UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, *et al.* Plaintiffs, v. SALLY M. R. JEWELL, *et al.* Defendants.	Civ. No. 14-cv-00670 (RCL)

SAFARI CLUB INTERNATIONAL AND NATIONAL RIFLE ASSOCIATION OF AMERICA'S OPPOSITION TO FRIENDS OF ANIMALS ET AL.'S MOTION TO INTERVENE

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I. INTRODUCTION

Safari Club International and the National Rifle Association of America ("Safari Club and NRA") oppose the motion to intervene filed by Friends of Animals and the Zimbabwe Conservation Task Force ("FoA/ZCTF") because FoA/ZCTF have failed to (1) demonstrate Article III standing as required for intervention as of right in this Circuit, (2) meet the impairment requirement for intervention, and (3) satisfy the criteria for permissive intervention. FoA/ZCTF mischaracterize what Safari Club and NRA's case is about, asserting alleged interests in the future hunting of elephants in Zimbabwe or even the hunting of all wildlife throughout Africa and introducing claims about alleged harms from hunting that were not part of the Federal Defendants' basis for imposing the ban on the importation of Zimbabwe's elephants.

Safari Club and NRA challenge a ban imposed by Federal Defendants for Zimbabwe for 2014 only. That ban does not regulate the importation of elephants hunted after December 31, 2014. As a result, Safari Club and NRA's case concerns only the ability of hunters who harvested an elephant in Zimbabwe in 2014 to import those elephants into the United States. A court ruling that allows these sport-hunted elephants to be imported into the United States will not affect the number of elephants taken in Zimbabwe after December 31, 2014 and cannot affect FoA/ZCTF's alleged interest in observing elephants in Zimbabwe past that date. In addition, assuming that this case could somehow affect future hunting, FoA/ZCTF have insufficiently alleged a concrete interest in observing elephants in Zimbabwe in the future, and have not proven that fewer U.S. hunters will reduce the number of elephants removed from the population in Zimbabwe. Moreover, Friends of Animals' (individually "FoA") vague argument that it will have to expend resources to educate the public if these imports are allowed is unsupported for a

number of reasons, including that FoA does not allege any past education effort specific to Zimbabwe elephants, as the case law requires.

Finally, the Court should exercise its discretion to deny permissive intervention because FoA/ZCTF have not met the requirements of permissive intervention. Their participation will prejudice Safari Club's and NRA's challenge to the Zimbabwe importation ban because of their attempt to expand this case to attack hunting in general.

II. FACTUAL STATEMENT

On April 4, 2014, Defendant the U.S. Fish and Wildlife Service ("FWS" or "Service") abruptly suspended the importation of sport-hunted African elephants taken in Zimbabwe during 2014.[1] On July 31, 2014, the FWS published a new decision that continued the importation ban. By their terms, these decisions only applied to elephants taken in 2014, and the Service stated that it would make a new finding that applied in 2015 and beyond. "The decision to suspend import of elephant trophies from Zimbabwe will be re-evaluated in December 2014." http://www.fws.gov/news/ShowNews.cfm?ID=63A2049A-BDAE-6965-CA97D3188ADE98C5.

Safari Club originally filed this lawsuit on April 21, 2014. Dkt. 1. NRA joined the lawsuit on May 16, 2014. Dkt. 13. On August 1, 2014, Safari Club and NRA moved to amend their Complaint to add claims challenging the new July 31 decision. Dkt. 34. The Federal Defendants opposed the amendment (in part) and moved to dismiss the claims challenging the April 4 Zimbabwe decision. Dkt. 36, 37, 42.

[1] The Service also banned imports from Tanzania in a separate decision. Although the legal and factual issues were different (other than both involving the importation of sport-hunted elephants), Safari Club and NRA included these claims in the same lawsuit that challenged the Zimbabwe decision. As FoA/ZCTF's motion to intervene only involves the Zimbabwe claims, this Opposition will only discuss those claims.

After these motions were briefed and argued, FoA/ZCTF filed a motion to intervene, but withheld filing their memorandum of points and authorities pending the Court's resolution of the motion to amend and motion to dismiss. Dkt. 45. On December 26, 2014, the Court granted Safari Club and NRA's motion to amend and denied the Federal Defendants' motion to dismiss the Zimbabwe April 4 claims. Dkt. 47, 48.[2] FoA/ZCTF then filed their memorandum in support of their motion to intervene ("Mem."). Dkt. 50. Facts and alleged facts relevant to this motion to intervene and the case are discussed below as necessary.

III. ARGUMENT

A. FoA/ZCTF Lack Both An Impairment to Their Alleged Interests to Intervene as of Right and Standing

1. Standards for Intervention of Right and Standing

Federal Rule of Civil Procedure 24(a)(2), which governs intervention as of right, states in pertinent part:

> On timely motion, the court must permit anyone to intervene who: claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represented that interest.

The D.C. Circuit has determined that intervention as of right depends upon the applicant's ability to satisfy five prerequisites: (1) the timeliness of the motion; (2) a showing of "adequate interest;" (3) a possible impairment of that interest; (4) a lack of adequate representation by the existing parties to the action; and (5) standing. *Fund for Animals v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). FoA/ZCTF fail to establish the impairment requirement for intervention as of right.

[2] The Court granted the Federal Defendants' motion to dismiss as to the Tanzania import ban claims.

Courts in this Circuit have ruled that an intervenor "must demonstrate that it has standing under Article III of the Constitution." *Id.* at 732 (*quoting Military Toxics Project v. EPA,* 146 F.3d 948, 953 (D.C.Cir.1998).

> The "irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered injury in fact, an actual or imminent invasion of a legally protected, concrete and particularized interest; (2) there must be a causal connection between the alleged injury and the defendant's conduct at issue; and (3) it must be "likely," not "speculative," that the court can redress the injury.

Ctr. for Law and Educ. v. Dep't of Educ., 396 F.3d 1152, 1157 (D.C. Cir. 2005) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)). Standing for a defendant-intervenor requires a showing that resolution of the case in the plaintiff's favor would harm the applicant's concrete interests. *See Military Toxic Project v. Evtl. Prot. Agency,* 146 F.3d 948, 954 (D.C. Cir. 1998) (Court agreed that organization had defendant-intervenor standing because it benefited from the challenged rule and would suffer concrete injury if the court granted relief sought by petitioners/plaintiffs). The analysis for a defendant-intervenor is similar for standing and for intervention as of right. Therefore, Safari Club and NRA will analyze both together for each of the arguments FoA/ZCTF present.

2. The Relief Sought in this Case will Not Injure or Impair Any Interest in Observing Elephants in Zimbabwe After 2014

As discussed above, for purposes of standing and intervention, the intervenor must have an interest that the outcome of the case (disposition of the case in the intervention rule) will injure or impair. Although they attempt to rely on various theories and arguments, FoA/ZCTF essentially assert that Safari Club and NRA's success in this case would decrease their opportunities to view elephants in Zimbabwe in the future. Because of the nature of this case, FoA/ZCTF lack an injury in fact and an interest in the subject of this case and, even if that interest was related to this litigation, cannot demonstrate a possible impairment of that interest.

FoA/ZCTF fail to meet the criteria for standing and intervention as of right because FoA/ZCTF ignore the fact that, in this litigation, Safari Club and NRA exclusively challenge a 2014 importation ban.

The relief that Safari Club and NRA seek in this case – declaring the illegality of the 2014 Zimbabwe elephant importation ban and enjoining the ban (Sec. Am. Compl. at 37-38) – will not cause a further decrease in the number of elephants in Zimbabwe in the future, or decrease the opportunity to view them. The ban that is the subject of this action ended on December 31, 2014. According to the FWS's website:

> For Zimbabwe, the suspension will continue through 2014 unless the Service receives additional information that documents that the situation in Zimbabwe meets the criteria established under the Endangered Species Act. We will reevaluate this decision in December 2014 in order to make ***a new finding for calendar year 2015.***

http://www.fws.gov/international/pdf/questions-and-answers-suspension-of-elephant-sport-hunted-trophies.pdf (emphasis added). If Federal Defendants intend to impose a new ban or restrictions on the importation of elephants from Zimbabwe, they will do so in a separate decision that is not part of this litigation. Every elephant that is the subject of the 2014 ban has already been harvested and removed from the population. No further elephants can be taken that could ever be the subject of the 2014 importation ban. FoA/ZCTF express no (and have no) interest in preventing the importation of elephants legally hunted in Zimbabwe in 2014 (*i.e.,* those that cannot be imported because of Federal Defendants' importation ban). The 2014 Zimbabwe importation ban does not dictate the legality of the importation of elephants hunted after December 31, 2014. Thus, the outcome of this case cannot injure or impair FoA/ZCTF's opportunities to observe elephants in Zimbabwe today or in the future.

Despite these facts, FoA/ZCTF claim that resolution of this case in Safari Club and NRA's favor will result in more elephants being hunted in the future. *See* Mem. at 9, 11, 14. Because all of the elephants that are the subject of the 2014 have already been removed from the wild, Safari Club and NRA's success in this lawsuit will not affect the number of elephants in Zimbabwe that will be available for members of FoA and/or ZCTF to view and/or enjoy. For this reason, FoA/ZCTF's alleged interests in enjoying and/or conserving elephants in Zimbabwe cannot be impaired by the outcome of this lawsuit. FoA/ZCTF can therefore not establish the requisite harm/impairment required for intervention as of right and standing.

3. FoA/ZCTF Fail to Demonstrate the Requisite Imminent Harms to Their Concrete and Particularized Interests Necessary for Intervention and Standing

Even if the relief that the Court could grant in this case could somehow affect elephant hunting past December 31, 2014, FoA/ZCTF still fail to demonstrate that they have actual or imminent injuries-in-fact to concrete and particularized interests in viewing elephants in Zimbabwe. Although the declarations that FoA/ZCTF have filed with their motion to intervene express general concern about elephants and a desire to end sport hunting, the statements fall short of showing the requisite harm to interests in Zimbabwe's elephants.[3]

[3] To assert standing on behalf of its members an organization must show:

> (1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.

Sierra Club v. Envtl. Prot. Agency, 292 F.3d 895, 898 (D.C. Cir. 2002) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)). Thus, if its members lack standing (or have not shown a right to intervene), then the organization lacks standing (and a right to intervene).

The declaration FoA submitted from its president Priscilla Feral contains allegations of minimal past travel to Zimbabwe and vague assertions of planned future travel. Feral Decl. (Dkt. 50-3). Ms. Feral declares that FoA "successfully lobbied against proposals to grant ivory quotas to the southern African countries of Zimbabwe, Namibia, Botswana and South Africa at 11th Conference of the Parties held in Nairobi, Kenya, in April 2000." *Id*. at ¶ 5. These ivory quotas do not apply to the exportation or importation of legally sport-hunted elephants and have nothing to do with the action challenged in this litigation.[4]

Ms. Feral's discussion of past travel to Zimbabwe also describes her attendance at an international treaty meeting concerning the trade of myriad species. Safari Club and NRA assume that this was a CITES meeting that took place 18 years ago in Zimbabwe. Ms. Feral explained that her visit to Zimbabwe was for the purpose of lobbying. "[O]n one occasion I traveled to Zimbabwe as an NGO and to lobby delegates at the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)." *Id*. at ¶ 6. This court has ruled that "it is settled that a plaintiff cannot show injury simply by pointing to an expenditure of resources such as… lobbying expenses." *LPA Inc. v. Chao*, 211 F. Supp. 2d 160,165 (D.D.C. 2002) (citing multiple sources). Ms. Feral's presence in Zimbabwe, for purposes other than viewing and enjoying elephants, cannot meet the criteria she must satisfy to demonstrate any jeopardy to her interest in elephants.

Even if Ms. Feral's past visit to Zimbabwe had been for the intended purpose of viewing elephants, and nothing indicates it was, her allegations would still not suffice for Article III standing purposes. Ms. Feral's statement offers no mention of concrete plans to visit Zimbabwe

[4] Sport-hunted elephants were not at issue. Rather, some range countries desired to sell stockpiled ivory (ivory confiscated from poachers or naturally dead elephants) under a quota system. *See* CITES Doc. 11.31.1. http://cites.org/sites/default/files/eng/cop/11/doc/31_01.pdf Apparently, FoA lobbied against the sale of ivory under that system.

in the future for the purpose of viewing or enjoying elephants. *See Lujan*, 504 U.S. at 564 (Visiting a location in the past without concrete plans to visit it again in the future does "not support a finding of the 'actual or imminent' injury[.]"). In her declaration, Ms. Feral states:

> Additionally, I intend to ensure that a member of the FoA staff or I continue our regular travels to Africa to see all species our members support and protect, including African elephants. In fact, I have plans to go to Africa every year between November and January to check on the recovery efforts. FoA is also currently establishing an African Wildlife Advisory Committee, which will focus on conserving wildlife, such as African elephants, in their native ranges.

Feral Decl., ¶ 7. Although these statements include vague future plans, they fail to focus on Zimbabwe, much less on the areas where U.S. citizens hunt elephants. The agency action that Safari Club and NRA assert in this litigation only applies to "sport-hunted African elephant trophies taken in Zimbabwe[.]" 79 Fed. Reg. 44459 (July 31, 2014); *see also* 79 Fed. Reg. 26986 (May 12, 2014). Ms. Feral's allegations reference only "plans to go to ***Africa***."[5] (emphasis added). In addition, the creation of a wildlife advisory committee cannot establish Article III standing, and FoA does not explain how it might.

FoA's general intention to send staff members to visit elephants in Africa is not sufficient to satisfy the requirements of Article III standing. The intention required for standing must apply to the specific location affected by the challenged action. "Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000) ("environmental plaintiffs adequately allege injury in fact when they aver that they ***use the affected area*** and are

[5] Zimbabwe covers a total area of 150,871 square miles. http://www.mapsofworld.com/zimbabwe/facts.html. The continent of Africa covers 11,677,239 square miles. http://geography.about.com/od/lists/a/largecontinent.htm.

persons 'for whom the aesthetic and recreational values of the ***area*** will be lessened' by the challenged activity.") (emphasis added, quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)). To fulfill their standing requirements, FoA/ZCTF must show concrete intentions to engage in the activities to which they allege potential harm. Visiting Africa, like visiting the National Forests generally, does not demonstrate a concrete and particularized injury in fact when the impact of the agency action is limited to a specific country within Africa.

Ms. Feral does make an additional mention of Zimbabwe, but only to express the incorrect opinion that "sport hunting in Zimbabwe does not enhance the survival of the species." Feral Decl., ¶ 21. "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved[.]'" *Sierra Club v. Morton*, 405 U.S. at 739 (holding that plaintiffs did not have standing to challenge the Forest Service's decision to allow Disney to build a ski resort in the Sierra Nevada Mountains). Absent a showing of injury in fact, a party merely attempts to "vindicate their own value preferences through the judicial process[,]" which is precisely what Article III is designed to prevent. *Id*. at 740.[6]

ZCTF's reliance on the declaration of its board member, Johnny Rodrigues, also is inadequate. Rodrigues Decl. (Doc. 50-2). Mr. Rodrigues' declaration similarly fails to present the kind of future concrete intentions needed for Article III standing. He states, "[a]ll my life I have been able to view African elephants. I have viewed elephants in Hwange, Kariba, Gonarezhous, Chiredzi, and Zambesi Valley. I enjoy viewing, photographing, and observing

[6] Moreover, this case is not about the regulation of ***hunting***. FoA's incorrect views about hunting are irrelevant in this litigation – since the case is about the legality of an importation ban, not the legality of hunting wildlife in a foreign country. Even if hunting *was* the subject of Federal Defendants' actions, FoA's interest in ending sport hunting would not be enough to satisfy the interest and harm requirements for standing.

these elephants." Rodrigues Decl., ¶ 17. Although Mr. Rodrigues demonstrates past conduct involving the viewing of elephants in Zimbabwe, he does not assert any definite plans to try to observe elephants in Zimbabwe in the future. Mr. Rodrigues continues, "I fear that my ability to view elephants in the future will be compromised if hunting and poaching continue." *Id*. at ¶ 21. As discussed above, past recreational activities without concrete plans to repeat them in the future do "not support a finding of the 'actual or imminent' injury[.]" *Lujan*, 504 U.S. at 564. Consequently, Mr. Rodrigues has not alleged an injury to an aesthetic interest in viewing elephants (again, assuming that this lawsuit could even affect such a viewing opportunity beyond December 31, 2014). "Such 'some day' intentions – without any description of concrete plans, or indeed any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Summers*, 555 U.S. at 496 (*quoting Lujan*, 504 U.S.at 564).

Neither Ms. Feral, Mr. Rodrigues, nor any other member of FoA or ZCTF has presented any concrete plans to view African elephants in Zimbabwe in the future. Thus, neither organization has shown the requisite interest or imminent harm or impairment to that interest required for Constitutional standing and intervention. Accordingly neither FoA nor ZCTF have fulfilled the standing requirement or established a right to intervene as of right.

4. FoA/ZCTF Lack Standing Because they Fail to Assert an Interest that Could be Redressed by Denying the Relief that Safari Club and NRA Seek

FoA/ZCTF have also failed to demonstrate that their alleged injuries and/or impairments to their interests in observing and conserving elephants in Zimbabwe could be redressed if Safari Club and NRA do not succeed in this litigation. That is because preserving the Federal

Defendants' importation ban will not lead to a reduction in the Zimbabwe elephant population.[7] As indicated in the sections above, Safari Club and NRA's case challenges Federal Defendants' actions concerning the importation of sport-hunted elephants from Zimbabwe – not the hunting of elephants in Zimbabwe. The Federal Defendants have no authority to regulate the hunting of elephants in Zimbabwe; only Zimbabwe's governmental management authorities have this power.

FoA/ZCTF claim that they have a "significant interest in this case" because they are "dedicated to the conservation of African elephants and ending sport-hunting." Mem. p. 14.[8] However, because FoA/ZCTF have not and cannot establish that their interests are advanced by Federal Defendants' decision to ban the importation of elephants from Zimbabwe in 2014, preserving that decision (*i.e.*, by denying Safari Club and NRA's claims in this case) will not redress any alleged injuries.

The ruling in this case would have no or no significant impact on the number of elephants actually removed from the wild in Zimbabwe. U.S. hunters are not the only ones who can hunt elephants in Zimbabwe. If U.S. hunters do not hunt Zimbabwe's elephants, elephants that would have been taken by U.S. hunters remain available to non-U.S. hunters, who are not subject to or affected by the U.S. ban. The hunting of those elephants also could be carried out by Zimbabwe residents, who kill elephants for food and in retaliation for the damage that the animals do to their crops. Importantly, the absence of U.S. hunters and the revenue they bring to Zimbabwe

[7] As with the previous argument, this argument erroneously assumes that the relief that the Court could grant in this case could somehow affect elephant hunting past December 31, 2014.

[8] Additionally, FoA/ZCTF state that, "Movant's goals of ending sport-hunting of African elephants, protecting the animals, and their ability to observe elephants living freely with their families in the wild, are all implicated by this case." Mem. p. 8. "I believe that sport-hunting of African elephants must be stopped. . . . The only way to stop poaching, is to stop hunting as well." Rodrigues Decl. ¶ 18. "I fear that my ability to view elephants in the future will be compromised if hunting and poaching continue." *Id.* ¶ 21.

for use in conservation and anti-poaching efforts makes it more likely for elephants to be killed by poachers who want the elephants solely for the illegal sale of ivory.

Federal Defendants' decision to ban the importation of sport-hunted elephants from Zimbabwe has no impact on whether elephants are hunted in Zimbabwe and/or whether elephants are illegally poached, other than to make it easier for poachers to operate in Zimbabwe. Thus, for any year, it is most probable that an importation ban would not reduce the number of elephants killed in Zimbabwe. It would simply change the identity and/or nationality of the individuals taking the elephants. Without a reduction in the number of elephants removed from the population, FoA/ZCTF cannot assert a reduced opportunity to enjoy elephants, and certainly cannot allege that denying relief in this case will redress this alleged injury.

FoA/ZCTF's interests are similar to those claimed by the plaintiffs in *Fund for Animals v. Norton*. In that case, a D.C. federal district court found that an animal rights group did not have standing to challenge importation permits issued by the FWS for argali sheep hunted in Mongolia, Kyrgyzstan, and Tajikistan. 295 F. Supp. 2d 1, 6 (D.D.C. 2003). The court held that the plaintiffs' injuries would not be redressed by success in the litigation because, even if the Service did not allow the importation of sport-hunted argali sheep into the U.S., the governments of Mongolia, Kyrgyzstan and Tajikistan "would remain as free as they now are to permit the sport hunting of argali in their own countries." *Id.* at 7. This Court should similarly find that FoA/ZCTF lack both standing and an impairment of interest because their alleged interest in enjoy elephants in Zimbabwe will not be affected by this Court denying the relief sought by Safari Club and NRA.

5. FoA's Increased-Resources Standing Theory is Unsupported by its Allegations

FoA also fails in its attempt to rely on an increased-resources theory of standing. FoA (but not ZCTF) argues that it has standing on its own behalf because, it alleges, it must "increase [ ] the resources [it] must devote to programs independent of [this] suit." Mem. at 13 (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)). FoA goes on to state, "[a]n organization has standing on its own behalf when 'the defendant's actions 'perceptibly impaired' the plaintiff organization's programs by making its 'overall task more difficult.'" *Id*. at 13-14 (citing *Equal Rights Ctr.*, 633 F.3d at 1138). However, FoA simply provides citations to law and provides no factual analysis as to how FoA must increase its resources, how its programs are impaired, or how its overall task is made more difficult. Without factual support, it alleges that "[w]hen FWS authorizes the importation of sport hunted trophies, FoA has to spend more time and resources educating about the negative impacts of sport hunting and working to conserve the targeted animals." *Id.* at 5. FoA makes no factual assertion that it has ever made concrete efforts to educate the public about elephant importation from Zimbabwe. In short, FoA cannot be forced to increase its resources for a program that does not exist. A task that FoA is not undertaking cannot be made more difficult.

This standing theory requires far more than FoA has alleged, much less proven.[9] "Indeed, '[t]he organization must allege that ***discrete programmatic concerns*** are being directly and adversely affected' by the challenged action." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (citation omitted); *see also Spann v. Colonial Vill., Inc.*, 899

[9] Bare statements in a brief are not sufficient. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("each [standing] element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). An applicant for intervention must support its factual assertions with declarations. *See Smoke v. Norton*, 252 F.3d 468, 470 (D.C. Cir. 2001) (relying on "affidavits filed in support of that motion" to determine whether intervention sought was as of right or permissive).

F.2d 24, 29 (D.C. Cir. 1990) ("The organizations instead allege ***concrete*** drains on their time and resources.") (emphasis added). The *Nat'l Taxpayers* court went on to explain, "[t]he impact NTU assumes Section 13208 will have on its future fundraising initiatives is entirely speculative, particularly in light of the fact that NTU has not yet implemented one of the programs alleged to have suffered as a result of Section 13208." *Id.* at 1433. Ultimately, the court concluded,

> Similarly, NTU's self-serving observation that it has expended resources to educate its members and others regarding Section 13208 does not present an injury in fact. There is no evidence that Section 13208 has subjected NTU to operational costs beyond those normally expended to review, challenge, and educate the public about revenue-related legislation. … NTU cannot convert its ***ordinary program costs*** into an injury in fact from Section 13208.

Id. at 1434 (emphasis added). In the case cited by FoA, the court "focused on whether [the plaintiffs] undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged discrimination …." *Equal Rights Ctr. v. Post Props., Inc.,* 633 F.3d 1136, 1140 (D.C. Cir. 2011). The court affirmed the grant of summary judgment to defendant based on lack of standing after finding the allegations insufficient because they failed to establish when the allocation of resources occurred or that they occurred near the time of the defendant's actions. *Id.* at 1141-42.

As previously noted, FoA has not demonstrated that it has any African elephant conservation programs or efforts in Zimbabwe, much less "discrete programmatic concerns" and a need to counteract the effects of allowing a limited number of imports from Zimbabwe. *See Rainbow/PUSH Coal. v. F.C.C.,* 396 F.3d 1235, 1242 (D.C. Cir. 2005) ("affidavit never even states, let alone explains how, the alleged discrimination by [defendant] in particular affects [plaintiffs'] counseling and outreach efforts, reducing their effectiveness or requiring [plaintiffs] to take concrete action in response"). Importation of elephants sport-hunted in Zimbabwe has

been ongoing since at least 1997,[10] yet FoA does not allege or prove that it has ever spent resources to educate the public about these imports. Nor can FoA credibly claim that the restoration of a limited number of imports for elephants hunted by U.S. citizens in 2014 will suddenly require devotion of its resources to educate the public on elephant hunting, especially when elephants are currently hunted in and imported from other African countries.[11] FoA offers no explanation why greater public outreach is necessary to protect elephants that can be hunted in Zimbabwe simply because a limited number of elephants hunted in 2014 could, if Safari Club and NRA prevail, once again be imported into the U.S.

If Safari Club and NRA are successful in this lawsuit, the Court will simply restore the status quo that has been in place for decades in Zimbabwe, not create a new situation to which FoA must respond. Based on the existence of elephant hunting in Zimbabwe through 2013 and ongoing importation from other countries, any resources spent educating the public about Zimbabwe imports that occur due to the lawsuit would, at most, simply be "ordinary program costs" to further an alleged ongoing interest.[12]

The alleged increased resources that FoA must expend to inform its members about alleged general dangers of trophy importation are abstract social interests, and are not particular to any African elephant conservation program in Zimbabwe. FoA's general allegations fail to set

[10] 62 Fed. Reg. 44627 (August 22, 1997).
[11] Imports are currently allowed from Namibia and South Africa. The U.S. also allows importation of sport-hunted elephants from Botswana, but exportation is currently not allowed by Botswana. *Id.*
[12] FoA also alleges that it "has invested substantial time and resources in raising public awareness about the negative impacts of sport hunting, as well the negative impacts of legalizing the trade or transport of sport-hunted trophies." Mem. at 4 (citing Feral Decl., ¶ 15). This statement does not allege any specific efforts regarding elephants sport-hunted in Zimbabwe and cannot help FoA satisfy Article III's standing requirements.

forth the minimum needed to establish injury in fact, and therefore FoA failed to demonstrate that it has Article III standing under this theory.[13]

B. The Court Should Exercise its Discretion to Deny FoA/ZCTF's Request for Permissive Intervention

FoA/ZCTF also seek to intervene permissively if the Court finds that they have not satisfied the requirements for intervention as of right. Rule 24(b) governs permissive intervention:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). "Rule 24(b)(2) requires a would-be intervenor to present '(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has a question of law or fact in common with the main action.'" *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 66 (D.D.C. 2004) (quoting *Equal Emp't Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998)). Standing may also be required for demonstrating the ability to intervene permissively.[14] If standing is required for

[13] FoA does not assert that this argument applies to intervention as of right. Even if this theory applied to intervention, FoA's argument would, for the same reasons, fail to establish an impairment of an interest.

[14] It appears that it is still an open question in this Circuit whether a permissive intervenor must demonstrate standing. *Peters v. D.C.*, 873 F. Supp. 2d 158, 212 (D.D.C. 2012) ("Whether standing is also required for permissive intervention in this Circuit is an unresolved issue."). Safari Club and NRA do not agree with the recent decision by one court that whether permissive intervenor must satisfy Article III's standing requirements has been resolved in this Circuit. *See Keepseagle v. Vilsack*, ---F.R.D.--- No. CV 99-3119 (EGS), 2014 WL 5796751, at *11 (D.D.C. Nov. 7, 2014) ("Movants' lack of standing renders them ineligible for permissive intervention.") (*citing Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 717 F.3d 189, 193 (D.C. Cir. 2013)). While the concurrence in *Deutsche Bank* case included language critical of excessive use of permissive intervention, the majority did not rule that permissive intervention requires a showing of Article III standing, leaving the issue unresolved still.

permissive intervention, then FoA/ZCTF's failure to demonstrate standing, as described above, also defeats its permissive intervention. Additionally, the Court may exercise its "discretion…to deny a motion for permissive intervention even if the movant established an independent jurisdictional basis, submitted a timely motion, and advanced a claim or defense that shares a common question with the main action." *Nat'l Children's Ctr., Inc.*, 146 F.3d at 1048.

1. FoA/ZCTF's Participation in this Lawsuit Will Prejudice the Adjudication of Safari Club's and NRA's Rights

Permissive Intervention must not be granted where the participation of the intervenor-applicant will prejudice the adjudication of the rights of the original parties. Fed.R.Civ.P. 24(b). Where intervenor applicants have attempted to complicate or confuse the case by raising new or different allegations, courts have rejected permissive intervention in an effort to avoid the prejudice it would cause to the original parties. *Norplant Contraceptive Prods. Liab. Litigation v. Wyeth Ayerst Labs.*, 907 F. Supp. 243 (E.D. Tex. 1995) (permissive intervention denied to applicant who sought to allege that implant caused death in case where all other plaintiffs asserted that device was cause of injuries, but not death); *Marvel Entm't Grp. Inc. v. Hawaiian Triathlon Corp*.,132 F.R.D. 143, 146 (S.D. N.Y. 1990) (permissive intervention denied to defendant-intervenor applicant who sought to assert "unrelated claims of unfair competition, breach of a contract and fraud which would needlessly expand the scope and costs of this litigation and would thus prejudice the rights" of the existing parties to the "expeditious resolution" of the action").

In this case, FoA/ZCTF seek to prejudice Safari Club and NRA's pursuit of this litigation by introducing new issues and arguments that were not the basis of Federal Defendants' decision to ban the importation of elephants from Zimbabwe for 2014. FoA/ZCTF wish to participate in

this lawsuit to assert that "sport-hunting is per se detrimental to the survival of endangered and threatened wildlife in Africa, including elephants." Mem. at 3. Federal Defendants did not make the decision to ban the importation of elephants from Zimbabwe on that factual premise. In fact, in making their 2014 Zimbabwe elephant importation ban decision, Federal Defendants acknowledged the positive value of sport hunting, noting that "[s]port hunting, as part of a sound management program, can provide benefits to conservation." http://www.fws.gov/international/pdf/questions-and-answers-suspension-of-elephant-sport-hunted-trophies.pdf. Federal Defendants' determination conforms to Congress' similar conclusion that appears in the language of the African Elephant Conservation Act:

> There is no evidence that sport hunting is part of the poaching that contributes to the illegal trade in African elephant ivory, and there is evidence that the proper utilization of well-managed elephant populations provides an important source of funding for African elephant conservation programs.

16 U.S.C.A. § 4202(9). Federal Defendants made their determination to ban importation based on their alleged inability to obtain sufficient information to support a finding that sport hunting enhanced the survival of Zimbabwe's elephants. In their announcement of the July 2014 importation ban decision, Federal Defendants explained that they "could not determine if sport-hunting quotas are reasonable or beneficial to elephant populations and, therefore, whether sport hunting is enhancing the survival of the species." 79 Fed. Reg. 44459, 44461 (July 31, 2014).

FoA/ZCTF seek to divert this Court's attention from the question of whether Federal Defendants acted legally in deciding that they could not make a determination that the importation of elephants enhances the survival of the species. This attempted diversion would force Safari Club and NRA to defend hunting rather than focus on their challenge to the improprieties of Federal Defendants' conduct. For this reason, this Court should not grant FoA/ZCTF leave to participate as permissive intervenors.

IV. CONCLUSION

Because FoA/ZCTF lack standing, do not meet all the requirements for intervention as of right, and fail to satisfy the requirements for permission intervention, the Court should deny their motion to intervene.

Dated this 20th day of January, 2015.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFARI CLUB INTERNATIONAL, *et al.*

Plaintiffs,

v.

SALLY M. R. JEWELL, *et al.*

Defendants.

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

[PROPOSED] ORDER

The Court hereby **DENIES** the motion to intervene of Friends of Animals and the Zimbabwe Conservation Task Force.

Dated:

ROYCE C. LAMBERTH
United States District Judge