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DIRECTOR'S OFFICE

Memorandum

To: IAFWA Government Members

From: Paul A. Lenzini, IAFWA Legal Counsel

Re: Details of the US-EC Understanding on
Trade in Certain Wild Furs

Background

Thanks to a resolution achieved by the United States and the European Community on December 18, 1997, the threatened prohibition on import into the EC of certain furs of US origin, scheduled to be implemented in December 1997, will not be applied. The threat derives from the 1991 European regulation on leghold traps. The regulation declares that the country of origin of products exported to the EC of certain species involved in trade in wild furs must comply with one of two conditions: that use of the leghold trap be prohibited or that trapping methods used for the species listed meet internationally agreed humane trapping standards. Council Regulation (EEC) No. 3254/91. (Copy attached at Tab A.)

Dealing with the threat of an embargo on wild fur of US origin has been made complex by the fact that the several States are the competent parties with respect to regulation of trap use but, as a matter of constitutional law, are generally not competent to enter into arrangements with foreign nations. And, while an embargo on the movement of US furs into the fifteen member EC could have significant indirect effects on wildlife management in this country, an EC embargo on imports from the US would directly implicate federal authority and interests relating to foreign trade.

Even prior to its final approval in 1991, Regulation 3254/91 was identified by the United States Trade Representative (USTR) in the annual "National Trade Estimate Reports on Foreign Trade Barriers" as constituting a significant barrier to United States exports. As such, the USTR is authorized to take action to eliminate such foreign trade barriers including negotiations or consultations with foreign

governments. If these efforts fail, USTR is authorized to file a formal complaint before the World Trade Organization in Geneva.

Following two USTR-led delegations to Brussels, in 1990 and 1991, and numerous subsequent consultations by USTR that failed to resolve the threat of an embargo, the IAFWA Executive Committee in March 1996, on the recommendation of the Fur Resources Committee, urged USTR to enter into negotiation of a framework agreement with the EC and principal supplier nations to the EC to establish internationally agreed guidelines for humane trapping. This long-running, contentious issue was resolved through separate EU settlements with the Canadians and Russians, on the one hand, and the United States on the other, described below.

I. The Canada, EC, Russia Agreement. In July 1997, representatives of these nations initialed the "Agreement on Humane Trapping Standards Between Canada, the European Community and the Russian Federation" ("the Agreement"), an arrangement containing several indicia of a binding international agreement. Annex 1 to the Agreement is a set of objective Standards (behavioral indicators and physical injuries) to be used in evaluating welfare of trapped animals for killing traps and restraining traps. The Agreement establishes a list of nineteen species to which the Standards apply, twelve of which are native to North America. An Implementation Schedule is established for trap testing and for phase out of traps that do not meet the Standards. The Agreement was signed by Canada and the EC on December 16, 1997, and was signed by the Russian Federation on April 24, 1998.

USTR officials and representatives of state wildlife agencies participated in negotiation of the Standards, but the US declined to become a party to the Agreement because it appears to be a binding international agreement and because primary authority for the subject matter in the US resides in the several States and in Indian tribes.

II. The US-EC Agreed Minute. In lieu of becoming a party to the Agreement on Humane Trapping Standards, the US and the EC arrived at a political understanding signed in Brussels on December 18, 1997. The understanding is set forth in the form of an Agreed Minute. (Tab B) The Agreed Minute acknowledges that an understanding was reached on the following matters:¹

A. The US and the EC consider that the Standards annexed to the Agreed Minute (identical to the Standards developed during

¹ While an accurate description of the contents of the Agreed Minute, the description below is not a verbatim recitation of it.

negotiation of the Canada, EC, Russia Agreement except for differences in the Implementation Schedule) provide a common framework for describing and evaluating progress toward the use of more humane traps and trapping methods and provide a basis for cooperation on the further development and implementation of the Standards by their respective competent authorities (in the United States, state wildlife agencies and tribal agencies). (A copy of the annexed Standards is at Tab C.)

B. The US endorses the Standards annexed to the Agreed Minute as providing such a common framework for implementation by its competent authorities for the humane trapping of specified terrestrial or semi-aquatic mammals, twelve species native to the United States listed in the Standards.²

C. The US and the EC intend to encourage and support research, development, monitoring and training programs by their competent authorities that promote the use and application of traps and trapping for the humane treatment of such (twelve species of) mammals, and they recognize the need to reevaluate and update the annexed Standards as new technical and scientific information and data become available based on such programs.

D. The US and the EC further intend to encourage their competent authorities to monitor and report on progress towards implementation of the annexed Standards.

E. The US and the EC recognize that nothing in their understanding affects their rights and obligations under the (Marrakesh) Agreement establishing the World Trade Organization.

F. The US and the EC intend to consult with each other on any matter concerning this understanding or the annexed Standards with a view to finding a mutually acceptable solution.

² Coyote, wolf, beaver, bobcat, otter, lynx, marten, fisher, ermine, muskrat, raccoon and badger. *Martes martes*, listed in the Standards under the common name "pine marten," is not native to North America.

G. Whenever the term "the Agreement" is used in the annexed Standards, it is understood to mean the Agreement on Humane Trapping Standards between Canada, the European Community and the Russian Federation.

III. Side Letters Accompanying the Agreed Minute. Three side letters accompany the Agreed Minute and should be considered in conjunction with it. (Tab D) The first two side letters are US letters to EC representatives, both dated December 18, 1997, and signed by the chargé d'affaires of the U.S. Mission to the European Union in Brussels. The third side letter, also dated December 18, 1997, is signed by the EC representatives named in the US side letters and is addressed to the chargé d'affaires of the U.S. Mission. The first US side letter transmits the advice of representatives of the competent authorities in the United States (IAFWA through the Fur Resources Committee) that they have intensified their efforts to identify more humane traps through a fifty-state initiative, in cooperation with federal agencies, to develop Best Management Practices for traps and trapping methods in the United States (BMPs), and that representatives of the competent authorities in the United States advise that the BMPs will be developed based on the Standards annexed to the Agreed Minute.

The first US side letter transmits the further advice of representatives of the competent authorities in the United States that the BMPs will apply not only to the twelve species listed in the Standards that are native to North America, but also to an additional ten furbearing species ("the ten unlisted species") trapped commercially in the United States.³

The first US side letter also informs the EC that U.S. competent authorities have indicated that, pursuant to the Standards annexed to the Agreed Minute, with respect to Mustela erminea and Ondatra zibethicus, the use of all jaw-type leghold restraining traps is being phased out within four years of entry into force of the Canada, EC, Russia Agreement and, also pursuant to the Standards annexed to the Agreed Minute, with respect to the ten other native species listed in the Standards, the use of conventional steel-jawed leghold restraining traps is being phased out within six years of entry into force of the Canada, EC, Russia Agreement.

The second US side letter memorializes an understanding reached by both parties in the course of negotiating the Agreed Minute having to do with the language of paragraph six of the Agreed Minute. That paragraph notes that both the US and the EC recognize that the Agreed Minute and the attached Standards

³ Mink, red fox, gray fox, arctic fox, swift fox, nutria, opossum, skunk, bassarisk and wolverine.

do not collectively affect the rights and obligations of the two sides under the WTO agreement. This side letter is meant to clarify that the US, in dropping its demand for certain additional language in this paragraph during the negotiations, was in no way implying through its actions that it was waiving its rights under the WTO agreement. The second US side letter goes on to request that the EC confirm its acceptance of the understanding through a letter of reply. The EC's side letter (the third side letter) confirms its acceptance of the understanding described in the second US side letter.

IV. Political Nature of the Agreed Minute and Accompanying Documents. The Agreed Minute and the accompanying documents (the Standards annexed to the Agreed Minute, the Implementation Schedule therein, and the side letters) constitute a political understanding of the US and the EC concerning the desirability of achieving progress toward the identification and use of more humane traps and trapping methods. The Agreed Minute reflects that in the United States authority to regulate use of traps and trapping methods for terrestrial or semi-aquatic mammals resides primarily in state and tribal authorities.⁴ The language in the Agreed Minute and accompanying documents avoids expressions that could create legal obligations on the US government under international law.⁵

Also not legally binding on the US or on the several States is the advice of representatives of state wildlife agencies, transmitted to EC representatives in the first US side letter, that the state agencies have intensified their efforts to identify more humane traps through the BMP initiative and that the use of all jaw-type leghold restraining traps for two species and the use of conventional steel-jawed leghold restraining traps for the ten other native species (listed in the Standards) is being phased out within certain time periods related to entry into force of the Canada, EC, Russia Agreement. Nor does the transmission of such advice to the EC give rise to an obligation enforceable in state or federal court.

Neither do any of the assertions of the Agreed Minute or the accompanying documents constitute a "best efforts" legal obligation of conduct or of results on the part of the several States to take particular actions with respect to traps or trapping methods if such actions could be taken. The existence of such a "best efforts" obligation would imply a relinquishment of state authority to exercise normal sovereign powers within its own borders without reference to the Agreed

⁴ Agreed Minute, par. 3; Implementation Schedule, par. 4.2 note 3; first US side letter, par. 2.

⁵ Neither a copy of the Agreed Minute nor of the accompanying documents will be transmitted to Congress pursuant to the Case-Zablocki Act, 1 U.S.C. § 112b, which requires transmission to Congress of international agreements entered into by the United States.

Minute and the accompanying documents. No relinquishment of state authority results from the signing of the Agreed Minute.

V. Future Actions Described in the Agreed Minute. Despite the absence of legal obligation, the Agreed Minute and accompanying documents engage the good faith of the United States and the several States such that the undertakings reflected therein should be pursued and fulfilled. The EC has taken on faith that the statements of future actions, made by representatives of U.S. competent authorities, and more fully described below, are accurate. The EC could be expected to be deeply concerned should such future actions not be reasonably forthcoming.

(A) By the United States:

1. The US should encourage and support research, development, monitoring and training programs by its competent authorities that promote the use and application of traps and trapping methods for the humane treatment of the twelve terrestrial or semi-aquatic mammals listed in the Standards annexed to the Agreed Minute.

[The US is fulfilling this item through a three-year program of trap testing being conducted by APHIS in cooperation with IAFWA through the Fur Resources Committee (APHIS Cooperative Agreement #98-74-05-0333). (Tab E) The FY 1998 appropriation contains initial year funding to APHIS for trap testing, to be conducted in cooperation with state wildlife agencies, in an amount of \$350,000. This item is also being fulfilled by the US through a FWS grant of Pittman-Robertson administrative funds to IAFWA through the Fur Resources Committee to conduct outreach concerning the need to develop more humane traps and trapping methods. (Tab F)]

2. The US should encourage its competent authorities to monitor and report on progress towards implementation of the Standards annexed to the Agreed Minute.

[The US is fulfilling this item through the APHIS-IAFWA Cooperative Agreement and through the grant of Pittman-Robertson administrative funds.]

3. The US intends to consult with the EC at its request on any matter concerning the Agreed Minute or the annexed Standards.

[An APHIS-IAFWA Memorandum of Understanding notes that, for purposes of the competent authorities in the U.S. through IAFWA, APHIS shall be the primary US government agency for discussions with the EC of issues

connected with the Agreed Minute and accompanying documents. A copy of the APHIS-IAFWA MoU is at Tab G.]

(B) By State Wildlife Agencies:

1. Trapping methods for the twelve native species listed in the annexed Standards should be tested to demonstrate conformity with the Standards according to such priorities as may be established in the BMP initiative, but in overall conformity with the Implementation Schedule set forth at Par. 4.2 of the annexed Standards. For restraining trapping methods,⁶ testing should be carried out within three to five years from entry into force of the Canada, EC, Russia Agreement. For killing trapping methods,⁷ testing should be carried out within five years from entry into force of the Canada, EC, Russia Agreement. Article 17 of the latter agreement provides for entry into force sixty days following the date of deposit with the Secretariat of the Council of the European Union of the last instrument of ratification or adoption according to the rules applicable for each party. The Russian Federation signed the Canada, EC, Russia Agreement on April 24, 1998. Whether the Agreement must be ratified by the Russian Duma is not clear.

[The BMP initiative being carried out by IAFWA through the Fur Resources Committee is intended to fulfill this item. Testing of restraining and killing traps will be carried out in cooperation with the Canadian testing program, with the effort here deploying resources principally toward restraining traps and the effort in Canada deploying resources principally toward killing traps. The States through the Fur Resources Committee intend to report testing results at regular intervals.]

2. BMPs for traps and trapping methods should be based on the latest technical and scientific information and data.

[The BMP initiative and the Canadian testing program will be based on such information and data.]

3. BMPs for traps and trapping methods should be based on the Standards annexed to the Agreed Minute.

⁶ "Restraining trapping methods" are defined in the annexed Standards to mean "traps designed and set with the intention of not killing the trapped animal, but restraining its movements to such an extent that a human can make direct contact with it." Par. 2.1.

⁷ "Killing trapping methods" are defined in the annexed Standards to mean "traps designed and set with the intention of killing a trapped animal of the target species." Par. 3.1.

[The BMP initiative and the Canadian testing program will orient testing in line with the Standards, including the guidelines therein.]

4. Within three years after the end of a period of three to five years after entry into force of the Canada, EC, Russia Agreement, i.e., within not to exceed eight years following entry into force of the Agreement (entry into force occurs sixty days after deposit of the last instrument of ratification), restraining traps that do not meet the Standards are phased out by the competent authorities. Shorter periods of time to phase out apply to the use of jaw-type leghold restraining traps for ermine and muskrat and to the use of conventional steel jawed leghold restraining traps for the ten other native species listed in the Standards. See items V(B)(8) and (9), below.

[This item should be fulfilled by individual States subject to the interim use option and the case-by-case derogation procedure described below in 6 and 7.]

5. Within three years after the end of a period of five years after entry into force of the Canada, EC, Russia Agreement, i.e., within not to exceed eight years following entry into force of the Agreement (entry into force occurs sixty days after deposit of the last instrument of ratification), killing traps that do not meet the Standards are phased out by the competent authorities.

[This item should be fulfilled by individual States subject to the interim use option and the case-by-case derogation described below in 6 and 7.]

6. If a competent authority determines that the results of trap testing do not support the conformity of traps of a particular type with the Standards for a specific species (among the twelve native species listed in the annexed Standards) or under specific environmental conditions, the competent authority during the phase out period or later may continue to permit the use of such traps on an interim basis while research continues to identify a replacement trap. In such a case, prior written notification, for transmission to the EC, should be given of the traps to be authorized and the status of the research program.

[The APHIS-IAFWA Memorandum of Understanding provides for the giving of interim use notices to APHIS for transmission to the EC. At an appropriate time, after testing in connection with the BMP initiative and during the phase out period, individual States should consider establishing a written policy relating to exercise of the interim use option and the giving of notice to APHIS.]

7. With respect to the twelve native species listed in the annexed Standards, as an alternative to the interim use option procedure described in 6 above, during

the phase out period or later a competent authority may approve, on a case-by-case basis for any of the following purposes, use of traps of a particular type that have not been demonstrated by testing to conform to the Standards:

- (a) the interests of public health or safety;
- (b) protection of public or private property;
- (c) purposes of research, education and protection of the environment, including repopulation, reintroduction, breeding or for the protection of flora and fauna; and
- (d) using traditional wooden traps essential for preserving cultural heritage of indigenous communities.

If case-by-case approvals are employed, prior written notification for transmission to the EC should be given of such approvals along with their reasons and conditions.

[The APHIS-IAFWA Memorandum of Understanding provides for giving notice of case-by-case approvals to APHIS for transmission to the EC. At an appropriate time during the phase out period, individual States should consider establishing a written policy relating to exercise of case-by-case approvals and the giving of notice to APHIS.]

8. With respect to ermine and muskrat, the use of all jaw-type leghold restraining traps should be phased out within four years of entry into force of the Canada, EC, Russia Agreement, subject to the interim use option and the case-by-case derogation procedure.

[This phase out should be fulfilled by individual States subject to the interim use option and the case-by-case derogation procedure.]

9. With respect to the ten native species listed in the Standards (other than ermine and muskrat), the use of conventional steel jawed leghold restraining traps should be phased out within six years of entry into force of the Canada, EC, Russia Agreement, subject to the interim use option and the case-by-case derogation procedure.

[This phase out should be fulfilled by individual States subject to the interim use option and the case-by-case derogation procedure.]

10. Norms established in the BMP initiative should also be applied to the ten unlisted species, commercially trapped in the United States, described in footnote 3 above. The Implementation Schedule is not applicable to these species nor is the interim use option or the case-by-case approvals.

[BMPs should be made applicable to the ten unlisted species.]

Attachments:

- A Council Regulation (EEC) No. 3254/91
- B Agreed Minute Dated December 18, 1997
- C Annexed Standards
- D Side Letters Accompanying Agreed Minute