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INTERNATIONAL**



**THE HUMANE SOCIETY
OF THE UNITED STATES**



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DEFENSE COUNCIL



The Fund for Animals
we speak for those who can't

September 28, 2015

Public Comments Processing
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

***RE: Comments on African Elephant Special Rule Amendment
(FWS-HQ-IA-2013-0091)***

Dear Chief Hoover,

The Humane Society of the United States, Humane Society International, International Fund for Animal Welfare, the Natural Resources Defense Council, and The Fund for Animals hereby submit the following comments in response to the U.S. Fish and Wildlife Service's Proposed Rule to amend the Endangered Species Act (ESA) Section 4(d) regulation pertaining to African Elephants (*Loxodonta africana*). 80 Fed. Reg. 45154 (July 29, 2015). Our organizations deeply appreciate the Obama Administration's commitment to elephant conservation and applaud the Service for its dedicated work on this important Proposed Rule. We strongly urge the Service to take decisive and expeditious action to increase protections for this iconic animal, which is faced with extinction.

Legal Background

Since 1978, the African Elephant (*Loxodonta africana*) has been listed as threatened under the ESA and regulated under a special rule. 50 C.F.R. §§ 17.11, 17.40(e). In 1988, Congress enacted the African Elephant Conservation Act (AECA), which authorized the establishment of moratoria on imports of African Elephant ivory. 16 U.S.C. §§ 4222 *et seq.* In 1992, the Service amended the African Elephant special rule to reflect the ivory moratoria adopted under the AECA. 57 Fed. Reg. 35473 (Aug. 10, 1992). However, that rule currently allows for unrestricted interstate trade in ivory and other elephant parts, does not require permits for all trophy imports, and does not prohibit the take or trade in live elephants. 50 C.F.R. § 17.40(e).

On July 1, 2013, President Obama issued an Executive Order establishing a Presidential Task Force on Wildlife Trafficking to address the escalating international poaching crisis and the illegal trade in wildlife and their derivative parts and products. In February 2014, the President adopted the National Strategy for Combatting Wildlife Trafficking,

announcing the Administration's guiding principles for strengthening enforcement of wildlife laws, reducing U.S. demand for illegally traded wildlife, and expanding international cooperation and commitment to address this issue. See <http://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf>.

Immediately thereafter, the Service issued Director's Order No. 210 to strengthen enforcement of existing laws and also announced a plan to amend the African Elephant special rule to tighten restrictions on import, export, and interstate commerce in ivory and hunting trophies. See <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html>.

One year later (on February 11, 2015, after no regulatory action from the Service), The International Fund for Animal Welfare, Humane Society International, The Humane Society of the United States, and The Fund for Animals (hereinafter "Petitioners") petitioned the Service to reclassify the African Elephant (*Loxodonta africana*) from Threatened to Endangered under the ESA. On June 11, 2015, the Center for Biological Diversity submitted a petition to list African Elephants as two endangered species (Forest Elephants, *Loxodonta cyclotis*, and Savannah Elephants, *Loxodonta africana*). The Service has not yet made a 90-day finding on either of these uplisting petitions. 16 U.S.C. § 1533(b)(3).

The ESA requires listing determinations to be made "solely on the basis of the best scientific and commercial data available..." 16 U.S.C. § 1533(b)(1)(A). See also *TVA v. Hill*, 437 U.S. 153, 184 (1978) (the goal of the ESA is to "reverse the trend toward extinction, whatever the cost"); *New Mexico Cattle Growers v. U.S. Fish & Wildlife Service*, 248 F.3d 1277, 1284-85 (10th Cir. 2001) (quoting H.R. Rep. No. 97-567, pt. 1 at 29 (1982), "The addition of the word 'solely' is intended to remove from the process of listing or delisting of species any factor not related to the biological status of the species."); H.R. Conf. Rep. No. 835, 97th Cong. 2d Sess. 19-20 (1982) (the limitations on the factors the Service may consider in making listing decisions were intended to "ensure that decisions . . . pertaining to listing . . . are based solely upon biological criteria and to prevent nonbiological considerations from affecting such decisions.").

Pursuant to the ESA (16 U.S.C. § 1538(a)) and implementing regulations (50 C.F.R. §§ 17.21, 17.22), once the Service lists a species as endangered, individuals of the species are protected from import, export, take, interstate sale, and interstate commercial transport, except "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. § 17.21(g)(1)(ii). As the plain language of the statute makes clear, enhancement authorization may only be issued for activities that *positively benefit* the species in the wild.

For threatened species, the Service "shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). The Service generally applies the same protections to threatened species as endangered species (50 C.F.R. § 17.31), but certain species, like the African Elephant, are regulated under a special rule. Special rules must be designed and implemented to actually promote the conservation of the species. See *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985). See also 16 U.S.C. § 1531(b) (the primary purpose of the ESA is to "provide a program for the conservation of

such endangered species”); 16 U.S.C. § 1532(3) (the term “conservation” means “to use...all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”).

The current special rule fails to provide for the conservation of African Elephants, as required by law. Indeed, the current regulation fails to address the significant impact that Americans have on the imperilment of the species through a robust domestic market in elephant parts supplied by poaching, unsustainable trophy hunting, and other activities. Therefore, we strongly urge the Service to take immediate action to substantially increase its oversight of such activities. *See also* 16 U.S.C. § 1533(b)(6)(A)(i)(I) (providing that the Service shall finalize a proposed listing regulation within one year from the date it is published in the Federal Register).

New Scientific Evidence Supports Increased Protection

As discussed in the uplisting petition filed by Petitioners¹ (attached and hereby incorporated by reference), the best available science shows that the African Elephant has suffered a population-wide decline of roughly 60% since the Service listed the African Elephant as Threatened in 1978. This sharp decline is a result of habitat loss, poaching, commercial exploitation, trophy hunting, human-elephant conflict, regional conflict and instability, and climate change, which, combined, put the species in danger of extinction. *See* 16 U.S.C. § 1533(a)(1)(A)-(E).² Indeed, according to the Secretariat for the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), “poaching numbers in Africa remain at levels that are unsustainable, with mortality exceeding the natural birth rate, resulting in an ongoing decline in African Elephant numbers.”³

Indeed, since that petition was filed, additional scientific evidence has emerged demonstrating the dire plight of the species. For example, new studies confirm that elephants are losing habitat to expanding farmland and urban areas,⁴ severe drought in East Africa has negatively impacted elephant populations,⁵ and elephant populations are shrinking even within protected areas.⁶ While many large mammals suffer from the loss of wildlands, African Elephants are particularly imperiled due to overutilization for

¹ Note that Petitioners do not include the Natural Resources Defense Council, a signatory of this letter.

² *See also* UNEP et al., *A Rapid Response Assessment: Elephants in the Dust, the African Elephant Crisis*. United Nations Environment Program. (2013), http://www.cites.org/common/resources/pub/Elephants_in_the_dust.pdf.

³ CITES, *Elephant Conservation, Illegal Killing, and Ivory Trade*. (2014). 10. Available at http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-01_2.pdf.

⁴ Kioko, J., V. Herbert, D. Mwetta, Y. Kilango, M. Murphy-Williams, and C. Kiffner. (2015). Environmental correlates of African elephant (*Loxodonta Africana*) distribution in Manyara Area, Tanzania. *Annual Research and Review in biology*, 5, 147-154.

⁵ Okello, M. M., L. Kenana, D. Muteti, F. Warinwa, J. W. Kiringe, N. W. Sitati, H. Maliti, E. Kanga, H. Kija, S. Bakari, P. Muruthi, S. Ndambuki, N. Gichohi, D. Kimutai, and M. Mwita. (2015). The status of key large mammals in the Kenya – Tanzania borderland: a comparative analysis and conservation implications. *International Journal of Biodiversity Conservation*, 7, 267-276.

⁶ Mose, V. N., and D. Western. (2015). Spatial cluster analysis for large herbivore distributions: Amboseli ecosystem, Kenya. *Ecological Informatics*.

commercial and recreational purposes. One new study evaluates the severe problem of poaching and retaliatory killings of elephants in Zambia;⁷ another concludes that elephant densities are lower in trophy hunting areas compared to a national park where trophy hunting is not permitted.⁸ By analyzing seized ivory, experts have identified poaching hotspots,⁹ such as Garamba National Park, where in just over two months in 2014 poachers killed 68 elephants using helicopters, grenades, and chainsaws.¹⁰ It is clearer than ever that the currently-legal trade in elephant ivory is facilitating illegal trade that is directly supplied by industrialized poaching.¹¹

Thus, Petitioners maintain their legal position that African Elephants should be protected as Endangered and that the Service must act to halt and reverse the current trends towards extinction by strictly regulating the significant American demand for elephant parts and products (including hunting trophies). We nevertheless provide comment on the Service's proposed amendments to the special rule.

Recommendations for Strengthening the Proposed Rule to Promote Conservation

(1) Regulation of Elephant Trophies

We applaud the Service for taking action through the Proposed Rule and import permit decisions to disincentivize the recreational killing of African Elephants by American trophy hunters. As discussed in Petitioners' uplisting petition, the United States is one of the leading importers of African Elephants for hunting trophy purposes. This undermines elephant conservation, as explained in a recent scientific study, because range states may be setting unsustainably high hunting quotas: in the Greater Mapungubwe Transfrontier Conservation Area (managed by South Africa, Zimbabwe, and Botswana) scientists found that, in contrast to current hunting allowances, "only a small number of bulls (<10/year) could be hunted sustainably. At current rates of hunting, under average ecological conditions, trophy bulls will disappear from the population in less than 10 years."¹²

⁷ Nyirenda, V. R., P. A. Lindsey, E. Phiri, I. Stevenson, C. Chomba, N. Namukonde, W. J. Myburgh, and B. K. Reilly. (2015). Trends in Illegal Killing of African Elephants (*Loxodonta africana*) in the Luangwa and Zambezi Ecosystems of Zambia. *Environment and Natural Resources Research*.

⁸ Crosmar, W. G., S. D. Cote, and H. Fritz. (2015). Does trophy hunting matter to long-term population trends in African herbivores of different dietary guilds?. *Animal Conservation*, 18, 117-130.

⁹ Wasser, S. K., L. Brown, C. Mailand, S. Mondol, W. Clark, C. Laurie, and B. S. Weir. (2015). Genetic assignment of large seizures of elephant ivory reveals Africa's major poaching hotspots. *Science*, 349, 84-87.

¹⁰ Hance, J. (2015). Poaching onslaught in Garamba National Park: wildlife conservation. *Environmental Management*, Mar/Apr, 24-25.

¹¹ Bennett, E. L. (2015). Legal ivory trade in a corrupt world and its impact on African elephant populations. *Conservation Biology*, 29, 54-60; Smith, R. J., D. Biggs, F. A. V. St. John, M. Sas-Rolfes, and R. Barrington. (2015). Elephant conservation and corruption beyond the ivory trade. *Conservation Biology*, 29, 953-956.

¹² S. Selier et al. (2014), Sustainability of elephant hunting across international borders in southern Africa: A case study of the greater Mapungubwe Transfrontier Conservation Area. *The Journal of Wildlife Management*, 78: 122–132. Available at http://www.researchgate.net/publication/259539652_Sustainability_of_elephant_hunting_across_international_borders_in_southern_Africa

Because hunters target the biggest and strongest males, trophy hunting removes these animals from the breeding pool and unnaturally selects for smaller or weaker animals.¹³ In this way, trophy hunting can decrease genetic resilience which is needed for elephants to be able to adapt and survive challenges such as climate change and cause unnatural evolutionary impacts. For example, selective hunting likely increased the occurrence of mature female African Elephants (*Loxodonta africana*) lacking tusks from 10% to 38% in parts of Zambia over 20 years.¹⁴

Another study reviewed the functioning of Zambia's protected areas and game management areas (GMAs), where trophy hunting occurs.¹⁵ The authors found numerous problems that pertain to management of trophy hunting in GMAs including: uncontrolled human immigration and open access to wildlife; the Zambia Wildlife Authority (ZAWA) retains most of income derived from trophy hunting, little of this income goes to people living in GMAs with affluent community members benefiting most, and there are frequent financial irregularities associated with the distribution of this income; scouts employed in anti-poaching in GMAs are poorly and irregularly paid, insufficiently trained and equipped, and inadequate in number; ZAWA is poorly funded, has an inadequate number of staff to protect elephants against poaching, has increased hunting quotas to unsustainable levels in GMAs in order to raise money (the authors state that ZAWA 'are sometimes forced to make decisions to achieve financial survival at the expense of the wildlife they are mandated to conserve'), establishes trophy quotas arbitrarily, and does not monitor wildlife populations or trophies; and hunting concession agreements are not effectively enforced and unscrupulous concession operators are not adequately punished. The authors blame these many failures for the low numbers and diversity of wildlife, including elephants.

The Service itself has already found that elephant trophy hunting in Zimbabwe does not enhance the survival of the species there:

“based on the information currently available to the Service on government efforts to manage elephant populations, efforts to address human-elephant conflicts and poaching, and the state of the hunting program within the country, and without current data on population numbers and trends being incorporated into a national management strategy or plan, the Service is unable to make a finding that sport-hunting in Zimbabwe is enhancing the survival of the species...”¹⁶

[national borders in southern Africa A case study of the greater Mapungubwe Transfrontier Conservation Area.](#)

¹³ Allendorf, F.W. and Hard, J.J. (2009). Human-induced evolution caused by unnatural selection through harvest of wild animals. *Proceedings of the National Academy of Sciences of the United States of America*, 106, 9987-9994.

¹⁴ Jachmann, H., Berry, P.S.M., and Imae, H. (1995). Tuskeness in African Elephants: a future trend. *African Journal of Ecology*, 33, 230-235. DOI: 10.1111/j.1365-2028.1995.tb00800.x

¹⁵ Lindsey, P. A., Nyirenda, V. R., Barnes, J. I., Becker, M. S., McRobb, R., Tambling, C. J., ... & t'Sas-Rolfes, M. (2014). Underperformance of African Protected Area Networks and the Case for New Conservation Models: Insights from Zambia. *PloS one*, 9(5), e94109.

¹⁶ 80 Fed. Reg. 42524 (July 17, 2015). See also 79 Fed. Reg. 44459 (July 31, 2014) (“Without management plans with specific goals and actions that are measurable and reports on the progress of meeting these goals, the Service cannot determine if...Zimbabwe is implementing, on a national

Similarly, the Service has found that elephant trophy hunting in Tanzania does not enhance the survival of the species because questionable management practices, a lack of effective law enforcement, and weak governance have resulted in uncontrolled poaching and catastrophic elephant population declines in Tanzania.¹⁷ The Service has previously rejected attempts to import trophies from Zambia due to similar concerns of mismanagement including inconsistencies in reported elephant population estimates, failure to comply with monitoring requirements, absence of government funding for elephant protection, and lack of effective anti-poaching measures.¹⁸ Further, it does not appear that the Service has made enhancement findings for elephant trophy imports from either Mozambique or Cameroon.

Not only is there significant concern regarding the sustainability of African Elephant trophy hunting, but also the notion that trophy hunting supports local communities to the benefit of wildlife conservation is largely unsupported. According to an IUCN analysis from 2009,¹⁹ big-game hunting only provided one job for every 10,000 inhabitants in the area studied,²⁰ and many of these jobs were temporary seasonal positions like opening the trails at the start of the hunting season. Trophy hunting fails to create a significant number of permanent jobs, but ecotourism offers a possible solution. Consider the Okavango in Botswana where, as of 2009, a safari ecotourism tourism park provided 39 times the number of jobs than would big-game hunting on an area of equal size. Another example is the Luangwa National Park in Zambia, which produced twice the number of jobs provided by Benin and Burkina Faso's trophy hunting sector combined in 2007. The IUCN also found that Africa's 11 main big-game hunting countries only contributed an average of 0.6% to the national GDP as of 2009. Of this marginal profit, studies suggest that as little as 3-5% of trophy hunting revenues are actually shared with local communities.^{21,22}

The proposed import of all African Elephant trophies must be strictly scrutinized to determine whether the hunt actually enhanced the survival of the species. We are pleased that the Service has proposed to amend the special rule to require import permits for all trophies (rightfully rebutting the presumption in 16 U.S.C. § 1538(c) to apply the ESA permitting provisions to CITES Appendix II elephants, as well as CITES Appendix I

scale, appropriate management measures for its elephant populations.”); 79 Fed. Reg. 26986 (May 12, 2014); <http://www.fws.gov/international/pdf/enhancement-finding-March-2015-elephant-Zimbabwe.pdf>; <http://www.fws.gov/international/pdf/enhancement-finding-July-2014-elephant-Zimbabwe.pdf>.

¹⁷ See <http://www.fws.gov/international/pdf/enhancement-finding-2015-elephant-Tanzania.PDF>; <http://www.fws.gov/international/pdf/enhancement-finding-2014-elephant-Tanzania.PDF>.

¹⁸ See *Marcum v. Salazar*, 810 F.Supp.2d 56, 63 (D.D.C. 2011); *Marcum v. Salazar*, 694 F.3d 123 (D.C.Cir. 2012).

¹⁹ IUCN. (2009). Programme Afrique Centrale et Occidentale. Big Game Hunting in West Africa. What is its contribution to conservation?

²⁰ South Africa, Namibia, Tanzania, Botswana, Cameroon, Central African Republic, Burkina, and Benin.

²¹ Economists at Large. (2013). The \$200 million question: How much does trophy hunting really contribute to African communities? A report for the African Lion Coalition, prepared by Economists at Large, Melbourne, Australia.

²² Sachedina, H.T. 2008. “Wildlife Is Our Oil : Conservation, Livelihoods and NGOs in the Tarangire Ecosystem, Tanzania.” University of Oxford. PhD. Thesis.

elephants). The permitting process is essential to ensure that trophy imports are analyzed under the enhancement standard, and we strongly encourage the Service to publish notice and accept public comment on all applications for African Elephant trophy imports to ensure that the enhancement analysis is based on the best available science.

We also applaud the Service for attempting to ensure that trophy hunting does not contribute to commercial trade in ivory derived from trophy tusks; however, we are deeply concerned that the Proposed Rule does not do enough to regulate the activity of Americans engaged in elephant trophy hunting, as the Proposed Rule establishes an arbitrary and capricious “quota” for trophy imports. Specifically, the Proposed Rule (50 C.F.R. § 17.40(e)(6)(E)) provides that “No more than two African Elephant sport-hunted trophies [can be] imported by any hunter in a calendar year.”

The Service has a statutory burden to demonstrate that every provision of the special rule is “necessary and advisable to provide for the conservation” of African Elephants. 16 U.S.C. § 1533(d). Further, the Service must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In the Proposed Rule, the Service has articulated that establishing a quota is necessary to limit the quantity of elephant tusks that one person imports, in order to restrict the ability to import “commercial quantities of ivory as sport-hunted trophies.” 80 Fed. Reg. at 45165. But the Service has articulated no explanation for why allowing two trophies per hunter per year—the equivalent of each hunter killing two elephants per year – would not create a risk of allowing commercial quantities of ivory to be imported (e.g., four tusks can generate substantial amounts of valuable ivory products on an annual basis).

Further, given the negative impacts that trophy hunting has on elephant conservation, it is arbitrary and capricious for the Service to assert that allowing every American to kill two African Elephants each year is necessary and advisable for elephant conservation. Based on the Service’s current position, there are only a few countries from which U.S. hunters can source elephant trophies (e.g., South Africa and Namibia), but the Service does not appear to have considered how its proposed trophy quota would impact the populations within those countries (as opposed to impacts on the species across its range). Therefore, we strongly urge the Service to remove the quota language from the Proposed Rule, replacing that language with a new § 17.40(e)(6)(E) to read: “A determination is made that the import, when combined with any previous import by the same importer, is not likely to result in commercial quantities of ivory being imported.”

The Service should evaluate each proposed trophy import on a case-by-case basis under the enhancement standard, which is unlikely to result in the allowance of more than one elephant trophy import per hunter per lifetime, if any. Threatened species permits, which the Service has proposed to apply to African Elephant trophy imports, can only be issued for conservation purposes. 16 U.S.C. § 1531(c)(1) (FWS “shall seek to conserve endangered and threatened species and shall utilize [its] authorities in furtherance of the purpose[]” of the ESA, i.e., *conservation*, 16 U.S.C. § 1531(b)). In deciding whether to issue a threatened species permit, the Service must consider “[t]he probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;” “[w]hether the permit . . . would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population

from which the wildlife sought to be covered by the permit was or would be removed;” “whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species”; “[t]he opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application;” and “[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.32(a)(2).

Before issuing a threatened species permit for the import of an elephant trophy, the Service must evaluate whether the source country has established a scientifically based management program that is developed and implemented to promote the conservation of the species in each management area. We recommend that the Service determine on a regular basis (e.g., annually or every 3 years) whether it could make an enhancement finding for each country where elephant hunting occurs. In order to facilitate that evaluation, the Service should adopt criteria that range state and management area plans must meet and formal guidance on how permit biologists should evaluate each application to import an elephant trophy. For example, the range state from which the trophy originated must:

- Have an approved and current national elephant management plan, which develops and implements conservation activities for specific elephant conservation units and works in concert with regional elephant management plans. Such national management plans should be developed using the IUCN SSC guidelines for strategic conservation planning, based on scientific information, and implemented in a manner that benefits the species and provides economic incentives for local communities to protect and expand African Elephant habitat.
- Have up-to-date estimates on elephant distribution range, abundance, and status.
- Observe a precautionary approach to establishing hunting quotas given current elephant population trends.
- Carry a credible capacity to monitor and manage elephant populations in order to maintain healthy numbers and genetic diversity.
- Appoint an identified national elephant plan coordinator.
- Have an understanding of the biological needs of the species, as informed by the best available science.
- Have sound law enforcement capabilities to deter or punish illegal retaliatory killings.
- Involve local communities in elephant protection and humane conflict mitigation strategies.
- Implement a human-elephant conflict management plan (including rapid response, mitigation approaches, a training component, education).
- Actively promote wildlife-integrated land-use to ensure land-use planning does not negatively impact elephant conservation.
- Achieve conservation targets within identified time frames.
- Document the achievement of stated goals and monitor and evaluate the implementation of the plan, and adapt it as necessary.
- Be in compliance with all international, regional and national commitments, agreements and regulations relating to wildlife (and specifically elephant) conservation, including (but not limited to) CITES.

- Have enacted laws and provided ample resources for enforcement against illegal trade in elephants and their parts.
- Cooperate with neighboring countries for transboundary elephant population conservation and monitoring.
- Have a system for measuring good governance when it comes to wildlife conservation/protection policy making and its implementation (for example, transparency International's corruption perception index).
- Have credible policies for managing any hunting offtake, including:
 - A science-based system for establishing hunting quotas which is demonstrably sustainable at a population level;
 - Price-setting (taxes and minimum number of safari days) and a system of concession leasing that increase the value of elephants across Africa (no competition on price);
 - Hunting moratoria for any declining populations;
 - A verifiable and enforceable mechanism to ensure no subadults or females are taken;
 - An adaptive management policy of monitoring the impacts of the removal of individuals on remaining populations, and adjusting quotas accordingly; and
 - A demonstrable commitment to ensure proceeds of trophy hunting are used to benefit wildlife (and specifically elephant) conservation and communities living with wildlife.

We applaud the Service for being mindful of not opening a loophole for the ivory market through trophy trade and prohibiting the import of antique trophies. We also applaud the Service for prohibiting interstate and foreign commerce in imported trophies and prohibiting the export of raw ivory from trophies. We similarly urge the Service to prohibit the export of worked ivory derived from trophies (as discussed further below).

(2) Regulation of Ivory Trade

We applaud the Service for taking robust action to address the domestic trade in African Elephant ivory. But we strongly urge the Service to take additional steps to strictly prohibit the import, export, interstate sale, and interstate commercial transport in African Elephant ivory, allowing such activity only for scientific purposes or enhancement purposes or if the ESA exemptions for antique or Pre-Act ivory apply. The Proposed Rule makes clear that the AECA continues to limit the scope of ivory imports even if such action is not prohibited by the ESA, but additional ESA action is needed.

Analysis of international and domestic trade in African Elephants and their parts clearly shows that the species is in danger of extinction due to overutilization for commercial and recreational purposes, including activity that is currently legal. Original analysis from Petitioners' uplisting petition shows that between 2003 and 2012, net imports from all sources and for all legal purposes represented approximately 49,501 African Elephants in international trade. Net United States imports from all sources and for all legal purposes represented approximately 8,119 African Elephants in international trade (16.4% of total trade). From 2010-2012 alone, Americans legally imported approximately 22,500 pounds of ivory specimens.

While international ivory trade that is currently legal can be monitored via the CITES trade database, illegal trade is more difficult to precisely quantify. But there is a clear link between legal trade and illegal trade (as detailed in Petitioners' uplisting petition). For example, the CITES decisions to approve sales of stockpiled ivory from Botswana, Namibia, Zimbabwe, and South Africa to Japan and China²³ stimulated international demand for elephant parts and has created confusion amongst consumers about the legal status of the elephant products in trade.²⁴ After the 2008 sale, there was an immediate and unprecedented spike in international trade in ivory, and net imports of African Elephant specimens have grown substantially since then.

Federal law enforcement officials routinely seize shipments of ivory directly from Africa, proving that the United States is an end market for illegal ivory products.²⁵ The United States plays a significant role in the overutilization of the species—large amounts of ivory are offered for sale on the domestic market that appear to have been carved after the 1989 CITES Appendix I listing, implying that they were illegally imported.²⁶

The African Elephant is in danger of extinction due to this overutilization for commercial and recreational purposes, and elephant poaching to supply this demand has reached an unsustainable level.²⁷ Therefore, increased oversight of the international and domestic trade in ivory (and other elephant parts and products) is necessary to bring the African Elephant back from the brink of extinction.

A. The Service Must Adopt Strict Regulations for the Domestic Ivory Market

We applaud the Service for finally proposing to strictly regulate the United States domestic ivory market, which is clearly significant in size and global influence. In addition to the evidence noted above of copious legal ivory imports into the United States, a 2015 report authored by Daniel Stiles (one of the few experts proficient at visually dating ivory²⁸) and commissioned by the Natural Resources Defense Council strongly suggests that the vast majority of ivory offered for sale in the San Francisco and Los Angeles markets may have been derived from recently-killed elephants (and thus may have been imported illegally).²⁹

²³ CITES, *Illegal ivory trade driven by unregulated domestic markets*, 4 Oct. 2002, available at http://www.cites.org/eng/news/pr/2002/021004_ivory.shtml.

²⁴ CITES, *Ivory Auctions Raise 15 Million U.S.D. for Elephant Conservation*, http://www.cites.org/eng/news/pr/2008/081107_ivory.shtml.

²⁵ See Beth Allgood, et al., *U.S. Ivory Trade: Can a Crackdown on Trafficking Save the Last Titan?*, 20 *Animal L.* 27, 36 (2013).

²⁶ D. Stiles & E. Martin, *The U.S.A's Ivory Markets—How Much a Threat to Elephants?*, 45 *Pachyderm* 67 (July 2008–June 2009), available at www.pachydermjournal.org/index.php/pachy/article/view/13/52.

²⁷ CITES, *Elephant Conservation, Illegal Killing, and Ivory Trade*. (2014). 10. Available at http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-01_2.pdf.

²⁸ See, e.g., Daniel Stiles. 2014. *The big ivory apple*. *Natural History*. Available at <http://www.naturalhistorymag.com/perspectives/292575/the-big-ivory-apple>; Esmond Martin and Daniel Stiles. 2008. *Ivory markets in the USA*. *Care for the Wild International and Save the Elephants*.

²⁹ Daniel Stiles. (2015). *Elephant Ivory Trafficking in California, USA*, available at http://docs.nrdc.org/wildlife/files/wil_15010601a.pdf.

Our organizations have reviewed the comments that Stiles submitted on this Proposed Rule and strongly disagree with his argument that the United States lacks a sizable ivory market. Such a conclusion is also contrary to Stiles' previous work. Stiles is now taking the position that the United States ivory market is insignificant, that his past surveys are baseless, and that "no conclusions should be drawn about what percentage of ivory in the USA is legal or illegal based on visual examination." While we understand that dating ivory items based solely on visual inspection is difficult, Stiles' 2015 report clearly concludes that the majority of ivory he observed in California was likely illegally sourced:

"[B]etween 77% and 90% of the ivory surveyed in Los Angeles was likely illegal under California law and 47-60% could have been illegal under federal law. However, it is possible that some could have been produced in the United States from old raw ivory already in the country before 1989 . . . 80% of the ivory seen in San Francisco was likely illegal under California law and 52% could have been illegal under federal law."³⁰

Even if this is only a rough estimate, the results are disturbing and indicate that California's ivory market is clearly a contributor to the elephant poaching crisis. The conclusion that much of California's ivory market is comprised of illegal ivory is supported by the evidence that many of the ivory items found in California were fake antiques whose true nature had been disguised by staining, cracking, and chipping them to look old.³¹ As Stiles stated of ivory in Los Angeles: "Many of the claimed 'antiques' were obvious fakes that had been stained and artificially aged, based on visual inspection."³² He also found that illegal ivory was disguised by deliberately mixing it with resin, bone, and legal sources of ivory such as mammoth.³³ For example, in two of the stores he visited he could not count the number of elephant ivory pieces because the store owners had mixed them in with mammoth, hippo, and bone pieces.³⁴ Two other vendors stated that all of the several hundred items on display were either legal ivory imported prior to 1989, or non-ivory, although that would mean that the pieces had all been in inventory for at least 25 years without selling, which is highly unlikely.³⁵

Stiles also now suggests that consumer demand for ivory in the United States is decreasing. While it is true that the 2015 report found that California's ivory market has decreased in size, this does not mean that demand has subsided. Indeed, in the 2015 report, Stiles found the opposite to be true, stating that "[c]onsumer demand for ivory in California remains high" and that "[a]lmost all vendors who were asked stated that demand has not

³⁰ Stiles (2015) at 11, 13.

³¹ *Id.* at 10.

³² *Id.* at 11. In one Los Angeles store "[The] vendor claimed that 41 of the 96 pieces of African ivory he offered for sale were made by a particular ethnic group in Africa. To verify this, the investigator contacted Professor Doran Ross, an African art expert from the University of California Los Angeles (UCLA) and Director Emeritus of UCLA's Fowler Museum, who examined the pieces. He concluded that of the 96 African ivory pieces, '[a]ll but five or six . . . are ludicrous fakes.' (D. Ross, personal communication, April 11, 2014). Professor Ross, who has extensive experience studying the art of this ethnic group and whose museum has the world's largest collection of art from this ethnic group, stated that the pieces were 'cartoons... [and] are profoundly insulting jokes on any sincere consideration of 'traditional,' 'antique,' or 'ancient' African art.'" *Id.*

³³ *Id.* at 6-7.

³⁴ *Id.* at 13.

³⁵ *Id.* at 12.

dropped.”³⁶ Instead, Stiles attributed the decline in California’s ivory market to the very thing he advocates against in his comments: stricter laws and regulations. As he wrote in the 2015 report:

“Based on the investigator’s conversations with ivory vendors, it appears that the decline in ivory is, at least in part, due to increased awareness amongst vendors that there are legal problems pertaining to the sale of ivory, and that these could become more severe.”³⁷

Stiles also now argues that many of the new-looking ivory items in the United States could actually be carved from the “tons of legal raw ivory in the U.S.” and thus may be legal to sell. However, this statement conflicts with his 2015 finding that “[b]ased on the style of the possibly illegal worked ivory . . . it originated, in order of proportion, from East Asia, Africa, and Europe.”³⁸ Finally, Stiles asserts that the United States lacks a sizable ivory market by claiming that little raw ivory enters the United States, relative to the country’s size and economy. However, information from the CITES database, as detailed above, clearly shows that thousands of tusks (representing hundreds of dead elephants) were imported in recent years, in addition to all of the worked ivory imported, which also has negative conservation impacts when sourced through poached elephants. Thus, we encourage the Service to disregard Stiles’ comments on this Proposed Rule due to lack of consistency.

The current special rule does not regulate the domestic ivory market, and it is imperative that the Service apply the ESA prohibitions on interstate commerce to African Elephants in order to promote the conservation of the species, as required by law. While the Proposed Rule describes an impressive list of prosecutions against elephant ivory traffickers, primarily under the Lacey Act,³⁹ the Service must do more than focus on large scale smuggling of ivory and must address the rampant interstate trade in ivory, which has a substantial negative cumulative impact on elephant conservation. The United States must take a leadership role on curtailing the trade in elephant products not only to address the domestic demand for ivory but also to enhance the ongoing collaboration with other consumer nations (such as China) to signal that collective action is needed to conserve this iconic species.

B. Comments on the Proposed De Minimis Exception for Interstate Commerce

As demonstrated in Petitioners’ uplisting petition, the Service should strictly prohibit interstate commerce in African Elephant ivory, as it does currently with Asian elephant ivory. If the Service proceeds with amending the special rule under the current Threatened listing (as opposed to uplisting the species to Endangered), we request that the broad *de minimis* exemption be removed or significantly tightened (i.e., limited to *de minimis* musical instruments only).

While the Service posits that the *de minimis* exemption described in the Proposed Rule applies to a “very narrow class of items” that does not contribute to the poaching of

³⁶ *Id.* at 15.

³⁷ *Id.* at 16.

³⁸ *Id.* at 15.

³⁹ 80 Fed. Reg. at 45158-9.

elephants, we believe that this exception has negative ramifications beyond those foreseen by the Service, and should therefore be removed for three main reasons.⁴⁰

First, by allowing unfettered interstate trade in *de minimis* ivory items, the Service fails to comply with the ESA's requirement that special rules be "necessary and advisable to provide for the conservation of such species." 16 U.S.C. 1533(d). The proposed *de minimis* exception is neither necessary nor advisable. For example, in contrast to other special rules that are designed to "incentivize proactive conservation efforts,"⁴¹ the Service's proposal to allow unregulated interstate sale (without permits) in a significant number of small ivory pieces would not encourage conservation and instead is designed primarily to minimize political opposition to the regulation. Permitting an individual in the United States to buy an item with a *de minimis* amount of ivory will not make that individual more likely to contribute to elephant conservation in the long-term.

Second, the proposed *de minimis* exception would create substantial enforcement difficulties and contribute to the threats facing the species' continued existence. The exception would allow a robust market in ivory to persist and create a cover for illegal trade in ivory sourced directly through poaching. Lack of public awareness regarding the elephant poaching crisis and the United States' role in it has significantly contributed to illegal sales in this country. Under the current system, legal ivory goods are sold alongside illegal goods, causing consumers to (mistakenly) believe that *all* ivory trade is legal. By allowing significant ivory trade to continue, the *de minimis* provision in the Proposed Rule would perpetuate this consumer confusion and make it more likely that the status quo will continue.

Third, the *de minimis* exception would create problematic precedent for other ivory-consuming nations, providing a roadmap for carving out exceptions from current and/or future efforts to restrict the ivory trade, to the detriment of elephant conservation. The importance of domestic action as it relates to diplomatic efforts overseas cannot be overstated, and in order to ensure that the Proposed Rule is "advisable" to provide for elephant conservation the Service must take a strong stance to stop ivory sales. The weaker the United States rules, the less credibility the Administration will have to encourage strong rules elsewhere. In particular, we are concerned about the influence such an exception may have on China, which is home to the world's largest ivory trade. On September 25, 2015, President Obama and China's President Xi Jinping made a joint commitment to halt their domestic ivory markets,⁴² and China previously announced that it would phase out domestic manufacture and sales of ivory and ban commercial ivory imports.⁴³ However, past regulatory action in that country has included an ill-conceived registration system, premised on the idea that a certain class of items was acceptable to sell. The United States should not send the message to China and other consumer nations that exempting certain items from a general ban is acceptable.

⁴⁰ 80 Fed. Reg. at 45163.

⁴¹ http://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet_020714.pdf.

⁴² <https://www.whitehouse.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>.

⁴³ Karl Mathiesen. May 29, 2015. China agrees to phase out its ivory industry to combat elephant poaching. The Guardian. Available at <http://www.theguardian.com/environment/2015/may/29/china-agrees-to-phase-out-its-ivory-industry-to-combat-elephant-poaching>.

If the Service does decide to adopt a *de minimis* exception, we would strongly encourage it to be limited to musical instruments (which appears to be the primary intended purpose of the provision) and not to relax the criteria in any way in the Final Rule. In particular, it is extremely important that the *de minimis* exception continue to prohibit items made wholly or primarily of ivory (criterion IV), since much of the illegal market is comprised of such items – mainly trinkets, figurines, and netsuke – and this criterion is a commonsense way of ensuring that smaller ivory items are not given an easier path to market. It is also crucial that the *de minimis* exception continue to require that the ivory be a fixed component of the item (criterion III) in order to prevent sellers from skirting this restriction by pairing an ivory product with another, larger item of marginal value. The other criteria are all reasonable elements that, if enforced, would be an improvement on the regulatory status quo.

Moreover, we recommend that the Service strengthen the *de minimis* exception in several ways to prevent abuse. First, the Service should further restrict the date of import requirement for *de minimis* items. The *de minimis* exception contained in the Proposed Rule allows commerce in items if the ivory was imported into the United States prior to January 18, 1990 (for items located within the United States) or removed from the wild prior to February 26, 1976 (if the item was imported into the United States). We believe that the Service should change the former to 1976 as well to help ensure that only *de minimis* items with old ivory are being sold under the *de minimis* exception. Second, the Service should publish a comprehensive list of the types of documentation that may be used to prove that an item qualifies under this exception. Third, given that the Proposed Rule states that the Service will accept “qualified appraisal[s]” as proof of provenance, the Service should review its policy for qualified appraisers to prevent fraud. As we learned while working on ivory legislation in New York State, which previously relied heavily on appraisals as proof of age, the appraisal system is fraught with abuse: although appraisers can examine the style, condition, price, and information from the seller, they often cannot determine the date of acquisition. As stated by Norman Sandfield, a member of the International Ivory Society and International Society of Appraisers:

“[A]s a dealer in ivory products, I am not sure how I would respond to a customer who asked for a written statement from the seller that clearly states the ivory sold is not restricted. Anything I give the customer would have no legal standing (except to possibly embarrass me in the future), and I have no authority to issue any paperwork with legal standing on ivory issues. Most collectors and dealers of ivory with whom I have talked believe that they have acquired all of their ivory legally, but would be hard pressed to prove it with the necessary paperwork.”⁴⁴

One way in which to prevent abuse of the appraisal process would be to strengthen the Service’s policy and oversight regarding the qualifications of these appraisers.

⁴⁴ Norman Sandfield, IIS Newsletter 2002-45.

C. The Final Rule Should Not Contain An Exception for Museums

The ESA provides that the term “commercial activity” means “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.” 16 U.S.C. § 1532. This definition is directly relevant for the analysis of whether a particular specimen qualifies for the ESA Pre-Act exception for prohibited activities (16 U.S.C. § 1538(b)) and to the scope of the prohibition on interstate transport when there is no sale (16 U.S.C. § 1538(a)(1)(E)).

In the Proposed Rule, the Service solicits comments on whether the Final Rule should contain a total exception to the prohibition on interstate commerce (including direct sale) in elephant ivory for museums.⁴⁵ We strongly oppose such an exception for two reasons.

First, a museum exception for the interstate trade of elephant ivory is unnecessary given the antiques exception contained in the ESA, and even more unnecessary if the Final Rule contains the *de minimis* exception included in the Proposed Rule. Indeed, these exceptions combined cover a broad swath of items: both antique items and newer items containing a small amount of ivory. It is difficult to fathom any ivory items that a museum would have a legitimate interest in selling that are not covered by these exceptions. Examples of items that could not be sold interstate include some jewelry pieces, ivory chess sets, and ivory figurines that were sourced from recently-killed elephants. These items are not of historical or educational value, which is the primary purpose of legitimate museums.

Second, entities purporting to be museums (a term which is not defined in the ESA) could abuse a museum exception to perpetuate the trade in elephant ivory in a manner that undermines elephant conservation. For instance, in 2007, Sacramento State University’s then-president wrote to the Tanzanian government to secure special access for two avid trophy hunters from California – Paul and Renee Snider – to kill more than 80 species of animals for a new “natural history museum”, to be paid for with a reported \$2.4 million donation from the couple.⁴⁶ If the Sniders’ personal collection of trophies were considered a museum, they would be allowed to sell ivory sourced from unsustainably hunted elephants, to the detriment of elephant conservation.

D. The Service Should Not Broaden Exemptions for The Export of Ivory

In the Proposed Rule, the Service solicits information regarding whether to broaden the exemptions it has developed for the noncommercial import and export of worked ivory.⁴⁷ We believe the Service should not broaden the proposed exemptions.

With regards to exports, the Proposed Rule would limit ivory exports by (1) restricting commercial exports of worked ivory to antiques only, and (2) restricting noncommercial exports of worked ivory to that which qualifies as antique, Pre-Act, law enforcement and

⁴⁵ 80 Fed. Reg. at 45163.

⁴⁶ Jennifer Fearing, Cecil the Lion’s Awful Death Should End Trophy Hunting, Sacramento Bee, Aug. 3, 2015, available at <http://www.sacbee.com/opinion/op-ed/soapbox/article29887975.html>.

⁴⁷ 80 Fed. Reg. at 45170.

bona fide scientific specimens, and ivory legally acquired and removed from the wild prior to February 26, 1976 that is either part of a household move or inheritance, musical instrument, or traveling exhibition.⁴⁸

These changes would limit the ability of brokers to purchase large quantities of worked ivory in the United States at stores and auctions for export, thereby stimulating international demand for ivory that is often met through poaching. According to data collected by the International Fund for Animal Welfare, from 2009 to 2012, 6,753 supposedly legal ivory objects were exported or seized on attempted export from the United States, approximately 250 of which were seized before they were actually exported.⁴⁹ Many of these exports were likely by foreign buyers who traveled to the United States to buy ivory due to the fact that it is much less expensive here than in China, which has the world's largest ivory market.⁵⁰ In a 2015 report commissioned by the Natural Resources Defense Council on California's ivory market, the investigator was told by an established ivory collector informant that he had attended several auctions conducted by a California gallery that included ivory lots.⁵¹ Many foreigners attended, some with interpreters, and the ivory lots always sold out, with many being purchased by telephone bidders.⁵² Similarly, a 2014 report by the International Fund for Animal Welfare found that a significant proportion of ivory buyers at U.S. auctions are males of Asian descent.⁵³ The report stated that "[i]n at least two of the auction galleries visited, the owners were Chinese, and several auction websites posted their catalogs and other promotional materials in Chinese."⁵⁴ Even reputable auction houses have been responsible for exporting illegal ivory for buyers under the pretense of legality. Indeed, according to Service data on ivory seizures, Sotheby's attempted to export a number of the ivory exports seized between 2009 and 2012.⁵⁵ And in 2013, ivory vendors in New York City stated that between 2009 and 2011 Chinese buyers visited their stores and bought almost everything on display.⁵⁶

The modifications to export rules contained in the Proposed Rule are also important in the context of Chinese policy. Indeed, as the top ivory-consuming nation, China must ban export of ivory to both curb its domestic market and to prevent other countries from assuming its role in ivory demand. The United States must show leadership in this area to continue encouraging other countries like China to enact stringent regulations on the ivory market.

⁴⁸ 80 Fed. Reg. at 45174.

⁴⁹ International Fund for Animal Welfare. (2014) Bidding Against Survival: The Elephant Poaching Crisis and the Role of Auctions in the U.S. Ivory Market at 8. Available at http://www.ifaw.org/sites/default/files/IFAW-Ivory-Auctions-bidding-against-survival-aug-2014_0.pdf.

⁵⁰ Stiles (2015) at 15.

⁵¹ *Id.*

⁵² *Id.* at 15.

⁵³ IFAW (2014) at 22.

⁵⁴ *Id.*

⁵⁵ IFAW (2014) at 14.

⁵⁶ Stiles (2014) at 15.

(3) Regulation of Other Elephant Parts

The United States continues to be a major importer of elephant parts and products in addition to trophies and ivory. As detailed in Petitioners' uplisting petition, between 2003 and 2012, this included small leather products (57,844 specimens), ivory carvings (56,204 specimens), and skins (33,184 specimens). United States imports of these parts over the period studied far exceed those of other countries (approximate 44% of global total). Further, the number of African Elephant skins imported to the United States is dramatically increasing (from an average of 797 per year to an average of 2,123 per year in recent years). This is likely in part due to burgeoning demand for shoes made from elephant leather. The Service asserts that regulating such activity is not necessary because "there is no information to indicate that...commercial use of elephant parts and products other than ivory has had any effect on the rates or patterns of illegal killing of elephants and the illegal trade in ivory."⁵⁷ However, even if ivory is the primary motivation for elephant poaching, regulating the international and domestic trade in other elephant parts will ensure that the new restrictions on the ivory market do not have the impact of incentivizing killing elephants for other valuable parts. Further, the Service ignores the broader negative impact that commercialization of wildlife parts has on public perception of the need to conserve imperiled species. Therefore, we strongly urge the Service to regulate interstate and foreign commerce in all African Elephant parts and products in order to provide for the conservation of the species.

(4) Regulation of Live Elephants

We applaud the Service for proposing to amend the special rule to apply the take prohibition to live African Elephants in captivity in the United States.

As the U.S. Fish and Wildlife Service and the National Marine Fisheries Service have repeatedly acknowledged, when a species, subspecies, or distinct population segment is listed, such listing clearly applies to any individual of the listed entity, whether living in captivity⁵⁸ or in the wild. *See* 16 U.S.C. § 1533(b) (making clear that the take prohibition applies to captive animals regardless of the date of listing); 16 U.S.C. § 1538(a)(1) (prohibiting the take of "any" endangered species); H.R. Rep. No. 93-412 (1973) ("[t]he term 'fish or wildlife' means all wild animals, whether or not raised in captivity"); 42 Fed. Reg. 28052 (June 1, 1977) ("captive individuals provide gene pools that deserve continued preservation, and such individuals make it possible to re-establish or rejuvenate wild populations," and "[f]or these reasons, the Service will continue to enforce the stringent prohibitions of the Act as they relate to captive individuals of a species that is endangered in the wild..."); 44 Fed. Reg. 30044 (May 23, 1979) ("The Service has consistently maintained that the Act applies to both wild and captive populations of a species..."); 63 Fed. Reg. 48634, 48636 (September 11, 1998) (explaining that "take" was defined by

⁵⁷ 80 Fed. Reg. at 45161.

⁵⁸ FWS regulations define "captivity" to mean that "living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food." 50 C.F.R. § 17.3.

Congress to apply to endangered or threatened wildlife “whether wild or captive” and conceding that “It is true that the Act applies to all specimens that comprise a ‘species’” and “does not distinguish between wild and captive specimens thereof”); 77 Fed. Reg. 431, 434 (Jan. 5, 2012) (the ESA “specifically covers any species that is listed as endangered or threatened, whether it is native to the United States or non-native and whether it is in captivity or in the wild.”); 78 Fed. Reg. 33790 (June 5, 2013); 78 Fed. Reg. 35201, 35204 (June 12, 2013) (“the Act does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state, including through designation as a separate distinct population segment (DPS). It is also not possible to separate out captive- held specimens for different legal status under the Act by other approaches...”); 79 Fed. Reg. 4313, 4317 (Jan. 27, 2014) (“The ESA does not support the exclusion of captive members from a listing based solely on their status as captive.”); 80 Fed. Reg. 34500 (June 16, 2015).

Thus, it would be arbitrary and capricious for the Service to not extend ESA protections to captive elephants, particularly given that the Service has long recognized that certain uses of captive animals undermine the conservation of endangered species in the wild. *See* 57 Fed. Reg. 548, 550 (January 7, 1992) (There is a danger of “captive-bred animals...[being] used for purposes that do not contribute to conservation, such as for pets...or for entertainment”); 44 Fed. Reg. 30044, 30045 (May 23, 1979) (“uses of captive wildlife can be detrimental to wild populations”); 77 Fed. Reg. 431, 434 (Jan. 5, 2012) (“While the Service does believe that captive breeding can provide a significant benefit to endangered species, such benefits can only be realized when the breeding program is scientifically based and conducted in a manner that contributes to the continued survival of the species... However, breeding just to breed, without adequate attention to genetic composition and demographics of the breeding population, may not provide a clear conservation benefit to an endangered species.”).

Further, studies show that the use of endangered species in entertainment media undermines conservation efforts by decreasing public awareness about the plight of endangered species, decreasing donations to conservation programs, and facilitating poaching and trafficking of wild animals.⁵⁹ Additionally, studies highlight the need for education programs to be carefully crafted to ensure that wildlife exhibition actually has a positive impact on viewers.⁶⁰ Thus, it is imperative that captive elephants be strictly protected from take (including the use of bullhooks to force performances, such as occurs at the Natural Bridge Zoo and other substandard exhibition facilities) and that ESA permits

⁵⁹ *See, e.g.*, Steve R. Ross et al., *Inappropriate Use and Portrayal of Chimpanzees*, *Science* vol. 319, pg. 1487 (2008); Stephen R. Ross et al., *Specific Image Characteristics Influence Attitudes about Chimpanzee Conservation and Use as Pets*, *PLoS One* 6(7) (July 13, 2011); Kara Schroepfer et al., *Use of “Entertainment” Chimpanzees in Commercials Distorts Public Perception Regarding Their Conservation Status*, *PLoS One* 6(10) (Oct. 12, 2011).

⁶⁰ *See, e.g.*, Kristen E. Lukas & Stephen R. Ross, *Naturalistic Exhibits May Be More Effective Than Traditional Exhibits at Improving Zoo-Visitor Attitudes Toward African Apes*, *Anthrozoos* Vol. 27:3, 435-455 (Sept. 2014); Eric Jensen, *Evaluating Children’s Conservation Biology Learning at the Zoo*, *Conservation Biology* Vol. 28:4, 1004-1011 (Aug. 2014); Philip J. Nyhus et al., *Thirteen Thousand and Counting: How the Growing Captive Tiger Populations Threaten Wild Tigers*, in *Tigers of the World*, 2d ed., pp. 232, 237 (2010); BK Anne-Isola Nekaris et al, *Tickled to Death: Analysing Public Perception of ‘Cute’ Videos of Threatened Species (Slow Lorises – Nycticebus spp.) on Web 2.0 Sites*, *PLoS ONE* Vol. 8(7) (July 24, 2013).

are required for all actions that harm or harass captive elephants. Such permits should be subject to public notice and comment to ensure that otherwise prohibited activities involving captive elephants actually enhance the survival of the species.

Similarly, it is imperative that interstate and foreign commerce in live elephants is regulated. Thus, we strongly urge the Service to apply those prohibitions to live elephants and to narrowly construe the Pre-Act exception for captive elephants to ensure that elephants used for commercial enterprises are not exempt from permitting requirements. *See, e.g., PETA v. FWS*, Case No. 14-55471, (9th Cir. 2014). Recently, there has been global outrage against the export of wild elephants captured from Zimbabwe and sold to China for exhibition⁶¹ and three U.S. zoos are now seeking to import 18 elephants from Swaziland. The Service must ensure that any proposed imports of live elephants into the U.S. are strictly scrutinized through the ESA permitting process under the enhancement standard.

(5) Preemption

We agree with the Service's interpretation that the ESA does not address *intrastate* sale of ivory and that state laws prohibiting the sale of endangered species parts or products are not preempted by federal law. As the Service noted in its proposed rule, two states, New York and New Jersey have already passed laws to address their local markets in ivory; a similar bill in California is awaiting the Governor's signature and several states are considering similar legislation. Such laws are critical components of a robust enforcement framework to address the demand for trinkets that are contributing to the decimation of wild populations of African Elephants.

Conclusion

We applaud the Service for taking action to amend the existing special rule, which has failed to provide for the conservation of African Elephants, as required by law. While Petitioners believe that this species meets the statutory definition of an Endangered species and therefore must be protected under the ESA's strict prohibitions on import, export, interstate commerce, and take, if the Service moves forward with finalizing the amended special rule we strongly urge the Service to tighten its proposal as indicated herein.

Respectfully,

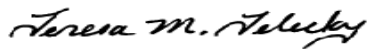


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⁶¹ Bloomberg, *Zimbabwe Flies 20 Elephants to China Amid Conservation Efforts* (July 6, 2015), <http://www.bloomberg.com/news/articles/2015-07-06/zimbabwe-flies-20-elephants-to-china-amid-conservation-efforts>.



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