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September 28, 2015

Craig Hoover, Chief, Wildlife Trade and Conservation Branch
Division of Management Authority
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

RE: FWS–HQ–IA–2013–0091; Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*)

Mr. Hoover:

The American Society of Appraisers appreciates having the opportunity to provide comments in connection with the above-referenced proposed rulemaking. While this proposal reflects a significant improvement from the preceding Directors Order 210 of February 25, 2014, there remain several important concerns among the community of professional appraisers who, under the proposed rule, will likely be called upon to help substantiate transactions under either the “De Minimis” or “Antique” exemptions that the Fish and Wildlife Service (FWS) has proposed:

Our Members Are Concerned about Potential Liability Arising from Completing a “Qualified Appraisal”, as defined by FWS, in Connection with the “De Minimis” and “Antique” Exemptions

Under existing legal and regulatory requirements, it is clear that any intentional act to circumvent the Endangered Species Act (ESA) is punishable by fines, imprisonment, or both. What is unclear, however, is whether and to what extent FWS plans to pursue legal or administrative recourse against appraisers who perform “best efforts” appraisals in connection with De Minimis or Antique exemption transactions, only to discover after some time that key assumptions or determinations that underpinned the appraiser’s opinion regarding the item are determined to be inaccurate. This lack of clarity, if not addressed either within the rulemaking or an adjunct statement by FWS, is likely to cause appraisers to not take on these assignments for fear of unknown subsequent liability.

This could arise in two distinct situations: First, where new specific facts regarding an artist who incorporated ivory into their works are discovered, thereby making underlying assumptions of the appraisers faulty, and thereby making their previous determination that an item would qualify for the Antique exemption wrong. Second, advances in scientific testing of ivory could bring about new findings about the age of the original ivory. Again, through no direct fault of the appraiser, their previous findings would become erroneous.

In either instance, the appraiser has made no effort to intentionally violate, or conspire to violate, the terms of the ESA. And yet, without a clear statement outlining whether FWS intends to review and pursue recourse in these instances, appraisers may decide not to accept the risks,

known and unknown, with performing appraisals in connection with the above-discussed exemptions. This will frustrate efforts by market participants to buy, sell, or donate items containing ivory, and run opposite of the policy objectives contained in the proposed rule.

A secondary question is whether FWS intends to require scientific testing of all ivory, regardless of whether or not a robust market of existing sales exists such that the appraiser can reach certain conclusions without the need for scientific analysis. These analyses, which add significant cost to the appraisal and require the ivory to be compromised in some manner, could deter individuals from seeking an appraisal and, thereby, foregoing an otherwise permitted transaction under the proposed rule. To the extent that an appraiser would feel compelled to err on the side of caution, they would likely require scientific testing in all but the most obvious of circumstances.

Recommendation: We strongly urge FWS to take steps to provide clarity to appraisers whose services will likely be required in connection with De Minimis or Antique exemption transactions:

1. State, either in the final rule or an adjunct document, whether and to what extent FWS intends to go after “best efforts” appraisals, as well as any liability the appraiser may incur should FWS decide that the appraiser somehow failed to meet its “Qualified Appraisal” requirements.
2. Provide guidance as to the extent FWS expects appraisers to conduct scientific testing as part of a “Qualified Appraisal”, as well as the type of information that FWS expects the appraiser to provide when they opt not to conduct such scientific testing.

We Recommend FWS Instead Focus on the Value of Items Containing Ivory When Deciding the Level of Item Identification and Appraisal Required

One significant concern regarding the proposed rule is the extent to which otherwise mundane, run of the mill items that just happen to contain ivory will be burdened with the same identification and appraisal requirements as more valuable items. The costs associated with ensuring that an item of lesser value can be legally transacted may well outstrip the proposed price or donative value, and as such, discourage individuals from engaging in otherwise legal transactions. We believe that this could have a strong chilling effect on the part of the ivory market where sales are most likely to occur.

Instead of placing blanket requirements on all items, we would urge FWS to consider adopting a tiered system where the level of detail required when entering into an exempted transaction is commensurate with the value of the item. By way of analogy, the Internal Revenue Service uses a similar approach when it comes to the donation of works of art for claiming a noncash charitable contribution deduction. At \$5,000, the individual seeking the deduction is required to obtain an appraisal that accompanies IRS Form 8283. Once the value of the item goes above \$20,000, however, IRS requires the appraiser to provide a more robust “Art Item Identification” document that gives more detail about the item or items in question, along with attaching the appraisal report to Form 8283. While these dollar figures may not be the right numbers to apply, a review of existing sales data could inform the proper dollar number at which the more onerous requirements are appropriate.

Under this approach, FWS will find individuals who engage in larger dollar transaction will have a more comprehensive paper trail supporting their sales activity and, where such a paper trail is lacking, afford FWS some basis for pursuing recourse against that individual. More importantly, though, is that it will remove a costly burden from the lowest tier of the ivory market, one which would otherwise continue to chill transactions in these low dollar value items.

Recommendation: Adopt a tiered system for the type of documentation required to support use of an exemption, based on the value of the item or items involved, so as to remove cost burdens from the lowest tier of the ivory market.

Where Close Cases are Unavoidable, We Would Request that FWS Provide Some Kind of Advisory Service

While our expectation is that FWS would not go after those cases where the item or items involved are close to the regulatory thresholds, prudent individuals and appraisers would benefit from the ability to seek, prior to the completion of the appraisal or transaction, a statement from FWS stating whether the application of certain exemption is likely to be accepted. The majority of individuals involved in the transaction, seeking to avoid those instances where liability under the regulations could occur, might otherwise elect not to engage in a transaction with “close call” items out of fear that a subsequent scientific or academic advance will make their transaction one not permitted under the regulations.

Much like with the lower dollar value items discussed above, this would have a chilling effect specific to those items containing close to 200 grams of ivory, or those within a few years of the 100 year antique cutoff, thereby limiting the disposition options of individuals with these kinds of items. Rather than promoting such an environment, FWS has an opportunity to instead encourage the sale, purchase, or donation of these items by allowing individuals, either on their own or through the appraiser they have hired, to seek a statement from FWS saying whether the exemption they intend to use would be accepted under the current facts and circumstances.

Recommendation: Provide individuals with an advisory service, accessible either by the individual or the appraiser they have retained, as to whether or not FWS would accept the disposition of an item under a specific exemption where the use of that exemption creates a “close call” situation.

ASA and its members appreciate having an opportunity to comment on this proposed rule, and are happy to provide further insight should FWS or any of its sister agencies desire more information. Feel free to contact John D. Russell, JD, Director of Government Relations for ASA, with any questions at 703-733-2103, or jrussell@appraisers.org.

Sincerely,
American Society of Appraisers