

## Conservator's Legal Guide to Ivory Regulation 2015

**ABSTRACT**—The Obama Administration issued an Executive Order on July 1, 2013 to assert increased federal regulation of the ivory trade. The US Fish & Wildlife Service on July 29, 2015 proposed new regulations to increase protection for African elephants under Section 4(d) of existing federal legislation known as the Endangered Species Act. These and other federal laws and regulations cited in References impose moratoria on the import of ivory, disallowing conservation, trade and sale of existing antiquaria, jewelry furnishings and musical instruments that contain ivory, and yet the federal laws provide express exemptions for “sport-hunted trophies”.

### 1. ELEPHANT IVORY<sup>1</sup>

Elephant ivory historically has been a luxury component of fine furnishings, musical instruments, vintage jewelry, game pieces, and decorative objects. Ivory has been used for carvings and incorporated in numerous other accessories and materials, objects that are in the collections of museums, corporations, and individuals. Ivory has had a market value based on its rarity and historical interest, as well as its collectability factor as exotica and aesthetic attraction. Conservators ought to be aware of dramatic changes in American ivory regulation beginning in 2014 that impact use of ivory for conservation purposes, even for scientific and museum specimens.

### 2. AFRICAN AND ASIAN ELEPHANTS

The reality is that elephant ivory sources to male elephant tusks, and elephants are, and for centuries have been, killed for their tusks and hides. In the 20th century, some nations where elephants are indigenous enacted laws and promulgated regulations to prevent the wanton killing of elephants. Worldwide regulation of the elephant ivory trade began in earnest in the 20th century, in conjunction with recognition and acknowledgment among governments, animal protection organizations, scientists, and others that the African and Asian elephant populations were contracting for various reasons, including loss of habitat, changes in land use, and poaching to obtain the valuable tusks for sale and international trade.

### 3. AMERICAN LEGISLATION 20TH CENTURY

#### 3.1. ENDANGERED SPECIES ACT

In 1973 President Richard Nixon signed into law the Endangered Species Act [ESA], 7 U.S.C. § 136, 16 U.S.C. § 1531 et seq. [Pub. L. 93-205, 87 Stat. 884]. The law incorporates prior legislative attempts to regulate protection of animals in the wild. The United States Fish and Wildlife Service [USFWS], among other agencies, is charged with implementing and administering the ESA, a regulatory regime recited in the Code of Federal Regulations [CFR], 50 CFR Part 17.

#### 3.2. CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

In enacting ESA into law domestically, the United States in 1974 concurrently ratified a multilateral treaty on the international front commonly referred to as CITES, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, sometimes called the Washington Convention for the eponymous location where it was signed. The key takeaway date from CITES is February 26, 1976. The ivory world is divided into certifiable imports before and after this critical date.

In fact, the United States was among the first countries to ratify CITES. CITES' purported objective is to ensure that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild. CITES includes varying degrees of protection of more than 35,000 species of animals and plants worldwide. The CITES taxonomy prioritizes the level of perceived endangerment by Appendix numbers, with Appendix I being high-threat and the most at risk. African and Asian elephants are both listed on Appendix I. American regulations for implementing CITES are recited in 50 CFR Parts 13, 14, 17, and 23.

#### 3.3 AFRICAN ELEPHANT CONSERVATION ACT

Notwithstanding the CITES regime enacted in the 1970s, about 15 years later Congress was motivated to add protections to stem the illegal trade in African elephant ivory, enacted in 1988 the African Elephant Conservation Act [AECA], 16 U.S.C. 4201 et seq. [Pub. L. 100-478, 102 Stat 2315. 54 Fed. Reg. 24758]. A moratorium on the importation of raw and worked ivory was authorized on imports from countries that did not meet criteria established by AECA. Raw ivory is defined in the statute as any African elephant tusk, and any piece of a tusk, the surface of which is polished. Worked ivory is any African elephant tusk or piece that is not defined as raw ivory.

AECA further authorizes a discretionary suspension on the moratorium on ivory imports. Over the course of a quarter of century, the moratorium apparently was suspended, or at least

not fully enforced, subject to the ebb and flow of various administrations and events. It is important to note the so-called new ivory regulatory system is based on existing law, ESA, and AECA, which are still in effect, and neither has been repealed or amended by Congress.

#### 4. AMERICAN LEGISLATION 21ST CENTURY

##### 4.1 EXECUTIVE ORDER

In July 2013, President Barak Obama issued an Executive Order forming an interagency Presidential Task Force on Wildlife Trafficking to forge a National Strategy for Combating Wildlife Trafficking [the National Strategy]. See References and Further Reading for a comprehensive list of laws, regulations and executive orders.

##### 4.2 NATIONAL WILDLIFE TASK FORCE

The Task Force represented by many federal agencies and other stakeholders decided to create a policy that almost completely bans the trade of ivory within and beyond American borders. The goal is to extinguish the import and export of ivory in and out of US ports as well as interstate and intrastate trade, with extremely limited exceptions and exclusions.

As part of this new initiative, the USFWS restored the Endangered Species Act restrictions on African ivory, and renewed the AECA moratorium on raw and worked African ivory. In other words, without amending federal statutes, a decision was made to enforce the existing AECA to the full extent of the law.

##### 4.3 NATIONAL STRATEGY AND USFWS DIRECTOR'S ORDER 210 (2014)

In February 2014, the National Strategy was published, supported by a USFWS Director's Order 210 (the "D.O.") dated February 25, 2014, establishing policies to enable USFWS to restrict the import, export, and interstate commerce of objects made from or composed of ivory, unless otherwise exempted. The D.O. supersedes all prior policies under AECA. The trade regulated is not limited to commercial exploitation and sales. Even museum exhibitions and scientific specimens are restricted. In short, absent an express exclusion, the ivory trade for commercial and cultural purposes is essentially front-burned by the Order. Contrary to press reports, the DO does not create new law or have implementing regulations yet been approved. Nonetheless, if implemented to the full extent of the underlying authorities of CITES, ESA, and AECA, the sale of ivory, and accessing or using ivory for the conservation of objects, is effectively banned.

##### 4.4 INTERSTATE RESTRICTIONS

Interstate commerce of ivory is prohibited, unless it complies with the antique standard of proof, requiring a certifiable bona fide antique described subsequently.

##### 4.5 INTRASTATE RESTRICTIONS

Intrastate commerce of ivory is prohibited, unless it is a bona fide antique or the seller can prove—for Asian elephant ivory—the object was lawfully imported prior to 1975 and—for African elephant ivory—the object was imported prior to 1990, or otherwise imported under a valid CITES pre-Convention exemption document.

##### 4.6 IMPORT BANS

All commercial imports of African ivory are banned, antique or otherwise. Imports of worked African elephant ivory imported for personal use as part of a household move or as part of an inheritance are allowed, provided that the ivory was legally acquired before February 26, 1976; was not subsequently transferred after February 26, 1976, from one person to another person for financial gain or profit; and the object has a valid pre-CITES certificate obtained from the exporting country pursuant to requirements under CITES management authority.

##### 4.7 EXPORT BANS

All commercial exports of ivory are prohibited, except for bona fide antiques, certain noncommercial items, and in exceptional circumstances, objects permitted under the ESA.

##### 4.8 TROPHY HUNTING ELEPHANTS FOR SPORT

The clampdown permits sport elephant hunting, allowing hunters two annual importations of sport-hunted elephants! Trophy hunting is not a new exemption to ivory regulation, but part of the AECA. To conservators, appraisers, art collectors, musicians, and others, the trophy elephant provision does not address how the hunting permits are regulated or how revitalized restrictions impact those four tusks per year per person, or how that raw ivory will be monitored or enforced. The exemption is justified by the USFWS—and in the legislative history—on the ground that sport hunting "contributes to conservation" and provides revenues for protected area-management.<sup>2</sup>

##### 4.9 FEBRUARY 1976 GATEWAY: MUSICAL INSTRUMENTS

The ban does not apply to noncommercial transport for scientific and cultural purposes for exempt objects like musical instruments containing ivory, providing the following:

- the instrument was legally acquired prior to February 26, 1976;
- the instrument was not subsequently transferred from one person to another person for financial gain or profit since February 26, 1976; the person or group qualifies for a CITES musical instrument certificate;
- and the musical instrument containing elephant ivory is accompanied by a valid CITES musical instrument certificate or an equivalent CITES document.

#### 4.10 FEBRUARY 1976 GATEWAY: MUSEUM EXHIBITIONS

The ban does not apply to noncommercial transport for scientific and cultural purposes for exempt objects like museum specimens, providing the following:

- the object was legally acquired prior to February 26, 1976;
- the object was not subsequently transferred from one person to another person for financial gain or profit since February 26, 1976;
- the person or group qualifies for a CITES travelling exhibition certificate;
- and the object containing elephant ivory is accompanied by a valid CITES travelling exhibition certificate or an equivalent CITES document.

#### 4.11 THE GATEWAY TO LEGITIMATELY IMPORTING IVORY ANTIQUES: DESIGNATED PORTS OF ENTRY

The DO revitalizes enforcement of the ESA requirement under Section 1539(g) that any person claiming the benefit of the statutory exemption for antiques has the burden of proof, an administrative and evidentiary hurdle bolstered by severe, and perhaps impractical, implementation rules.

The importer or owner of the antique must demonstrate in accordance with ESA, CITES criteria and documentation:

- the object is at least 100 years old; composed in whole or in part of an ESA-listed species;
- the object has not been repaired or modified with any ESA species on or after December 28, 1973, and
- the object was imported through an endangered species antique port, of which there are 12 authorized ports in the USA.

In other words, in 2014, to import a bona fide antique made of ivory or any work that contains ivory, the importer must prove the object was created prior to 1914, that it was not restored, conserved repaired, or otherwise modified since December 28, 1973, and that it provably entered the United States through one of the 12 designated ports.

### 5. IVORY CRUSH

The federal warehouse known as the National Wildlife Property Repository in Colorado stockpiled forfeited and seized contraband goods, including ivory. The federal government's position is that the stockpile was not available for commercial use. The issue of using that existing stock for museum conservation has not been addressed. In 2013, the government had all the ivory—an officially undisclosed amount—pulverized to dust in a rock crusher.

### 6. CONCLUSION

When working with ivory objects or items, conservators seek alternative materials. Private practice conservators might consider using a questionnaire for clients, or an internal memorandum for their files, to checklist the issues implicated by the decision

to enforce existing regulations and laws. Because the regime is implemented by new policies, the bright lines between acceptable and unlawful may not be clear, and may not be known until matters are adjudicated in courts. However, new proposed regulations issued July 2015 on the eve of publication are indicators of the government's implementation plans. See proposed regulations following body of text.<sup>3</sup>

### APPENDIX

Author Alexandra Darraby advises AIC that U.S. Fish and Wildlife Service proposed the federal regulation below to implement the Endangered Species Act. Readers may submit comments before September 28, 2015 at the Federal eRulemaking Portal: <http://www.regulations.gov>.

If approved, 50 Code of Federal Regulations 17.40 would be amended to recite as follows:

§ 17.40 (e)

Special rules—mammals.

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(e) African elephant (*Loxodonta africana*). This paragraph (e) applies to any specimen of the species *Loxodonta africana* whether live or dead, including any part or product thereof. Except as provided in paragraphs (e)(2) through (9) of this section, all of the prohibitions and exceptions in §§ 17.31 and 17.32 apply to the African elephant. Persons seeking to benefit from the exceptions provided in this paragraph (e) must demonstrate that they meet the criteria to qualify for the exceptions.

(1) *Definitions*. In this paragraph (e), *antique* means any item that meets all four criteria under section 10(h) of the Endangered Species Act (16 U.S.C. 1539(h)). *Ivory* means any African elephant tusk and any piece of an African elephant tusk. *Raw ivory* means any African elephant tusk, and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved. *Worked ivory* means any African elephant tusk, and any piece thereof, that is not raw ivory.

(2) *Live animals and parts and products other than ivory and sport-hunted trophies*. Live African elephants and African elephant parts and products other than ivory and sport-hunted trophies may be imported into or exported from the United States; sold or offered for sale in interstate or foreign commerce; and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided the requirements in 50 CFR parts 13, 14, and 23 have been met.

(3) *Interstate and foreign commerce of ivory*. Except for antiques and certain manufactured items containing *de minimis* quantities of ivory, sale or offer for sale of ivory in interstate or foreign commerce and delivery, receipt, carrying, transport, or shipment of ivory in interstate or foreign commerce in the course of a commercial activity is prohibited. Except as provided in paragraphs (e)(5)(iii) and (e)(6) through (8) of this section, manufactured items containing *de minimis* quantities of ivory may be sold or

offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32, provided they meet all of the following criteria:

(i) If the item is located within the United States, the ivory was imported into the United States prior to January 18, 1990, or was imported into the United States under a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) pre-Convention certificate with no limitation on its commercial use;

(ii) If the item is located outside the United States, the ivory was removed from the wild prior to February 26, 1976;

(iii) The ivory is a fixed component or components of a larger manufactured item and is not in its current form the primary source of the value of the item;

(iv) The ivory is not raw;

(v) The manufactured item is not made wholly or primarily of ivory;

(vi) The total weight of the ivory component or components is less than 200 grams; and

(vii) The item was manufactured before [EFFECTIVE DATE OF THE FINAL RULE].

(4) *Import/export of raw ivory.* Except as provided in paragraphs (e)(6) through (9) of this section, raw ivory may not be imported into or exported from the United States.

(5) *Import/export of worked ivory.* Except as provided in paragraphs (e)(6) through (9) of this section, worked ivory may not be imported into or exported from the United States unless it is contained in a musical instrument, or is part of a traveling exhibition, household move, or inheritance, and meets the following criteria:

(i) *Musical instrument.* Musical instruments that contain worked ivory may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The instrument containing worked ivory is accompanied by a valid CITES musical instrument certificate or equivalent CITES document;

(C) The instrument is securely marked or uniquely identified so that authorities can verify that the certificate corresponds to the musical instrument in question; and

(D) The instrument is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(ii) *Traveling exhibition.* Worked ivory that is part of a traveling exhibition may be imported into and exported from the United States without a threatened species permit issued under § 17.32 provided:

(A) The ivory was legally acquired prior to February 26, 1976;

(B) The item containing worked ivory is accompanied by a valid CITES traveling exhibition certificate (See the requirements for traveling exhibition certificates at 50 CFR 23.49);

(C) The item containing ivory is securely marked or uniquely identified so that authorities can verify that the certificate corresponds to the item in question; and

(D) The item containing worked ivory is not sold, traded, or otherwise disposed of while outside the certificate holder's country of usual residence.

(iii) *Household move or inheritance.* Worked ivory may be imported into or exported from the United States without a threatened species permit issued under § 17.32 for personal use as part of a household move or as part of an inheritance if the ivory was legally acquired prior to February 26, 1976, and the item is accompanied by a valid CITES pre-Convention certificate. It is unlawful to sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory imported into the United States as part of a household move or inheritance. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to items imported or exported under this paragraph (e)(5)(iii) as part of a household move or inheritance.

(6) *Sport-hunted trophies.* (i) African elephant sport-hunted trophies may be imported into the United States provided:

(A) The trophy was legally taken in an African elephant range country that declared an ivory export quota to the CITES Secretariat for the year in which the trophy animal was killed;

(B) A determination is made that the killing of the trophy animal will enhance the survival of the species and the trophy is accompanied by a threatened species permit issued under § 17.32;

(C) The trophy is legibly marked in accordance with 50 CFR part 23;

(D) The requirements in 50 CFR parts 13, 14, and 23 have been met; and

(E) No more than two African elephant sport-hunted trophies are imported by any hunter in a calendar year.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce or to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any sport-hunted African elephant trophy. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(6) as part of a sport-hunted trophy.

(iii) Except as provided in paragraph (e)(9) of this section, raw ivory that was imported as part of a sport-hunted trophy may not be exported from the United States. Except as provided in paragraphs (e)(5), (7), (8), and (9) of this section, worked ivory imported as a sport-hunted trophy may not be exported from the United States. Parts of a sport-hunted trophy other than ivory may be exported from the United States without a threatened species permit issued under § 17.32 of this part, provided the requirements of 50 CFR parts 13, 14, and 23 have been met.

(7) *Import/export of ivory for law enforcement purposes.* Raw or worked ivory may be imported into and worked ivory may be exported from the United States by an employee or agent of a Federal, State, or tribal government agency for law enforcement

purposes, without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for law enforcement purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(7) for law enforcement purposes.

(8) *Import/export of ivory for genuine scientific purposes.* (i) Raw or worked ivory may be imported into and worked ivory may be exported from the United States for genuine scientific purposes that will contribute to the conservation of the African elephant, provided:

(A) It is accompanied by a threatened species permit issued under § 17.32; and

(B) The requirements of 50 CFR parts 13, 14, and 23 have been met.

(ii) It is unlawful to sell or offer for sale in interstate or foreign commerce and to deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity any African elephant ivory that was imported into or exported from the United States for genuine scientific purposes. The exception in paragraph (e)(3) of this section regarding manufactured items containing *de minimis* quantities of ivory does not apply to ivory imported or exported under this paragraph (e)(8) for genuine scientific purposes.

(9) *Antique ivory.* Antiques (as defined in paragraph (e)(1) of this section) are not subject to the provisions of this rule. Antiques containing or consisting of ivory may therefore be imported into or exported from the United States without a threatened species permit issued under § 17.32, provided the requirements of 50 CFR parts 13, 14, and 23 have been met. Also, the provisions and prohibitions under the African Elephant Conservation Act (16 U.S.C. 4201 *et. seq.*) apply, regardless of the age of the item. Antiques that consist of or contain raw or worked ivory may similarly be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit issued under § 17.32.

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#### NOTES

1. Ivory sourced to walrus, warthog, hippopotamus, mammoth, and mastodon is excluded. Ivory from toothed whales is regulated under CITES, ESA, and the Marine Mammal Protection Act.
2. As this was written in April 2014, the USFWS just announced it has pulled back on exemptions for trophy hunting in Tanzania and Zimbabwe because of “uncontrolled poaching,” thus suspending the exemption only for those two countries and, until further determinations, only for the calendar year 2014.
3. In July 2015 as this was edited for publication, Cecil, a black-maned lion, and celebrity star of Hwange National Park in Zimbabwe, a preserve, was reportedly lured, tracked, hunted, and killed by an American as a trophy. The U.S. Fish & Wildlife is investigating.

#### REFERENCES:

50 CFR Part 17

African Elephant Conservation Act, 16 USC 4201 *et seq.*

Endangered Species Act, 16 USC 1531 *et seq*

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 17 U.S.T. 1087

#### FURTHER READING

Executive Order 13648 (July 31, 2013)

Federal Register 2015–18487 (July 29, 2015)

Art, Artifact, Architecture and Museum Law (2015 ed), by Darraby, Alexandra

Proposed State Legislation & Enacted Bills Regulating Ivory  
California AB96; Connecticut HB 5470, HB 5700, HB 5718, HB 5731 and HB 6955; Florida SB 1120; Hawaii HB 837 and SB 674 Illinois SB 1858; Maryland HB713 (inactive); New Jersey S2012 (enacted, with a total ban on importing, selling, offering to sell, purchasing, or possessing with intent to sell any ivory product including musical instruments); New York S7890 (enacted, ivory ban except for bona fide less than 20% ivory and "historical documentation evidencing provenance and showing the antique to be not less than 100 years old," and certain musical instruments); Nevada SB 398; Oklahoma HB 1787; Oregon SB 913; Virginia SB 1215 (inactive); Washington SB 5241.