

WELCOME TO THE JUNGLE: HOW LOOPHOLES IN THE FEDERAL ENDANGERED SPECIES ACT AND ANIMAL WELFARE ACT ARE FEEDING A TIGER CRISIS IN AMERICA

By: Carney Anne Nasser, Esq.

“Those who wish to pet and baby wild animals ‘love’ them. But those who respect their natures and wish to let them live normal lives, love them more.”

Edwin Way Teale, *Circle of the Seasons*, 1953.

INTRODUCTION.....195

I. FACTUAL BACKGROUND: WHAT ARE “GENERIC” TIGERS?.....200

 A. *Generic Tigers: No Conservation Value*200

 B. *The Dangerous White Tiger Fiction*201

 C. *Breeding and Exhibiting Generic Tigers: Detrimental to Species Survival*.....204

 D. *Tiger Surplus*.....207

II. U.S. FISH AND WILDLIFE SERVICE OVERSIGHT OF TIGERS209

 A. *The ESA and the Generic Tiger Loophole: A Breeding Ground for Exploitation*209

 B. *Endangered Species Act “Enhancement Requirement:” Pay-to-Play*217

III. U.S. DEPARTMENT OF AGRICULTURE OVERSIGHT OF TIGERS.221

 A. *Background and Framework*221

 B. *USDA Licensure as a Way to Circumvent State and Local Laws*.....225

 C. *Tiger Cub Photo Ops: a Goldmine for Exhibitors*227

 D. *Suggested Prohibition on Public Contact with Tigers*233

 E. *Example of State Action: New York’s “Tiger Selfie” Ban*.....236

CONCLUSION238

INTRODUCTION

Tigers are the largest existing cat species¹ and the largest living carnivorous land-mammals.² They are formidable predators who can eat up to 88 pounds of meat in a single sitting,³ and are capable of killing prey animals that substantially outweigh them.⁴ Tigers are one of the most recognizable and iconic animal species,⁵ inspiring their popularity as mascots for over 1400 high school, college, and professional sports teams in the United States.⁶ However, in the past century, the wild population of these magnificent cats has been decimated by 97 percent.⁷ Indeed, three out of the nine tiger subspecies are now totally extinct,⁸ and one of

Carney Anne Nasser is Senior Counsel for Wildlife and Regulatory Affairs at the Animal Legal Defense Fund. Ms. Nasser graduated from U.C. San Diego with a B.A. in political science, holds a J.D. from Tulane University, and a graduate degree in community advocacy from the George Washington University Graduate School of Political Management. Most of her animal law practice has focused on curtailing the exploitation of exotic animals for entertainment, with special attention on captive tigers. Ms. Nasser would like to dedicate this article to the memory of the late Dr. Ronald Tilson, who served as Director of Conservation at the Minnesota Zoo, Chairman of the Tiger Foundation, and Coordinator of the Tiger Species Survival Plan for the Association of Zoos and Aquariums. Dr. Tilson's expertise, guidance, and advice has been invaluable in Ms. Nasser's own endeavors to protect captive tigers from exploitation. She would also like to give special thanks to Chris Green, Deborah Robinson, Delci Winders, Bobbi Brink, Linda Faso, and Tim Harrison for their friendship, mentorship, and tireless work to protect animals; and to her mom, Carney Small, for everything.

¹ Philip J. Nyhus & Ronald Tilson, *The Conservation Value of Tigers: Separating Science from Fiction*, 1 J. WILDCAT CONSERVATION LEGAL AID SOC'Y 29, 30 (2009), http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=philip_nyhus [hereinafter *Separating Science from Fiction*]; see also *About Tigers*, TIGER CONSERVATION CAMPAIGN, <http://support.mnzoo.org/tigercampaign/tiger-conservation-campaign/about/> (last visited Feb. 17, 2016) (giving a general overview of tiger facts).

² *Meet Our Animals: Tiger*, SMITHSONIAN NATIONAL ZOOLOGICAL PARK, <http://nationalzoo.si.edu/Animals/GreatCats/tigerfacts.cfm> (last visited Sept. 12, 2015).

³ See *Tiger: Overview*, WORLD WILDLIFE FUND (WWF), <http://www.worldwildlife.org/species/tiger> (last visited Sept. 12, 2015).

⁴ *Separating Science from Fiction*, *supra* note 1, at 30–31.

⁵ See *id.* at 29.

⁶ See MASCOTDB, http://www.mascotdb.com/displaymatches.php?mascot=Tigers#VZ7Rk_kw3AE (last visited Sept. 12, 2015).

⁷ *Tiger: Overview*, *supra* note 3.

⁸ Press Release, Ass'n of Zoos & Aquariums, AZA Tiger Species Survival Plan Conservation Campaign Momentum Builds (Nov. 19, 2013), <https://www.aza.org/PressRoom/detail.aspx?id=31819>.

the six remaining subspecies exists only in captivity.⁹ The total wild population, once as high as 100,000 in the early 20th century,¹⁰ has continued to decline dramatically since the late 1990s, when the estimated number of wild tigers was closer to 7,000.¹¹ Now, recent estimates by tiger conservation experts suggest that only between 2,500 and 4,000 tigers remain in the wild.¹²

Researchers at Stanford, Princeton, U.C. Berkeley, and University of Florida have determined that we are on the cusp of a “sixth mass extinction,”¹³ which could exterminate 75 percent of

⁹ See *id.*; see also Philip J. Nyhus & Ronald Tilson, *The Conservation Value of Privately Owned Tigers*, in AZA ANNUAL CONFERENCE PROCEEDINGS 2003, AMERICAN ZOO & AQUARIUM ASSOCIATION, 55–59 (Doherty, E. and Girton, K., eds., 2003) [hereinafter *Privately-Owned Tigers*]; *Separating Science from Fiction*, *supra* note 1, at 31 (giving an overview of the subspecies of the tiger). “The South China tiger *P.t. amoyensis* exists in captivity but has not been seen in the wild for nearly four decades.” *Id.* Remaining tigers in the wild belong to one of five subspecies: Bengal [*P.t. tigris*], Amur [*P.t. altaica*], Indochinese [*P.t. corbetti*], Malayan [*P.t. jacksonii*], and Sumatran [*P.t. sumatrae*]. *Id.* Bali [*P.t. balica*], Javan [*P.t. sondaica*], and Caspian [*P.t. virgata*] subspecies are totally extinct. *Id.* Contrary to popular belief, white tigers are not a separate subspecies. *Id.* In captivity, they are the result of inbreeding for a genetic anomaly that is frowned upon by the Association of Zoos and Aquariums (AZA). See *Tiger Species Survival Plan*, ASS’N OF ZOOS AND AQUARIUMS, <http://support.mnzo.org/tigercampaign/tiger-ssp/> (last visited Sept. 13, 2015). Indeed, the world’s preeminent tiger conservationists have opined that “[a white tiger’s] value to wild tiger conservation is zero and they are hampering efforts to educate the public about the true challenges of conserving the world’s wild tigers. . . . [O]ne logical outcome of the popularity of white tigers is a warped perspective and awareness of what a tiger is . . . and the true threats faced by wild tigers” See Philip J. Nyhus, Ronald Tilson & Michael Hutchins, *Thirteen Thousand and Counting: How the Growing Captive Tiger Populations Threaten Wild Tigers*, in TIGERS OF THE WORLD 234-35 (Philip J. Nyhus et al. eds., 2d ed. 2010) [hereinafter *Thirteen Thousand and Counting*].

¹⁰ DOUGLAS F. WILLIAMSON & LEIGH A. HENRY, PAPER TIGERS?: THE ROLE OF THE U.S. CAPTIVE TIGER POPULATION IN THE TRADE IN TIGER PARTS 7, 7 (2008), https://www.wwf.or.jp/activities/lib/pdf_wildlife/conservation/papertiger0808.pdf; see also Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. 52,297, 52,298 (proposed Aug. 22, 2011) (to be codified at 50 C.F.R. pt. 17).

¹¹ WILLIAMSON & HENRY, *supra* note 10, at 7; see Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,298.

¹² See WILLIAMSON & HENRY, *supra* note 10, at 7; *Separating Science from Fiction*, *supra* note 1, at 32; *About Tigers*, *supra* note 1; Leigh Henry, *Caging the Captive Tiger Problem*, ROLL CALL (July 29, 2014, 7:41 PM), http://www.rollcall.com/news/caging_the_captive_tiger_problem_commentary-235355-1.html?pos=oopih; *Tiger: Overview*, *supra* note 3.

¹³ See Alan Neuhauser, *75 Percent of Animal Species to be Wiped Out in ‘Sixth Mass Extinction’*, U.S. NEWS AND WORLD REPORT (June 19, 2015), <http://www.usnews.com/news/blogs/data-mine/2015/06/19/75-percent-of-animal-species-to-be-wiped-out-in-sixth-mass-extinction> (“From rhinos to tigers to

the earth's animal species within three generations (including tigers).¹⁴ Experts have concluded that the pace of extinction is escalating to *one hundred times* its normal rate,¹⁵ due primarily to the following factors: habitat loss, human population growth, carbon emissions, climate change, and “*over-exploitation for economic gain*.”¹⁶

As wild populations of tigers have plummeted, the number of tigers kept captive in the United States has skyrocketed to a number that, while unascertainable due to legal deficiencies described in this article, is estimated to be somewhere between 5,000 and 15,000.¹⁷ The majority of these captive tigers in the U.S. are being held not by zoos, circuses, and other commercial exhibitors, but rather in the hands of private individuals.¹⁸ Private ownership of tigers is opposed by the American Veterinary Medical Association (AVMA), the Association of Zoos and Aquariums (AZA), the U.S. Department of Agriculture (USDA), the Centers for Disease Control and Prevention (CDC), and the American Bar Association (ABA).¹⁹ But despite these admonitions, the U.S.

elephants, three out of four ‘familiar’ animal species – those commonly thought of and well understood by human beings – will be extinguished within three human lifetimes, a new study finds, confirming that Earth is in the midst of what’s become known as the ‘sixth mass extinction’ driven by runaway development, shrinking animal habitats and climate change.”). As a point of reference, the most recent previous mass extinction event took place 66 million years ago when dinosaurs went extinct. *Id.*; see also Rob Jordan, *Stanford Researcher Declares that the Sixth Mass Extinction is Here*, STANFORD NEWS (June 19, 2015), <http://news.stanford.edu/news/2015/june/mass-extinction-ehrich-061915.html>. See generally, Gerardo Ceballos et al., *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCIENCE ADVANCES 3 (June 19, 2015), <http://advances.sciencemag.org/content/advances/1/5/e1400253.full.pdf>.

¹⁴ See Neuhauser, *supra* note 13.

¹⁵ See Jordan, *supra* note 13 (“The new study, published in the journal *Science Advances*, shows that even with extremely conservative estimates, species are disappearing up to about 100 times faster than the normal rate between mass extinctions, known as the background rate.”).

¹⁶ See *id.* (emphasis added).

¹⁷ See *Privately Owned Tigers*, *supra* note 9; *Separating Science from Fiction*, *supra* note 1, at 34; WILLIAMSON & HENRY, *supra* note 10, at 17.

¹⁸ *Separating Science from Fiction*, *supra* note 1, at 34.

¹⁹ *Privately Owned Tigers*, *supra* note 9; *Position Statement: Large Wild and Exotic Cats Make Dangerous Pets*, U.S. DEP’T. OF AGRIC. (Feb. 2000), http://www.aphis.usda.gov/animal_welfare/downloads/big_cat/position.pdf (describing dangers of private ownership and believes only trained professionals should keep these animals); *American Bar Association Resolution 105*, AM. BAR ASSOC. (Feb. 9, 2015), http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/105.pdf (urging all legislative bodies to pass laws that prohibit “the possession,

remains home to more privately owned tigers than in any other country.²⁰ While increasing the captive population of this critically endangered species may at first seem beneficial, the vast majority of tigers in America are considered “generic,” cross-bred tigers with no traceable pedigree and thus no true conservation value.²¹

The main federal laws governing captive tigers in the U.S. are the Endangered Species Act (ESA),²² the Lacey Act,²³ and the Animal Welfare Act (AWA).²⁴ The ESA exists “to conserve endangered species,”²⁵ and works with the Lacey Act, which, as amended by the Captive Wildlife Safety Act, aims to limit the interstate trafficking of wildlife—particularly tigers and other big cats.²⁶ One primary purpose of the AWA is “to insure that animals intended for use . . . for exhibition purposes or for use as pets are provided humane care and treatment.”²⁷ Yet, existing loopholes in implementation of both the ESA and AWA work in tandem to incentivize captive breeding and exploitation of tigers—a problem further exacerbated by inconsistent and insufficient state regulation.²⁸ Indeed, voids in the existing statutory and regulatory

sale, breeding, import, or transfer of dangerous wild animals, such as big cats, bears, wolves, primates, and dangerous reptiles, in order to protect public safety and health, and to ensure the humane treatment and welfare of such animals[]” except for those kept in AZA-accredited zoos, research facilities, and true sanctuaries).

²⁰ Nyhus & Tilson, *supra* note 1, at 34. According to Nyhus and Tilson, the world’s population of captive tigers is 13,000 – 25,000, with the number of captive tigers in the U.S. accounting for as many as 15,000 of that total number. *Id.* at 32, 34.

²¹ See *Tiger Species Survival Plan*, *supra* note 9 (discussing that the number of privately owned tigers is unknown and that there is a low number of captive-bred tigers in zoos as a “genetic insurance policy”).

²² See 16 U.S.C. §§ 1531–1544 (2012).

²³ See 16 U.S.C. §§ 3371–3378 (2012).

²⁴ See 7 U.S.C. §§ 2131–2159 (2012).

²⁵ 16 U.S.C. § 1531(c)(1) (2012).

²⁶ See 16 U.S.C. §§ 1531–1544; Captive Wildlife Safety Act, 108 Pub. L. No. 191 (2003).

²⁷ See 7 U.S.C. § 2131(1) (2012).

²⁸ As of January 2015, there were 5 states that failed to enact any statutory or regulatory oversight pertaining to the private ownership of tigers: Nevada, Wisconsin, Alabama, North Carolina, and South Carolina. See *Dangerous Wild Animal Laws*, HUMANE SOC’Y OF THE U.S. (Jan. 2015), <http://www.humanesociety.org/assets/pdfs/wildlife/exotics/state-laws-dangerous-wild-animals.pdf> [hereinafter “Map”]. However, on Feb. 2, 2015, the Court of Appeals of Indiana ruled that the Indiana Department of Natural Resources—which had exercised permit authority over the private ownership of wild animals—has no authority to regulate privately owned wildlife under the current statutory scheme. See *Ind. Dep’t of Nat’l Res. v. Whitetail Bluff*, 25 N.E.3d 218, 225–26, 228–29 (Ind. Ct. App. 2015). The Indiana Supreme Court

schemes that purport to protect tigers and aid in their conservation have failed even to provide a reliable way of ascertaining how many captive tigers there are in the U.S.,²⁹ let alone the conditions in which they are being kept, where they are being transferred, or how many may fall into the illegal and lucrative exotics trafficking market.³⁰ Unfortunately, the very laws designed to protect and conserve tigers have, in practice, encouraged “over-exploitation [of tigers] for economic gain.”³¹

Specifically, the Generic Tiger Loophole in the ESA Captive Bred Wildlife registration requirements and the USDA policy interpreting AWA handling regulations that allow public handling of tiger cubs have enabled unscrupulous breeding practices with no oversight, contributed to a surplus number of captive tigers that is unascertainable with any degree of accuracy, and increased the likelihood that an increasing number of tiger parts entering the illegal trade will originate in the U.S.³²

declined review, leaving hundreds of privately-owned wild and dangerous animals—including captive tigers—totally unregulated, and bringing the number of states with no oversight of private ownership of tigers back to six. See Niki Kelly, *Regulation of Wild Animals Possession Cut: Ruling Ends DNR Permit Authority*, IND. J. GAZETTE (July 2, 2015), <http://www.journalgazette.net/news/local/indiana/Regulation-of-wild-animal-possession-cut-7503878>. The 44 states that have enacted some level of regulation pertaining to private ownership of tigers—ranging from basic permit or license schemes to total bans—are inconsistent and offer numerous loopholes, grandfather clauses, and exemptions. See Map, *supra*.

²⁹ WILLIAMSON & HENRY, *supra* note 10, at 26 (“No clear census or regulatory system exists to detail the precise numbers or whereabouts of Tigers in captivity in the United States.”); *Separating Science from Fiction*, *supra* note 1, at 34; see Philip J. Nyhus et al., *The Status and Evolution of Laws and Policies Regulating Privately Owned Tigers in the United States*, 1 J. OF THE WILDCAT CONSERVATION LEGAL AID SOC’Y 47, 49 (2009) [hereinafter *Status and Evolution*].

³⁰ *Separating Science from Fiction*, *supra* note 1, at 34. The illegal trade in exotic animals is estimated to be an illicit global business worth \$5-20 billion annually, with tiger parts being among the most lucrative and sought-after commodities on the black market. Liana Sun Wyler & Pervaze Sheikh, CONG. RESEARCH SERV., RL34395, INTERNATIONAL ILLEGAL TRADE IN WILDLIFE: THREATS AND U.S. POLICY (2008) (summary of findings precedes pg. 1) (showing the international retail value of a tiger skin is approximately \$1,300 – \$20,000, and the value of a set of tiger bones is estimated to be between \$3,300 – \$7,000). *Id.* at 7; see also WILLIAMSON & HENRY, *supra* note 10, at 39.

³¹ See Jordan, *supra* note 13.

³² See generally U.S. Dep’t of Interior, *Tigers in America – Bad Laws That Don’t Work*, TIGERSINAMERICA.ORG, <http://www.tigersinamerica.org/unlaws.htm> (last visited Sept. 16, 2015) (explaining what the loophole is, and how the captive breed wildlife regulations are to blame); Tracy Coppola, *ACTION: speak out against public handling of big cats*, IFAW.ORG (Aug. 14, 2015), <http://www.ifaw.org/united-states/news/action-speak-out-against-public-handling-big-cats> (explaining gap in

This article will explore the origins of America's tiger crisis in existing federal statutory, regulatory, and policy deficiencies, the paradox of how growth in private ownership of tigers is actually harmful to tiger survival, and then illustrate why loopholes in the ESA implementing regulations and application of AWA safe handling requirements must be closed in order to further meaningful species conservation efforts.

I. FACTUAL BACKGROUND: WHAT ARE "GENERIC" TIGERS?

A. *Generic Tigers: No Conservation Value*

Generic tigers are tigers of inter-subspecific crossed pedigree (i.e., tigers who are not of pure-bred Bengal, Amur/Siberian, Indochinese, Malayan, or Sumatran subspecies lineage).³³ The FWS has stated its position that the "[FWS] do[es] not believe that breeding inter-subspecific crossed or generic tigers provides a conservation benefit for the long-term survival of the species."³⁴ The AZA, through its Species Survival Plans (SSP) for Amur tigers, Sumatran tigers, Malayan tigers, and generic tigers that are administered by the Minnesota Zoo, also shares this position.³⁵ Whereas the goal of the Amur, Sumatran, and Malayan tiger SSPs is to *increase* those populations in AZA zoos, the generic tiger SSP exists for the unique purpose of "reduc[ing] the population of generic tigers in AZA-accredited zoos"³⁶ in order to "free space for studbook-registered tigers."³⁷ To this end, the AZA has announced that "[a] breeding moratorium for generic tigers is now in place" for AZA-accredited institutions.³⁸

All privately owned tigers are presumed to be generic,³⁹ and thus

USDA policy allowing for handling of cubs).

³³ See *Tiger Species Survival Plan*, *supra* note 9; see also Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299.

³⁴ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299.

³⁵ See *Tiger Species Survival Plan*, *supra* note 9.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.*

³⁹ *Privately Owned Tigers*, *supra* note 9, at 3 ("Privately owned tigers have essentially no conservation value . . . because they are of unknown genetic heritage.") (internal citations omitted). Indeed, according to Tilson and Nyhus, privately-owned tigers "are no longer Amur or Sumatran or Bengal tigers. They are tiger soup." Nyhus, *Thirteen Thousand and Counting*, *supra* note 9, at 236.

“not genetically valuable.”⁴⁰ With only 279 of the tigers in the U.S. included in AZA-managed conservation breeding programs,⁴¹ that means that *at least* 95 percent of the captive tigers in the U.S. are generic tigers with no conservation value.⁴² Breeding generic tigers not only has no connection to legitimate conservation of the species, it also carries serious negative welfare implications.⁴³

B. *The Dangerous White Tiger Fiction*

Contrary to popular belief (spurred in part by entertainers like Siegfried and Roy who advertise their “Royal White Tigers”⁴⁴ as if they are a rare subspecies), no populations of white tigers exist in the wild.⁴⁵ White tigers are the result of a genetic anomaly that occurs so rarely that only twelve white tigers have been confirmed in the wild in over one hundred years.⁴⁶ In contrast, numerous U.S. exhibitors purposefully breed to create white tigers, with some holding dozens of white tigers in their inventories.⁴⁷

Those who breed white tigers for profit demonstrate not only a disregard for legitimate conservation of the species, but also a

⁴⁰ *Separating Science from Fiction*, *supra* note 1, at 36.

⁴¹ *See Tiger Species Survival Plan*, *supra* note 9.

⁴² *See Separating Science from Fiction*, *supra* note 1, at 34; *see also Privately Owned Tigers*, *supra* note 9, at 3.

⁴³ *See Separating Science from Fiction*, *supra* note 1, at 35–36.

⁴⁴ *See Siegfried and Roy’s Secret Garden and Dolphin Habitat*, SIEGFRIED & ROY, http://siegfriedandroy.com/?page_id=151 (last visited on Sept. 10, 2015) (“Four types of exotic big cats reside within the Secret Garden: Siegfried & Roy’s Royal White Tigers of Nevada and White Lions of Timbavati, heterozygous Bengal tigers (possessing both tawny and white genes), a black panther and a leopard dynasty.”).

⁴⁵ *Separating Science from Fiction*, *supra* note 1, at 31, 37.

⁴⁶ *See Sarda Sahney, The Myth of the Endangered White Tiger*, SCIENCE 2.0 (Aug. 30, 2007, 5:38 AM), http://www.science20.com/fish_feet/white_tigers_species_mortality_and_conservation_value.

⁴⁷ *See, e.g., Ira Dreyfuss, U.S. Seizes Elephants from Owner Accused of Abuse*, THE BOSTON GLOBE (Mar. 19, 2004), http://www.boston.com/news/nation/articles/2004/03/19/us_seizes_elephants_from_owner_accused_of_abuse/. For example, John Cuneo, owner of an Illinois-based tiger breeder and circus exhibition company called the Hawthorn Corp., reportedly had 87 tigers—60 of whom were white tigers—in his inventory when the USDA removed elephants from his property in 2004. *Id.* Oklahoma roadside zoo owner Joe Schreiber has been documented selling white tiger cubs as recently as this year. *See* Ok. Dept. of Agric., Food & Forestry, Certificate of Veterinary Inspection No. 1994068 (Jan. 15, 2015) (noting the sale of a two-week old white tiger cub from Schreiber’s G.W. Zoo to Jungle Exotics roadside zoo in Southern California).

significant lack of concern for the welfare of the animals.⁴⁸ Indeed, this disproportionate number of captive white tigers in the U.S. is the result of inbreeding for a recessive allele that also carries increased risk for an abnormally high neonatal mortality rate and high incidence of other serious conditions.⁴⁹ These include: crossed eyes, cleft palate, clubbed feet, kidney abnormalities, scoliosis, strabismus, blindness, vascular anomalies that inhibit the ability to feed and swallow, congenital defects in cranial and skull development, and diminished life expectancy.⁵⁰ Leading experts in tiger conservation, including the late Dr. Ronald Tilson⁵¹ and Dr.

⁴⁸ See *White Tigers: All White Tigers Are Inbred and Are Not Purebred*, BIG CAT RESCUE, <http://bigcatrescue.org/abuse-issues/issues/white-tigers/> (last visited Nov. 4, 2015) (discussing how breeding white tigers causes non-traditional coloring, which can result in the cubs being killed at birth, and that the tigers serve no conservation value); ASS'N OF ZOOS AND AQUARIUMS, WELFARE AND CONSERVATION IMPLICATIONS OF INTENTIONAL BREEDING FOR THE EXPRESSION OF RARE RECESSIVE ALLELES 1, 3, 4 (2011), https://www.aza.org/uploadedFiles/About_Us/AZA%20White%20Paper%20Inbreeding%20for%20Rare%20Alleles%2018%20Jan%202012.pdf [hereinafter WELFARE AND CONSERVATION] (discussing the problems with inbreeding directly associated with the trait being bred for, and the larger consequences for the species).

⁴⁹ See *White Tigers: All White Tigers Are Inbred and Are Not Purebred*, *supra* note 48; WELFARE AND CONSERVATION, *supra* note 48, at 1, 3–4.

⁵⁰ *White Tiger's Coat Down to One Change in a Gene*, BBC NEWS (May 23, 2013), <http://www.bbc.com/news/science-environment-22638341> (discussing how tigers in captivity develop health issues and noting that many captive white tigers have health problems including “eyesight problems and some deformities”); WELFARE AND CONSERVATION, *supra* note 48, at 3–4 (“[I]n the case of the white tiger one recessive allele has to come from each parent to allow for expression of the white striped color morph. While this has happened rarely in wild tiger populations, such as one in India many decades ago . . . such traits only rarely get expressed, and, when expressed, it is very likely that they confer a disadvantage resulting in reduced fitness for a given individual under most circumstances.”); *White Tigers: All White Tigers Are Inbred and Are Not Purebred*, *supra* note 48 (discussing the various abnormalities resulting from inbreeding of tigers including crossed eyes, scoliosis of the spine, and other disorders that result in early death).

⁵¹ *Board of Directors, Dr. Ronald Tilson*, THE TIGER FOUNDATION <http://www.tigers.ca/home/W2D7.html> (last visited Sept. 15, 2015). Dr. Tilson received his Ph.D. in Ecology from the University of California, Davis, and conducted post-doctoral research in Namibia. *Id.* Prior to his passing in November 2013, Dr. Tilson authored or co-authored hundreds of scholarly articles, including some of the world’s leading texts on tigers. *Id.* For decades, Dr. Tilson served as Director of Conservation at the Minnesota Zoo, but also served as Chairman of the Tiger Foundation, Coordinator of the Tiger Species Survival Plan for the Association of Zoos and Aquariums for nineteen years, and Coordinator of the Tiger Global Conservation Strategy. *Id.* He received numerous accolades for his contributions to species conservation, and was widely recognized and still celebrated as one of the leading tiger experts in the world. *Id.*

Philip Nyhus,⁵² have stated with certainty that all white tigers in this country are generic and lack conservation value.⁵³ Such experts condemn the practice of inbreeding for the recessive gene that not only creates tigers with no conservation value, but also creates tigers whose likelihood of survival and good health is extremely slim.⁵⁴ For these reasons, experts agree that individuals involved in breeding or exhibiting white tigers are “doing a great disservice to honest conservation and preservation efforts to save the five remaining and endangered subspecies of tigers barely clinging to survival in their rapidly diminishing natural habitats.”⁵⁵

The AZA likewise acknowledges the animal welfare concerns and lack of conservation value of breeding or exhibiting white tigers⁵⁶ by including them in the Generic Tiger SSP, explaining that “[s]election for specific traits will hasten a population’s loss of gene diversity, lead to higher inbreeding levels more quickly, and create a domesticated form of the species that no longer represents or resembles the wild population.”⁵⁷ In 2011, the AZA underscored

⁵² *College Directory: Philip Nyhus*, COLBY COLLEGE, <http://www.colby.edu/directory/profile/philip.nyhus/> (last visited Nov. 4, 2015). Dr. Philip Nyhus is an Associate Professor of Environmental Studies at Colby College. *Id.* Dr. Nyhus also conducts research on tiger and large mammal conservation in Asia and the United States and is the author or editor of over 50 scholarly publications, most of which included collaborations with Dr. Ron Tilson on some of the leading texts pertaining to tigers and tiger conservation. *See id.* Dr. Nyhus received his M.S. and Ph.D. in Land Resources from the Nelson Institute for Environmental Studies at the University of Wisconsin, Madison. *Id.*

⁵³ *See Thirteen Thousand and Counting*, *supra* note 9, at 234; *see also Separating Science from Fiction*, *supra* note 1, at 37 (“Contrary to popular belief, there are no wild white tiger populations, and white tigers in captivity are all significantly inbred.”).

⁵⁴ *See White Tigers: All White Tigers Are Inbred and Are Not Purebred*, *supra* note 48; *Thirteen Thousand and Counting*, *supra* note 9, at 234; *see also*, Nyhus and Tilson, *Separating Science from Fiction*, *supra* note 1, at 37 (“Contrary to popular belief, there are no wild white tiger populations, and white tigers in captivity are all significantly inbred.”); *see also Tiger Species Survival Plan*, *supra* note 9 (“All white tigers are considered generic tigers.”); *see also White Tiger’s Coat Down to One Change in a Gene*, *supra* note 50.

⁵⁵ Dan Laughlin, *The White Tiger Fraud*, BIG CAT RESCUE (May 30, 2011), <http://bigcatrescue.org/2011/the-white-tiger-fraud/>; *see also Thirteen Thousand and Counting*, *supra* note 9, at 234, 235 (“[A white tiger’s] value to . . . conservation is zero and they are hampering efforts to educate the public about the true challenges of conserving the world’s wild tigers. . . . [O]ne logical outcome of the popularity of white tigers is a warped perspective and awareness of what a tiger is . . . and the true threats faced by wild tigers.”).

⁵⁶ *See WELFARE AND CONSERVATION*, *supra* note 48, at 2.

⁵⁷ *Id.* at 5.

its position against breeding white tigers, stating that “selective breeding for specific phenotypes is in direct opposition to standard zoo population management goals of maximizing genetic diversity by minimizing inbreeding,”⁵⁸ and that breeding white tigers is “not in adherence to AZA’s Board-approved Policy on the Presentation of Animals.”⁵⁹ The purpose of the SSPs is to “reinforce wild populations,” and as there are no wild populations of white tigers to reinforce, white tigers are included in the AZA’s breeding moratorium on generic tigers.⁶⁰

C. Breeding and Exhibiting Generic Tigers: Detrimental to Species Survival

Private owners and exhibitors who use tigers in for-profit enterprises frequently claim that they are contributing to valuable conservation of the species.⁶¹ According to true conservation experts, “[i]t is a fiction that most tigers owned by private individuals—such as pet tigers, tigers bred and sold for profit, or white tigers—are valuable for wild conservation.”⁶² As captive breeding and ownership of tigers has surged in the U.S., the population of wild tigers has continued to plummet⁶³—thus

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 6.

⁶⁰ See *Tigers Species Survival Plan*, *supra* note 9 (“[a] breeding moratorium for generic tigers is now in place”); see also MINNESOTA ZOO, http://archive.org.org/m/mnzoo.org/2012-11-04_583044_39/Minnesota_ZOO/ (last visited Jan. 27, 2016); see also *White Tiger’s Coat Down to One Change in a Gene*, *supra* note 50 (“[White tigers] are found exclusively in captive programmes where the limited numbers are interbred to maintain the distinctive fur colour.”); Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,298. (implicitly condemning the breeding of white tigers by articulating that generic tigers lack conservation value).

⁶¹ See *Separating Science from Fiction*, *supra* note 1, at 33, 36 (discussing how many roadside zoos claim to support tiger conservation); Pat Hoctor, *Capturing Exotic Animals*, ANIMAL FINDERS GUIDE (2013) <https://www.animalfindersguide.com> (discussing the importance of using a humane method in the capturing of your species); see also Graham Wood, *Steve Salton’s Tigers, Leopards at His Home are Dragging Down Home Values, Neighbors Say*, AOL REAL ESTATE (Feb. 9, 2013, 1:52 PM), <http://realestate.aol.com/blog/2013/02/08/steve-salton-tigers-leopards-home/> (private owner Steve Salton reportedly justified keeping three tigers and two leopards in his backyard “because he’s passionate about caring for endangered species”).

⁶² *Separating Science from Fiction*, *supra* note 1, at 30.

⁶³ See *id.* at 29, 30 (discussing people profit greatly from marketing and breeding tigers in captivity and the fact that tigers are disappearing).

eviscerating any contention that the private ownership or commercial use of tigers is beneficial to the enhancement of wild tiger populations.⁶⁴ Moreover, experts in the zoological and conservation communities estimate that up to 90 percent of wild animals kept as pets die within the first two years.⁶⁵ Studies in the conservation of a variety of endangered species have also revealed that public display and commercial use of endangered species not only may fail to help, but may be *actively detrimental* to wild populations of such species.⁶⁶ Fish and Wildlife Service (FWS) itself has acknowledged “sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife.”⁶⁷

Often, the presence of endangered species in unnatural

⁶⁴ *Separating Science from Fiction*, *supra* note 1, at 30, 33. As pointed out by Nyhus and Tilson, “[m]any ‘roadside zoos’ claim to support wild tiger conservation, but in reality do little or nothing to contribute to meaningful conservation of wild tigers and their habitats.” *Id.* at 33.

⁶⁵ *Privately-Owned Tigers*, *supra* note 9, at 3.

⁶⁶ See, e.g., Stephen R. Ross et al., *Specific Image Characteristics Influence Attitudes about Chimpanzee Conservation and Use as Pets*, PLOS ONE (July 13, 2011); <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0022050>. Often, the presence of endangered species in public exhibitions leads to erroneous public perceptions that such species are not in fact endangered. *Id.* For example, Dr. Stephen R. Ross, who is the Director of the Lester E. Fisher Center for the Study and Conservation of Apes at the Lincoln Park Zoo and Chair of the AZA Chimpanzee SSP, has conducted studies that show that when an endangered species is exhibited alongside or in close proximity to a human—as is the case in interactive tiger cub exhibitions—observers incorrectly assume that wild populations of such species are plentiful. *Id.* As Dr. Ross explains, commercial presentations of endangered species “may serve to counteract the efforts of scientific and conservation organizations that have formed strong policy statements condemning the use of [such species] as pets, citing risks to public health and safety, concerns about animal welfare, and adverse effects on wild populations.” *Id.*; see also Kara Schroepfer et al., *Use of “Entertainment” Chimpanzees in Commercials Distorts Public Perception Regarding Their Conservation Status*, 6(10) PLOS ONE (Oct. 12, 2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3192158/> (finding that the commercial use and portrayal of chimpanzees in unnatural situations “may have a devastating effect on great ape conservation efforts”).

⁶⁷ *Why Cub Petting Violates the Endangered Species Act*, BIG CAT RESCUE (Aug. 4, 2013), <http://bigcatrescue.org/why-cub-petting-violates-the-endangered-species-act/> (quoting Department of the Interior, Fish and Wildlife Service, 58 Fed. Reg. 68323 (Dec. 27, 1993); *Id.* (quoting Captive-bred Wildlife Regulation, 57 Fed. Reg. 548-01, 550 (Jan. 7, 1992) (“When the agency amended the CBW regulations to codify this policy in 1993, it voiced concern that, in the absence of such limitation, ‘captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as . . . for entertainment.’”)); see also 50 C.F.R. § 17.21(g)(3)(i) (2010) (“[p]ublic education activities may not be the sole basis to justify issuance of a [CBW] registration”).

exhibitions leads to erroneous public perceptions that such species are not in peril.⁶⁸ Tiger conservationists argue that the use of tigers as sources of entertainment has led to “the blurring of our awareness of what tigers are and the serious threats wild tigers face to their continued survival.”⁶⁹ The ease with which tigers can be bred, bought, sold,⁷⁰ and used for entertainment not only diverts funds that would be better spent on legitimate conservation projects, but unfettered access to an endangered species lessens public concern for their diminishing numbers in the wild.⁷¹ Showcasing tigers for profit has sadly lessened the general public’s knowledge of wildlife and nature.⁷² Experts Tilson and Nyhus have expounded upon this point, stating that, “[p]eople watch the films, they visit the zoos, and by the mesmerizing power of these vicarious experiences, they come carelessly to believe that the Bengal tiger . . . is alive and well because they have seen it.”⁷³

⁶⁸ See, e.g., Stephen R. Ross et al., *supra* note 66.

⁶⁹ *Thirteen Thousand and Counting*, *supra* note 9, at 232.

⁷⁰ See generally *USDA Should Revoke Federal License of Nation’s Largest Big Cat Breeder*, HUMANE SOCIETY (Feb. 6, 2014), http://www.humanesociety.org/news/press_releases/2014/02/GW-License-Revocation.html (“Certificates of Veterinary Inspection that illustrate the extent of Schreiber’s involvement in the exotic animal trade. Between Feb. 19, 2011, and Sept. 5, 2013, Schreiber moved at least 51 tigers, seven lions, two leopards, five bears and two monkeys out of Oklahoma. In 2013 alone, he disposed of at least 21 tiger cubs, including four cubs who were only three-days-old at the time of transport. These animals went to multiple other substandard exhibitors in more than a dozen states.”); Oklahoma Department of Agriculture, Food & Forestry records indicate that Joe Schreiber, the roadside zoo owner described *supra* note 47, sold at least *nineteen* tigers just between December 4, 2014, and January 21, 2015, to other roadside zoos and exhibitors in California, Illinois, Florida, Texas, Colorado, and Missouri. See Ok. Dept. of Agric., Food & Forestry, Certificates of Veterinary Inspection Nos. 1994068 (Jan. 21, 2015) (documenting Schreiber’s sale of one infant tiger to Jungle Exotics roadside zoo in Calif.); 1994054 (Dec. 23, 2014) (documenting Schreiber’s sale of two infant tigers to Woody’s Menagerie in Ill.); 1994055 (Dec. 23, 2014) (documenting Schreiber’s sale of two infant tigers to Robert Engesser, dba Jungle Safari roadside zoo in Fl.); 1994053 (Dec. 19, 2014) (documenting Schreiber’s sale of two infant and four adult tigers to Sharkarosa roadside zoo in Tex.); 1994052 (Dec. 5, 2015) (documenting Schreiber’s sale of one infant tiger to Charles Erhardt in Tex.); 1953524 (Dec. 5, 2014) (documenting Schreiber’s sale of three adult tigers to Nick Sculac, dba Serenity Springs roadside zoo in Colo.); 1953523 (Dec. 4, 2014) (documenting Schreiber’s sale of two juvenile tigers to Deb Tolentino at D-D roadside zoo in Mo.); 1953522 (Dec. 4, 2014) (documenting an additional sale of two infant tigers to Nick Sculac in Colo.).

⁷¹ See *Separating Science from Fiction*, *supra* note 1, at 38; see also *Thirteen Thousand and Counting*, *supra* note 9, at 235.

⁷² *Thirteen Thousand and Counting*, *supra* note 9, at 236.

⁷³ *Id.* at 237.

D. Tiger Surplus

Tigers, who are cheap to purchase as cubs,⁷⁴ grow up to be dangerous apex predators whose dietary and veterinary needs can cost well over \$10,000 per year.⁷⁵ Therefore, it comes as no surprise that there are estimated to be *hundreds* of unwanted tigers in private ownership the U.S.⁷⁶ When these apex predators become too unmanageable, too costly, or otherwise unwanted, it is common for them to end up in the hands of other private owners, sold to roadside zoos, or even killed.⁷⁷ While a few of the lucky surplus tigers may end up in reputable sanctuaries that do not engage in breeding, trade, or commercial use of tigers,⁷⁸ there is no reliable

⁷⁴ See WILLIAMSON & HENRY, *supra* note 10, at 22–23 (“[W]hereas a decade ago, a Tiger cub might cost [\$] 2,000, at present the cost would be only [\$] 200–500, which is less than the cost of many pedigreed dog puppies.”).

⁷⁵ See *id.* at 22.

⁷⁶ See *id.* at 44.

⁷⁷ See *id.* at 24, 25; see also *supra* note 70 (documenting the sales of nineteen tigers from one roadside zoo owner to a number of other exhibitors).

⁷⁸ According to FWS, a true sanctuary meets the following threshold criteria:

(1) Is approved by the United States Internal Revenue Service as a corporation that is exempt from taxation under § 501(a) of the Internal Revenue Code of 1986, which is described in §§ 501(c)(3) and 170(b)(1)(A)(vi) of that code;

(2) Does not commercially trade in prohibited wildlife species, including offspring, parts, and products;

(3) Does not propagate any of the prohibited wildlife species; and

(4) Does not allow any direct contact between the public and the prohibited wildlife species.

50 C.F.R. 14.252 (2007); see also 16 U.S.C. § 3372(2)(c)(i)–(iv) (2012).

The Global Federation of Animal Sanctuaries has set forth the following more specific criteria, defining a sanctuary as a facility that is incorporated as a non-profit organization and adheres to the following criteria:

No captive breeding (with a potential exception for only those organizations having a bona fide release/ reintroduction program to return wildlife to the wild);

No commercial trade in animals or animal parts;

No tours allowed that are not guided and conducted in a careful manner that minimizes the impact on the animals and their environment, does not cause them stress, and gives them the ability to seek undisturbed privacy and quiet;

Animals are not exhibited or taken from the sanctuary or enclosures/habitats for non-medical reasons, with some limited exceptions for certain animal species, such as horses, under approved circumstances;

The public does not have direct contact with wildlife (with some limited exceptions as outlined in the standards, in conjunction with adoption/foster programs for some birds and small reptiles as allowed by law).

In addition, organizations must demonstrate:

Adherence to standards on animal care including housing, veterinary care, nutrition, animal well-being and handling policies, as well as standards on physical facilities, records and staff safety, confirmed by an extensive questionnaire, site visit, and interviews;

Ethical practices in fundraising;

way of tracking the disposition of tigers.⁷⁹ Disposition of surplus tigers in the U.S. may rarely involve domestic trafficking in skins and parts, however, it is not unheard of. Indeed, an eighteen-month long covert FWS investigation into the illegal wildlife trade in the U.S., known as “Operation Snow Plow,”⁸⁰ resulted in the prosecution of sixteen individuals and one business in connection with the illegal purchase, sale, and slaughter of exotic cats—including 19 tigers—for their meat, skins, skulls, and gallbladders.⁸¹ Most of the cats originated at USDA-licensed exhibitors or dealers.⁸²

According to TRAFFIC, the leading non-governmental organization monitoring and investigating wildlife trafficking all over the globe,⁸³ the existing statutory and regulatory framework in the U.S. is “not currently adequate to foreclose the possibility that parts or derivatives from these animals could enter illegal trade.”⁸⁴ Statutory and regulatory insufficiencies and failures described in Sections III & IV, *infra*, have given rise to circumstances suggesting that it is only a matter of time before

Ethical acquisition and disposition of animals;

Restrictions on research, limited to non-invasive projects that provide a health, welfare or conservation benefit to the individual animal and/or captive animal management and/or population conservation;

The existence of a contingency plan if the property where the sanctuary is located is not owned by the sanctuary or its governing organization.

Who Can Apply, GLOBAL FEDERATION OF ANIMAL SANCTUARIES, <http://www.sanctuaryfederation.org/gfas/for-sanctuaries/definitions/> (last visited Sept. 23, 2015).

⁷⁹ See WILLIAMSON & HENRY, *supra* note 10, at 24 (discussing Florida’s lack of accurate records and the need for changes to be made nationwide).

⁸⁰ *Id.* at 39.

⁸¹ *Id.*

⁸² *Id.* Investigation targets included exhibitors, dealers, taxidermists, trophy collectors, and an exotic meat dealer in Illinois that had sold tiger meat. *Id.* TRAFFIC’s report raised concerns for a growing market for tiger parts originating in the U.S. and entering the global wildlife trafficking market due to volume of privately owned tigers, insufficient government oversight, relatively low prices for live tigers in the U.S., and the high monetary value placed on tiger parts in Asia. *Id.*

⁸³ WILLIAMSON & HENRY, *supra* note 10, at 3. TRAFFIC was established in 1976 in part to monitor and investigate global wildlife trafficking and is governed by a steering committee comprised of representatives from TRAFFIC’s partner organizations, the World Wildlife Fund (WWF) and the International Union for the Conservation of Nature (IUCN). See *Traffic – About Traffic*, TRAFFIC.ORG, <http://www.traffic.org/overview/> (last visited Sept. 23, 2015).

⁸⁴ WILLIAMSON & HENRY, *supra* note 10, at 43. Indeed, while the CWSA aims to curtail the *interstate* transport and trafficking of tigers by non-exempted parties, the *intrastate* sales and transport between private owners is “virtually untraceable,” particularly in states with weak or no oversight. See *id.* at 21.

tiger parts originating in the U.S. enter the illegal international market: 1) surplus of captive tigers in the U.S. who have no conservation value;⁸⁵ 2) loopholes in existing laws that incentivize the breeding of tigers for commercial exploitation and are insufficient to monitor tiger movement and trade within the U.S.;⁸⁶ 3) relatively cheap cost to purchase live tigers in the U.S.;⁸⁷ 4) high value of tiger parts in Asia;⁸⁸ and 5) relatively low-risk involved in wildlife trafficking.⁸⁹ According to TRAFFIC, “the fact that the United States continues to generate Tigers [sic] that end up unwanted indicates that the U.S. could become a source for parts in the illegal trade in the future.”⁹⁰

II. U.S. FISH AND WILDLIFE SERVICE OVERSIGHT OF TIGERS

A. *The ESA and the Generic Tiger Loophole: A Breeding Ground for Exploitation*

Tigers are listed as endangered at the *species level* under the federal ESA, meaning that all five remaining subspecies⁹¹ and tigers who are of mixed or unascertainable pedigree⁹² are included in the listing. The ESA was enacted in 1973, in pertinent part, to “conserve endangered species”⁹³ and, in furtherance of this

⁸⁵ *Id.* at 21, 41.

⁸⁶ *Id.* at 3, 21.

⁸⁷ *Id.* at 22–23.

⁸⁸ See Andrew Jacobs, *Tiger Farms in China Feed Thirst for Parts*, N.Y. TIMES, Feb. 13, 2010, at A4.

⁸⁹ See Donovan Webster, *The Looting and Smuggling and Fencing and Hoarding of Impossibly Precious, Feathered and Scaly Wild Things*, N.Y. TIMES MAGAZINE (Feb. 16, 1997), <http://www.nytimes.com/1997/02/16/magazine/looting-smuggling-fencing-hoarding-impossibly-precious-feathered-scaly-wild.html?pagewanted=1> (explaining that jail time is rarely imposed for wildlife trafficking, and even when it is, the monetary penalties and prison sentences are drastically lower than they would be for trafficking narcotics of the same value).

⁹⁰ WILLIAMSON & HENRY, *supra* note 10, at 21.

⁹¹ See *Separating Science from Fiction*, *supra* note 1, at 31; ECOS Environmental Conservation Online System, *Species*, U.S. FISH AND WILDLIFE SERVICE, http://ecos.fws.gov/tess_public/pub/SpeciesReport.do?lead=10&listingType=L (last visited Nov. 14, 2015).

⁹² See 50 C.F.R. § 17.11; see also *Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers*, 76 Fed. Reg. at 52,299 (clarifying that “[t]he listing is at the species level and, thus, includes all subspecies of tiger (including those that are of unknown subspecies, referred to as ‘generic’ tigers) and inter-subspecific crosses.”).

⁹³ 16 U.S.C. § 1531(c) (2012); see also *Endangered Species Act*, H.R. Rep. No.

objective, prohibits the import and export;⁹⁴ “take”;⁹⁵ possession and other conduct with illegally taken wildlife;⁹⁶ delivery, receipt, transport, or shipping in interstate or foreign commerce;⁹⁷ and sale or offer for sale in interstate or foreign commerce⁹⁸ of listed species. Administered and enforced by the U.S. Fish and Wildlife Service (FWS),⁹⁹ the ESA gives the agency authority to issue permits to allow activities with endangered species that would otherwise be prohibited.¹⁰⁰ However, such permits (frequently referred to as “Section 10” permits because they are authorized in Section 10 of the ESA) are only supposed to be granted “for scientific purposes or to enhance the propagation or survival of the affected species”¹⁰¹ or for takes that are “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”¹⁰²

93-740, at 427 (1973), <http://www.eswr.com/docs/lh/426-488.pdf>.

⁹⁴ 16 U.S.C. § 1538(a)(1)(A) (1982).

⁹⁵ 16 U.S.C. § 1538(a)(1)(B), (C) (1982). The term “take” includes harming or harassing an individual member of a protected species, and applies to any—i.e., wild or captive-bred—member of the protected species. 16 U.S.C. § 1532(19) (2012); *see also* Captive-bred Wildlife Regulation 63 Fed. Reg. 48,634, 48,636 (proposed Sept. 11, 1998) (to be codified at 50 C.F.R. pt. 17) (“‘Take’ was defined by Congress in Section 3 of the Act as . . . ‘to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . .’ endangered or threatened wildlife, whether wild or captive.”).

⁹⁶ 16 U.S.C. § 1538(a)(1)(D) (1982).

⁹⁷ 16 U.S.C. § 1538(a)(1)(E) (1982).

⁹⁸ 16 U.S.C. § 1538(a)(1)(F) (1982).

⁹⁹ *See* 16 U.S.C. § 1537a(a) (1982); *see also* 50 C.F.R. § 10.1 (2015).

¹⁰⁰ *Endangered Species: Permits*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/endangered/permits/index.html> (last updated July 15, 2013).

¹⁰¹ 16 U.S.C. § 1539(a)(1)(A) (2012); *see also, infra* Section III.B.

¹⁰² 16 U.S.C. § 1539(a)(1)(B). FWS is required to publish notice of each Section 10 permit application in the Federal Register, and accept public comments for a period of 30 days. 16 U.S.C. § 1539(c). The ESA allows FWS to issue Section 10 permits only after a determination the permits “were applied for in good faith,” permit issuance “will not operate to the disadvantage of such endangered species,” and “will be consistent with” the endangered species conservation policies set forth in § 1531 of the ESA. 16 U.S.C. § 1539(d). The ESA works in tandem with the Lacey Act, which also is enforced by FWS. *See generally* 16 U.S.C. §§ 3371–3378 (giving an overview of the entire Lacey Act); 50 C.F.R. §§ 14.250–14.255 (2015). The Lacey Act provides that it is unlawful for any person to “import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.” 16 U.S.C. § 3372(a)(1). The Captive Wildlife Safety Act (CWSA), signed into law on December 19, 2003, is an amendment to the Lacey Act, passed in an attempt to “further the conservation of [big cats]” by prohibiting the interstate transport of tigers and other big cats for use as pets. *See* Statement by the Press Secretary, The White House (Dec. 19, 2003), 2003 WL 22977745; Captive Wildlife Safety Act, Pub. L. No 108-191, 117 Stat. 2871 (2003) (codified at 16 U.S.C. §§ 3371(g) & 3372);

In 1979, FWS amended the ESA regulations to provide an exception to the Section 10 permit process by extending general, conditional permission to “take; export or re-import; deliver, receive, carry, transport or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered wildlife that is *bred in captivity* in the United States”¹⁰³ where it can be demonstrated that the “the principal purpose of the activities is *captive breeding for conservation purposes*.”¹⁰⁴ Such permission first requires application and approval for captive bred wildlife (CBW) registration by FWS¹⁰⁵ and a demonstration that the proposed activity will “enhance the propagation or survival of the affected species.”¹⁰⁶ In the absence of CBW registration, Section 10

Captive Wildlife Safety Act: What Big Cat Owners Need to Know, U.S. FISH & WILDLIFE SERVICE (Aug. 2007), <http://www.fws.gov/le/pdf/CaptiveWildlifeSafetyActFactsheet.pdf>. The CWSA makes it unlawful to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce” any “lion, tiger, leopard, cheetah, jaguar, or cougar or any hybrid of such a species.” See 16 U.S.C. §§ 3371, 3372(a)(2). However, due to broad exemptions that open the door for circumvention by private owners, the CWSA does not sufficiently curtail the permissible transfer of tigers, regardless of their intended use. See 16 U.S.C. § 3372(e)(2)(A), (C).

¹⁰³ See 50 C.F.R. § 17.21(g)(1) (emphasis added); see also *Captive Wildlife Regulation*, 44 Fed. Reg. 54,002 (proposed Sept. 17, 1979) (to be codified at 50 C.F.R. pt. 13, 17). The CBW registration regulations pertain primarily to species that—like tigers—are not native to the U.S. See 50 C.F.R. § 17.21(g)(1)(i).

¹⁰⁴ See *Captive-Bred Wildlife Registration Under the U.S. Endangered Species Act*, U.S. FISH & WILDLIFE SERV. (Jan. 2012), <http://www.fws.gov/international/pdf/factsheet-captive-bred-wildlife-and-endangered-species-act-2012.pdf> (emphasis added); see also *Captive-bred Wildlife Regulation*, 57 Fed. Reg. 548 (Jan. 7, 1992) (to be codified at 50 C.F.R. pt. 17) (restating that “conservation of wild populations must be the [FWS] primary goal” in administering the CBW registration program); *Captive Wildlife Regulation*, 44 Fed. Reg. at 54,002 (Final Rule announcing that the CBW registration system is “designed to protect wild populations.”); 16 U.S.C. § 1532(3) (defining “conservation” to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”).

¹⁰⁵ 50 C.F.R. § 17.21(g)(2) (2014).

¹⁰⁶ 50 C.F.R. § 17.21(g)(1)(ii) (2014). In 1993, after articulating a concern that “captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as for pets, for research that does not benefit the species, or for entertainment.” *Captive-bred Wildlife Regulation*, 57 Fed. Reg. 548 (Jan. 7, 1992) (to be codified at 50 C.F.R. pt. 17). FWS amended the definition of “enhancement” in the CBW regulations to clarify that “[p]ublic education activities may not be the sole basis to justify issuance of a [CBW] registration”. 50 C.F.R. § 17.21(g)(3)(i) (2014); see *Captive-bred Wildlife Regulation*, 58 Fed. Reg. 68,323, 68,324 (Dec. 27, 1993) (to be codified at 50 C.F.R. pt. 17). Moreover, CWB

permits are still required for otherwise prohibited activities, including the initial import of tigers who are bred outside of the U.S.¹⁰⁷

Between 1979 and 1998, the CBW registration requirement applied to all captive tigers in the U.S.¹⁰⁸ However, in 1998, FWS amended the CBW regulations to eliminate the CBW registration requirement for otherwise prohibited activities with inter-subspecific crossed or generic tigers.¹⁰⁹ This generic tiger

registration applicants must include information specified in 50 C.F.R. § 17.22(a)(1) (2015), including “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.” 50 C.F.R. § 17.22(a)(1)(vii). The FWS is obligated to consider the issuance criteria specified in § 17.22(a)(2), including whether “the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.22(a)(2)(vi). A CBW registrant must also comply with the general ESA permit conditions, including that it “maintain” any “live wildlife possessed under a permit . . . under humane and healthful conditions.” Humane Conditions, 50 C.F.R. § 13.41 (2005); *see* Scope of Regulations, 50 C.F.R. § 13.3 (2014). In addition, § 13.42 provides that “[t]he authorizations on the face of a permit . . . are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction.” Permits are Specific, 50 C.F.R. § 13.42 (2005). Although 50 C.F.R. § 13.42 is a general permitting regulation, this provision applies equally to CBW registration. *See* 50 C.F.R. § 13.3 (“The provisions in this part are in addition to, and are not in lieu of, other permit regulations of this subchapter and apply to all permits issued thereunder, including . . . ‘Endangered and Threatened Wildlife and Plants’ (part 17) As used in this part 13, the term ‘permit’ will refer to a license, permit, certificate, letter of authorization, or other document as the context may require . . .”).

¹⁰⁷ *See, e.g., Captive Bred Wildlife Registration Under the U.S. Endangered Species Act*, *supra* note 104. For example, in order for a U.S.-based circus to lawfully exhibit tigers abroad, it must first apply for and obtain Section 10 permits for the export and re-import of the tigers. *See, e.g., WILLIAMSON & HENRY, supra* note 10; *see* Endangered Species; Marine Mammals; Receipt of Applications for Permit, 80 Fed. Reg. 28,296, 28,296–97 (May 18, 2015) (publishing notice of a Florida-based circus exhibitor’s application, No. PRT-58231B, for a Section 10 permit to acquire and import 6 tigers from a Mexico-based exhibitor).

¹⁰⁸ *See* U.S. Dep’t of Interior, *supra* note 32.

¹⁰⁹ Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,638–39 (Sept. 11, 1998) (to be codified at 50 C.F.R. pt. 17); *see also* 50 C.F.R. § 17.21(g)(6). The Generic Tiger Loophole is ostensibly conditioned upon the requirement that “[t]he purpose of such activity is to enhance the propagation or survival of the affected exempted species.” *See* 50 C.F.R. § 17.21(g)(6)(i). However, given that generic tiger owners aren’t required to register with FWS, it’s virtually impossible for the FWS to enforce the foregoing requirement. An existing law review note confuses the issue by suggesting that generic tigers are totally “exempted from the ESA.” *See* Adele Young, *Caged Cats: Private Ownership of Lions and Tigers*, 38 WM. & MARY ENVTL. L. & POLY 535, 540, 542 (2014), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1598&context=wmelp>. While the Generic Tiger Loophole in the CBW registration requirements is indeed a gaping exemption, Ms. Young’s note omits any reference to the CBW

exemption (the “Generic Tiger Loophole”) from CBW registration requirements was created because of “the lack of conservation value . . . due to [the] mixed or unknown genetic composition”¹¹⁰ of generic tigers, and purportedly to enable the FWS to focus its oversight on conservation breeding and use of pure-bred tigers.¹¹¹

However, rather than *helping* tigers, the Generic Tiger Loophole has plunged the species into deeper peril by incentivizing commercial and private owners to primarily breed and use generic tigers in order to evade the ESA. Consequently, due to patchwork regulation at the state and local levels,¹¹² and the Generic Tiger Loophole,¹¹³ an estimated 95 percent of tigers in America are completely outside of FWS oversight¹¹⁴ unless they are used for import, export, or another activity that falls outside the ambit of activities covered by the CBW registration system.¹¹⁵

In its notice of intent to institute the CBW registration system, the FWS acknowledged that the primary purpose of the ESA is “to conserve wild populations of Endangered and Threatened species,”¹¹⁶ and has further articulated that the intent of the CBW registration system is “to encourage *responsible* breeding efforts with listed species.”¹¹⁷ Instead, the Generic Tiger Loophole has substantially contributed to irresponsible breeding practices and accounted in large part for the virtual impossibility of accurately tracing the number and location of captive tigers in the U.S.¹¹⁸ For

registration system, thus apparently attributing the Generic Tiger Loophole to *all sections* of the ESA. In the process, Ms. Young’s discussion in Section II of her note suggests an *additional* Generic Tiger Loophole in the ESA that fortunately does not exist. *See id.*

¹¹⁰ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. 52,297, 52,298 (proposed Aug. 22, 2011) (to be codified at 50 C.F.R. pt. 17).

¹¹¹ Captive-bred Wildlife Regulation, 63 Fed. Reg. 48,634, 48,637, 48,638 (Sept. 11, 1998) (to be codified at 50 C.F.R. pt. 17).

¹¹² *See, e.g.,* Map, *supra* note 28 (showing how states’ regulations on animals varies).

¹¹³ *See* 50 C.F.R. § 17.21(g)(6)(i) (2010).

¹¹⁴ *See Separating Science from Fiction, supra* note 1, at 34; *see also Privately-Owned Tigers, supra* note 9, at 1; *More Tigers in American Backyards than in the Wild*, WORLD WILDLIFE FUND (July 29, 2014), <http://www.worldwildlife.org/stories/more-tigers-in-american-backyards-than-in-the-wild>.

¹¹⁵ *See* 50 C.F.R. §§ 17.21(a)-(b).

¹¹⁶ Captive Wildlife Regulation, 44 Fed. Reg. 30,044, 30,044 (proposed May 23, 1979) (to be codified at 50 C.F.R. pt. 17).

¹¹⁷ Captive-bred Wildlife Regulation, 58 Fed. Reg. at 68,324 (emphasis added).

¹¹⁸ *See Status and Evolution, supra* note 29, at 49; *see also* Nyhus & Tilson, *supra* note 1, at 34.

reasons discussed further in Section IV.B, *infra*, the population of tigers kept in private hands (i.e., not exhibited by circuses, zoos, or for other commercial purposes) has been nearly impossible to track.¹¹⁹

Exhibitors who recognize and profit off of the marketability of white tigers¹²⁰ are particularly candid about how helpful the Generic Tiger Loophole has been on their ability to breed and profit off of these animals.¹²¹ For example, one South Carolina-based exhibitor who breeds, trades, and provides tigers for use in the entertainment industry and for photo opportunities,¹²² has acknowledged that the captive supply of white tigers now “exist[s] in captivity in great abundance” due to the FWS’ removal of generic tigers from CBW registration requirements.¹²³

¹¹⁹ See WILLIAMSON & HENRY, *supra* note 10, at 17, 19, 21.

¹²⁰ WELFARE AND CONSERVATION, *supra* note 48, at 2 (finding that “the interest in seeing white tigers, white lions, white alligators, and king cheetahs continues often in preference over the ‘normal’ looking individuals of the same species”). According to roadside zoo owner Bhagavan “Doc” Antle:

One thing is for sure, we humans see our world in full color and white attracts our attention, our admiration, and our desire - the desire to possess, especially anything rare. Some seek to possess of the living being, others want the trophy body. Either way, over time the white tiger was selectively removed from nature whenever man observed it.

Bhagavan Antle, *White Tiger History*, TIGERS, http://www.bhagavanantle.com/white_tiger_facts.html (last visited Jan. 27, 2016); see also *Take Action Tuesday: When “Cute” Animals Reveal an Ugly Truth*, CHIMPANZEE SANCTUARY NORTHWEST (Feb. 10, 2015), www.chimpsanctuarynw.org/blog/tag/doc-antle/ (mentioning roadside zoo).

¹²¹ See *infra* note 122; see also *White Tigers: All White Tigers are Inbred and are not Purebred*, *supra* note 48.

¹²² See *EXPOSED! T.I.G.E.R.S: A Tourist Attraction Exploiting Animals in the Name of Wildlife Conservation*, ONE GREEN PLANET, www.onegreenplanet.org/animalsandnature/exposed-t-i-g-e-r-s-a-tourist-attraction-above-wildlife-conservation/ (last visited Oct. 23, 2015). Antle supplies animals for television shows, movies, and commercials, and offers public photo opportunities with tigers for a hefty \$100.00 fee. *T.I.G.E.R.S. Preservation Station*, MYRTLE BEACH SAFARI, <http://www.myrtlebeachsafari.com/preservation-station.php> (last visited Oct. 23, 2015) (photo fee); see also *About T.I.G.E.R.S.*, PRESERVATION STATIONS, <http://www.tigerfriends.com/about.html> (last visited Oct. 23, 2015) (for information about animals involvement in media).

¹²³ See, e.g., Antle, *supra* note 120.

A big boost to the diversity of the white tiger genetics happened after the US F&W S Generic Tiger Ruling in 1998 eliminated the CBW permit requirement, allowing breeders to purchase new bloodlines in interstate commerce without restriction - and they did. Unfortunately the boom in breeding tigers for color produced an abundance of tigers that exceed the carrying capacity of the available captive habitat.

Id.

Following a recommendation by TRAFFIC, and in recognition of the need “to strengthen control over captive breeding of tigers in the United States to ensure that such breeding supports the conservation of the species in the wild,”¹²⁴ the FWS published notice in the Federal Register on August 22, 2011, of a proposed rule to remove the Generic Tiger Loophole from the CBW registration requirements.¹²⁵ In announcing the proposed rule change, FWS also acknowledged the potential detrimental impact of captive breeding on the survival of tigers in the wild, “the need to be vigilant¹²⁶ [to] monitor” the captive population of tigers in the U.S., and admitted that “[b]y exempting inter-subspecific crossed or generic tigers from the CBW registration process in 1998, [FWS] may have inadvertently suggested that the breeding of these tigers qualifies as conservation.”¹²⁷ FWS raised concerns over unscrupulous breeding practices, including inbreeding, and proposed to remove the exemption for generic tigers from the CBW registration requirements in order to “discourage the breeding of tigers of unknown or mixed lineage”¹²⁸ and exercise more effective enforcement of the ESA.¹²⁹

Generic tiger exhibitors (who are currently under no obligation to provide *any* information to FWS about breeding and transfer of

Not surprisingly, exhibitors who profit off of such breeding also vehemently defend the private ownership of tigers. See Bhagavan Antle, *Big Cat Safety, Handling and Training*, REXANO.ORG (2005), http://www.rexano.org/ResponsibleOwnership/Husbandry/big_cat_training_Fra me.htm (for Dr. Antle’s opinion on tiger ownership).

¹²⁴ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,301.

¹²⁵ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,297.

¹²⁶ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,298, 52,299.

¹²⁷ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299. The FWS demonstrated a high degree of deference to the concerns raised by the most recent TRAFFIC report, which noted that “[t]he United States at present cannot even account accurately for how many Tigers are in the country, much less what happens to the parts of Tigers that might either die of natural causes or be killed.” WILLIAMSON & HENRY, *supra* note 10, at 42; Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299. Indeed, TRAFFIC recommended removal of the Generic Tiger Loophole from CBW registration requirements in order to better track the number, location, ownership, acquisition, and disposition of tigers in the United States. WILLIAMSON & HENRY, *supra* note 10, at 44.

¹²⁸ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299.

¹²⁹ *Id.*

tigers) would have to submit complete applications¹³⁰ that include a demonstration of how their commercial breeding practices “enhance the propagation or survival of the affected species.”¹³¹ If approved for CBW registration, registrants would have to submit an annual report including a year-end inventory of tigers as well as a report concerning all otherwise prohibited activities conducted with the tigers.¹³² However, if those who breed generic tigers are required to apply for CBW registration—which is supposed to be granted only for *conservation* breeding purposes—such registration *should* be summarily denied based on the position articulated by FWS and AZA that generic tigers have no conservation value.¹³³ Therefore, closing the Generic Tiger Loophole—particularly if the FWS stands by its assessment¹³⁴ that propagating generic tigers does not constitute “breeding for conservation purposes,”¹³⁵ should help deter generic tiger breeding

¹³⁰ CBW registration applications must include information specified in 50 C.F.R. § 17.22(a)(1), including “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit.” 50 C.F.R. § 17.22(a)(1)(vii) (2004). FWS is required to consider the issuance criteria set forth in § 17.22 (a)(2), including “[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.22(a)(2)(vi). Obtaining and renewing CBW registration requires compliance with the general ESA permit conditions including maintaining “[a]ny live wildlife possessed under a permit . . . under humane and healthful conditions.” 50 C.F.R. § 13.41 (2004). *See generally* 50 C.F.R. §§ 13.3 (2014). In addition, 50 C.F.R. § 13.42 provides that “[t]he authorizations on the face of a permit . . . are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction.” 50 C.F.R. § 13.42 (2005). Although 50 C.F.R. § 13.42 is a general permitting regulation, this provision applies equally to CBW registration. *See generally* 50 C.F.R. §§ 13.3, 13.42.

¹³¹ *See* 50 C.F.R. § 17.21(g)(2). Like other Section 10 permits, FWS may issue CBW registration after a 30-day public comment period and a determination that the registration was “applied for in good faith,” that registration “will not operate to the disadvantage of such endangered species,” and “will be consistent with” the endangered species conservation policies set forth in § 1531 of the ESA. 16 U.S.C. § 1539(c), (d).

¹³² 50 C.F.R. § 17.21(g)(3)(iii); WILLIAMSON & HENRY, *supra* note 10, at 14.

¹³³ *See, e.g.*, Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299 (discouraging “the breeding of tigers of unknown or mixed lineage”); *see Tiger Species Survival Plan, supra* note 9.

¹³⁴ *See* Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,299.

¹³⁵ *See id.*

[FWS] do[es] not believe that breeding inter-subspecific crossed or generic tigers provides a conservation benefit for the long-term survival of the species. Inter-subspecific tiger crosses and animals of unknown

and curtail some of the unscrupulous uses of tigers that bear no relationship to legitimate conservation.¹³⁶ FWS accepted public comments on the proposed rule change through October 21, 2011.¹³⁷ Yet, as of the date of this publication *more than four years later*,¹³⁸ FWS still has not published notification that the rule has been finalized.¹³⁹

B. Endangered Species Act “Enhancement Requirement:” Pay-to-Play

As discussed *supra* Section III.A, the ESA allows FWS to issue permits and approve permits for otherwise prohibited activities, including CBW registration applications, for activities with tigers that are otherwise prohibited, but only “for scientific purposes or to *enhance the propagation or survival of the affected species*”¹⁴⁰

subspecies cannot be used for maintaining genetic viability and distinctness of specific tiger subspecies. Generic tigers are of unknown genetic origin and are typically not maintained in a manner to ensure that inbreeding or other inappropriate matings of animals do not occur.

Id.

¹³⁶ See *id.*; see also *Close Generic Tiger Loophole*, BIG CAT RESCUE (Nov. 25, 2011), <http://bigcatrescue.org/close-generic-tiger-loophole/>.

¹³⁷ Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. 58,455, 58,457, 58,458 (proposed Sept. 21, 2011) (to be codified at 50 C.F.R. pt. 17).

¹³⁸ The author submitted this article on July 21, 2015.

¹³⁹ See generally H.R. REP. NO. 113-551 (2014) (illustrating budget concerns for endangered species programs).

¹⁴⁰ 16 U.S.C. § 1539(a)(1)(A) (emphasis added); see also 50 C.F.R. §§ 17.21(g)(1)(ii), 17.22, 17.3. One stated that:

Enhance the propagation or survival, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

50 C.F.R. § 17.3. In 1993, after articulating a concern that “[c]aptive-bred animals

(“Enhancement Requirement”). The “Enhancement Requirement” originally was proposed and implemented to “permit otherwise prohibited acts” only when the *underlying acts themselves* are undertaken “to enhance the propagation or survival of the affected species[.]”¹⁴¹

However, FWS instead has allowed exhibitors to purchase their way around this requirement simply by “donating to a well-established conservation program”¹⁴²—regardless of the value or content of the “otherwise prohibited”¹⁴³ acts involving endangered species being permitted. This policy was expressly articulated by FWS while guiding the Hawthorn Corp. (the tiger breeder whose inventory of white tigers was noted *supra* note 44) through an application for permits to export and re-import tigers for use in Canadian circuses.¹⁴⁴ In that instance, FWS advised Hawthorn’s

. . . might be used for purposes that do not contribute to conservation, such as for pets, for research that does not benefit the species, or for entertainment[.]” Captive-bred Wildlife Regulation, 57 Fed. Reg. at 550. FWS amended the definition of “enhancement” in the CBW regulations to clarify that “public education [activities may not be] . . . the sole justification for issuance of a CBW registration”). Captive-bred Wildlife Regulation, 58 Fed. Reg. at 68,325; 50 C.F.R. § 17.21(g)(3)(i). Moreover, CBW registration applicants must include information specified in 50 C.F.R. § 17.22(a)(1), including “[a] full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit[.]” 50 C.F.R. § 17.22(a)(1)(vii). FWS is obligated to consider the issuance criteria specified in § 17.22(a)(2), including “[w]hether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.” 50 C.F.R. § 17.22(a)(2)(vi). A CBW applicant/registrant must also comply with the general permit conditions, including that it maintain “[a]ny live wildlife possessed under a permit . . . under humane and healthful conditions.” 50 C.F.R. § 13.41; *see also* 50 C.F.R. § 13.3 (scope of regulations). In addition, § 13.42 provides that “[t]he authorizations on the face of a permit . . . are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction.” 50 C.F.R. 13.42. Although 50 C.F.R. § 13.42 is a general permitting regulation, this provision applies equally to CBW registration. *See* 50 C.F.R. § 13.42; *see also* 50 C.F.R. § 13.3 (“The provisions in this part are in addition to, and are not in lieu of, other permit regulations of this subchapter and apply to all permits issued thereunder, including . . . ‘Endangered and Threatened Wildlife and Plants’ (Part 17) As used in this part 13, the term ‘permit’ will refer to a license, permit, certificate, letter of authorization, or other document as the context may require . . .”).

¹⁴¹ CONG. RESEARCH SERV., 97TH CONG., *reprinted in* A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, AND 1980 358 (1982).

¹⁴² Complaint for Declaratory and Injunctive Relief at para. 23, *People for the Ethical Treatment of Animals v. U.S. Fish & Wildlife Service, et al.*, (No. 1:15-cv-00600-CMH-IDD), (E.D.V.A. May 8, 2015) [hereinafter PETA Complaint].

¹⁴³ 16 U.S.C. § 1539(a)(1)(A) (“Section 10” of the ESA).

¹⁴⁴ Ryan Abbott, *Tiger Export Permits Bring PETA’s Claws Out*, COURTHOUSE

president, John Cuneo, that he must “demonstrate how [Hawthorn’s] proposed activities directly relate to the survival of th[e] species in the wild.”¹⁴⁵ “Many of our applicants achieve this goal by donating to a well-established conservation program in the range state.”¹⁴⁶ Taking this loophole a step further, FWS has also offered ESA permit applicants the option of merely “[c]ontribut[ing] money to an organization that participates in in-situ work in the range state for [the protected species]’ as [a]n [e]xample of an activity applicants participate in to show enhancement.”¹⁴⁷

The FWS further has advised tiger exhibitors that “[a]lthough [FWS has] no minimum amount one could contribute in order to meet the enhancement requirement of the ESA, the donation should be substantive enough to have an impact on one or more aspects of the threat of the extinction of the species.”¹⁴⁸ In similarly advising Las Vegas-based tiger exhibitors who sought permits to export tigers abroad for use in a magic show, FWS informed the applicants that “[w]hen furnishing donations one could look at the proportion of the revenues which could be generated by your exhibition activities and the needs of the Project to assist in determining an appropriate donation amount.”¹⁴⁹

FWS’ administration of the Enhancement Requirement through this type of “Pay-to-Play” system is currently being challenged in

NEWS SERV. (Aug. 08, 2013),

<http://www.courthousenews.com/2013/08/08/60128.htm>.

¹⁴⁵ E-mail from Jeffrey Pierce, Litigation Fellow, Animal Legal Defense Fund to Brenda Tapia, Branch of Permits, Animal Legal Defense Fund, at 9 (Dec. 8, 2014), http://aldf.org/wp-content/uploads/2014/12/20141208_Cover-Letter-FWS-Comments-Knowlton_final.pdf-Adobe-Acrobat-Pro.pdf.

¹⁴⁶ See Fax from Anna Barry, Senior Biologist, FWS Division of Management Authority, to John Cuneo, Jr., Hawthorn Corp., (Mar. 12, 2012) (on file with author).

¹⁴⁷ PETA Complaint, *supra* note 142, at ¶ 23; Fax from Anna Barry, Senior Biologist, FWS Division of Management Authority, to John Cuneo, Jr., Hawthorn Corp., Oct. 19, 2011 (emphasis added) (on file with author).

¹⁴⁸ See E-mail from Anna Barry, Senior Biologist, FWS Division of Management Authority, to Rachael Michael, Apr. 28, 2015, included with PRT-58231B, notice of which was published in 80 Fed. Reg. 28296 (May 18, 2015) (on file with author); see also Letter from Timothy Van Norman, Chief, Branch of Permits, USFWS Division of Management Authority, to Ferdinand and Anton Fercos Hantig, June 19, 2014 (pp. 8-10 of 72 of the Fercos Hantig FWS Docs) (on file with author).

¹⁴⁹ See Letter from Timothy Van Norman, Chief, Branch of Permits, USFWS Division of Management Authority, to Ferdinand and Anton Fercos Hantig, Sept. 15, 2014 (p. 3 of 72 of the Fercos Hantig FWS Docs) (on file with author).

federal court.¹⁵⁰ The animal advocacy group, People for the Ethical Treatment of Animals (PETA), filed a declaratory and injunctive action against FWS and Secretary of the Interior Sally Jewell on May 8, 2015.¹⁵¹ The filing alleges that FWS' policy of issuing ESA permits on a Pay-to-Play basis, rather than for underlying activities that "enhance the propagation or survival of the affected species,"¹⁵² is contrary to law and an abuse of discretion that violates the ESA, FWS regulations, and the Administrative Procedure Act.¹⁵³ PETA's complaint includes numerous recent examples of FWS' issuance of Section 10 permits through this "Pay-to-Play" system,¹⁵⁴ including for the export of tigers¹⁵⁵ and Asian elephants¹⁵⁶ for use in circuses abroad, and for the import of sport-hunted rhino trophies.¹⁵⁷ The illicit effect of this scheme is highlighted in one such example where the agency even blatantly admitted that "[the application]'s weak, but I say we accept it and let's get the permits out."¹⁵⁸ The legislative history of the Enhancement Requirement clearly shows that allowing applicants to circumvent scientific restrictions through these types of Pay-to-Play transactions is not what Congress had in mind when it added the requirement to the ESA.¹⁵⁹ Indeed, Congress added the Enhancement Requirement in an effort to help ensure that the underlying acts themselves for which the permits were sought were "undertaken to enhance the propagation or survival of the affected species."¹⁶⁰ FWS' distorted, and apparently unlawful, administration of the ESA permit process spotlights yet another gaping failure of the current regulatory framework that must be resolved in order to stop the exploitation of captive tigers and curtail breeding practices that have no relationship to legitimate species conservation.¹⁶¹

¹⁵⁰ See PETA Complaint, *supra* note 142, at ¶ 22.

¹⁵¹ *Id.* at para. 1.

¹⁵² 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. § 17.21(g)(1)(ii); PETA Complaint, *supra* note 142, at ¶19, ¶ 22; *see also* 50 C.F.R. § 17.22.

¹⁵³ PETA Complaint, *supra* note 142, at para., 70–73.

¹⁵⁴ *Id.* at para. 29, 36, 37, 41, 46.

¹⁵⁵ *Id.* at para. 42–49.

¹⁵⁶ *Id.* at para. 34–41.

¹⁵⁷ *Id.* at para. 28–33.

¹⁵⁸ PETA Complaint, *supra* note 142, at para. 48.

¹⁵⁹ *See* CONG. RESEARCH SERV., *supra* note 141, at 358.

¹⁶⁰ *Id.*

¹⁶¹ WILLIAMSON & HENRY, *supra* note 10, at 21.

III. U.S. DEPARTMENT OF AGRICULTURE OVERSIGHT OF TIGERS

A. *Background and Framework*

The AWA was enacted, in pertinent part, “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment”¹⁶² by regulating minimum standards of “transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.”¹⁶³ Operating as a dealer¹⁶⁴ or exhibitor¹⁶⁵ requires an AWA license.¹⁶⁶ Private ownership of tigers does *not* require a USDA license. The USDA is empowered to administer and enforce the AWA, promulgate regulations, and periodically inspect licensees to determine compliance with the AWA and its implementing regulations.¹⁶⁷ The USDA’s enforcement of the AWA is carried out by the agency’s

¹⁶² 7 U.S.C. § 2131 (1985).

¹⁶³ 7 U.S.C. § 2131.

¹⁶⁴ 7 U.S.C. § 2132(f) (2012). The AWA defines “dealer” as:

[A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes. Such term does not include a retail pet store (other than a retail pet store which sells any animals to a research facility, an exhibitor, or another dealer).

7 U.S.C. § 2132(f).

¹⁶⁵ 7 U.S.C. § 2132(h). The AWA defines “exhibitor” as:

[A]ny person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

7 U.S.C. § 2132(h).

¹⁶⁶ 7 U.S.C. § 2134 (2012).

¹⁶⁷ See 7 U.S.C. § 2146(a) (2012).

Animal and Plant Health Inspection Service (“APHIS”).¹⁶⁸ While exceedingly rare, chronic AWA violators may face license suspension, revocation, civil or criminal penalties,¹⁶⁹ or agency confiscation of animals.¹⁷⁰

The AWA is not a federal animal cruelty law, but rather sets *bare minimum* standards for handling and housing “certain warm-blooded used for research, exhibition, and commerce[.]”¹⁷¹ Obtaining an exhibitor license from APHIS is a minimum threshold requirement for circuses, zoos, roadside animal parks, and any other big cat exhibitors.¹⁷² Minimum standards of care for tigers housed by exhibitors are found in 9 C.F.R. §§ 3.125–3.142 of the AWA regulations (“Subpart F”).¹⁷³ Subpart F is a catch-all section, with regulations that are *not* species-specific.¹⁷⁴ In other words, the minimum standards of handling, care, and transportation it contains apply equally to tigers as well as zebras,

¹⁶⁸ See U.S.D.A. OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 33601-10-CH: CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS 1 (June 2010), <http://www.usda.gov/oig/webdocs/33601-10-CH.pdf>.

¹⁶⁹ See 7 U.S.C. § 2149 (2012).

¹⁷⁰ See 7 U.S.C. § 2146(a); see also, 9 C.F.R. § 2.129(a),(b) (1989).

¹⁷¹ See U.S.D.A. OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 1. The OIG has repeatedly criticized APHIS for failing to enforce the AWA. See U.S.D.A. OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 33002-3-SF: APHIS ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES i, ii (2005) (emphasis removed), <http://www.usda.gov/oig/webdocs/33002-03-SF.pdf> (finding that the USDA was “not aggressively pursuing enforcement actions against violators of the AWA” and that when the agency imposed monetary penalties, such penalties were so low as to be considered a mere “cost of conducting business” for the licensees); see, e.g., U.S.D.A. OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 33601-001-41: APHIS OVERSIGHT OF RESEARCH FACILITIES 14 (Dec. 2014), <http://www.usda.gov/oig/webdocs/33601-0001-41.pdf> (identifying numerous instances in which the USDA took no enforcement action despite “grave” or repeated violations of the AWA, or animal deaths). See generally USDA OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 33002-4-SF: APHIS ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 1, 6 (May 2010), <http://www.usda.gov/oig/webdocs/33002-4-SF.pdf> (documenting a multitude of ongoing deficiencies in the USDA’s administration of the AWA, including a finding that licensees have “little incentive to comply with AWA because monetary penalties were, in some cases, arbitrarily reduced and . . . often so low that violators regarded them as a cost of business”).

¹⁷² U.S.D.A. OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 1. While some of the OIG audits are focused on one particular type of licensee, there exists serious concerns about under-enforcement of the AWA with respect to the activities by *all* licensees (e.g., exhibitors, dealers, and research facilities). See *supra* note 171.

¹⁷³ 9 C.F.R. §§ 3.125–3.142 (1979) (§§ 3.134 and 3.135 have been removed).

¹⁷⁴ See *Final Rules: Animal Welfare; 9 C.F.R. Part 3*, ANIMAL WELFARE INFORMATION CTR. (Feb. 15, 1991), <https://awic.nal.usda.gov/final-rules-animal-welfare-9-cfr-part-3>.

llamas, goats, and any other “warmblooded animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals.”¹⁷⁵ The broad range of animals covered by Subpart F, and their vastly varying basic needs, belies the rudimentary nature of the minimum care standards that the AWA regulations establish.¹⁷⁶

The AWA does make it more possible to track the number of tigers exhibited by zoos, sanctuaries, circuses, and entertainers, because such exhibitors must be licensed by the USDA, and USDA inspectors take note of animal inventories that are made publicly-available with inspection reports.¹⁷⁷ While USDA licensees are supposed to keep and make animal inventories and the records of acquisition and disposition of animals available for inspection,¹⁷⁸ they are not required under any federal law to contemporaneously report the birth, death, sale, or other transfer of tigers or their

¹⁷⁵ 9 C.F.R. §§ 3.125–3.142 (title for Part 3, Subpart F). For example, space requirements for tigers and other animals who fall under the regulations articulated in Subpart F merely require licensees to provide “sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.” 9 C.F.R. § 3.128. These terms are left undefined, and in many cases amount to “broadly-worded guidance” which inspectors have “difficulty interpreting.” U.S.D.A. OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 2. Indeed, as recently as 2010, the USDA has acknowledged that inspectors require “better guidance” in order to “more effectively evaluate exhibitor compliance . . .” *Id.* at 1.

¹⁷⁶ See *Final Rules: Animal Welfare*, *supra* note 174.

¹⁷⁷ See 7 U.S.C. § 2134 (“No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.”). Recent inspection reports and animal inventories for licensees are available online through the USDA APHIS Animal Care Information System Search Tool. *Animal Care Information System Search Tool*, USDA APHIS, <https://acissearch.aphis.usda.gov/LPASearch/faces/CustomSearch.jspx> (last visited Nov. 4, 2015).

¹⁷⁸ See 7 U.S.C. § 2140 (1976) (“Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe. . . . Such records shall be made available at all reasonable times for inspection and copying by the Secretary.”); see also 9 C.F.R. § 2.75(b)(1) (2004) (“Every . . . exhibitor shall make, keep, and maintain records or forms . . . concerning animals . . . purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.”).

cubs.¹⁷⁹ Moreover, USDA inspectors only take inventory of the exhibitor's regulated animals present at the time of the inspection.¹⁸⁰ The most recent, publicly available information from exhibitor inventories indicates that there are 341 USDA licensees keeping approximately 1,903 tigers in the United States.¹⁸¹ This suggests that the overwhelming majority of the approximately 5,000 tigers in U.S. are held by private owners who operate entirely outside the bounds of federal agency oversight.¹⁸²

¹⁷⁹ WILLIAMSON & HENRY, *supra* note 10, at 27; *see* 7 U.S.C. § 2140; 9 C.F.R. § 2.75. Licensed tiger exhibitors are notorious for failing to comply with 9 C.F.R. § 2.75(b)(1), which requires that “[e]very dealer . . . and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose . . . information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.” 9 C.F.R. § 2.75(b)(1). For example, the USDA has cited the Hawthorn Corporation, an Illinois-based tiger exhibitor, at least *fourteen times* for failing to comply with AWA record keeping requirements. *See* U.S. DEPT OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REPORTS OF THE HAWTHORN CORP. (license no. 33-C-0053, 23675 W. Chardon Road, Grays Lake, IL 60030) (Dec. 3, 2014; Aug. 25, 2005; Jan. 20, 2005; Nov. 9, 2004; Feb. 27, 2004; May 23, 2001; Aug. 18, 1999; Aug. 29, 1996; July 17, 1996; June 18, 1996; May 10, 1996; Mar. 27, 1996; Oct. 26, 1994; May 9, 1994). Not only has Hawthorn failed repeatedly to comply with AWA record keeping requirements for tigers, Hawthorn's owner, John Cuneo, has lied publicly about the disposition of tigers by Hawthorn Corp. In a 2011 news article, Cuneo lied saying, “We bury every one of [the tigers] on the property here. We don't sell their bones or their hides and we have all the paperwork[.]” *Tiger Owner Denies Accusations Made by PETA*, 911 ANIMAL ABUSE (Sept. 25, 2010), <http://911animalabuse.com/hawthorn-circus/>; *see also* *Hawthorn Corporation (John Cuneo): Fact Sheet*, PETA, www.mediapeta.com/peta/pdf/Hawthorn-Corporation-pdf.pdf/ (last visited Nov. 4, 2015) (showing the failure to keep records). However, in actuality, an area resident obtained a tiger head and pelt from Hawthorn for purposes of making a rug after the animal was reportedly euthanized. Frank Abderholden, *Woman Finds Hebron Man's Tiger Head, Hide*, BIG CAT RESCUE (Mar. 6, 2009), <http://bigcatrescue.org/woman-finds-hebron-mans-tiger-head-hide/>.

¹⁸⁰ *See* 9 C.F.R. § 2.75(b)(1)(i)–(vii). Therefore, inventories taken during inspections of traveling exhibitors (whether at a particular venue or at the primary facility) would not include animals who are in the exhibitor's total inventory but are not present at the location where the inspection is performed. *See* 9 C.F.R. § 2.75(b)(1)(i)–(vii).

¹⁸¹ *See generally* *Animal Care Information System Search Tool*, *supra* note 177 (using ACIS, the author collected data for all of the exhibitors in all fifty states, including the number of exhibitors with tigers in their inventories and the number of total regulated tigers).

¹⁸² *Separating Science from Fiction*, *supra* note 1, at 34; *see also* WILLIAMSON & HENRY, *supra* note 10, at 26–27. To the extent that there has been any tapering of the number of privately owned tigers, it is likely not due to federal agency oversight but rather the growing number of localities and states that are banning

B. USDA Licensure as a Way to Circumvent State and Local Laws

While private ownership of tigers does not require a USDA license, private owners still may obtain a “Class C”¹⁸³ exhibitor license from the USDA if they meet minimum standards of care—irrespective of whether or not they are engaged in AWA-regulated conduct.¹⁸⁴ It may seem counterintuitive for an owner of a dangerous wild animal to seek federal licensure and oversight where it is not mandated.¹⁸⁵ However, it is incentivized in jurisdictions like Illinois, New York, and Oregon, where state prohibitions on keeping tigers and other dangerous wild animals as pets contain express exemptions for USDA licensees.¹⁸⁶ The monetary cost associated with obtaining a USDA license is *de minimus*. Indeed, obtaining a Class C USDA license merely entails a \$10 initial application fee¹⁸⁷ and an annual fee ranging from \$30 (for licensees with no more than 5 regulated animals in their inventories) up to a maximum fee of \$310 (for licensees with 501

or further restricting dangerous wild animals as pets. *See Thirteen Thousand and Counting, supra* note 9, at 230, 237. As discussed *supra* Part IV.A, the AWA only applies to the commercial use of tigers. *See supra* Part IV.A. Private ownership falls outside the bounds of the intended reach of the AWA. *See* 7 U.S.C. § 2131.

¹⁸³ *See, e.g.*, 9 C.F.R. § 2.6 (2004)(explaining license fees and classifications of licenses for brokers, dealers, and exhibitors).

¹⁸⁴ *See* 7 U.S.C. § 2133 (2012) (“The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons’ complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder.”); *see also* 7 U.S.C. § 2134. This, of course, means that an even greater percentage of captive tigers in the U.S. may be kept as pets if some of the 341 USDA licensees with tigers in their inventories are actually private owners.

¹⁸⁵ *See* WILLIAMSON & HENRY, *supra* note 10, at 19 (stating private owners are subjected to strict AWA regulations if they register with the USDA therefore there is an incentive for private owners to avoid federal regulation).

¹⁸⁶ *See* 720 ILL. COMP. STAT. 5/48-10(b) (2015) (providing that federally licensed exhibitors are exempt from the prohibition on keeping dangerous wild animals, including tigers); *see also* 5/48-10(a) (defining “dangerous animal” to include tigers.); N.Y. ENVTL. CONSERV. § 11-0512 (McKinney 2015). New York’s exemption for USDA licensees attempts to address circumvention by private owners by requiring that they can demonstrate “that the sole purpose for which the wild animal or animals are used is for exhibition to the public for profit or compensation” § 11-0512 (2)(b); *see* OR. REV. STAT. § 609.345(1)(b) (2015) (exempting USDA licensees from the state restrictions on keeping tigers in Oregon); *see also* WILLIAMSON & HENRY, *supra* note 10, at 19.

¹⁸⁷ *See* 9 C.F.R. § 2.6(a).

or more regulated animals in their inventories).¹⁸⁸

Obtaining an inexpensive USDA license and submitting to infrequent inspections¹⁸⁹ are small prices to pay for total blanket exemption from more restrictive state or local laws. Indeed, an internal audit report released in 1996 by the USDA's Office of the Inspector General (USDA OIG) revealed that 70 percent of the sampled exhibitors with four or fewer regulated animals "obtained their licenses to aid them in circumventing State or local laws that restricted private ownership of dangerous exotic animals."¹⁹⁰ Since that 1996 audit report, the AWA regulations have been updated in an attempt to better restrict this apparent circumvention.¹⁹¹ Yet still, a subsequent OIG report from 2010 revealed that it is still "possible for a licensee to maintain his or her status as an exhibitor indefinitely without ever actually exhibiting their animals,"¹⁹² and that, despite "significant progress"¹⁹³ in reducing the number of AWA-licensees who are nothing more than private owners, licensees still may renew an exhibitor license "based solely on a stated intent to exhibit."¹⁹⁴

In addition to the problem of certain states granting blanket exemptions to USDA licensees, there remains no consistency at all among the states regarding their underlying laws governing the private ownership of tigers and other dangerous wild animals.¹⁹⁵ While some states have implemented bans (many of which are fraught with grandfather clauses and exceptions), other states

¹⁸⁸ See 9 C.F.R. § 2.6(c). It is also worth noting that the USDA fees for initial license applications and renewals have not been increased in more than twenty-five years. See Animal Welfare, 54 Fed. Reg. 36,123 (Aug. 31, 1989) (to be codified at 9 C.F.R. pts. 2 & 3) (announcing rule changes in the AWA regulations, including the increase in licensure fees that are still effective in 2015). While the annual license fee for Class C exhibitors depends on the total number of regulated animals in the inventory, the annual license fee for Class A brokers and auction houses and Class B dealers is contingent upon the licensee's annual revenue and ranges from \$30 (for licensees who generate no more than \$500 annually from the sales of animals) to \$760 (for licensees who generate \$100,000 or more from the sales of animals each year). See 9 C.F.R. § 2.6(c).

¹⁸⁹ See 7 U.S.C. § 2146(a) (2012).

¹⁹⁰ See OFFICE OF THE INSPECTOR GEN., *supra* note 168, 15.

¹⁹¹ See 9 C.F.R. § 2.11(a)(5) (2015) (providing that a license will not be issued to "any applicant who . . . [i]s or would be operating in violation or circumvention of any Federal, State, or local laws"); see also Animal Welfare; Inspection, Licensing, and Procurement of Animals, 65 Fed. Reg. 47,908, 47,908 (proposed Aug. 4, 2000) (to be codified at 9 C.F.R. pts. 1 & 2).

¹⁹² See OFFICE OF THE INSPECTOR GEN., USDA, *supra* note 168, at 15.

¹⁹³ *Id.* at 17.

¹⁹⁴ *Id.*

¹⁹⁵ See Map, *supra* note 28.

have simple, rubber-stamp permit requirements or allow private ownership of tigers with no state oversight whatsoever.¹⁹⁶

C. Tiger Cub Photo Ops: a Goldmine for Exhibitors

Tiger cubs are money makers, and the Generic Tiger Loophole enables owners to breed and sell tigers with ease.¹⁹⁷ While true sanctuaries neither breed, nor permit members of the public to have direct contact with tigers of any age,¹⁹⁸ roadside zoos and other exhibitors across the U.S. frequently engage in breeding and facilitate public handling sessions with tigers.¹⁹⁹ For example, Doc Antle, the South Carolina-based tiger breeder and exhibitor discussed *supra*, Part III.A, sells opportunities to have a photo taken with a tiger cub for \$100 a piece at his roadside zoo.²⁰⁰

¹⁹⁶ As of January 2015, there were five states with no statutory or regulatory oversight of the private ownership of tigers: Nevada, Wisconsin, Alabama, North Carolina, and South Carolina. See Map, *supra* note 28. However, on Feb. 2, 2015, the Court of Appeals of Indiana ruled that the Indiana Department of Natural Resources—which had exercised permit authority over the private ownership of wild animals—has no authority to regulate privately owned wildlife under the current statutory scheme. See *Ind. Dep’t of Nat’l Res. v. Whitetail Bluff*, 25 N.E.3d 218, 229 (Ind. Ct. App. 2015). The Indiana Supreme Court declined review, leaving hundreds of privately-owned wild and dangerous animals—including captive tigers—totally unregulated, and bringing the number of states with no oversight of private ownership of tigers back to six. While legislators have voiced their intent to revise the statute to correct the discrepancy, private ownership of exotic animals will remain unregulated until a statutory amendment is enacted. See Kelly, *supra* note 28. The 44 states that have enacted some level of regulation pertaining to private ownership of tigers—ranging from basic permit or license schemes to total bans—are inconsistent and offer numerous loopholes, grandfather clauses, and exemptions. See Map, *supra* note 28.

¹⁹⁷ WILLIAMSON & HENRY, *supra* note 10, at 16, 23; see also *supra* note 66 (explaining that commercial presentations of endangered species, specifically tiger cubs, counteract conservation efforts).

¹⁹⁸ See, e.g., GLOBAL FEDERATION OF ANIMAL SANCTUARIES, STANDARDS FOR FELID SANCTUARIES 29, 29, 35 (July 2013), <http://www.sanctuaryfederation.org/gfas/wp-content/uploads/2013/07/FelidStandardsJuly2013HA.pdf>; see also 16 U.S.C. § 3372(e)(2)(c)(i)-(iv) (2012); 50 C.F.R. § 14.252 (2015).

¹⁹⁹ See ANIMAL FINDERS GUIDE, Aug. 1, 2015, at 5 (advertising two infant tiger cubs “for sale or trade” and two juvenile white tigers “for sale” who make a “beautiful exhibit”); *T.I.G.E.R.S. Preservation Station*, *supra* note 122; Zoological, *infra* note 203; see e.g., *supra* notes 109–11; ANIMAL FINDERS GUIDE, Apr. 1, 2015, at 5 (advertising the sale of a “[t]iger cub, female, 5 ½ months old. She would continue to make for an exceptional exhibit. Very entertaining, social, and loves attention”).

²⁰⁰ *T.I.G.E.R.S. Preservation Station*, *supra* note 122; *About T.I.G.E.R.S.*, *supra* note 122.

Another roadside zoo in Florida offers similar *ten-minute* “hands on” encounters with a tiger cub that cost \$165 per person,²⁰¹ yet another in Florida offers *swim with tigers* experiences for \$200,²⁰² and a facility in Oklahoma currently charges \$100 for photo and handling opportunities with the “Baby Snow Tiger [sic] . . . that just arrived.”²⁰³

USDA policy interpreting AWA handling regulations²⁰⁴ discourages public contact with tiger cubs (and other big cats), but allows it between approximately eight and twelve weeks of age.²⁰⁵ USDA interpretation of AWA handling regulations, elucidated in an enforcement action against the aforementioned Doc Antle, requires there to be a barrier between the public and a juvenile²⁰⁶

²⁰¹ See *Up Close & Personal Tours*, ZOOLOGICAL WILDLIFE FOUNDATION OF FLORIDA, <http://zoologicalwildlifefoundation.com/wildlife-tours/up-close-personal-tours/> (last visited Sept. 30, 2015).

²⁰² See *Swim with Tiger Cubs at Dade City's Wild Things in Florida*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/10/09/swim-with-tiger-cubs-florida_n_1951022.html (last updated Oct. 9, 2012).

²⁰³ See *Contact Information*, TIGER SAFARI (2003), <http://www.tigersafari.org.com/info.asp>. The Humane Society of the United States recently revealed the results of undercover investigations at numerous roadside zoos, including Tiger Safari. See Wayne Pacelle, *HSUS Undercover Investigations at Roadside Zoos in Virginia, Oklahoma Reveal Severe Abuse*, HUFFINGTON POST (Jan. 22, 2015), http://www.huffingtonpost.com/wayne-pacelle/hsus-undercover-investiga_b_6527062.html. The investigation reported that Antle's facility is engaged in the trade of tigers with Tiger Safari. *Id.* While evidence of a sale is not always documented, the investigation revealed indiscriminate breeding at Tiger Safari with virtually no agency monitoring. See *id.* It is this indiscriminate breeding and trading that has contributed to a surplus of tigers who are virtually untraceable. See *id.*

²⁰⁴ See 9 C.F.R. § 2.131(c)(1) (2004) (requiring that “any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public”); see also 9 C.F.R. § 2.131(b)(1) (requiring “[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort”); 9 C.F.R. § 2.131(c)(3) (requiring that “[y]oung or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being”); 9 C.F.R. § 2.131(d)(1) (requiring that animals are exhibited only under circumstances that are “consistent with their good health and well-being”).

²⁰⁵ See *Big Cat Question and Answer: Commonly Asked Big Cat Questions*, USDA APHIS, http://www.aphis.usda.gov/animal_welfare/downloads/big_cat/big_cat_q&a.pdf (last visited Oct. 2, 2015).

²⁰⁶ The USDA has found “that there is an inherent danger present for both the viewing public and the exhibited animal(s) where there is any chance that the public could come into direct contact with juvenile or adult big cats” and that “big cats become juveniles when they reach 12 weeks of age.” *Id.*; *In re: Jamie Michelle Palazzo*, U.S. Dep't of Agric., AWA Docket No. 07-0207 (2010) at 9 (internal

or adult cat during public exhibition.²⁰⁷ This narrow window of opportunity for direct public contact with tigers²⁰⁸ means that exhibitors must maintain a constant supply of tiger cubs in order to generate steady income from these lucrative photo and bottle feeding sessions.²⁰⁹

Furthermore, many exhibitors simply disregard the USDA's regulations and handling guidelines by forcibly removing tiger cubs from their mothers shortly after birth, and allowing public contact with the cubs when they are only a few weeks old and still immunocompromised.²¹⁰ For instance, Karl Mogensen, who runs a roadside zoo in Virginia, recently was cited by the USDA for forty-four AWA violations, including violations relating to the care and handling of tiger cubs he used for interactive public contact

quotation marks omitted); *see* *Antle v. Johanns*, 2007 WL 5209982, *3 (D.S.C. 2007), *aff'd per curiam*, 264 F. App'x 271 (4th Cir. 2008) (dismissing an action to set aside a United States Department of Agriculture decision that interpreted 9 C.F.R. § 2.131 to be violated when persons who are to be photographed with a big cat are allowed to stand behind the cat without any barrier between the cat and the persons being photographed).

²⁰⁷ *Antle*, 2007 WL 5209982 at *1.

²⁰⁸ *See* WILLIAMSON & HENRY, *supra* note 10, at 23.

²⁰⁹ *See id.*

²¹⁰ *See, e.g.*, U.S.D.A., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REPORT OF KARL MOGENSEN, DBA NATURAL BRIDGE ZOOLOGICAL PARK, (license no. 52-C-0035, Jan. 6, 2015) (hereinafter *Mogensen Report*); *see also* U.S.D.A., DECLARATION OF RONALD TILSON, PH.D. 57 (2012), included with *Petition for Rulemaking to Prohibit Direct Contact with Big Cats, Bears, and Nonhuman Primates*, submitted by the Humane Society of the United States, World Wildlife Fund, Global Federation of Animal Sanctuaries, International Fund for Animal Welfare, Born Free USA, The Fund for Animals, Big Cat Rescue, and the Detroit Zoological Society (hereinafter *Tilson Declaration*) ("Prematurely removing a [tiger] cub from its mother is not condoned by the majority of animal care professionals because it may have significant negative developmental and welfare impacts for both the cub and its mother. . . . Tiger experts . . . agree that it is normally in a cub's best interest to stay with its mother until the species-typical age of dispersal (i.e., 2.5-3 years)." *Id.* at 59, para. 8. Tigers are born blind, fragile, and totally dependent upon their mother's milk and body heat for survival, "which is why legitimate conservation propagation programs allow dams and their cubs to be left undisturbed after birth to allow the mother and offspring to bond and establish a feeding routine." *Id.* at 60, para. 11. During the HSUS' undercover investigation at Tiger Safari, the Oklahoma roadside zoo mentioned *supra* note 184, investigators found that cubs were subjected to as many as *sixty* public contact sessions in one day. *See* Pacelle, *supra* note 203. Excessive public handling interferes with a tiger cub's ability to get proper rest. Tigers sleep up to twenty hours per day, and depriving them of their natural sleep cycle can further compromise their young immune systems by "causing exhaustion, anxiety, irritability, and associated physiological consequences." *See* *Tilson Decl.*, *supra* note 212, at 60, para. 12.

sessions.²¹¹ Whereas in the wild, tigers stay with their mothers for their first two and a half to three years of life,²¹² the twenty-seven page USDA inspection and citation report describes Mogensen's practice of removing tiger cubs from their mothers *immediately upon birth*, after which they were hand raised by a human caretaker,²¹³ placed on exhibit in the facility's gift shop when they were only two to three weeks old, and made available for public contact during photo shoots and "interactive play" sessions when they were only three to four weeks old.²¹⁴ Because the USDA's permissible window for public contact with tigers is so brief, it is not surprising to see an exhibitor like Mogensen push the envelope to maximize profitability by making the cubs available to the public for hands-on experiences several weeks before they were fully vaccinated.

Dade City Wild Things, the Florida roadside zoo that sells opportunities for the public to swim with tigers mentioned *supra*, is currently facing administrative charges filed by the USDA in connection with at least nineteen alleged AWA violations.²¹⁵ The complaint lists numerous instances during which Dade City Wild Things and its staff reportedly forced tiger cubs to participate in

²¹¹ See, e.g., Mogensen Report, *supra* note 210, at 12.

²¹² See Tilson Decl., *supra* note 210, at 59, para. 8 ("In the wild, a tiger cub will stay with its mother until sexual maturity, typically 2.5 to 3 years.").

²¹³ See Tilson Decl., *supra* note 210 at 59, para. 9 ("Hand-reared cubs typically weigh less than mother-reared cubs, and often suffer digestive issues from formula-feeding and unhygienic environments, potentially resulting in infection."); Mogensen Report, *supra* note 210, at 12.

²¹⁴ See, e.g., Mogensen Report, *supra* note 210, at 12.

²¹⁵ See Complaint, Stearns Zoological Rescue & Rehab d.b.a. Dade City Wild Things, AWA Docket No. 15-0146 (U.S.D.A. July 17, 2015) (noting that despite previous USDA citations, Dade City Wild Things "continued to mishandle animals, particularly infant and juvenile tigers, exposing these animals and the public to injury, disease, and harm."). *Id.* at para. 5. The administrative complaint describes the exhibitor's lack of good faith, and details at least four instances in which tiger cubs were forced to participate in public handling in swimming pools despite their visible distress and repeated attempts to get out of the water. See *id.* para. 8 (a)–(d). The USDA complaint also references numerous disturbing instances during which the exhibitor reportedly used "physical abuse to handle or work" tiger cubs, as well as additional allegations that the exhibitor subjected tigers to "excessive handling" that is "detrimental to their health or well-being" in addition to circumstances where the exhibitor allegedly endangered tigers and the public by exhibiting big cats without sufficient distance or barriers between tigers and the public. See *id.* at para. 9 (a)–(b), 10 (b)–(d), 11; see also Amy Mariani, *USDA Files Complaint Against Dade City Wild Things*, BAY NEWS 9 (Aug. 23, 2015, 8:50 PM), http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2015/8/23/usda_files_complaint.html.

swimming sessions with the public even when the cubs demonstrated “obvious discomfort.”²¹⁶ One public swimming session cited in the complaint involved a tiger that was estimated to be only about six weeks old at the time he was forced to participate.²¹⁷ Among other numerous serious allegations, the complaint also accuses Dade City Wild Things of willfully violating the AWA by “using physical abuse to handle or work animals,”²¹⁸ including handling tiger cubs by the tail or leg.²¹⁹

Instances in which exhibitors allow dangerous public contact with tigers who are *older* than twelve weeks also abound.²²⁰ A sixteen page decision and order permanently revoking the Class C exhibitor license of Marcus Cook, dba Zoo Cats, Inc., describes dozens of occasions when, according to the USDA, Cook caused undue trauma to animals and jeopardized public safety—including numerous instances involving Cook’s use of *juvenile* lions and tigers for direct contact with the public.²²¹ The USDA’s order of revocation noted numerous serious concerns about the welfare of the tigers used by Cook, including Cook’s disregard for the special needs of tiger cubs who were denied proper nutrition, and whose deformed rear legs suggested the possibility of metabolic bone disease (a condition caused by improper nutrition).²²² Fortunately no one was seriously injured as a result of Cook’s recklessness.²²³

In Nevada, exhibitor Karl Mitchell, dba Big Cat Encounters, who has a particularly lengthy history of willfully violating the AWA, has flouted AWA handling regulations by continuing to illegally exhibit tigers and facilitate direct public contact with big cats despite numerous cease and desist orders, more than \$100,000 in civil penalties, and a USDA order permanently revoking

²¹⁶ Complaint, *Stearns Zoological Rescue*, at para. 8 (a)–(d).

²¹⁷ *See id.* at para. 10 (c).

²¹⁸ *See id.* at para. 9.

²¹⁹ *See id.* at para. 9 (a)–(b).

²²⁰ *See, e.g.*, Decision and Order, *Zoo Cats, Inc., et al.*, AWA Docket No. 03-0035 (U.S.D.A. Sept. 24, 2008) at para. 13 (15 week old tiger injured spectator during exhibition where there were no barriers between the tigers and the public); *id.* at para. 10 (exhibition of adult tigers where spectators were allowed to feed tigers through the bars of the cage). *See generally* Ltbadmin, *Stop Cub Petting*, LIONS TIGERS AND BEARS (May 10, 2013), <https://lionstigersandbears.org/stop-cub-petting/> (describing danger of cubs around humans after 12 weeks).

²²¹ Decision and Order, *Zoo Cats, Inc.*, at para. 9, 11, 13, 14 (a).

²²² *Id.* at para. 14 (c).

²²³ *See id.* at para. 8 (noting that during the use of a technique that was “risky at best” some customers were scratched by tigers during Cooks public handling exhibitions).

Mitchell's Class C license more than ten years ago.²²⁴ Indeed, the Big Cat Encounters website still advertises “[p]hoto[s] with Exotic Animals” and flagrantly depicts numerous instances where Mitchell has facilitated direct public contact with *adult* tigers.²²⁵ In order to sign up for a pricey “big cat experience” with a tiger at Mitchell's facility, patrons are directed on the company's website to “[v]isit the donate tab to make a deposit, and put reservations in the ‘purpose’ box.”²²⁶

Tigers are apex predators who cannot be tamed. Exhibitors who have placed members of the public—particularly children—in direct contact with big cats are engaging in extremely reckless conduct, as other tragic incidents illustrate. Indeed, a seventeen-year-old girl was killed by a 550-pound adult male tiger at a roadside zoo in Kansas in 2005 while taking her senior photos

²²⁴ See Decision and Order, Karl Mitchell, AWA Docket No. 09-0084 (U.S.D.A. Dec. 21, 2010) (discussing Mitchell's continuing violations and multiple monetary civil penalties); Order Denying Complainant's Pet. for Recons., *Karl Mitchell and Big Cat Encounters*, AWA Docket No. 09-0084, 2011 WL 1087499 (U.S.D.A. Mar. 8, 2011), <http://nationalaglawcenter.org/wp-content/uploads/assets/decisions/mitchell2.pdf>; Order Granting Complainant's Pet. for Recons., Karl Mitchell, 60 Agric. Dec. 647, 665, 667, 668 (U.S.D.A. 2001) (revoking Mitchell's license and discussing his continued willful violations); Decision and Order, Karl Mitchell, 60 Agric. Dec. 91, 132 (U.S.D.A. 2001); Mitchell v. U.S.D.A., 42 F. App'x 991, 991 (9th Cir. 2002); Karl Mitchell d/b/a All Acting Animals, 57 Agric. Dec. 972, 974–76 (U.S.D.A. 1998).

²²⁵ See *Celebrity Pics*, BIG CAT ENCOUNTERS, <http://www.bigcatencounters.org/moviestarparties.html> (last visited Oct. 14, 2015) (showing celebrities in photos with contact with grown tigers); see also *Events and Parties: Photo with Exotic Animals*, BIG CAT ENCOUNTERS, <http://www.bigcatencounters.org/events.html> (last visited Oct. 14 2015) (showing an adult hugging a large tiger and alluding to the opportunity to do so).

²²⁶ See *Big Cat Experience: Itinerary*, BIG CAT ENCOUNTERS, <http://www.bigcatencounters.org/bigcattours.html> (last visited Oct. 14, 2015); see also Letter from Dr. Robert Gibbens, DVM, Director, Western Region, USDA/APHIS/Animal Care, to Commissioner Dan Schinhofen, Oct. 22, 2015 (“The activity described [on Mr. Mitchell's website] is considered exhibition under the AWA, and therefore requires a USDA exhibitor's license.”) A judge in Nye County, Nev., recently affirmed a county order requiring Mitchell to remove the eleven tigers and one liger he is currently keeping and using for Big Cat Encounters. See Mark Waite, *Big Cat Owner Loses Court Battle, Plans to Appeal*, PAHRUMP VALLEY TIMES (Nov. 26, 2014, 8:01 AM), <http://pvtimes.com/news/big-cat-owner-loses-court-battle-plans-appeal.html>. The judge's decision, granting the county's motion for summary judgment, comes after the county was forced to file suit to enforce a nuisance abatement order entered against Mitchell after finding that Mitchell violated the terms of the zoning permit necessary for him to keep dangerous wild animals in the jurisdiction, in part due to his ongoing illegal public exhibitions. *Id.* Mitchell, who disregarded the county's nuisance abatement order, has a history of criminal conduct, and has given every indication that he will also disregard the judge's decision. *Id.*

while having free contact with the cat.²²⁷ In response to this tragic incident, Kansas became one of the first states to prohibit photo opportunities and other dangerous public contact with tigers.²²⁸

D. Suggested Prohibition on Public Contact with Tigers

America's tiger crisis cannot be resolved without ending breeding outside of the AZA's managed SSP breeding programs. Theoretically, once the Generic Tiger Loophole is closed, exhibitors who use tigers for entertainment props should categorically be denied CBW registration. However, given that some exhibitors may be adept at continuing to circumvent the ESA by keeping their activities purely intra-state,²²⁹ it is critical that the USDA also does its part to curtail the lucrative photo, bottle feeding, and swimming sessions with tigers that incentivize the indiscriminate breeding practices that are fueling a surplus of tigers with no conservation value in America.²³⁰ Prohibiting public contact with tigers is not only essential to disincentivizing the unscrupulous breeding practices that are feeding the surplus of generic tigers in the U.S.,²³¹ it is critical to ensuring the AWA's intended purpose of ensuring the "humane care and treatment" of tigers,²³² and ending

²²⁷ See Associated Press, *Tiger Kills Teen Posing for Photo*, NBCNEWS.COM (Aug. 19, 2005), http://www.nbcnews.com/id/9005475/ns/us_news-life/t/tiger-kills-kansas-teen-posing-photo/#.VawUX_kw2pQ; see also Associated Press, *Animal Sanctuary's License Revoked*, TOPEKA CAPITAL JOURNAL (Nov. 16, 2006), http://cjonline.com/stories/111606/bre_sanctuary.shtml#.VawU2Pkw2pQ.

²²⁸ See *infra* note 251.

²²⁹ The ESA's limitations imposed on captive-born wildlife are only applicable to animals in inter-state or foreign commerce. See 50 C.F.R. § 17.21(g)(1) (2015).

²³⁰ See generally WILLIAMSON & HENRY, *supra* note 10, at 44 (estimating that there are hundreds of unwanted adult tigers in the U.S. with not enough reputable sanctuaries to take them all).

²³¹ See generally *id.* (discussing that the U.S. needs stronger regulations and the surplus problem).

²³² 7 U.S.C. § 2131. While the focus of this article is on indiscriminate breeding practices, it is important to note that exhibitors who profit off of the exhibition of tigers routinely subject the cats to inhumane treatment, neglect, and disregard for their species-specific needs. See, e.g., U.S. D.A., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REPORT OF JOE SCHREIBVOGEL, (license no. 73-C-0139, 25803 No. CR 3250, Wynnewood, OK, 73098) (Mar. 25, 2015) (discussing food left out around the tigers becoming rancid, and a lack of shade provided to tigers in disregard for the health and welfare for the animals). In addition to forced premature maternal separation discussed *supra*, tiger exhibitors are routinely cited for failing to provide animals veterinary care and nutrition; subjecting tigers to cruel and illegal declawing; housing cats in unsafe and unsanitary conditions; handling the animals in a manner that causes them trauma, stress, and discomfort; using transport cages as permanent housing;

and unexplained animal deaths. *See id.* For example, Joe Schreibvogel, owner of an Oklahoma roadside zoo that breeds tiger and supplies them for direct contact sessions, was forced to pay a \$25,000 penalty and had his Class C license suspended in connection with numerous AWA violations. *See Inside Edition Investigates Tigers as Shopping Mall Attractions*, INSIDE EDITION (Nov. 28, 2011), <http://www.insideedition.com/investigative/3426-inside-edition-investigates-tigers-as-shopping-mall-attractions>. The USDA opened an addition investigation into Schreibvogel after *twenty-three tiger cubs died* at his facility. *See id.* Also concerning is that Schreibvogel's animal inventory reportedly included at least 200 tigers in 2011; but only four years later, the most recent publicly-available USDA inspection report documents the presence of 101 tigers at the Oklahoma facility. *See id;* *see also* INSPECTION REPORT OF JOE SCHREIBVOGEL, *supra*.

Nevada-based magician, Dirk Arthur, dba Illusioneering, Inc., who uses tigers and other big cats in his act, has continued to engage in the inhumane and unlawful practice of declawing the cats he uses despite a USDA policy prohibiting the practice. *See* U.S.D.A., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REPORT OF ILLUSIONEERING, INC., DIRK ARTHUR, AND STAGE MAGIC, (license no. 88-C-0151, 4370 W. Torino Ave., Las Vegas, NV 89139) (Dec. 28, 2013) (citing Arthur for multiple AWA violations, including the illegal declawing of two tigers and one lion, and noting that “[s]ince 2006 declawing . . . procedures are no longer considered to be acceptable when performed solely for handling or husbandry purposes since they can cause considerable pain and discomfort to the animal and may result in chronic health problems.”). *See also*, *Information Sheet on Declawing and Tooth Removal*, U.S.D.A. (Aug. 2006), http://www.aphis.usda.gov/animal_welfare/downloads/big_cat/declaw_tooth.pdf (clarifying that declawing is “no longer allowed under the Animal Welfare Act.”). Other exhibitors who have been cited for illegally declawing tigers include two roadside zoos in Ohio that have facilitated direct contact the public and big cats: Stump Hill Farms, a roadside zoo in Ohio (USDA license no. 31-C-0050) and Tiger Ridge Exotics (USDA license no. 31-C-0048). *See, e.g.*, ANNA FROSTIC & KIMBERLY OCKENE, PETITION FOR RULEMAKING TO PROHIBIT DIRECT CONTACT WITH BIG CATS, BEARS, AND NONHUMAN PRIMATES 39 (2012), <https://bigcatrescue.org/wp-content/uploads/2014/10/Public-contact-petition-amended-1-13-and-comments.pdf>. The Hawthorn Corp., which has been the subject of over two hundred thousand dollars in USDA fines, two suspensions of its Class C license, and the USDA's first ever confiscation of an elephant, has been cited for more than one hundred violations of the AWA over several decades, including numerous instances in which inspectors found failure to provide veterinary treatment to tigers with foot problems, alopecia, conjunctivitis, and open sores. *See* Chester Gipson, *Hawthorn Elephant Update*, APHIS (Feb. 14, 2006), http://www.aphis.usda.gov/animal_welfare/downloads/stakeholder/stakeholder4.pdf; *Hawthorn Corporation*, *supra* note 179; *see also* U.S.D.A., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REP. OF THE HAWTHORN CORP., (license no. 33-C-0053, 23675 W. Chardon Road, Grays Lake, IL 60030) (June 29, 2011; Apr. 4, 2009; Feb. 26, 2006; Aug. 25, 2005; Feb. 5, 2004; Sept. 25, 2001; Oct. 9, 1997; June 16, 1994; June 16, 1993). The Illinois-based tiger breeder and exhibitor has also been cited on numerous occasions for confining tigers to transport cages that are barely bigger than their bodies for weeks or *months* on end, even when larger caging was available. *See, e.g.* U.S.D.A., ANIMAL & PLANT HEALTH INSPECTION SERV., INSPECTION REP. OF THE HAWTHORN CORP., (license no. 33-C-0053, 23675 W. Chardon Road, Grays Lake, IL 60030) (Aug. 13, 2008; Feb. 5, 2004; Sept. 10, 2003; June 1, 2002; May 24, 2002; Apr. 23, 2002). The undercover investigation of

exhibitions that serve to diminish public interest in legitimate conservation.²³³ On August 5, 2013, the USDA published notice in the Federal Register of its receipt of a petition for rulemaking²³⁴ to amend AWA handling regulations and standards to, *inter alia*, prohibit public contact with tiger cubs and put an end to the tiger cub photo-op (and swim-with-tigers) business in light of the negative conservation, welfare, and safety concerns associated with the practice.²³⁵ The agency took public comments on the proposal through November 18, 2013.²³⁶

Closing the Generic Tiger Loophole is critical to more uniform oversight of the interstate movement of captive tigers in the U.S., and to ensuring more effective enforcement of the ESA. However, a straightforward ban would enable USDA inspectors to more accurately cite AWA violations, and would remove the ability of exhibitors to claim confusion about the parameters for permissible direct public contact with tigers.²³⁷ While the USDA has previously acknowledged the need for “[s]pecific provisions” to “eliminate any assertion of confusion [by exhibitors] about the requirements of the regulations and standards” governing handling of big cats,²³⁸ the petitioned rule change is still under consideration.²³⁹

Oklahoma roadside zoo, Tiger Safari, described *supra* notes 184 & 191, documented instances during which the exhibitor punched, dragged, choked, slapped, and withheld food and water from tiger cubs. Pacelle, *supra* note 203. These are only a few representative examples of the abuse, neglect, and disregard for the most minimum standards of care for tigers by U.S.D.A.-licensed exhibitors.

²³³ See *Tiger Kills Teen*, *supra* note 227 (describing an incident caused by the improper care of tigers by an exhibitionist resulting in public fear and outrage).

²³⁴ See FROSTIC & OCKENE, *supra* note 232; Petition to Amend Animal Welfare Act Regulations to Prohibit Public Contact With Big Cats, Bears, and Nonhuman Primates, 78 Fed. Reg. 47,215, 47,215–17 (proposed Aug. 5, 2013) (to be codified at 9 C.F.R. pts. 2 and 3).

²³⁵ See Petition to Amend Animal Welfare Act, 78 Fed. Reg. at 47,215–17.

²³⁶ See Petition to Amend Animal Welfare Act Regulations to Prohibit Public Contact With Big Cats, Bears, and Nonhuman Primates, 78 Fed. Reg. 63,408, 63,408 (proposed Oct. 24, 2013) (to be codified at 9 C.F.R. pts. 2 and 3).

²³⁷ See Zoo Cats, Inc., 67 Agric. Dec. 1048, 1054 (U.S.D.A. 2008).

²³⁸ *Id.*

²³⁹ Compare Petition to Amend Animal Welfare Act, 78 Fed. Reg. at 47,216 (showing that the proposed rule change is to prohibit licensees from allowing persons from coming into direct physical contact with big cats), with 9 C.F.R. §2.131 (2015) (showing proposed rule changes not in effect; §2.131 contains no prohibition against direct physical contact with big cats or other dangerous animals).

E. Example of State Action: New York's "Tiger Selfie" Ban

The AWA expressly empowers states and localities to implement their own, more restrictive standards of care, treatment, and handling for AWA-regulated animals within their jurisdiction.²⁴⁰ The state of New York had already enacted a ban on the private ownership of tigers,²⁴¹ but on March 6, 2014, it took another important step towards curtailing the breeding and exploitation of tigers when Assemblymember Linda Rosenthal introduced A. 9004C, a bill banning direct contact between the public and big cats during public exhibitions.²⁴² Shortly after the bill was introduced, it became informally known as the "Tiger Selfie Ban"²⁴³ due to the sudden trend in online dating profile pictures depicting men posing with tigers.²⁴⁴ New York's statewide ban on "knowingly allow[ing] the public to have direct contact with a big cat,"²⁴⁵ passed on June 23, 2014,²⁴⁶ and was signed into law by Governor Cuomo on August 11, 2014.²⁴⁷

Rather than waiting for the USDA to amend the AWA regulations or revise its policies to prohibit public contact with tigers, New York recognized the inherent animal welfare and public safety concerns associated with the use of dangerous wild animals for direct contact exhibitions—including the specific concerns relating to breeding and surplus animals.²⁴⁸ The new

²⁴⁰ See 7 U.S.C. § 2143(a)(8) (2012) (providing that the AWA "shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the [U.S.D.A.] . . .").

²⁴¹ See N.Y. ENVTL. CONSERV. LAW § 11-0512 (McKinney 2012).

²⁴² A.B. 9004C, 2014 Assemb., Reg. Sess. (N.Y. 2014).

²⁴³ See Maya Kosoff, *New York is Banning Tinder's Infamous 'Tiger Selfies'*, BUSINESS INSIDER (June 23, 2014), <http://www.businessinsider.com/new-york-bans-tinder-tiger-selfie-2014-6>.

²⁴⁴ *Id.*; see Lindsay Gellman, *Tiger Photos Roam Wild on Online Dating Sites*, WALL STREET J. (May 26, 2014), <http://www.wsj.com/articles/SB1000142405270230419850457957258399588586>.

²⁴⁵ A.B. 9004C.

²⁴⁶ See Kosoff, *supra* note 243.

²⁴⁷ See A.B. 9004C; see also, David Klepper, "Tiger Selfies" Banned in New York, NBC NEW YORK (Aug. 11, 2014, 2:12 PM), <http://www.nbcnewyork.com/news/local/Tiger-Selfie-Ban-Zoo-Cuomo-Animal--270942841.html>.

²⁴⁸ See A.B. 9004C ("This activity also requires an ongoing supply of young animals. Infant animals are prematurely separated from their mothers to be groomed for human handling, often die due to constant handling and travel, and are even subjected to abusive training and painful declawing or deranging procedures in a futile attempt to make them safe for public contact once they mature. After the animals grow too big for handling, they are held on leashes

law²⁴⁹ took effect on February 7, 2015.²⁵⁰

New York joined Kansas²⁵¹ in the minority of jurisdictions that

with no protective barriers. Often they are dumped and sent to substandard facilities.”).

²⁴⁹ See N.Y. ENVTL. CONSERV. LAW § 11-0538 (McKinney 2015), providing:

1. As used in this section:

(a) “Big cat” shall mean any live species of lion (*panthera leo*), tiger (*panthera tigris*), leopard (*panthera pardus*) (with the exception of clouded leopards (*neofelis nebulosa*)), jaguar (*panthera onca*), mountain lion, sometimes called cougar (*felis concolor*) or any hybrid of such species.

(b) “Direct contact” means physical contact or proximity where physical contact is possible, including, but not limited to, allowing a photograph to be taken without a permanent physical barrier designed to prevent physical contact between the public and big cats.

(c) “Dealer” shall mean any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, sells, or negotiates the purchase or sale of any animals.

(d) “Exhibitor” shall mean any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the commissioner, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not.

2. It shall be unlawful for any person licensed or required to be licensed as an exhibitor or dealer pursuant to the Animal Welfare Act, 7 USC 2132-2134, including agents or employees of such person, to knowingly allow the public to have direct contact with a big cat.

3. Any person who violates the provisions of this section shall be subject to a penalty of not more than five hundred dollars for the first offense and not more than one thousand dollars for a second and subsequent offenses. Each instance of allowing direct contact of a big cat with the public in violation of this section shall constitute a separate offense.

4. Nothing in this section shall be construed to limit or restrict veterinary examination, treatment or care of a big cat or transportation of the animal for such purpose.

²⁵⁰ A.B. 9004C.

²⁵¹ In response to the fatal tiger attack at Lost Creek roadside zoo during Haley Hildrebrand’s senior high school photo shoot, discussed *supra* Part IV.C, the State of Kansas passed numerous statutory changes to, *inter alia*, prohibit exhibitors from facilitating direct public contact with big cats. See Kan. Stat. Ann. § 32-1306 (d) (2006) (“A dangerous regulated animal shall not be allowed to come into physical contact with any person other than the person possessing the animal, the registered designated handler or a veterinarian administering medical examination, treatment or care.”). See generally S.B. 578, 81st S., Reg. Sess. (Kan. 2006) (an act imposing limitations on ownership and possession of certain animals); *Kansas Governor Signs Bill to Protect Kansans, Animals*, KANSAS CITY INFOZINE (April 18, 2006), <http://www.infozine.com/news/stories/op/storiesView/sid/14361/> (“The bill, SB 578, regulates the possession and ownership of certain animals defined as dangerous regulated animals. It was introduced in response to the death of Haley R. Hilderbrand, 17, of Altamont, Kansas, who was killed by a tiger last year while posing with it for senior high school pictures.”). Kansas and New

have taken an important step for public safety and animal welfare by banning direct public contact with dangerous wild animals.²⁵² While strengthening domestic enforcement of federal wildlife laws has been articulated as a top priority by the White House,²⁵³ it is critical that states pass their own laws and close loopholes in existing laws, to ensure that breeding, trafficking, and exploitation of tigers is disincentivized within their borders.²⁵⁴

CONCLUSION

Tigers are the most iconic of the big cat species.²⁵⁵ Despite being critically endangered, loopholes abound in U.S. laws, regulations, and policies designed to protect tigers.²⁵⁶ These loopholes have created a shroud of mystery surrounding the number and location of captive tigers in the U.S. Without a reliable way of tracking captive tigers, nearly all of whom are “generic” and fall outside FWS requirements for CBW registration, there is no meaningful way to ensure that tigers are not being maintained in substandard conditions, subjected to abuse, or falling into the lucrative exotics trade market.²⁵⁷ The price tag on tiger cubs has plummeted while the potential revenue for their parts has skyrocketed in some countries, making tigers worth more dead than they are alive.²⁵⁸

In the U.S., tigers are bred and sold as pets, for use in pricey cub handling sessions in roadside zoos, and for display in entertainment acts—all of which are activities and uses that experts deem to have a detrimental impact on legitimate species

York are only among a handful of states that have taken important action for public safety and animal welfare by enacting *statutory* prohibitions on direct public contact with tigers of all ages. *See infra* note 252.

²⁵² *See State Laws Exotic Cats*, BIG CAT RESCUE (July 21, 2015), <http://bigcatrescue.org/state-laws-exotic-cats/>.

²⁵³ *See* THE WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 6, 6–7 (2014), http://assets.worldwildlife.org/publications/662/files/original/NationalStrategyWildlifeTrafficking.pdf?1392147850&_ga=1.66072302.1568665488.1434916708.

²⁵⁴ *See Close Generic Tiger Loophole*, *supra* note 136.

²⁵⁵ *About Tigers*, WORLD WILDLIFE ORGANIZATION – UK, <http://www.wwf.org.uk/wildlife/tigers/> (last visited Oct. 5, 2015).

²⁵⁶ *Id.*; *see Close Generic Tiger Loophole*, *supra* note 136.

²⁵⁷ *See Close Generic Tiger Loophole*, *supra* note 136; Michael Markarian, *Tiger Loopholes Put People and Animals At Risk*, ENCYCLOPEDIA BRITANNICA ADVOCACY FOR ANIMALS (Mar. 27, 2015), <http://advocacy.britannica.com/blog/advocacy/2015/03/tiger-loopholes-put-people-and-animals-at-risk/>.

²⁵⁸ *See* WILLIAMSON & HENRY, *supra* note 10, at 39.

conservation.²⁵⁹ Several concrete steps are available to stop the overbreeding that is creating unwanted, surplus, adult tigers who may fall prey to perverse economic incentives. Closing the Generic Tiger Loophole, and amending the AWA regulations or the USDA's interpretive policies to prohibit public contact with tigers are not only practical, they are necessary to fulfillment of the intended purposes of the ESA and AWA, helpful to eliminating existing enforcement burdens on the USDA and FWS, important to preserving public safety, and critical to protecting captive and wild tigers alike. The time to act is now, before the U.S. unwittingly becomes a major supplier to the illicit, and extremely lucrative, international trade in tiger parts and while there is still time to redirect public attention and efforts to *legitimate* tiger conservation initiatives.

²⁵⁹ See Nicole Paquette, *The Status of Captive Wild Animals in the U.S.: An Overview of the Problem and the Laws*, BORN FREE USA, <http://www.bornfreeusa.org/facts.php?p=179&more=1&page=4> (last visited Oct. 5, 2015).