.D.C. 1999), *aff'd* 38 Fed. App'x. 4 (D.C. Cir. 2002) ("[A] declaratory judgment is appropriate to declare the rights between the parties only where there is 'a very significant possibility of future harm; it is insufficient ... to demonstrate only a past injury.'") (citation omitted).

Plaintiffs argue that their requests for declaratory relief remain live because the Service may "use the exact same approach [of changing its long-standing enhancement finding without warning] to terminate elephant importation from Namibia and South Africa." Pls.' Supp. MTD Opp. at 26. This argument fails because Plaintiffs have not identified any concrete statement from the Service announcing a policy to withhold public notice prior to issuing enhancement findings under the special 4(d) rule. Therefore, this is not a case where the "plaintiff's allegations go not only to a specific agency action, but to an ongoing policy as well." *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1430 (D.C. Cir. 1994) (noting that the plaintiff must also have "standing to challenge the future implementation of that policy," and that the claim must be ripe for review). In any event, to the extent that Plaintiffs may be entitled to relief, Plaintiffs can obtain appropriate relief by challenging the July finding and pursuing their notice and comment claim with respect to that finding. *See* Proposed 2d Am. Compl. ¶ 109.

In short, Plaintiffs' challenges to the Service's April enhancement finding for Zimbabwe are moot because the April finding has been replaced by the July finding and Plaintiffs can

obtain any relief to which they are entitled by challenging the July finding. Therefore, the Court should dismiss Counts I through III in the Amended Complaint and deny Plaintiffs leave to file a Second Amended Complaint to the extent that it includes challenges to the April finding.

B. None of the Mootness Exceptions Applies.

Once Defendants establish that Plaintiffs' claims challenging the April enhancement finding for Zimbabwe are moot, the burden shifts to Plaintiffs to show that an exception applies. *Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 576 (D.C. Cir. 2010). Here, Plaintiffs assert that both the "voluntary cessation" and "capable of repetition yet evading review" exceptions apply. However, Plaintiffs have failed to meet their burden to establish that either exception applies.

The voluntary cessation exception insures that a defendant is not "free to return to his old ways" after it takes unilateral action that moots a case. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The exception does not apply, however, where the defendants' conduct mooting the case is not "voluntary" within the meaning of the mootness doctrine, i.e., the defendant ceased its conduct specifically to avoid litigation. *American Bar Ass'n*, 636 F.3d at 648 (where agency did not alter its conduct in order to avoid litigation, but the agency's policy statement was nullified by intervening legislation, the voluntary cessation exception did not apply). Here, as in *American Bar Association*, the Service did not alter its conduct in order to avoid litigation. The Service indicated from the time it issued its April enhancement finding that it intended to reconsider the finding. In fact, the day the Service issued its April finding it sent a letter to Zimbabwe requesting responses to certain questions and asking for current information on the country's elephants. Ex. 1 (AR001009). In that letter, the Service explained that the suspension of imports of African elephant sport-hunted trophies taken in Zimbabwe during 2014 was temporary and that it would reconsider its decision and potentially lift the suspension after

receiving information from Zimbabwe. *Id.* On April 18, 2014, the Service similarly stated in an email to Plaintiff Safari Club International that it intended to conduct a review of the information it was receiving from the Government of Zimbabwe, professional hunters, and others in Zimbabwe as quickly as possible and might lift the suspension if the information addressed the Service's concerns. Ex. 2 (AR001070). Because the Service did not alter its conduct to avoid litigation when it issued the July finding mooting out Plaintiffs' challenge to the April finding, its conduct was not voluntary in the sense intended in the mootness context.

Even if the Service's conduct was "voluntary" within the context of the mootness doctrine, events have completely and irrevocably eradicated the effects of the alleged violation and there is no reasonable expectation that the alleged violations will recur. *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008). There is no reasonable expectation that the Service will again issue an interim suspension on the importation of sport-hunted elephant trophies from Zimbabwe as it did in April 2014. Through its communications with the Zimbabwean government and others, the Service has made clear the type of information it needs to be able to find that the importation of sport-hunted elephant trophies from Zimbabwe to the United States enhances the survival of the species. By issuing its reconsidered, final finding in July based in part on the additional information provided after the April finding was completed, events have completely and irrevocably eradicated any effects of the alleged violations. In addition, unlike in the case cited by Plaintiffs, Pls.' Supp. MTD Opp. at 17 (citing *Kifafi v. Hilton Hotels Ret.* Plan, 701 F.3d 718, 725 (D.C. Cir. 2012)), there is a government actor, so there should be less concern about a recurrence of any alleged improper behavior on the part of the Service. *Citizens for Responsibility & Ethics in Wash. v. SEC*, 858 F. Supp. 2d 51, 61 (D.D.C. 2012) (many Circuits consistently recognize that "where the defendant is a government actor—and not a private

litigant—there is less concern about the recurrence of objectionable behavior") (citing cases from the Fifth, Seventh, Tenth, and Eleventh Circuits). Consequently, the April finding does not fall within the "voluntary cessation" exception to mootness.

The "capable of repetition yet evading review" exception also does not apply. While the April finding may have been of a relatively short duration given that it was an interim finding, Plaintiffs' challenges to the April finding will not evade review because they are duplicative of their challenges to the July finding. Plaintiffs attempt to argue that their challenges to the April finding will evade review if the Court dismisses them as moot, but none of the examples they provide demonstrates that Plaintiffs "face a real probability that members will be subjected to the same type of arbitrary and capricious decision-making that resulted in the April 4 importation ban." Pls.' Supp. MTD Opp. at 26.

Plaintiffs first contend that the question of whether the Service "will continue to rely on a lack of information, rather than new information" will evade review. However, Plaintiffs have made this same contention with respect to the July finding, which Defendants have not opposed amendment of Plaintiffs' complaint to challenge. In Paragraph 96 of the Proposed Second Amended Complaint, Plaintiffs allege that:

> When finalizing the decision to ban importation of Zimbabwe's elephants on July 22, 2014, Federal Defendants did not correct the errors they had made when they illegally banned importation on a temporary basis. Federal Defendants continued to rely on a lack of information about the status of Zimbabwe's elephants, rather than on new information.

Proposed 2d Am. Compl. ¶ 96.

Plaintiffs next argue that the Service failed to meet its commitment to publish any change in position from its enhancement finding in 1997 in the Federal Register. Pls.' Supp. MTD Opp. at 26. Plaintiffs' Amended Complaint did contain a claim that the Service's April finding failed

to meet such a commitment. Am. Compl. at ¶¶ 92, 93. However, that claim was mooted out when the Service published notice of the April finding in the Federal Register on May 22, 2014. Defs.' MTD Reply at 22. Plaintiffs' Proposed Second Amended Complaint does not make the same allegation. Instead, Plaintiffs allege that despite notifying the public about the April and July findings in the Federal Register, the Service has "never provided the public with notice of the standards that they have established for an enhancement finding for Zimbabwe's elephants or a formal opportunity to comment in order to demonstrate Zimbabwe's compliance with those standards." Proposed 2d Am. Compl. ¶ 109.

Finally, Plaintiffs similarly argue that the Service acted without warning on April 4, 2014, failing to provide notice either to Plaintiffs or to Zimbabwe of an intention to change the Service's 1997 enhancement finding for Zimbabwe. Pls.' Supp. MTD Opp. at 26. The Service's 1997 enhancement finding does not contain a commitment to provide notice prior to making new enhancement findings. With respect to notice, the 1997 finding states only that it will remain in effect until the Service has published a notice of any change in the Federal Register. 62 Fed. Reg. 44,627, 44,633 (Aug. 22, 1997). As discussed above, the Service has published a notice regarding the April finding in the Federal Register. To the extent that this argument is related to Plaintiffs' claim that the Service failed to provide a notice and comment opportunity prior to issuing the April finding, Plaintiffs have an identical claim against the July finding and so their claim will not evade review.

CONCLUSION

For all the foregoing reasons, as well as the reasons provided in Defendants' opening brief and Defendants' Motion to Dismiss, Plaintiffs' Amended Complaint should be dismissed with prejudice.

Dated: September 19, 2014

Respectfully submitted,

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EXHIBIT 1

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

Mr. Edson Chidziya, Director - General
National Parks and Wildlife Management Authority
P.O. Box CY 140
Causeway
Harare, Zimbabwe

APR - 4 2014

Dear Mr. Chidziya,

I am writing to inform you that on April 4, 2014, the U.S. Fish and Wildlife Service (Service) announced the suspension of all imports of African elephant sport-hunted trophies taken in Zimbabwe during 2014 hunting season. This decision is based on the Service being unable to determine if the import of such trophies would meet criteria established under the U.S. Endangered Species Act (ESA) and the African Elephant Conservation Act (AECA), both being stricter domestic measures that have been enacted by the United States, to allow the import of sport-hunted African elephants. This temporary suspension applies only to elephants hunted in 2014. Trophies taken in previous years can still be imported, provided that they are accompanied by a valid CITES document and presented to the Service at the time of import.

Under the ESA, the Service, through the U.S. Management Authority, must determine that the import of sport-hunted elephant trophies will enhance the propagation or survival of the species. In most cases, we make this finding by evaluating the population of the species and population trend data, the elephant management program plans established to address human-elephant conflicts, the established hunting program, and other aspects of conservation and management. While it is not required by our regulations to issue an import permit for elephant trophies coming from Zimbabwe, the ESA does require that we make a positive finding that the importation of a sport-hunted trophy would enhance the survival of the species. If we cannot make such a finding, importation of sport-hunted elephant trophies would not meet the regulatory requirements under the ESA and, therefore, could not occur.

In evaluating the information available to the Service in regards to Zimbabwe, it was determined that we have very little current information on the status of African elephants within Zimbabwe or the management of elephants. Without current information, we do not have the ability to state where imports would meet the ESA criteria. Due to the lack of information, we determined that imports should be suspended at this time. The suspension could be lifted after the Service has received sufficient information to be able to demonstrate that elephant hunting in Zimbabwe meets the criteria under the ESA. It is my hope that we can quickly resolve this issue and once again allow U.S. hunters to import their trophies legally taken in Zimbabwe.

Given the limited information currently available to the Service, I have enclosed a number of questions that would assist us in making a positive finding under the ESA and lift the suspension. I hope that your staff could take an opportunity to review these questions and provide a response. Without this information, it would be very difficult for the Service to revise its current decision, thus allowing for the importation of sport-hunted trophies taken in 2014 and beyond.

I recognize the impact that this suspension may have on your management program and I am anxious to resolve this issue quickly. However, I am obligated by U.S. regulations and laws to make the required findings under the ESA before imports of 2014 elephant trophies can be authorized. I truly appreciate any assistance you can provide to us regarding the attached questions. It is my hope that by quickly resolving this issue, U.S. hunters can again play a strong role in the conservation of the African elephant in Zimbabwe. While the United States has specific stricter domestic measures that require additional findings beyond those required for the issuance of an export permit by your country, there is every reason to believe that through scientifically based management programs and close monitoring and control of hunting within your country, that U.S. hunters can both enjoy their hunting experiences within your country and provide a significant benefit to African elephant conservation. If you have any questions, please feel free to contact me by mail, email, or telephone (Tim_VanNorman@fws.gov; (703) 358-2350).

Sincerely,

Timothy J. Van Norman, Chief
Branch of Permits
Division of Management Authority
U.S. Fish and Wildlife Service

Enclosed

U.S. Fish and Wildlife Service
Division of Management Authority

Questions to Address Endangered Species Act Import Criteria

I. Management Plan (a comprehensive plan addressing specific management goals or actions)

1. Does Zimbabwe have a current national management plan for African elephants? If required under your national legislation, has the plan been approved by the appropriate government authorities? It would be helpful if we could receive a copy of the ratified plan. If there is no national plan, have regional plans been developed and adopted? If so, how do these regional plans interact to provide a national management strategy? Copies of such regional plans would also be helpful.

2. Is your agency the only agency that is responsible for administering the management plan(s)? If not, which other agency or organization within your national or regional governments is responsible?

3. Is the national plan(s) or are regional plans reviewed and updated on a regular basis? If so, what process do you use to make any revisions?

4. A management plan could be very specific concerning the areas of management it addresses (i.e., hunting activities, human-elephant interactions). What are the objectives of this plan(s) and is it designed to address specific management issues with measurable goals and outcomes?

5. Does the plan(s) cover specific regions of your country that are subject to hunting or is it inclusive of the whole country?

6. Have you developed a mechanism (i.e., adaptive management approach) for implementing the plan(s) and determining its effectiveness? Could you describe how implementation of the plan is progressing and if there are management or logistical problems that still need to be addressed?

7. Are there any other management plans or conservation plans that contribute to or interact with the elephant management plan(s) (i.e., regional plans, hunting concession plans)?

II. Population Status

1. What is the status of elephant populations within Zimbabwe (e.g., population numbers; population trends; sex and age class distribution)?

2. Do you have a standardized process to conduct population censuses? If so, how often? What areas are surveyed? Do they include all hunting areas? What is the censusing methodology?

3. What is the current population distribution within Zimbabwe (i.e., widespread, environmentally confined to specific areas, confined to national or regional protected areas)?

4. It would be beneficial if you could provide population data, including population trend information and demographic data (i.e., age class distribution, sex ratios).

5. African elephant populations move across international borders. Such movement can have a significant impact on population numbers throughout the year. How are transborder populations counted?

6. Even with protection activities and legal intervention, poaching could still occur. Do you have any estimates on the number of specimens lost to illegal killing annually?

7. What impact are human-elephant conflicts having on local or national populations? Is there a standardized national policy to address such conflicts and problem elephant control? If so, does this policy include culling of surplus animals and removal of nuisance animals? Is there domestic harvesting of elephants for local consumption or use?

III. Conservation and Management

1. How much national/regional/tribal land(s) have been set aside for wildlife conservation/protection purposes? Are their national/regional/tribal laws or regulations that specifically protect these lands?

2. How much habitat is available to elephants and does it receive effective protection?

3. Please describe potential threats to the species, such as poaching and human-animal conflicts, and how these threats are being addressed.

4. Is your agency currently conducting any research efforts addressing conservation issues involving elephants? What about other agencies or departments within your national or regional governments and what are their roles? Are you aware of any NGO projects currently underway in Zimbabwe that involve elephant conservation or management? If so, could you describe such projects or provide contact information to the organization carrying out the work?

IV. Hunting Policies/Regulations

1. Since Zimbabwe has an active sport-hunting program, please describe how this program functions.

2. Specifically, do you have an established national/regional hunting quota? How is this quota determined?

3. There have been antidotal accounts, coming out of several southern African countries, of hunters exchanging smaller, less desirable tusks from their legally hunted trophies for larger tusks from government ivory stores. What policies/regulations do you have that support or prohibit such activities?

4. What format do you use to manage sport hunting in Zimbabwe (i.e., establishment of national hunting districts under government control, awarding hunting concessions to privately owned operations)?

5. How are hunting areas/concessions allocated to safari outfitters, if at all? If concessions are awarded, what requirements have been established for the concession holders (i.e., mandatory census activities, assistance to local villages, etc.)? Are concessions awarded on an annual basis or for longer periods? If concession areas are centrally controlled by your government (e.g., several outfitters hunt in the same areas and no one outfitter is responsible for overall management), what mechanism is used to monitor and control outfitters activities?

6. How much do hunting licenses cost foreign hunters? How does your government utilize this revenue? Does a percentage go directly back to elephant conservation efforts or into more general wildlife management efforts? If so, what percentage is allocated to each? Is any of this revenue provided to local communities? If so, what percentage?

7. How does your government utilize revenue generated by hunting concessions?

8. How does the sport-hunting program provide any other tangible benefits, besides revenue, to local communities (i.e., increase employment, jobs in antipoaching units)?

9. Please provide a complete list of hunting concessions and their geographic areas of operation.

EXHIBIT 2

Zimbabwe trophies

1 message

Gabel, Roddy <roddy_gabel@fws.gov> Fri, Apr 18, 2014 at 11:36 AM
To: "Freeman, Nelson" <NFreeman@safariclub.org>

Hello, Nelson,

I just left a message on your cell phone about this same matter, but want to make sure we reach you.

We have revised our April 4, 2014, finding for Zimbabwe elephant trophies so that now we will allow the import of any trophy taken in 2014 up until April 4. The hunter will need to be able to demonstrate to our Office of Law Enforcement that the hunt occurred before that date in order to import the trophy.

I hope everyone understands as well that we are in contact with the Government of Zimbabwe, professional hunters, and others in Zimbabwe, and working through our embassy there, to get the most current information on African elephants in that country, including population status, poaching levels, how hunting programs are currently managed, etc. If the information we are receiving addresses our concerns sufficiently and shows that hunting continues to be well managed, populations are stable, etc., we may lift the suspension of imports completely and continue to allow the import of all trophies legally taken in 2014. We intend to conduct this review as quickly as possible and will get the word out once the review is completed.

If you have any other questions, please feel free to call me or contact Danielle Kessler (703-358-2644).

Regards,

Roddy

–
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