

WRITTEN TESTIMONY FOR THE RECORD

THE HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS

OVERSIGHT HEARING ON THE U.S. FISH AND WILDLIFE SERVICE'S PLAN TO IMPLEMENT A BAN
ON THE COMMERCIAL TRADE IN ELEPHANT IVORY

JUNE 24, 2014

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On behalf of the 80,000 members of the American Federation of Musicians of the United States and Canada (AFM) and the International Conference of Symphony and Opera Musicians (ICSOM), a Players' Conference within the AFM representing over 4000 musicians in over 51 major symphony and opera orchestras throughout the United States, I want to thank Subcommittee Chairman John Fleming and Minority Committee Member Alan Lowenthal for holding the June 24, 2014 oversight hearing on the plan of the U.S. Fish and Wildlife Service (USFWS) to implement a ban on the commercial trade in elephant ivory. The ban has a laudable goal: to shut down the illegal trade in ivory that fuels African elephant poaching. The AFM supports conservation efforts and the fight against illegal poaching and illicit trade in African elephant ivory.

However, the USFWS Director's Order 210 – both as originally issued on February 25, 2014 (the Order), and as modified on May 14, 2014 (the Amended Order) – has had and will continue to have the most severe of negative and unintended consequences on musicians, culture and the music industry, without advancing the goals of the elephant ivory ban, reducing illegal ivory trade or diminishing elephant poaching in Africa because of its restrictions on musical instruments.

Although elephant ivory was once used in small amounts in the manufacture of some musical instruments, this has not been the case for decades. However, thousands of musicians now own musical instruments that lawfully contain small amounts of elephant ivory. These musicians did not buy their instruments for the de minimis amounts of ivory they contain, but for their acoustic and handling properties unrelated to ivory per se. The use and sale of these musical instruments does not fuel the illegal ivory trade.

But the Amended Order nevertheless imposes severe restrictions on musicians' ability to perform internationally with these instruments, and will erode the instruments' economic value, causing great harm to our musical culture as well as great economic harm to our nation's musical artists. Although the Amended Order sought to correct problems created by the Order's restrictions on the ability of musicians to travel with their instruments, it fails to provide a clear, practical and reliable system for permitting such travel.

The AFM submits this written testimony for the record in order to show, first, that musical instruments containing small amounts of ivory simply should be exempted from the ivory ban, and second, that at a minimum, the application of the Amended Order and any new rules regarding musical instruments should be held in abeyance until clear, reliable and non-burdensome means of compliance are worked through with stakeholders.

The AFM and Its Universe of Stakeholders

The AFM is the largest labor organization in the world representing professional musicians, and possibly the oldest, having been founded in 1896. The AFM represents musicians in such diverse workplaces as motion picture and sound recording studios, live theaters, symphony, opera and ballet orchestras, hotels, lounges, tours and every other sort of venue large and small. The AFM has also represented the legislative and policy interests of working musicians since at least 1907, when operetta composer Victor Herbert was asked and appeared before Congress in support of copyright reforms on behalf of composers and the AFM. The AFM is firmly committed to raising industry standards and placing the professional musician in the foreground of the cultural landscape and relevant policy debates.

AFM members comprise the broadest imaginable universe of performing musicians. We perform as jazz, classical, folk, country, rhythm and blues, world music, Latin, Asian, salsa, samba, polka, hip-hop and rock artists in over 200 affiliated locals (*see* attached list of AFM Locals) throughout the United States and Canada. We are found in the professional ranks of major and regional symphonic, operatic and ballet orchestras, musical theater pits, major motion picture sound studios, night clubs, city music festivals, and traditional city-community concert and drum-and-bugle style bands. We teach in schools, universities and private studios, thus training new generations of artists.

Contrary to popular misconceptions, most musicians are neither rich nor celebrities, nor is ours a life of effortless play. We have natural talent, but only hard work and practice will hone our art. Full-time jobs in music are rare. Most professional musicians struggle to earn a decent living, and a successful musician is likely to be a person of extraordinary musical gifts earning, at best, a modest, middle-class livelihood.

For professional musicians, our musical instrument is a crucial tool of the trade, and more – it is our voice. A musician chooses his or her instrument with the utmost care for sound, playability and personal suitability, and then practices and performs on it until the instrument is an extension of the musician’s artistic self. Musicians’ instruments may range in value from \$1,000.00 to \$10,000,000.00; for most musicians it is a major investment, and its economic value is as crucial to the musician’s future economic well-being as its acoustic quality is crucial to his or her artistic expression. I cannot emphasize too strongly the importance of instruments to musicians and the music industry: professional musicians depend on their instruments to earn a living and give voice to their artist expression, student musicians to learn their art, and amateur musicians to express themselves in their homes and communities.

AFM members recognize the dignity of work and the value artists and supporters of the arts place on that work. With the execution of every musical note, we strive for perfection in both practice and

performance. We know that perfection demanded by our commitment to the art can only be achieved through our instruments.

Musical Instruments Containing De Minimis Amounts of Ivory Should Be Exempt From the Ban

At the June 24, 2014 oversight hearing, Ms. Arian Sheets, Curator of Stringed Instruments at the National Music Museum, provided the Subcommittee with clear testimony that while twentieth century instrument makers used small amounts of elephant ivory (often less than one gram) in certain musical instruments, elephant ivory has not been used in the manufacture of musical instruments for decades. Thus, the contemporary manufacture of musical instruments neither provides a market for illegally-traded ivory nor fuels the African elephant poaching that feeds that illegal market.

It is also clear that the continued existence, sale and use of thousands of what Ms. Sheets calls “vintage” instruments that contain small amounts of elephant ivory from earlier decades, when such use was lawful, *also* does not feed the illegal ivory market nor encourage elephant poaching. As I explained above, musicians select instruments for the quality of the instrument’s tone and the highly individualized sense of the instrument’s suitability for artistic talent and desires. We do not select instruments for the minimal amounts of elephant ivory they may contain; ivory is irrelevant to the musical value of the instrument. Bluntly stated, musical instruments are not bought and sold for ivory, and in the wake of all the furor that erupted over the Order and the Amended Order, the AFM is unaware of any evidence that the import, export, interstate sale or intrastate sale of musical instruments has any effect on illegal ivory trafficking or elephant poaching.¹

The AFM understands that the difficulty facing the USFWS is that of determining which vintage instruments contain lawfully-obtained, pre-Convention elephant ivory, and which, perhaps, do not. But the approach taken in the Order and the Amended Order, which put an impossible burden on ordinary citizen-musicians to ascertain and document the provenance of the small amounts of ivory in their instruments – which were never purchased for their ivory in the first place, and about which sufficient documentation may be impossible to obtain – puts an extraordinary hardship on musicians with no countervailing benefit for wildlife conservation. Musicians are terrified to take their instruments on tour to foreign engagements, for fear of confiscation upon return to the United States, no matter what steps they have taken, because the permitting process is full of obstacles and may be impossible to fulfill with certainty. Middle-class musicians can ill afford for their instruments – which represent a major investment for them – to lose value because they cannot be sold in inter- or intra-state commerce. And these harms will have an adverse effect on the arts generally, from symphony, opera and ballet

¹ Indeed, the USFWS has acknowledged that precluding the movement of musical instruments containing CITES pre-Convention or antique ivory “would not benefit elephant conservation” and such movements “do not contribute to poaching and illegal trade.” *USFWS Moves to Ban Commercial Elephant Ivory Trade Questions and Answers*, <http://www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html>, see answer to “Why not impose a complete ban on all import, export and domestic sale?”

orchestra institutions to ethnic “world music” groups (and groups performing in every genre imaginable) to the viability of foreign cultural exchanges.

In light of the fact that the practice of inserting small amounts of elephant ivory in musical instruments ended decades ago, the lack of evidence that travel, use and sale of musical instruments with small amounts of ivory has any ill effect on wildlife conservation, and the harms with which the Amended Order will burden musicians in particular and the arts generally, the AFM believes that musical instruments should be exempted from the Amended Order.

The Application of the Amended Order and Any New Rules on Musical Instruments Containing Small Amounts of Elephant Ivory Should be Held in Abeyance Pending Establishment of Clear, Reliable and Non-Burdensome Means of Compliance

If musical instruments containing small amounts of elephant ivory are not to be completely exempted from the application of the Amended Order and other conservation regulations, their application should, at a minimum, be deferred until the USFWS (and any other relevant government agencies) have consulted with stakeholders in the music and arts communities and reached agreements upon clear, reliable and non-burdensome methods of compliance.

In his testimony during the June 24, 2014 oversight hearing, David J. Hayes, Vice-Chair of the Advisory Council on Wildlife Trafficking, noted that the Advisory Council had “urge[d] the Interior Department’s Fish & Wildlife Service to work with the regulated community to provide non-burdensome permit approvals for non-commercial import and export of products that contain ivory (e.g., orchestra instruments that contain ivory; traveling museum exhibitions, etc.), and for clear and reasonable burden of proof standards that qualify ivory products as “antiques” that are exempt from the Endangered Species Act.”

But to date, the application of the Amended Order has been unclear, unreliable, and burdensome. Musicians of all types – those who tour as musicians employed by orchestra institutions, those who tour in their own small groups or as solo performers in all types of musical genres, and those who simply own vintage instruments and fear their loss or devaluation – have suffered from uncertainty that hurts the arts and does nothing for wildlife conservation.

The Order

Immediately upon issuance of the February 25, 2014 Order, the American music industry was thrown into turmoil. It is no exaggeration to say that AFM musicians in the United States and Canada experienced panic at the thought that under the immediate enforcement provisions of the Order, they faced the possible confiscation of their instruments containing small amounts of ivory upon returning from foreign tours, and had no clear idea and no government guidance regarding how to comply with the Order to avoid such extreme results. The AFM worked hard to untangle the new rules regarding travel in and out of the country, but there upon issuance of the Order there was no one central government source of reliable answers to the myriad of confounding questions raised by the Order and its immediate enforcement.

The AFM and other organizations were able to assist two major U.S. symphony orchestras whose players, all members of AFM Locals in Boston and New York, were already scheduled to travel overseas within a few months. But it was impossible meet the needs of the many non-orchestral musical groups who were booked to perform overseas and had no guarantee that they would be able to return safely with their musical instruments – because it was impossible to determine up-to-date, conclusive and accurate directions about how to navigate customs and immigration with instruments containing small amounts of ivory. There were some indefensible confiscations of instruments that may have been related to African ivory, and the uncertainties surrounding the Order allowed rumor and misinformation to spread through the music industry like wildfire.

The AFM became convinced that complications would continue unless and until musical instruments either were exempted from the Order, or were subjected to clear, reliable and non-burdensome rules. As I wrote to President Obama, “the language in the Order creates insurmountable obstacles that the average citizen musician cannot navigate due to the lack of a One-Stop government site that provides necessary guidance.” (See attached letter to President Obama dated April 4, 2014.) I wrote a similar letter to the Congressional Black Caucus, Congressional Hispanic Caucus and Congressional Asian Pacific American Caucus, to advise them the Order likely would adversely impact diverse musical cultural constituencies, including groups that travel with special indigenous non-traditional musical instruments that may contain ivory. (See attached letter to the Congressional caucuses dated April 4, 2014.) In that letter, I requested and recommended the exemption of musical instruments from the Order until such time as USFWS issued an orderly plan that would allow artists to smoothly traverse the system assuring guaranteed, safe importation of their valued musical instruments through customs and immigration upon return.

Last but certainly not least, the AFM and partner organizations met with the USFWS to urge that the needs of the music community could and should be met without any harm to wildlife conservation.

The Amended Order

Due to considerable pressure brought about by the AFM and its national music partners, the USFWS issued the Amended Order on May 15, 2014. Though we welcomed the Amended Order’s expansion of the date related to sales and trade of musical instruments, the Amended Order did not go far enough to mitigate the burdens and harms caused by including musical instruments containing small amounts of ivory within the purview of the elephant ivory ban. The following are only some of the ongoing problems under the Amended Order and potential new regulations.

The Burden of Proof and the Lack of Clarity Surrounding Applications for CITES Certificates

The Amended Order allows the import/export (i.e., foreign tours and returns to the United States) of musical instruments containing worked elephant ivory that was legally acquired and removed from the wild prior to February 26, 1976 (the date that the African elephant was listed under the Convention on International Trade in Endangered Species (CITES)), and not sold since February 25, 2014. This would cover an enormous number of musical instruments, except for the following critical practical problem: the burden of proving that the minimal amount of ivory in a musical instrument was taken from the wild

pre-CITES is often impossible to meet. Numerous instruments, including many of the finest examples that are prized by musicians for their playing qualities, were crafted with small amounts of ivory long before CITES existed. Violin bows, for example, are often extremely old. None of these instruments, and very few others, would have been provided with documentation regarding their ivory content, most especially because the instruments were never valued for the minimal amounts of ivory they might contain but only for their ability to produce sounds.²

Simply put, it is unreasonable to impose a burden of proof upon citizen-musicians that simply cannot be met, particularly given the lack of connection between musical instruments and the illegal ivory trade.

If the USFWS persists in believing that musicians should be required to make some showing regarding the likely source of any ivory in a musical instrument (though a showing far short of proving provenance where proof is impossible), the showing that should be required to obtain a CITES certificate (or other “musical passport”) must be informed by practical reality, determined in conjunction with musicians and experts on musical instruments, and accompanied by clear, consistent and reliable guidance and directions (including to enforcement officials) – before it is enforced. At present, even with the issuance of a new musical instrument permit number 3-200-88, appropriate government “required” documentation needed to prove the source of any ivory in the instrument is unclear.

Resolution of Economic Issues Relating to Seizures of Legally Purchased Musical Instruments

The AFM understands that fines have recently been levied on confiscated musical instruments and their component parts, with no system in place to reimburse affected artists whose instruments may eventually be deemed to be perfectly lawful.

There is currently no system in place to reimburse musicians for the value of lawful instruments that are damaged or destroyed in inspection or enforcement efforts. Musical instruments are fragile, and instruments suspected of being in violation of regulations may be damaged or destroyed if inspected and mishandled by non-experts. As an economic matter, regulations must provide for compensation in such circumstances. As a practical matter, regulatory language must be developed in cooperation with musicians and instrument experts to ensure that it appropriately protects valuable instruments during any physical inspection.

Preventing Devaluation of Musical Instruments

As I described above, musical instruments are major investments for working musicians and music students. Regulations that prevent the sale of musical instruments containing minimal amounts of African elephant ivory will do nothing to prevent the illegal ivory trade, but will radically reduce the

² Indeed, it is not only difficult for musicians to determine or document the ivory (or lack thereof) in their instruments. The AFM understands that there is at least one documented case of an instrument being confiscated by U.S. officials because it was suspected to contain elephant ivory, when in fact it contained none.

economic value of musical instruments, threatening the livelihoods, capital investment, and future retirement of musicians, as well as preventing a new generation of musicians from benefitting from some of the finest musical instruments in existence. This is a most serious problem, not only for individual musicians, but for the music and arts community as a whole, and must be addressed.

Insufficient Number of Ports of Exit and Re-entry to the United States

At time of the issuance of the Amended Order until now, the USFWS made no effort to accomplish targeted, effective public education regarding the need, under the Amended Order, to exit and enter the United States through designated ports. Moreover, citing cost prohibitions during our meetings, the USFWS would not consider expanding the number of ports available to musicians re-entering the United States with affected musical instruments. These problems must be rectified. And, as noted above, reliable techniques for distinguishing African elephant ivory from other materials must be developed, and safe procedures for the handling and protection of musical instruments must be developed with instructions clearly filtered down to enforcement officials.

International Inquiries

I have written at length about American musicians, but AFM and non-AFM Canadian musicians cross daily into the United States, and there is no clarity regarding the documentation they now need to bring their musical instruments into the United States. New regulations now imposed by the United States government have added additional layers to the travel procedures Canadian musicians follow, which already include immigration verification, work permits, and the Canadian government requirement for musicians to obtain an ATA Carnet, just to name a few. Similarly, international musicians committed to perform in the United States, often as part of important cultural exchanges, suffer from uncertainty regarding requirements and their ability to obtain appropriate CITES documentation.

Conclusion

In addition to thanking the Subcommittee for its attention to this critical issue, I would also like to thank officials of the USFWS for their continued responsiveness to the concerns of the music community. But as the consideration of these issues continues, the AFM urges Congress, the Administration and the USFWS to take to heart the plight of the working musician and the music industry at large.

In this regard, it is worth noting that musical instrument makers and the music industry generally have been leaders, not followers, in the conservation of wildlife, given the fact that they discontinued the use of ivory in musical instruments decades ago. Many musical instruments lawfully containing small amounts of elephant ivory remain in use, and they have extraordinary artistic and financial value to musicians and the arts. The AFM believes that a full moratorium for musicians and their instruments should be placed on the application of the Amended Order and any other new rules to musical instruments, either permanently, or, at a minimum, until such time all issues are resolved in conjunction with stakeholders and clear final guidelines and documentation are published on the USFWS website.

Respectfully submitted,

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