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

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Docket Number: FWS-HQ-IA-2013-0091

Re: Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*)

I am pleased to submit these comments on behalf of the League of American Orchestras (the League) in response to the request by the U.S. Fish and Wildlife Service (80 Fed. Reg. 45154) for comments on the proposed revisions to the rule for the African elephant promulgated under section 4(d) of the Endangered Species Act of 1973, to increase protection for African elephants in response to poaching of the species and illegal trade in ivory. The League is fully supportive of the goals of wildlife conservation and combatting illegal trade in protected species, and we appreciate the leadership the U.S. government has demonstrated in considering how proposed new policies will impact commerce and non-commercial international transportation of musical instruments that contain small amounts of African elephant ivory.

We support the U.S. Fish and Wildlife Service's (USFWS) effort to make accommodation in the proposed rule for future commerce in existing musical instruments containing "*de minimis*" amounts of ivory that are not contributing to the poaching crisis, support the proposal to lift the restriction on travel with instruments purchased after February 25, 2014, and request that USFWS consider further policy revisions and clarifications that will ensure musicians may continue to use the essential tools of their trade.

The League leads, supports, and champions America's orchestras and the vitality of the music they perform. Its diverse membership of approximately 800, 501(c)(3) nonprofit organizations across North America runs the gamut from world-renowned symphonies to community orchestras, from summer festivals to student and youth ensembles. Founded in

1942 and chartered by Congress in 1962, the League links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. Our organization is also an active participant in the wider international cultural exchange community, partnering with The Recording Academy, Chamber Music America, the American Federation of Musicians, the American Federation of Violin and Bow Makers, International Conference of Symphony and Opera Musicians, the National Association of Music Merchants, and the Performing Arts Alliance to communicate with musicians in the U.S. and abroad regarding compliance with international rules for travel with musical instruments that contain protected species material.

Every day, thousands of U.S. professional musicians, students, and private individuals use musical instruments in public performances, private events, educational pursuits, and for personal enjoyment. Musicians who make their living performing with these tools of the trade live in cities and towns, large and small, in every corner of the United States, and contribute to the economic strength, civic vitality, and educational vibrancy of their communities. International artists from beyond our country's borders are frequently invited to perform for U.S. audiences, multiplying the diverse array of offerings available to listeners. In ongoing international cultural and diplomatic endeavors, U.S. orchestras, small ensembles, and soloists tour internationally to perform for audiences across the globe.

Ivory in Musical Instruments

We applaud USFWS for acknowledging numerous times in the draft regulations that "trade in the types of manufactured items that would qualify for this proposed *de minimis* exception is not contributing to or driving the illegal ivory trade."¹

While very small amounts of ivory may be found in an array of existing string, wind, percussion, and brass instruments made decades – and even centuries – ago, instrument makers turned to alternative materials, such as mammoth ivory, decades ago for crafting new instruments. (The proposed rule helpfully clarifies that mammoth ivory is not regulated by USFWS.²) The use and re-sale of these instruments does not increase demand for ivory products or drive ivory value. Instruments are not purchased for their ivory content, but rather for their impeccable overall quality and tonal attributes that enable their owners to perform to their very best abilities.

Commerce

In the course of their careers, working musicians nationwide make a considerable investment in the highest quality musical instruments available to them and count on their instruments to

¹ 80 Fed Reg 45163 (July 29, 2015).

² Ibid, 45175-6.

enable them to hone their musical skills, advance their careers, and supply extraordinary musical experiences to audiences. While musical instruments are often extremely fragile, they can be highly durable with a performance lifespan of hundreds of years. Whether an instrument was crafted centuries or decades ago, it is likely to be sold and re-sold many times over. Some commerce occurs through retail outlets and dealers, and some sales of musical instruments are person-to-person transactions.

We support the proposal to allow the future domestic interstate sale of musical instruments that contain "*de minimis*" amounts of ivory. Clarifications in the final rule will ensure that this exception will protect cultural activity.

The first criterion for qualifying for the *de minimis* exemption is as follows: "If the item is located in the United States, the ivory must have been imported prior to January 18, 1990, or imported under a CITES pre-Convention certificate with no limitation on its commercial use." We ask USFWS to clarify that the date restriction for when an instrument was last "imported" does not apply in the case of importing a musical instrument into the United States after a musician has traveled to perform abroad using the Musical Instrument Certificate or other relevant permit. Engaging in non-commercial international travel to use a musical instrument should not render that instrument ineligible for commercial sale.

USFWS specifically asks the public for input on the requirement that the ivory is a "fixed component or components of a larger manufactured item and not the primary source of the value of the item."³ The proposed rule does not define what is meant by "fixed components of a larger manufactured item."⁴ We request that movable parts that are attached to instruments, such as tuning pegs on violins, qualify for this standard.

The primary value of musical instruments currently in use is derived from the musical attributes of the instrument. The original elephant ivory content – while often structurally essential to the original construction of the instrument – is not the primary source of the value of the item. Musical instruments that were originally crafted with alternative materials to elephant ivory can command comparable prices to those that contain elephant ivory. This can be true of both instruments valued for their cultural and historical significance by collectors, and those instruments in use by musicians. It is important to note that the value of historically significant musical instruments can be connected to whether the instrument is in its original condition with original parts – but even in such cases, the elephant ivory component is not the primary source of the value of the item. For instruments in use by performers, the overall craftsmanship that produces the qualities of the sound and tone – and

³ *Ibid.*, 45163.

⁴ *Ibid.*

how well those qualities are matched to the skill and preference of the musician – are the primary source of the value of the item.

The proposed threshold for qualifying for the "*de minimis*" standard for domestic interstate commerce is 200 grams. While this amount covers a wide array of musical instruments that contain ivory, it may not cover some bagpipes as well as instruments with multiple keyboards, such as organs. Among the variety of musical instruments that have been previously made with small quantities of ivory, the most common among orchestral musicians are bows used for stringed instruments, which may have a piece of finished ivory on the protective tip. The quantity of ivory in a bow tip weighs on average 0.25 grams. Embellishments and parts on bassoons, the body of stringed instruments, and the veneer of piano keys use larger quantities. In the proposed rule the USFWS says, "We have chosen 200 grams as the weight limit because we understand that this is the approximate maximum weight of the ivory veneer on a piano with a full set of ivory keys and that this quantity would also cover most other musical instruments with ivory trim or appointments."⁵ While the proposed limitation will accommodate many musical instruments, we ask USFWS to consider an adjustment to the threshold, or another means of clarification, that will accommodate organs with multiple keyboards and bagpipes.

We prefer a measurement by volume, as it may be difficult to assess the weight of ivory parts without dismantling fragile instruments. USFWS expresses a desire in the proposed rule to avoid "destructive testing" when applying the antique exemption.⁶ We ask USFWS to take steps to ensure that the process for assessing whether an item meets the *de minimis* standard likewise protects the structural integrity of musical instruments, and enables the owners to clearly discern whether commerce is permissible.

We support flexibility on documentation that will affirm that musical instruments meet the proposed requirements. We ask that USFWS maintain the flexibility of the "use after import" standard for documentation when applying requirements for meeting the *de minimis* exemption.

We ask that USFWS provide clarification regarding the opportunities for repairing the ivory content of musical instruments. The proposed rule states that "a person who transported an item containing ivory across State lines for the purpose of having the item repaired would not fall under the prohibition for 'commercial activity.'"⁷ The rule further states, "the payment of money would be to compensate the repair person for his or her labor and expenses and not involve gain or profit from the ivory item itself (unless the activity involved using additional ivory to repair the item, which would not be allowed)." It is unclear whether

⁵ 80 Fed Reg 45162-3 (July 29, 2015).

⁶ *Ibid*, 45172.

⁷ *Ibid*, 45161.

the reference to “additional ivory” would apply to replacing existing ivory parts with new ivory parts, or whether it applies to adding a new total volume of ivory to a musical instrument by repairing non-ivory parts using ivory. Clarification on this point will be essential for compliance.

We ask that USFWS consider applying the *de minimis* exemption for musical instruments to export for commercial sale. The Question and Answers posted by USFWS regarding the proposed rule helpfully include an example scenario stating that, “If the bow meets the requirements for the *de minimis* exception, including that the ivory was removed from the wild prior to February 26, 1976, and that the total weight of the ivory is less than 200 grams you will be able to sell it in the United States.”⁸ Further, the proposed rule states that foreign commerce is permitted for musical instruments that meet the requirements of the *de minimis* exemption.⁹ Export for commercial sale will be permitted for items that meet the antique exemption. We ask that USFWS consider maintaining opportunities for commercial exports for non-antique musical instruments that meet the *de minimis* requirements.

The proposed rule includes exemptions for exhibitions by museums. We request that orchestras and other 501(c)(3) cultural organizations be considered eligible for exemption under this, or a separate future rulemaking process. The proposed rule explains that the Endangered Species Act definition of “commercial activity” includes an exception for “museums or similar cultural or historical organizations”¹⁰ and suggests that a future rulemaking procedure may create further accommodations, acknowledging the importance of these organizations in “curating objects that are of historical and cultural significance.”¹¹ Orchestras and other 501(c)(3) nonprofit music organizations play a similarly significant cultural role, and may own musical instruments that are used in pursuit of their tax-exempt purpose. We ask that USFWS engage the music community as future proposals are considered.

Travel

In 2012 alone, orchestras in communities across the United States are estimated to have engaged international guest artists on more than 1,200 occasions for multiple concerts and community programs and engagement activities.¹² These artists perform alongside U.S. musicians for concert audiences, and in schools and community settings. By inviting foreign musicians to perform and collaborate, orchestras provide American audiences the opportunity to experience a diversity of musical talent and encourage a supportive climate for U.S. orchestras to perform abroad. A sample of seven adult orchestras providing the results

⁸ <http://www.fws.gov/international/pdf/african-ivory-4d-proposed-changes.pdf>

⁹ 80 Fed Reg 45173-4 (July 29, 2015).

¹⁰ *Ibid*, 45161.

¹¹ *Ibid*, 45163.

¹² 2011-12 League Orchestra Statistical Report.

of their 2012-13 international tours report performing more than 60 concerts for nearly 120,000 attendees across the globe.¹³ American youth orchestras also tour internationally, providing young U.S. musicians the chance of a lifetime to perform in the world's greatest concert halls and to engage in cultural exchange with young people from a diverse array of countries and cultures.

The proposed rule would remove the current restriction on non-commercial travel into the U.S. with instruments were purchased after February 25, 2014 that contain African elephant ivory. We strongly support this substantial policy improvement. The impact of this rule change will be two-fold. It will enable musicians who have recently purchased instruments to perform internationally. It will also ensure that their musical instruments retain their value for re-sale to musicians that perform internationally.

Further improvements are urgently needed for international travel with musical instruments that contain protected species material. We look forward to the opportunity for continued communication with USFWS as new travel-related policies are crafted, and urge U.S. permit, port, and enforcement agencies to adopt immediate solutions that will support ongoing international cultural exchange. We understand that ongoing concerns related to international travel by orchestras and other musicians that cross borders to perform will be taken up in a separate rulemaking procedure that will address the implementation of policies adopted at the 16th conference of parties to the Convention on International Trade in Endangered Species (CITES). We look forward to engaging with USFWS in future opportunities to comment on travel-related concerns related to the musical instrument certificate and port enforcement protocols. In the meantime, we are taking this opportunity to re-assert the urgent need to:

- Immediately expand the designated U.S. port locations and hours of operations available for inspecting and credentialing musical instrument certificates. The current extremely limited designated ports are insufficient to support the volume of travel undertaken by professional musicians, students, and others participating in an array of international cultural activity.
- Establish a process for issuing clearer, public international guidance tailored for musicians preparing to come into compliance with existing CITES permitting rules and enforcement procedures.
- Establish more efficient and uniform procedures across international CITES authorities, by leading an effort to harmonize the treatment of musical instruments among CITES parties at the 17th conference of parties in 2016.
- Implement a “personal effects” exemption and exemptions for musical instruments transported by cargo under a carnet, which would allow legally crafted and legally

¹³ 2012-13 League Orchestra Statistical Report preliminary figures.

purchased musical instruments to be transported through international ports without undergoing burdensome inspection procedures.

The music community is fully supportive of the goals of wildlife conservation and combating illegal trade in ivory and other protected species. We seek reasonable solutions that protect the domestic and international use of musicians' tools of their trade and preserve the use of historically and legally made instruments now and for future generations to come.

Thank you for the opportunity to comment on the proposed revision of the 4(d) rule for the African elephant. The League of American Orchestras looks forward to continued engagement with the U.S. Fish and Wildlife Service on immediate and ongoing implementation of final rules related to domestic and foreign commerce, as well as pursuing opportunities for future travel-related policy improvements that with both protect endangered species and facilitate international cultural activity.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jesse Rosen', with a stylized flourish at the end.

Jesse Rosen
President & CEO