

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
(ALEXANDRIA DIVISION)

HUMANE SOCIETY OF THE UNITED STATES,  
HUMANE SOCIETY INTERNATIONAL,  
CENTER FOR BIOLOGICAL DIVERSITY,

and

BORN FREE USA,

*Plaintiffs,*

v.

U.S. FISH AND WILDLIFE SERVICE,

and

U.S. DEPARTMENT OF THE INTERIOR,

*Defendants.*

Civil Action No. 1:18cv1301 (LO/JFA)

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. The Humane Society of the United States, Humane Society International, the Center for Biological Diversity, and Born Free USA (each a Plaintiff and collectively “Plaintiffs”), bring this action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, and the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*, as amended, to remedy the longstanding and ongoing refusal of the United States Fish and Wildlife Service (“FWS” or “the Service”) to comply with the unambiguous affirmative disclosure obligations imposed on the Service by 5 U.S.C. § 552(a)(2).

2. As relevant to this lawsuit, the 1996 amendments to the FOIA known as the “eFOIA” (codified at 5 U.S.C. § 552(a)(2)) impose on the Service the affirmative obligation to

place in a publicly accessible online reading room certain important and/or routinely requested government records, unless those records are otherwise exempted from disclosure by the statute.

3. Specifically, the Service is statutorily obligated by eFOIA to post every opinion or order it renders in adjudicating matters before it; every statement of Service policy (as well as every interpretation of those policies it articulates, unless the interpretation has already been published in the Federal Register); and categories of frequently requested records, as defined by the statute.

4. Separately, eFOIA requires the Service to provide an index of all of the foregoing records it posts so that members of the public can efficiently and easily access the information contained in those records.

5. The specific records at issue in this lawsuit are uniformly subject to the prompt, proactive disclosure obligation created by eFOIA. Significantly, the Service has never claimed otherwise.

6. As relevant to this lawsuit, Plaintiffs seek to have the Service post applications filed under the Endangered Species Act (“ESA”) by individuals or entities seeking FWS permission to import the heads, hides, tusks, or other parts of threatened species of African lions or elephants; copies of any permits issued by the Service in response to those applications; and the required findings made by the Service in the course of granting or denying those applications. Those applications are made to, and are adjudicated by, the Service’s Division of Management Authority in Falls Church, Virginia, where the relevant records are kept.

7. The Service has effectively (and properly) conceded that these records are not subject to any FOIA exemption. Indeed, the Service has previously released records in each

category at issue without claiming that the records are exempt from disclosure. It has done so only sporadically, incompletely, and belatedly, however.

8. The records at the center of this dispute contain information that is routinely “the subject of [continuing FOIA] requests,” and have already been “requested 3 or more times,” the statutory trigger for mandatory, proactive disclosure pursuant to eFOIA. The Service’s own records reflect that each of the Plaintiffs, other wildlife protection organizations, individual citizens, hunter organizations, and media outlets routinely request the materials at issue.

9. Indeed, the Service has actually posted some documents of this sort, albeit haphazardly and unpredictably, in its online reading room. That is, the Service has posted a few applications, a few permits and permit denials, and a small quantity of other relevant permit-related documents, effectively acknowledging that the eFOIA posting obligation applies to documents in these categories.

10. Nonetheless, with respect to the great majority of such documents, the Service has ignored, evaded, or delayed compliance with its eFOIA obligations. Notwithstanding Plaintiffs’ statutorily guaranteed right to have *all* of this information placed in an online reading room (and not just the few documents selected by the Service on the basis of some undisclosed rationale), the Service has repeatedly refused to do so, or even to explain why it believes it need not do so.

11. Even with respect to the few documents the Service has posted, it has steadfastly failed or refused to provide the statutorily required index, and has refused to respond in any meaningful way to Plaintiffs’ demand that it do so.

12. The Service’s persisting and unexplained refusal to post the records at issue has systemically deprived Plaintiffs and the public of records related to FWS’ implementation of critical conservation measures. For example, the ESA imposes a quota of two African elephant

trophies per hunter per year in order to ensure that trophy imports do not contribute to the commercial trade in ivory that even now leaves elephants at the brink of extinction. Without timely and comprehensive access to permit applications and to the results of those applications, there is no way for the public or organizations like Plaintiffs that are dedicated to the protection of threatened species to know whether these statutorily imposed quotas are being enforced.

13. Plaintiffs accordingly ask the court to exercise the full reach of its equitable authority to grant an order requiring the Service to comply with unambiguous statutory obligations it has steadfastly ignored.

### **JURISDICTION AND VENUE**

14. The Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), 702, 706, 28 U.S.C. § 1651, and 28 U.S.C. § 1331, and can grant declaratory relief pursuant to 28 U.S.C. §§ 2201-2202.

15. Venue is proper in the Eastern District of Virginia under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e). This action is brought against agencies of the United States, and Defendants maintain an office in Falls Church, Virginia, where its Division of Management Authority operates, where the records at issue in the matter are located, and where the events or omissions giving rise to these claims have occurred. 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e).

### **PARTIES**

16. Plaintiff THE HUMANE SOCIETY OF THE UNITED STATES (“HSUS”) is a non-profit organization headquartered in Washington, D.C. with an office in Richmond, Virginia. HSUS brings this action on its own behalf and on behalf of its members, who are personally vested in ensuring the humane treatment and continued survival of the world’s most

imperiled species, and have worked for decades to improve the plight of African wildlife. As explained below, HSUS' members are harmed by the FWS conduct at issue in this case because they rely upon HSUS to examine the materials at issue and act on their behalf. For example, on behalf of its members, HSUS filed the successful legal petition that resulted in applying Endangered Species Act protections to African lions for the first time, and HSUS has similarly petitioned FWS for maximum ESA protection for African elephants, leopards, giraffe, and chimpanzees. HSUS also routinely submits scientific information to FWS to inform the agency of the negative impacts of hunting imperiled species like lions, elephants, leopards, and rhinoceros in an effort to ensure that the ESA permitting scheme complies with FWS' statutory duties to promote conservation as well as transparency. HSUS communicates information about this issue of immense public concern to its members and the public by publishing a daily blog and emailing alerts to its constituents so they can take action to help improve protections of elephants and lions.

17. Plaintiff HUMANE SOCIETY INTERNATIONAL ("HSI") is a global non-profit organization, headquartered in Washington, D.C., with offices and programs around the world, including South Africa. HSI works to combat animal abuse and exploitation and to promote animal protection and welfare. HSI actively advocates against unsustainable trade in wildlife and regularly monitors the import and export of wildlife specimens. HSI provides the public and the press with information on a broad spectrum of wildlife issues, including trophy hunting, the exotic pet trade, the fur trade, shark finning, whaling, and poaching. HSI actively advocates at the state, federal, foreign, and international level against unsustainable trade in wildlife parts and products and regularly monitors the import and export of wildlife specimens. HSI also works with local authorities in African range states to improve management and protection of elephants

and lions, for example implementing a program to administer contraception to wild elephant populations that were previously slaughtered in herds in South Africa; partnering with local organizations in Zimbabwe to educate the public about humane wildlife management and protest the sale of elephants to China; funding a local Tanzanian organization to support an anti-poaching radio broadcasting program; and partnering with a local organization in Namibia to reduce human-lion conflict and oppose trophy hunting. Access to the materials at issue in this case is critical to HSI's mission.

18. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit Internal Revenue Service Code Section 501(c)(3) corporation that works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues. The Center is headquartered in Tucson, Arizona, with offices in Washington, D.C.; San Francisco, Joshua Tree, and Los Angeles, California; St. Petersburg, Florida; Portland, Oregon; Silver City, New Mexico; Minneapolis and Duluth, Minnesota; and Seattle, Washington. The Center brings this action on its own institutional behalf, and on behalf of its more than 68,000 members throughout the United States and around the world who derive scientific, aesthetic, recreational, and spiritual benefits from elephants, lions, and their habitat. The Center advocates on the federal and international level for increased protections for African elephants and lions, including a pending petition to list both forest and savannah elephants in Africa as endangered and commenting on management plans for the species. The Center engages in advocacy internationally on behalf of imperiled species at meetings of the Convention on International Trade in Endangered Species of Flora and Fauna ("CITES"), the World Heritage Committee, Convention on Migratory Species, and other international agreements. Center staff serve on intersessional working groups at CITES

that address issues such as importation procedures for wildlife parts (such as trophies), and attend and participate in the CITES process, which includes the listing and regulation of trade in species imperiled by trade. The Center frequently communicates to its members and the press about the conservation status of imperiled species and the threats to species survival, including trophy hunting. Because the Center communicates information about elephant and lion conservation and trophy imports to its members and the public by publishing a newsletter, sending out action alerts to its members and activists, and using social media, the information at issue in this case is of vital interest to the Center.

19. Plaintiff BORN FREE USA (“BFUSA”), a non-profit organization headquartered in Maryland, is a global leader in animal welfare and wildlife conservation. BFUSA brings this action on its own behalf and on behalf of its members. BFUSA leads legal and policy campaigns against, among other topics, the destructive international wildlife trade (and trafficking of elephant ivory in particular) and inhumane practice of trophy hunting (including the importing of elephant and lion trophies). BFUSA, which engages in compassionate conservation of some of the world’s most imperiled species for its own purposes and on behalf of its members, successfully petitioned the Department of the Interior to list lions under the Endangered Species Act, and has been one of the leading proponents to afford protections to African lions and elephants under international law. It is critical to BFUSA’s mission to have access to pending applications to import elephant and lion hunting trophies and to documents supporting the agency’s decision of whether to issue such permits so they can influence and monitor these government decisions.

20. Defendant U.S. FISH AND WILDLIFE SERVICE is a federal governmental agency within the meaning of 5 U.S.C. § 552(f)(1), and is a bureau within the United States

Department of the Interior (“DOI”). The Department of the Interior and its Fish and Wildlife Service together enforce the ESA. FWS processes applications for threatened species trophy imports at its offices located in Falls Church, VA. FWS has possession and control of the records at issue in this case in Falls Church, VA, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).

21. Defendant DEPARTMENT OF THE INTERIOR is a federal governmental agency within the meaning of 5 U.S.C. § 552(f)(1) that encompasses FWS, and has ultimate responsibility for the administration and implementation of the ESA and FWS’ FOIA determinations.

### **LEGAL FRAMEWORK**

#### *The Freedom of Information Act*

22. The Freedom of Information Act, 5 U.S.C. § 552, obligates federal agencies to release records to the public in two different ways. First, each federal agency (as defined by 5 U.S.C. § 552(f)(1)) must release records in response to specific requests made by members of the public unless one of the statute’s limited, enumerated exemptions applies. Second, each such agency has an affirmative obligation to make public certain categories of records specified by eFOIA by posting them online without waiting for a request from the public.

23. By requiring federal agencies to make these two different forms of disclosure, one responsive to public request and the other affirmative and automatic, the FOIA “encourages accountability through transparency, [and] is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike. The Freedom of Information Act should be administered with a clear presumption: In the face of doubt,



openness prevails.” Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

24. FWS and DOI are each federal agencies subject to the FOIA.

25. eFOIA specifies the categories of documents agencies are required to “make available for public inspection in an electronic format” proactively. Those records include (1) “final opinions . . . as well as orders, made in the adjudication of cases”; (2) “those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register”; and (3) “copies of all records, regardless of form or format—(i) that have been released to any person under a FOIA request submitted pursuant to Section 552(a)(3)]; and (ii) (I) that because of the nature of their subject matter, the agency determines have become *or are likely to become* the subject of subsequent requests *for substantially the same records*; or (II) that have been requested 3 or more times.” 5 U.S.C. § 552(a)(2) (emphasis added). Agencies are further required to provide an index of or guide to the records posted online for public inspection. *Id.* § 552(a)(2)(E).

26. eFOIA has two important efficiency-related purposes. First, it makes government transparency more efficient for the public because it allows citizens to oversee the conduct of their government without having to make FOIA requests or to engage in correspondence with agency personnel; anyone with access to the internet can obtain posted agency information instantaneously. It also promotes citizen access to the government by requiring that documents posted by the agency online be accompanied by an index, facilitating citizen review.

27. Second, it makes the process of transparency more efficient for federal agencies. As required by eFOIA, each agency can make a decision about whether categories of the information they generate meets the statutory definitions, and then post covered documents

without having to respond to individual requests or requestors. This minimizes the staff time each agency must devote to FOIA-related tasks and helps the agency reduce its backlog of pending FOIA requests. PL 104–231; S. Rep. 104-272; *see also* PL 114–185 (expanding the eFOIA provision to require proactive disclosure of routinely requested records, 5 U.S.C. § 552(a)(2)(D)(ii)(II)).

28. To effectuate these eFOIA requirements, the Department of the Interior directed FWS and similar bureaus to: “(1) Determine which of its records must be made publicly available under the FOIA (for example, certain frequently requested records); (2) Identify additional records of interest to the public that are appropriate for public disclosure; and (3) Post those records in FOIA libraries.” 43 C.F.R. § 2.67; *see also id.* § 2.65 (“Records that are *required* by the FOIA to be made *proactively* available for public inspection and copying are accessible on the Department’s Web site, <http://www.doi.gov/foia/libraries>”) (emphasis added); *id.* § 2.70 (“FOIA libraries means a physical or electronic compilation of records *required* to be made available *to the public* for inspection and copying under 5 U.S.C. 552(a)(2).”) (emphasis added).

29. An agency’s failure to comply with either the proactive disclosure provisions of eFOIA or the reactive provisions of FOIA is subject to *de novo* judicial review pursuant to 5 U.S.C. § 552(a)(4)(B).

#### *The Endangered Species Act*

30. The Endangered Species Act, 16 U.S.C. §§ 1531-1544, is the most comprehensive legislation for the preservation of threatened and endangered species ever enacted by any nation. In passing the Act, Congress found that different species “have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and

conservation” and that “other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(1)-(2).

31. By enacting the ESA, Congress established “a program for the conservation of such endangered species and threatened species” and mandated federal agencies to “utilize their authorities in furtherance of the purposes of” the ESA by committing “to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction . . . .” 16 U.S.C. § 1531(a)(4), (b), (c)(1).

32. The ESA defines the term “conserve” to mean “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 [the Act] are no longer necessary.” 16 U.S.C. § 1532(3).

33. Before a species receives any protection under the ESA, FWS must list the species as either “*threatened*” or “*endangered*,” based on a scientific evaluation of threats to the species’ continued existence. 16 U.S.C. § 1533(a), (c).

34. Whether a species is designated as “*threatened*” or “*endangered*” can have important consequences for importation of the species (whether live animals or parts or products derived from those species). *See* 16 U.S.C. § 1532(8).

35. The importation of *endangered* species is automatically prohibited under Section 9 of the ESA, unless such activity is “for scientific purposes or to enhance the propagation or survival of the affected species . . . .” 16 U.S.C. §§ 1538(a)(1)(A), 1539(a)(1)(A). Under this standard, before FWS will issue a permit to import an endangered species, it considers factors such as: “[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.” 50 C.F.R. § 17.22(a)(2).

36. For *threatened* species, the Service must issue regulations that are “necessary and advisable” for the conservation of threatened species and may extend the statutory protections afforded to endangered species by Section 9 of the ESA to threatened species. 16 U.S.C. § 1533(d).

37. Significantly, the Service has issued a default regulation providing that all *threatened* species are to receive the same Section 9 protection as *endangered* species, unless a species-specific regulation applies. 50 C.F.R. § 17.31. The issuance criteria applied to *endangered* species permit applications also apply when threatened species permits are required. *Id.* § 17.32(a)(2).

38. All African elephants (*Loxodonta africana*), and lions from southern and eastern Africa (*Panthera leo melanochaita*), are classified as *threatened* species and are subject to species-specific regulations. 50 C.F.R. § 17.40(e), (r).<sup>1</sup>

39. In 2016, the Service amended its regulations for African elephants. 81 Fed. Reg. 36,388 (June 6, 2016). The new regulation strictly regulates the trade in ivory. It does so in part by restricting the number of elephant tusks that may be imported as trophies each year by any one hunter (to discourage laundering of trophy tusks for commercial trade) and by requiring ESA permits for all elephant trophy imports regardless of the country of origin. 50 C.F.R. § 17.40(e)(6); 81 Fed. Reg. at 36,418.

40. Prior to ruling on any trophy import applications, the Service must determine whether hunting elephants in a particular country would somehow “enhance” the conservation of

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<sup>1</sup> Lions in western and northern Africa (*Panthera leo leo*) are listed as endangered, 50 C.F.R. § 17.11(h), and the Service has recognized that trophy hunting is a threat to the continued existence of lions in this region. 80 Fed. Reg. 80,000, 80,041 (Dec. 23, 2015). Any records pertaining to trophy imports of endangered African lions are outside the scope of this litigation because they would require public notice and comment under Section 10(c) of the ESA, 16 U.S.C. § 1539(c).

the species. 50 C.F.R. § 17.40(e)(6). This policy determination by the Service is called an “enhancement finding.”

41. Similarly, when the Service listed African lions in southern and eastern Africa as threatened, effective January 22, 2016, it issued a species-specific rule providing that an ESA permit, and a corresponding enhancement finding, would be required prior to issuing any permits for the import of a threatened African lion hunting trophy. 50 C.F.R. § 17.40(r)(1)-(2).

42. Through these regulations, before it can issue a permit allowing the importation of lion trophies, FWS is obligated to determine whether the import of those trophies:

enhances the propagation or survival of *P. l. melanochaita*, [by] examin[ing] the overall conservation and management of the subspecies in the country where the specimen originated and whether that management of the subspecies addresses the threats to the subspecies (i.e., that it is based on sound scientific principles and that the management program is actively addressing the current and longer term threats to the subspecies). In that review, [FWS must] evaluate whether the import contributes to the overall conservation of the species by considering whether the biological, social, and economic aspects of a program from which the specimen was obtained provide a net benefit to the subspecies and its ecosystem.

80 Fed. Reg. at 80,045.

43. Plaintiffs have a statutory role in the enforcement of the ESA. Recognizing the importance of saving species from extinction, Congress explicitly included a citizen suit provision in the ESA to encourage organizations like the Plaintiffs to act as private attorneys general to enforce the law. 16 U.S.C. § 1540(g).

*Convention on International Trade in Endangered Species of Wild Flora and Fauna*

44. The Convention on International Trade in Endangered Species of Wild Flora and Fauna (“CITES”) is an international conservation treaty designed to ensure that international trade in animals and plants does not threaten their survival. Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

45. The Treaty is accompanied by two appendices. For species listed in “Appendix I,” both *importing and exporting* countries must make a finding — prior to issuing a permit — that the trade is not detrimental to the survival of the species, called a “non-detriment finding.” CITES, art. III; 50 C.F.R. § 23.61(c) (in making such finding, FWS considers whether removal of the animal from the wild “is part of a biologically based sustainable-use management plan that is designed to eliminate over-utilization of the species”).

46. For Appendix II species, such as African lions, only the *exporting* country must make a non-detriment finding. CITES, art. IV.

47. African elephants in Zimbabwe, South Africa, Namibia, and Botswana and all African lions are listed under CITES Appendix II. All other populations of elephants are listed on Appendix I, which includes “all species threatened with extinction which are or may be affected by trade.” CITES, art. II(1).

#### **APPLICATION OF eFOIA TO FWS’ TROPHY IMPORT PROGRAM**

48. All of the documents at issue in this case fit within the categories specified for proactive, automatic posting in the FWS’ online reading room under eFOIA. *See supra* ¶ 25.

49. First, Plaintiffs have repeatedly requested access to documents in all three categories. Specific to African elephant and lion trophy import permits, Plaintiffs have submitted numerous requests under FOIA (5 U.S.C. § 552(a)(3)) seeking such records. For example:

- a. On April 6, 2011, HSUS requested “all records explaining or supporting any FWS determination that hunting African elephants or importing African elephant hunting trophies will enhance the survival of the species” and “all records received or created by FWS in the last three years regarding permits for the import of African elephant trophies”;

- b. On June 7, 2016, HSUS requested lion trophy import applications submitted since December 1, 2015;
- c. On May 23, 2017, HSUS and HSI requested permit application materials, copies of permits issued, and enhancement and non-detriment findings supporting the issuance or denial of permits for African elephant and African lion imports after September 1, 2016;
- d. On August 14, 2017, the Center requested permit application materials, copies of permits issued, and enhancement and non-detriment findings supporting the issuance or denial of permits for African elephant and African lion imports (as well as other species) after July 1, 2017;
- e. On March 9, 2018, HSUS and HSI requested permit application materials, copies of permits issued, and enhancement and non-detriment findings supporting the issuance or denial of permits for African elephant and African lion imports after January 1, 2018;
- f. On March 30, 2018, the Center requested permit application materials, copies of permits issued, and enhancement and non-detriment findings supporting the issuance or denial of permits for African elephant and African lion imports after November 3, 2017;
- g. On August 1, 2018, HSUS and HSI requested permit application materials, copies of permits issued, and enhancement and non-detriment findings supporting the issuance or denial of permits for African elephant and African lion imports after March 1, 2018.

50. Further, a FOIA log posted on FWS' online library indicates that numerous other non-profit organizations (such as the African Wildlife Foundation, International Fund for Animal Welfare, and Animal Legal Defense Fund) and media outlets (such as CNN, Associated Press, and E&E News) as well as trophy hunting trade groups routinely make such requests, which is unsurprising given the substantial controversy and public interest surrounding elephant and lion hunting. *See* <https://www.fws.gov/irm/bpim/foiareadingroom.html>.

51. These repeated requests for public information repeatedly go unheeded. When FWS does respond, it can take months to a year or more for the Service to release requested documents.

52. Although the Service's few substantive responses have been long-delayed and woefully incomplete, its responses to Plaintiffs' FOIA requests show that FWS has determined that elephant and lion trophy permit application materials, copies of permits issued, and enhancement and non-detriment findings are releasable (*i.e.*, in those limited instances where the Service has actually produced responsive records, it has not withheld in full any of the requested records as subject to a FOIA exemption).

53. For example, regarding the aforementioned May 23, 2017 request described in ¶ 49(c), FWS made a first partial response on August 15, 2017 and a second partial response on December 11, 2017. On March 9, 2018, FWS contacted HSUS to inquire whether those partial responses satisfied the requests in their entirety or "are you looking [for] more applications? There are about another 340 applications associated with this request." HSUS made clear that it desired *all* records responsive to the request. FWS thereafter produced a third partial response on May 31, 2018, but to date, FWS has not completed its response to this FOIA request that has been pending for over 17 months.



54. FWS did not even acknowledge the Center's August 14, 2017, FOIA request until November 3, 2017. The final batch of responsive records was not provided until December 11, 2017, meaning that the Center did not learn about any permits applied for or issued, or findings made, in July 2017 until more than four months later.<sup>2</sup>

55. Similarly, the agency has failed to release any requested records pursuant to requests made by HSUS and HSI in March or August 2018 or by the Center in March 2018, exceeding the statutory time allotted under FOIA. This delay has kept Plaintiffs in the dark about the agency's permitting activity for much of 2018.

56. The records Plaintiffs seek are not found in the FWS online reading room<sup>3</sup> or on any other page of the agency's website.

57. FWS does not proactively post online elephant or lion permit applications, copies of permits issued, or findings supporting issuance or denial of such permits prior to receiving a request under FOIA.

58. The Service has posted only a tiny slice of the relevant materials. For example, although Plaintiffs have requested lion trophy permit applications and related materials dating back to December 2015, the FWS reading room contains only copies of permits issued for lion trophies for a single month (June 2018). <https://www.fws.gov/irm/bpim/foialion.html>.

59. Similarly, while the FWS reading room includes a copy of the 2017 South Africa lion enhancement finding, the lion findings for South Africa for 2016 and for Zambia and Zimbabwe for 2017 are not posted online.

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<sup>2</sup> 5 U.S.C. §552(a)(6)(A) (establishing mandatory 20 day limit for agency to determine "whether to comply with such request and [to] immediately notify the person making such request").

<sup>3</sup> <https://www.fws.gov/irm/bpim/foiareadingroom.html>

60. Likewise, while the FWS reading room contains copies of a relative few permit applications and permits issued to import elephant trophies in 2017, at the present time, the reading room does not contain any information pertaining to elephant trophy import permits applied for or issued in 2018.

61. Additionally, while the FWS reading room does include a small handful of the enhancement and non-detriment findings for elephant trophy imports from 1997-2017, it does not contain the remainder of enhancement findings or non-detriment findings for elephant trophy imports.

62. Indeed, it appears that FWS is moving purposefully towards *less* transparency rather than more. FWS' website previously included pages where some (but not all) enhancement findings for elephant and lion trophy imports were posted, but in March 2018, FWS deactivated the links to those records (*see* <https://www.fws.gov/International/permits/by-activity/sport-hunted-trophies-elephants.html>).

63. Thus, the agency has failed to post online the vast majority of the applications made for importing threatened African lion and elephant trophies, copies of such permits issued or denied, or the associated findings.

64. HSUS, HSI, and the Center sent FWS a letter on May 18, 2018, requesting that FWS post in the agency's online FOIA reading room: (1) copies of all ESA permits issued since January 1, 2016 or in the future for the import of trophies of African elephant or threatened African lions; (2) all permit application materials for such permits (prior to permit issuance or denial moving forward); and (3) all enhancement findings supporting the issuance or denial of such permits.

65. In response, FWS neither posted the requested material online nor provided any substantive explanation of its refusal to do so.

66. Instead, FWS responded with an email dated June 4, 2018, containing boilerplate. The email said that it was the agency's policy "to comply with the requirement that we make available in an electronic format materials that have been released under the FOIA and 'that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times.'" The email did not acknowledge that the material already had been "requested 3 or more times."

67. On August 31, 2018, BFUSA sent an email requesting that FWS make available in a timely manner in the agency's online FOIA library: (1) copies of all ESA or CITES permits issued since January 1, 2016 or in the future for the import of trophies of African elephant or threatened African lions; (2) all permit application materials for such permits (prior to permit issuance or denial moving forward); (3) all enhancement and non-detriment findings supporting the issuance or denial of such permits; and (4) any letters of denial of such permit applications.

68. FWS responded on September 4, 2018, with the same boilerplate it used in June. Its email stated that "[i]t is the policy of the U.S. Fish and Wildlife Service to comply with the requirement that we make available in an electronic format materials that have been released under the FOIA and 'that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times.'" The information that has been posted can be found in our FOIA Reading Room: <https://www.fws.gov/irm/bpim/foiareadingroom.html>."

69. The minimal information that FWS has posted (which appears to be material released in responses to only certain narrow past FOIA requests), is posted in a disorganized and unsearchable manner, without any index.

70. Although all of the categories of documents at issue in this case have been requested repeatedly, by Plaintiffs, other wildlife protection organizations, members of the media, the public and hunter groups, and are thus subject to eFOIA's mandatory, proactive posting requirements without further inquiry, two subcategories of the documents must also be posted proactively, without prior request, because they represent or embody the Service's rules, orders, adjudications, opinions, or statements of policy.

71. Copies of permits issued, as well as enhancement and non-detriment findings, must be posted on line because they qualify as rules, opinions, orders, policies, or interpretations. *See* 5 U.S.C. §§ 551, 553, 552(a)(2)(A), (B).

72. Until quite recently, FWS' long-standing practice had been to make its African elephant and lion enhancement and non-detriment findings for trophy imports on a country-wide basis, for a set time period (often spanning several years). It made these findings only after a comprehensive review of the range country's management plan.

73. Each of these country-wide findings authorized approval (or denial) of individual applications until the finding was superseded by a subsequent finding.

74. FWS never accepted public comment on drafts of any of these findings, nor even provided public notice of the existence of most of the findings.

75. When FWS issued negative findings that prohibited the importation of elephant trophies from Tanzania and Zimbabwe in 2014 — in response to the ongoing poaching crisis — Safari Club International and the National Rifle Association filed suit challenging those findings,

claiming that they were agency rules and thus were invalid because they had not been promulgated pursuant to the APA's notice-and-comment procedures. *See Safari Club Int'l, et al. v. Zinke, et al.*, 878 F.3d 316 (D.C. Cir. 2017). The Court of Appeals for the D.C. Circuit agreed, concluding that the country-wide Zimbabwe elephant trophy enhancement finding was a rule and thus had been invalidly promulgated.

76. Rather than comply with *Safari Club Int'l, et al. v. Zinke* by engaging in transparent notice-and-comment rulemaking on its country-wide determinations, FWS chose instead to make the permitting process *even more* secretive. It announced that it was “withdrawing” all of its prior country-wide enhancement and non-detriment findings for elephant and lion trophy imports, and declared that it would thereafter make all of its findings on a case-by-case, application-by-application basis, again without public notice or comment.

77. At the same time, however, FWS announced that it would *continue to rely* on the information included in the prior, supposedly “withdrawn” enhancement and non-detriment findings that *Safari Club Int'l, et al. v. Zinke* had declared invalid. That is, the Service effectively “withdrew” the prior findings in name only and continues to rely on them in a secret process in which the public is not allowed to play a role.

78. The findings, thus, did not disappear; they just disappeared from public view. After the D.C. Circuit held that *more* transparency was required for such findings to be valid, the Service is now making those findings in documents it does not routinely post in its online reading room, based upon standards that it has purported to “withdraw.” It is undeniable that for purposes of eFOIA, the agency's new findings and permitting decisions — whether rules, opinions, orders, policies, or policy interpretations — must be proactively posted online. 5 U.S.C. § 552(a)(2)(A)-(B).

### HARM TO PLAINTIFFS

79. Plaintiffs and the constituencies they represent rely on ESA and CITES permitting records to evaluate trends in international trade, inform organizational strategy to improve protections where needed, participate in administering the ESA under 16 U.S.C. §§ 1533(b)(3), 1539(c), and 1540(g), and keep their members, contributors, and the general public informed on critical wildlife protection matters by collecting, distilling, and distributing data pertaining to the volume of hunting trophies imported into the U.S. and the rationales therefore.

80. Because FWS is not complying with its eFOIA posting obligations, Plaintiffs are forced to devote considerable organizational time and personnel resources in a largely unproductive attempt to obtain all of the relevant records from FWS on its African elephant and lion trophy import program by making and pursuing recurring specific FOIA requests. Smaller organizations, such as Born Free USA, that lack the capacity to pursue such records aggressively are especially disadvantaged by FWS' failure to routinely make these records available to the public.

81. The interests of Plaintiffs and their members are thus harmed by FWS' failure routinely and proactively to post online records pertaining to African elephant and lion trophy imports, and to provide a corresponding index. FWS' failure to comply with eFOIA forces Plaintiffs to deplete their limited organizational resources to obtain these public records through specific requests when those organizational resources would otherwise be put to more productive wildlife protection purposes.

82. Moreover, even if Plaintiffs' resources were unlimited, FWS' failure to release permit applications promptly, *before* making permitting decisions deprives Plaintiffs of the opportunity to contribute scientific information to inform the agency's permitting decision. Further, FWS' failure to release permitting decisions on a timely basis deprives Plaintiffs of

information necessary to aid federal agencies in enforcing violations of federal wildlife law, as Congress intended, and deprives Plaintiffs of the ability to ensure that FWS guarantees that activities it permits enhance the survival of the species while using the best available science.

83. This lack of transparency also prevents Plaintiffs from monitoring FWS' compliance with its statutory duties and regulatory commitments — such as strictly implementing the quota for elephant trophy imports — or from seeking judicial review to challenge the issuance of such permits prior to import for failing to comply with the ESA, CITES, or the APA.

84. For example, following public reports that a well-studied lion in South Africa, likely known as “Skye,” was shot by a trophy hunter in June 2017, Plaintiffs submitted a letter to FWS providing information from contacts in South Africa indicating that the hunt may have violated South African law. Plaintiffs did not know, however, because FWS had not disclosed, that the Service had received an application to import a lion from this exact location months earlier, and had issued the permit the very day the lion was reported to have been killed. If that permit application had been subjected to public scrutiny when filed, instead of months later, FWS could have made its permitting decision with all of the relevant information in hand. Instead, because of FWS's delay in releasing this permitting information, Plaintiffs wasted their resources in advocating before an agency that had already made a permitting decision. Plaintiffs' only recourse at that point was to refer the matter to FWS' Office of Law Enforcement for potential criminal violations of federal wildlife law.

85. The agency's failure to provide an index or guide to the limited and dated records posted online also causes harm to Plaintiffs who must dedicate significant time and personnel resources to sorting and indexing the disorganized files of records that have been posted.

86. FWS' process for dealing with ESA and CITES permit applications is increasingly a black box, even after the D.C. Circuit held that federal law requires *more* transparency. FWS does not post materials (or the indices) the law requires it to post, and has not promised to do so in the future, despite Plaintiffs' repeated inquiries on the subject. At the same time, FWS has not denied that it is obligated to do so or provide any explanation for why it has not done so to date. Instead, it has simply ignored its statutory obligations and Plaintiffs' efforts to encourage its compliance.

### **CLAIM FOR RELIEF**

#### **Defendants Failure to Post Permitting Materials Online Violates eFOIA**

87. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this Complaint, as though fully set forth below.

88. eFOIA requires agencies to "make available for public inspection in an electronic format . . . final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. § 552 (a)(2)(A).

89. Separately, eFOIA requires agencies to "make available for public inspection in an electronic format . . . copies of all records, regardless of form or format—(i) that have been released to any person under a FOIA request submitted pursuant to Section 552(a)(3)]; and (ii) (I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or (II) that have been requested 3 or more times." *Id.* § 552 (a)(2)(D).



90. Copies of permits issued and enhancement and non-detriment findings must be posted online because they qualify as rules, opinions, orders, policies, or interpretations. *See* 5 U.S.C. §§ 551, 553, 552(a)(2)(A), (B).

91. Defendants' ongoing pattern and practice of failing to comply with eFOIA by not proactively posting copies of all African elephant (*Loxodonta africana*) or African lion (*Panthera leo melanochaita*) trophy import permits or associated findings issued after January 22, 2016 in their online library.

92. Additionally, Defendants' failure to disclose in its online library (1) copies of all ESA or CITES permits issued since January 1, 2016 or proactively for the import of trophies of African elephant (*Loxodonta africana*) or African lions (*Panthera leo melanochaita*), (2) all permit application materials for such permits (prior to permit issuance or denial for those not yet issued or denied), and (3) all enhancement and non-detriment findings supporting the issuance or denial of such permits violates eFOIA. These three categories of records have been requested far more than three times and have been released in the past pursuant to FOIA requests.

93. As to the untimely and incomplete records that are made available online, FWS has only posted a few relevant existing records, and the agency has failed to provide an index or guide to these records as required under eFOIA. 5 U.S.C. § 552(a)(2)(E).

94. Defendants' failure to comply with eFOIA harms Plaintiffs' and their members' interests in ensuring that the Endangered Species Act and CITES requirements for importing threatened elephant and lion hunting trophies are strictly implemented. Therefore, Plaintiffs bring this claim under FOIA, 5 U.S.C. § 552(a)(4)(B). Alternatively, the Administrative Procedure Act provides judicial review of "every final agency action for which there is no other adequate remedy in court." 5 U.S.C. §706.

95. If this Court were to hold that the judicial review provisions of the FOIA are unavailable or inadequate to reach Defendants' violations of law fully, the APA provides that remedial authorization.

96. Even if the FOIA and the APA did not authorize the relief requested herein, the Court has the inherent equitable power to remedy Defendants' violations of law. As the Supreme Court has observed, even "[w]ith the [FOIA's] express vesting of equitable jurisdiction in the district court . . . there is little to suggest . . . that [in providing for that jurisdiction] Congress sought to limit the inherent powers of an equity court." *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 20 (1974).

97. Whether under the FOIA, the APA, or pursuant to the Court's equitable powers, this Court has the authority to remedy the violations of law plead herein.

#### **RELIEF REQUESTED**

Wherefore, Plaintiffs request that this honorable Court:

- A. Declare that Defendants have violated FOIA by failing to affirmatively disclose ESA and CITES permit applications and related materials pertaining to trophy imports of threatened African elephants (*Loxodonta africana*) or lions (*Panthera leo melanochaita*) submitted on or after January 1, 2016, records of decision for such permits, and enhancement and non-detriment findings supporting the issuance or denial of such permits.
- B. Order Defendants to immediately make all existing records related to ESA and CITES permit application materials pertaining to trophy imports of threatened African elephants (*Loxodonta africana*) or lions (*Panthera leo melanochaita*) submitted on or after January 1, 2016, records of decision for such permits, and

enhancement and non-detriment findings supporting the issuance or denial of such permits available via FWS' online library.

- C. Order Defendants, on an ongoing basis, to make all ESA and CITES permit application materials pertaining to trophy imports of threatened African elephants (*Loxodonta africana*) or lions (*Panthera leo melanochaita*), records of decision for such permits, and enhancement and non-detriment findings supporting the issuance or denial of such permits available electronically and in a timely manner after the receipt or creation of such records via FWS' online library, consistent with the eFOIA provision. 5 U.S.C. § 552(a)(2).
- D. Order FWS to provide an index or guide to the records it posts online pursuant to eFOIA. 5 U.S.C. § 552(a)(2)(E).
- E. Award Plaintiffs their costs, and reasonable attorneys' fees; and
- F. Grant Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted this 18th day of October, 2018.

Respectfully submitted,

/s/ Neal D. Mollen

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