

# CAGED CATS: PRIVATE OWNERSHIP OF LIONS AND TIGERS

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## INTRODUCTION

Ohio has traditionally had very few restrictions on animal ownership, exotic or domestic.<sup>1</sup> The lax laws lead the worst puppy mill owners, driven out of other states by legislation and inspections, to settle in Ohio as a safe harbor.<sup>2</sup> Prior to January 1, 2014, private big cat ownership in Ohio was virtually unrestricted.<sup>3</sup> It took the dramatic and public death of more than thirty big cats to jolt state politicians into action.

As the sun was setting on a rainy day in Zanesville, Ohio, state troopers started receiving reports of tigers and lions on a public highway.<sup>4</sup> They arrived at a nearby property to find the animals' owner, Terry

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<sup>1</sup> See Carolyn Pesce et al., *Scary safari in Ohio ends with carnage, questions*, USATODAY, (Oct. 19, 2011, 10:20 PM), <http://usatoday30.usatoday.com/news/nation/story/2011-10-18/exotic-animals-loose-ohio/50821092/1> (stating "Ohio has some of the nation's weakest restrictions on exotic pets and among the highest number of injuries and deaths caused by them. The Humane Society of the United States has documented 22 incidents with dangerous exotic animals in Ohio since 2003, demonstrating risks to public health and safety and animal welfare.").

<sup>2</sup> See Jim Provance, *Ohio Senate Approves Bill on Puppy-Mill Rules*, TOLEDOBLADE.COM, <http://www.toledoblade.com/Slate/2012/02/02/Ohio-Senate-approves-bill-on-puppy-mill-rules.html> (last visited Jan. 30, 2014) (quoting state senators describing the terrible reputation Ohio has for attracting 'bad actors' in the puppy mill world).

<sup>3</sup> See *Summary of State Laws Relating to Private Possession of Exotic Animals*, BORN FREE USA, [http://www.bornfreeusa.org/b4a2\\_exotic\\_animals\\_summary.php](http://www.bornfreeusa.org/b4a2_exotic_animals_summary.php) (last visited Jan. 30, 2014) for a list of state exotic laws, explaining that Ohio is one of the few states that does not require a permit for big cat ownership; see also John R. Plat, *Ohio Animal Tragedy Calls Attention to Loopholes in Captive Wildlife Laws*, SCIENTIFIC AMERICAN (Oct. 20, 2011), <http://blogs.scientificamerican.com/extinction-countdown/2011/10/20/ohio-animals-tragedy-calls-attention-to-loopholes-in-captive-wildlife-laws/> (describing how Ohio is known for lax exotics laws).

<sup>4</sup> Pesce et al., *supra* note 1.

Thompson, dead in the driveway.<sup>5</sup> Dozens of big cats, bears, and monkeys from his backyard menagerie swarmed the property, running free.<sup>6</sup> In an apparent suicide, he had released all of his animals and then shot himself.<sup>7</sup> With darkness imminent, the police shot and killed over thirty big cats, many at close range, in an effort to keep them from entering populated areas.<sup>8</sup>

Despite not needing to register his big cats at the state or federal level, authorities were aware that Thompson kept exotic animals on his property in an unsafe manner.<sup>9</sup> In 2005 Thompson was convicted of having an animal at large and cruelty to animals.<sup>10</sup> His neighbors reported shooting wolves that had escaped from his property in the past.<sup>11</sup> By emergency order from the former governor Ted Strickland, Ohioans convicted of animal cruelty were prohibited from owning exotic animals.<sup>12</sup> However, the next governor, Gov. John Kasich, allowed the executive order to expire, and Thompson's animals were never removed from his property.<sup>13</sup> The example of Terry Thompson and his animals demonstrates that even when there are laws intended to keep the animals and the public safe, they are unevenly enforced and often neglected.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Pesce et al., *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* See Ohio Executive Order 2010-17s authorizing the Department of Natural Resources, Division of Wildlife Regulation 1501:31-19-05 (prohibiting a person convicted of an offense involving the abuse or neglect of any animal pursuant to any state, local, or federal law from owning a dangerous wild animal, defined to include "Family felidae: lions (*Panthera leo*), tigers (*Panthera tigris*), jaguars (*Panthera onca*), leopard (*Panthera pardus*), clouded leopard (*Neofelis nebulosa*), snow leopard (*Panthera uncia*), cheetah (*Acinonyx jubatus*), bobcat (*Rufus rufus*), lynx (*Lynx rufus*), cougars, pumas, or mountain lions (*Puma concolor*), including hybrids thereof") Ohio Admin. Code 1501:31-19-05 (expired). The emergency order was issued after a captive bear fatally slashed an employee of an exotic animal farm in Ohio. Joe Guillen, *Outgoing Gov. Ted Strickland Bans Ownership of Exotic Animals, Cites Recent Bear Attack*, THE PLAIN DEALER (Jan. 6, 2011, 1:15 PM), [http://www.cleveland.com/open/index.ssf/2011/01/strickland\\_bans\\_ownership\\_of\\_e.html](http://www.cleveland.com/open/index.ssf/2011/01/strickland_bans_ownership_of_e.html).

<sup>13</sup> Pesce et al., *supra* note 1. Although the Humane Society of the United States has been pushing for a ban and restrictions on exotic ownership for many years, after the Zanesville incident the same Gov. Kasich said, "[i]f there's some way I could've prevented it, I would. But what we have to do is move forward and make sure we can clearly limit anything like this in the future." Alan Johnson, *Order That Kasich Rejected Would Have Barred Man from Having Exotic Animals*, THE COLUMBUS DISPATCH, <http://www.dispatch.com/content/stories/local/2011/10/19/humane-society-head-wants-ohio-exotic-animal-ban.html> (last visited Feb. 1, 2014).

Across the nation, the strength of state exotic cat laws varies greatly, as does the care with which those laws are enforced. On the federal level, the United States Fish and Wildlife Service (“USFWS”) has exempted generic tigers from the Endangered Species Act (“ESA”) requirements, and the United States Department of Agriculture (“USDA”) only regulates animals that are for commercial purposes, such as breeding or exhibiting. In the aftermath of the Zanesville incident, Congress has taken notice and is attempting to pass the Big Cats and Public Safety Protection Act, which would ban the breeding and sale of big cats, except in accredited zoos, state-licensed rehabilitation facilities, and universities.<sup>14</sup>

This Note will argue that the best solution to the problem of uneven big cat ownership requirements would be to pass the Big Cats and Public Safety Protection Act, eliminating private ownership of big cats except for zoos, sanctuaries, and universities. Unfortunately, such a strong restriction on big cat ownership seems unlikely to gain the necessary political support to pass both houses.

A lesser, but still beneficial change, would be to have the USFWS, rather than the USDA, regulate big cat ownership. The USFWS is better suited to licensing and understanding the requirements of big cats; it could take over the primary responsibility of licensing generic tiger ownership by adopting the proposed rule that rids the ESA of its generic tiger exception. Of course, this would only be the first step, as regulations covering lions, cheetahs, and other exotic cats would need to be written and published as well. The major benefit of this type of action would be that it is more politically feasible, because it would be the result of an agency action rather than a bill that must be passed by the House and Senate, and signed by the President.

Part I will review the federal legislation that creates a backdrop for big cat ownership today. Part II will discuss the role of the USFWS in the regulation of tigers, an endangered species. Part III will provide a sampling of the patchwork of state laws that apply to exotic cat ownership. Part IV will review case law illustrating the impotency of current state and federal laws. Part V will examine the USDA regulations and oversight of big cats at length, as well as the current interplay between the roles of the USDA and the USFWS. The Conclusion will argue that the Big Cat and Public Safety Protection Act would be the best way to cure the patchwork of state laws, federal regulations, and uneven enforcement problems. However, if passage of the bill is not politically feasible, then

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<sup>14</sup> Big Cats and Public Safety Protect Act, H.R. 4122, 112th Cong. (2011).

this Note argues for a stronger role for the USFWS in private big cat ownership oversight.

## I. FEDERAL LEGISLATION

The Lacey Act makes it illegal to import or export wildlife in violation of federal, state, or local laws.<sup>15</sup> The Captive Wildlife Safety Act amends the Lacey Act to make it illegal to import, export, buy, sell, transport, receive, or acquire in interstate or foreign commerce live lions, tigers, leopards, cheetahs, jaguars, cougars, or hybrids.<sup>16</sup>

However, the Lacey Act provides for four exceptions, which largely diminish the strength of the rule.<sup>17</sup> The first exception allows for big cats to be owned so long as they are licensed by the USDA's Animal and Plant Health Inspection Service ("APHIS") department.<sup>18</sup> The USDA only has the authority to license those big cats that are used in commercial activities, such as breeding or exhibitions.<sup>19</sup> This exception pushes people who are just looking for a backyard "pet" to breed their big cats just so that they qualify for a USDA permit.<sup>20</sup> It also promotes putting baby cubs on display for people to be photographed with the cubs, so that they are exhibited, a practice that is unsafe and unhealthy for young cubs.<sup>21</sup>

The second exception is for colleges, state-licensed rehabilitators, or veterinarians; the third exception is for those that have custody of animals to transport it to someone who is approved.<sup>22</sup> The final exception is for accredited wildlife sanctuaries that are non-profit, do not have a commercial trade in animals or animal body parts, do not propagate the animals, and do not allow direct contact between the public and the animals.<sup>23</sup>

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<sup>15</sup> Lacey Act, 16 U.S.C. §§ 3371–3378 (2006).

<sup>16</sup> Captive Wildlife Safety Act, Pub. L. No. 108–191, 117 Stat 2871 (2003).

<sup>17</sup> Lacey Act, 16 U.S.C.A. § 3372(e)(2) (2006). The enabling statute is the Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006).

<sup>18</sup> Lacey Act, 16 U.S.C.A. § 3372(e)(2)(A) (2006).

<sup>19</sup> This is because the Animal Welfare Act, which the USDA enforces, applies only to animals in commerce. 7 U.S.C.A. § 2131 (West).

<sup>20</sup> *State Laws Regarding the Private Possession of Exotic Cats*, BIG CAT RESCUE, <http://bigcatrescue.org/state-laws-exotic-cats/> (last visited Jan. 30, 2014).

<sup>21</sup> See *The Big Cat Handling Crisis*, BIG CAT RESCUE, [http://bigcatrescue.org/wp-content/uploads/2011/01/FactsheetBigCatsHandling\\_rev.1.pdf?d6dbe8](http://bigcatrescue.org/wp-content/uploads/2011/01/FactsheetBigCatsHandling_rev.1.pdf?d6dbe8) (last visited Jan. 30, 2014) [hereinafter *The Big Cat Handling Crisis*].

<sup>22</sup> Lacey Act, 16 U.S.C.A. § 3372(e)(2)(B),(D) (2006).

<sup>23</sup> 16 U.S.C.A. § 3372(e)(2)(C).

In reaction to the Zanesville incident, various members of Congress (Rep. Buck McKeon (R-CA) and Rep. Loretta Sanchez (D-CA)) and a senator (John Kerry (D-MA)) introduced legislation that would significantly increase the strength of the Lacey Act by eliminating the exemption for USDA APHIS licensed big cats.<sup>24</sup> By eliminating this exemption, the Big Cats and Public Safety Protection Act would remove the incentive to have big cats exhibited or bred. In fact it would be illegal for anyone except an accredited zoo, research facility, university, wildlife sanctuary or transporter to be in possession of big cats.<sup>25</sup> Not wanting wildlife sanctuaries to be overwhelmed with the estimated 5000 privately owned tigers in the United States,<sup>26</sup> and because zoos will not take these animals,<sup>27</sup> the Bill would allow those tigers already in private hands to remain so, as long as they are registered with the USDA. In time, because buying, selling, and breeding of big cats would be prohibited, the population of privately owned big cats under the USDA exemption would be reduced to zero.

The Big Cats and Public Safety Protection Act would also require that in order to be considered a wildlife sanctuary, the sanctuary could not transport big cats offsite for display.<sup>28</sup> This reduces the problem of roadside zoos or sanctuaries making money by visiting schools or other places and claiming to be educational. “Educational” situations like this are not good for the big cat or the students, and can lead to tragic results. This was the case for Haley Hilderbrand, 17, who was attacked and killed by a 550 pound Siberian Tiger restrained only by a leash during a school photo shoot; not surprisingly, police had to shoot the big cat several times just to kill it.<sup>29</sup>

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<sup>24</sup> See Big Cats and Public Safety Protection Act, H.R. 4122, 112th Cong. (2011) and corresponding bill S. 3547, 112th Cong. (2011); see also *Big Cats and Public Safety Protection Act (H.R. 4122)*, BORN FREE USA, <http://www.bornfreeusa.org/legislation.php?p=3179> (last visited Jan. 30, 2014).

<sup>25</sup> H.R. 4122, 112th Cong. Sec. 5(a)(2) (2011) (eliminating the Lacey Act big cat allowance of USDA-permitted exhibitors).

<sup>26</sup> *Taking Tigers Out of American Backyards*, WORLD WILDLIFE FUND (Mar. 1, 2012), [http://worldwildlife.org/press\\_releases/taking-tigers-out-of-american-backyards](http://worldwildlife.org/press_releases/taking-tigers-out-of-american-backyards).

<sup>27</sup> See Brian Handwerk, *Big Cats Kept as Pets Across U.S., Despite Risk*, NATIONAL GEOGRAPHIC, [http://news.nationalgeographic.com/news/2002/08/0816\\_020816\\_EXPLcats\\_2.html](http://news.nationalgeographic.com/news/2002/08/0816_020816_EXPLcats_2.html) (updated Oct. 9, 2003) (“Placing the big cats into zoos is not a solution. Most zoos do not accept animals without a clear genetic background—something the privately bred cats generally lack—and captive-bred cats are not returned to the wild.”).

<sup>28</sup> H.R. 4122, 112th Cong. Sec. 5(a)(2)(B)(v) (2011) (amending the Lacey Act exception for accredited wildlife sanctuaries to specify that they may not transport and display animals offsite).

<sup>29</sup> Paul Todd, *6 Questions About the U.S. Big Cats and the Public Safety Protection Act*, INTERNATIONAL FUND FOR ANIMAL WELFARE (Mar. 22, 2012), <http://www.ifaw.org/united-states/news/6-questions-about-us-big-cats-and-public-safety-protection-act>.

In fact, in the past 11 years there have been 246 reported maulings and 21 reported dead from captive big cats in the United States.<sup>30</sup>

## II. USFWS AND GENERIC TIGERS

The Federal Government also regulates many big cats, including tigers and ocelots, through the ESA. The ESA prohibits importing, exporting, taking, possessing, or selling of species listed as endangered, and so could be a great tool to stop private ownership of these big cats.<sup>31</sup> However, toward the bottom of Section 17.21 of the ESA, there is a short section that exempts fourteen species of endangered birds from the ESA prohibitions, and then goes on to exempt “the inter-subspecific crossed or ‘generic’ tiger (*Panthera tigris*) (i.e., specimens not identified or identifiable as members of the Bengal, Sumatran, Siberian or Indochinese subspecies (*Panthera tigris tigris*, *P.t. sumatrae*, *P.t. altaica* and *P.t. corbetti*, respectively).”<sup>32</sup> The section continues that the tigers are exempted from the ESA so long as:

- 1) the purpose of such activity is to enhance the propagation or survival of the affected exempted species;<sup>33</sup> and
- 2) Such activity does not involve interstate or foreign commerce, in the course of a commercial activity, with respect to non-living wildlife.<sup>34</sup>

It is not immediately clear why generic tigers would be exempt from the prohibitions of the ESA. Ostensibly, generic tigers can only be possessed and sold so long as the purpose of the possession or sale is to enhance the propagation of the species.<sup>35</sup> However, in reality, these generic tigers are kept as pets or shown at roadside zoos.<sup>36</sup> There are an estimated 5000–10,000 captive tigers in the United States,<sup>37</sup> the majority

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<sup>30</sup> *Id.*

<sup>31</sup> Endangered Species Act, 50 C.F.R. § 17.21(b)–(f) (2012).

<sup>32</sup> 50 C.F.R. § 17.21(g)(6).

<sup>33</sup> 50 C.F.R. § 17.21(g)(6)(i).

<sup>34</sup> 50 C.F.R. § 17.21(g)(6)(ii).

<sup>35</sup> 50 C.F.R. § 17.21(g)(6)(i).

<sup>36</sup> *See Help Protect Captive Tigers in the U.S.*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/cases-campaigns/action-alerts/action-alert-archive/2011-2/help-protect-captive-tigers-in-the-u-s/> (last visited Jan. 30, 2014).

<sup>37</sup> *Id.*

of which are generic tigers, and of no use to propagation of the species because they are not pure-bred.<sup>38</sup>

One theory for why the exemption arose is because of market pressure and the practices of zoos in past decades.<sup>39</sup> In order to attract visitors to zoos, many zoos would breed their tigers every year so that adorable cubs were on display to attract the public.<sup>40</sup> However, these cubs grow up, and zoos do not have enough room to care for all of the offspring.<sup>41</sup> Many of the “pet” and roadside zoo generic tigers originated as surplus animals from these zoos.<sup>42</sup>

Due to irresponsible breeding practices and a desire to clear out the older, nonbreeding animals, many zoos are constantly trying to get rid of animals.<sup>43</sup> In 1996, when the internet was a lot newer than it is today, the premier zoo accreditation association, the American Zoo and Aquarium Association, published a supposedly password-protected newsletter, listing zoo animals that various members were trying to get rid of.<sup>44</sup> Due to a glitch, it was publicly visible.<sup>45</sup> The newsletter revealed that:

On a single day, AZA zoos were looking to rid themselves of six hundred mammals, nearly four hundred reptiles, thousands of fish, hundreds of birds, and a variety of invertebrates. . . . They show, in stark detail, the large number of zoos trying to simultaneously unload the same species,

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<sup>38</sup> Todd, *supra* note 29 (listing the reasons that captive tigers cannot breed and help replenish wild tiger populations: “One, they are mostly genetic hybrids (not pure tiger subspecies like Bengal tigers or Siberian tigers) and would diminish the genetic vitality of wild populations. Two, captive tigers are comfortable around humans and often do not view them as threats. That would likely lead to tiger-human conflict, putting the tiger’s survival at stake. Three, captive tigers have not learned to hunt, a skill they acquire from their mothers in the wild.”).

<sup>39</sup> See Handwerk, *supra* note 27 (explaining “America’s zoos, and to some extent, circuses are largely responsible for today’s big cat explosion . . . Twenty-five years ago, zoos freely bred the animals in order to have a steady supply of cute cubs to display. But overbreeding led to an overabundance of big cats.”).

<sup>40</sup> *Id.*

<sup>41</sup> ALAN GREEN & THE CENTER FOR PUBLIC INTEGRITY, ANIMAL UNDERWORLD: INSIDE AMERICA’S BLACK MARKET FOR RARE AND EXOTIC SPECIES XIX (1999).

<sup>42</sup> *Id.* (stating “[b]urdened with unwanted surplus, the National Zoo and its well-regarded counterparts willingly overlooked the animal-care standards to which they supposedly subscribed. When they had animals to dispose of, a recipient’s lack of credentials or affiliations was meaningless. The goal was to clear out inventory.”).

<sup>43</sup> *Id.* at 44–45.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 45.

making zoo-to-zoo transactions unlikely, and therefore, disposal outside the AZA community all but inevitable.<sup>46</sup>

Whatever the motivation behind the exemption for generic tigers, there are several problems with it. As the USFWS has acknowledged, a major problem is that the exemption may be inadvertently encouraging the breeding of generic tigers by those who misguidedly think that they are helping to preserve an endangered species.<sup>47</sup> This misunderstanding could have occurred because the ESA specifically states that exemptions are only granted for the conservation of the species, and the USFWS notes an exemption for generic tigers.<sup>48</sup>

A second problem is that this regulatory exemption does not seem to be permitted under the framework of the ESA itself. Section 1539 of the ESA lists three circumstances where the Secretary of the Interior may permit exceptions to the ESA. The first allows an exception for “any act otherwise prohibited . . . for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations” which allows, for example, for the transport of zoo animals for breeding purposes.<sup>49</sup> The second exception allows for “any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” a provision that allows construction projects to go forward despite habitat destruction.<sup>50</sup> The third is for undue economic hardship, where a contract has already been entered into, and then a species is later designated as endangered.<sup>51</sup>

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<sup>46</sup> *Id.* at 45–46.

<sup>47</sup> The USFWS states that:

By exempting inter-subspecific crossed or generic tigers from the CBW registration process in 1998, we may have inadvertently suggested that the breeding of these tigers qualifies as conservation. By removing the exemption, we can reinforce the value of conservation breeding of individual tiger subspecies and discourage the breeding of tigers of unknown or mixed lineage.

Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. 52,297, 52,299 (2011).

<sup>48</sup> 50 C.F.R. § 17.21(g)(6)(i); *see also* Handwerk, *supra* note 27 (“Anybody who thinks that they are doing these animals a favor by allowing them to breed to save an endangered species is misguided, because they will just become hundreds more animals living their lives in cages,” said IFAW’s Minshew.”).

<sup>49</sup> 16 U.S.C.A. § 1539(a)(1)(A) (West 2012).

<sup>50</sup> 16 U.S.C.A. § 1539(a)(1)(B).

<sup>51</sup> 16 U.S.C.A. § 1539(b).

Because there are only three exemptions, and the tiger exemption clearly is not the second exemption, a taking incidental to a lawful activity, or the third exemption, an undue economic hardship pursuant to a contract, it would seem to have to fit in the first exemption, a taking “to enhance the propagation or survival of the affected species.”<sup>52</sup> The connection between the tiger exemption and species propagation is tenuous at best; when publishing the generic tiger exemption, the USFWS stated as a justification:

The exemption for inter-subspecific crossed or generic tigers was based on the alleged lack of conservation value of these specimens due to their mixed or unknown genetic composition. The intention behind the exemption was for the Service to focus its oversight on populations of ‘purebred’ animals of the various tiger subspecies to further their conservation in the wild.<sup>53</sup>

However, the alleviation of workload cannot be a strong enough justification to make the exemption one that enhances the propagation of the species, or else it might be applied to all endangered species and render the ESA essentially meaningless.

The generic tiger exemption also inadvertently promotes the idea that these generic tigers have some beneficial use as educational tools or props. In reality, it is much better to show a conservational video or read a story than to have a five-hundred-pound carnivore, many times stronger than a human, brought into close proximity with students. And finally, the generic tiger exception may contribute to the demand for tiger body parts, which are valued in some cultures for medicinal effects.<sup>54</sup>

Recently, the USFWS has issued a proposed rule that would eliminate this generic tiger exception.<sup>55</sup> This is an important first step

<sup>52</sup> 16 U.S.C.A. § 1539(a)(1)(A).

<sup>53</sup> Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-Subspecific Crossed or Generic Tigers, 76 Fed. Reg. at 52,298.

<sup>54</sup> See *Illegal Trade in Animal Parts*, WORLD WILDLIFE FUND, [http://wwf.panda.org/what\\_we\\_do/endangered\\_species/tigers/tigers\\_threats/tiger\\_trade/](http://wwf.panda.org/what_we_do/endangered_species/tigers/tigers_threats/tiger_trade/) (last visited Jan. 30, 2014) (explaining that there is a very high value for tiger bones in traditional Chinese medicine); see also *The Big Cat Handling Crisis*, *supra* note 21, at 1 (stating that “[u]nwanted cubs could be supplying the illegal wildlife trade. With no comprehensive system of tracking captive tigers, there is no way to know if the cubs are ending up in the trade for parts and derivatives—a lucrative market currently pushing wild tigers to extinction.”).

<sup>55</sup> 76 Fed. Reg. 52,297, *supra* note 53, at 52,297.

toward having those who are familiar with the requirements of big cats, the scientists and specialists in areas of research that would be relevant to captive wildlife needs and abilities, in charge of overseeing their welfare.<sup>56</sup> Since the USFWS already issues permits for possession of endangered species, eliminating the generic tiger exemption would simply enlarge the role of the USFWS, and decrease the role of the USDA.<sup>57</sup> The main benefit to eliminating the exception for generic tigers is that it is a feasible, politically straightforward step. That is, the USFWS need only publish a final rule based upon the comments that were received, in order to bring all tigers back under their purview.

### III. STATE LEGISLATION

State legislation on the issue of big cat ownership ranges from complete bans on private ownership to a total lack of any regulation.<sup>58</sup> Nineteen states ban private ownership of big cats and ten states have a partial ban on private ownership of exotic animals, precluding ownership of specific listed species.<sup>59</sup> Thirteen states require the owner of the exotic animal to obtain a license or permit or to register the animal.<sup>60</sup> Seven states do not require the owner of the exotic animal to obtain a license or permit, but may regulate some aspect like requiring veterinary certificates.<sup>61</sup> Two states, Wisconsin and West Virginia, do not have any statute or regulation governing the issue.<sup>62</sup>

Changes in legislation at the state level often demonstrate that it is not a strongly held belief in the right of citizens to own big cats that keep restrictive ownership laws from passing. It is much more often a

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<sup>56</sup> The dietary and space requirements for tigers differ significantly from most USDA-regulated animals, so do the materials and dimensions required to build the enclosures. For a description of some of the distinct enclosure requirements, see OFFICE OF INSPECTOR GENERAL, AUDIT REPORT 33601-10-CH: CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS, 6 (June 2010) [hereinafter 2010 AUDIT REPORT], available at <http://www.usda.gov/oig/webdocs/33601-10-CH.pdf>.

<sup>57</sup> The USFWS issues permits under 50 C.F.R. § 13.12 (2012).

<sup>58</sup> Each state has different laws with regard to big cat ownership. This Note does not attempt to address every state, but instead gives a broad overview of the differences between states' regulations, the ways that these regulations change, and commonly exploited loopholes found in state statutes.

<sup>59</sup> *State Laws for Keeping Exotic Cats*, BIG CAT RESCUE, <http://bigcatrescue.org/2011/state-laws-exotic-cats> (last visited Jan. 30, 2014).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

lack of thought about or understanding of the seriousness of big cat ownership, or worse, a general disinterest in animal issues altogether.

In Ohio, the laxity of the animal laws could not have gone unnoticed to anyone with a passing knowledge of animal regulations; it certainly did not go unnoticed by the many puppy mill owners and exotic animal dealers that flocked to the state.<sup>63</sup> Despite past warnings, lobbying, and human deaths from exotic animals,<sup>64</sup> what it finally took to get a permanent change was a dramatic threat to public safety. After the Zanesville incident, Ohio found the impetus to move from a state that had one of the weakest big cat ownership laws to one of the strongest.<sup>65</sup> Within six months of the incident, the Ohio State Senate passed the Ohio Dangerous Wild Animal Act, completely banning buying big cats after January 1, 2014, and imposing strict requirements, including liability insurance, for those current big cat owners that are grandfathered in.<sup>66</sup>

Virginia's exotic animal code has a loophole that is seen in many states. Big cat owners must apply for and obtain a special permit from the Department of Game and Inland Fisheries in order to import a big cat into the state.<sup>67</sup> This is an important requirement because states often have more resources and a greater local interest in ensuring safe conditions and animal welfare compliance within their own borders than federal USDA inspectors do.<sup>68</sup> However, the Virginia code then goes on

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<sup>63</sup> See, e.g., Pesce et al., *supra* note 1 (stating that “[y]ou can buy anything you want in Ohio,” and the state is ‘simply full to the brim with exotic animal breeders,’ said April Truitt, executive director and founder of the Primate Rescue Center in Nicholasville, Ky.”); see also Provance, *supra* note 2.

<sup>64</sup> See Pesce et al., *supra* note 1 (stating that “[t]he Humane Society of the United States has documented 22 incidents with dangerous exotic animals in Ohio since 2003, demonstrating risks to public health and safety and animal welfare.”); see also Guillen, *supra* note 12 (stating that outgoing Gov. Strickland issued his emergency executive order banning the buying and selling of dangerous exotic animals because a twenty-four-year-old boy was killed by a captive bear in Ohio in 2010; the order was allowed to expire by the following administration).

<sup>65</sup> See Alan Johnson, *Bill Bans Owning Most Wild Critters*, THE COLUMBUS DISPATCH (Apr. 26, 2012, 4:01 AM), <http://www.dispatch.com/content/stories/local/2012/04/26/bill-bans-owning-most-wild-critters.html>.

<sup>66</sup> OHIO REV. CODE ANN. § 935.05 (West 2012), available at [http://www.legislature.state.oh.us/BillText129/129\\_SB\\_310\\_EN\\_N.pdf](http://www.legislature.state.oh.us/BillText129/129_SB_310_EN_N.pdf); see also *Ohio Dangerous Wild Animal Act*, OHIO.GOV, <http://www.agri.ohio.gov/TopNews/DangerousWildAnimalAct/> (last visited Jan. 30, 2014) (Ohio Department of Agriculture explaining the new laws and how they will affect big cat owners).

<sup>67</sup> 4 VA. ADMIN. CODE § 15-30-40(A) (2012).

<sup>68</sup> See, e.g., OFFICE OF INSPECTOR GENERAL, *supra* note 56, at 5 (explaining that in 2009 the USDA had 97 Animal Care inspectors who performed over 4300 inspections nationally of more than 2700 exhibitors, and these inspectors are not specifically trained on

to provide an exemption, allowing exotic mammal owners licensed by the USDA to possess exotic animals in the state *without even obtaining a permit* from the State of Virginia.<sup>69</sup> The USDA licenses a person as an exhibitor, not the specific animals they have.<sup>70</sup> Therefore a person in Virginia (and many other states) can legally buy and sell dangerous exotic animals with no state oversight, and with just a yearly site visit by the USDA. The animals themselves come and go with anonymity; there are no concrete numbers on how many big cats are in backyards across the nation.<sup>71</sup>

#### IV. CASE LAW—ENFORCEMENT OF EXISTING LAWS RESTRICTING BIG CAT OWNERSHIP

##### A. *State Enforcement—Texas*

Another significant challenge, even if a state has the necessary laws on the books, is enforcement of those laws. Due to a lack of resources or motivation, local authorities often do not enforce existing restrictions on big cat ownership. Additionally, facilities masquerade as wildlife refuges or sanctuaries, when they are actually engaged in for-profit schemes. This is evident in the case of Carmel Azzopardi, the president and director of Amarillo Wildlife Refuge, Inc., a Texas non-profit corporation.<sup>72</sup> In 2006 he was indicted in the U.S. Northern District of Texas for knowingly and willfully offering for sale, selling, and transporting in interstate commerce an endangered species, a violation of the Endangered Species Act.<sup>73</sup>

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dangerous exotic animal requirements); *see also id.* at 1 (stating that in the audit, the OIG visited 31 exhibits, and questioned the safety conditions at 15 of them).

<sup>69</sup> 4 VA. ADMIN. CODE § 15-30-40(E) (stating mammals “that are imported or possessed by dealers, exhibitors, transporters, and researchers who are licensed or registered by the United States Department of Agriculture under the Animal Welfare Act . . . will be deemed to be permitted pursuant to this section, provided that those individuals wanting to import such animals notify the department.”).

<sup>70</sup> Animal Welfare Act, 7 U.S.C. § 2133 (2012) (stating “[t]he Secretary shall issue licenses to dealers and exhibitors”).

<sup>71</sup> *See, e.g., Help Protect Captive Tigers in the U.S.*, ANIMAL LEGAL DEFENSE FUND, <http://aldf.org/cases-campaigns/action-alerts/action-alert-archive/2011-2/help-protect-captive-tigers-in-the-u-s/> (last visited Feb. 1, 2014) (“Due to the current lack of regulation by the federal government, there is not an accurate count of how many thousands of these tigers are living in the country, or whether they live in potentially abusive—and dangerous—conditions.”).

<sup>72</sup> *In re: Amarillo Wildlife Refuge, Inc., A Texas Non-Profit Corp.*, AWA Docket No. 07-0077, 2009 WL 248415, 4 (Agric. Dec. Jan. 6, 2009).

<sup>73</sup> *Id.* at 4.

He tried to claim that his transfers of various big cats were donations, but in the end he accepted a plea agreement to plead guilty to violating the Endangered Species Act by transporting two clouded leopards in interstate commerce.<sup>74</sup> He received a \$2000 fine and was barred from commercial actions with “any endangered or threatened species for any purpose whatsoever without prior written approval.”<sup>75</sup> After receiving this fine, quite small compared to the \$10,000–\$15,000 price of ocelots on the black market,<sup>76</sup> and the order not to engage in any commercial actions with any endangered species, he was still in possession of many dangerous big cats that did not fall under the ESA, or were exempted generic tigers.

The problems with Amarillo Wildlife Refuge continued. Jacki King, a neighbor of Carmel Azzopardi, became worried about ongoing violations, and brought suit for a writ of mandamus to compel the county sheriff to revoke Azzopardi’s state certificate of registration for the big cats.<sup>77</sup> Under the Dangerous Wild Animal Act, ch. 822, subchapter E of the Texas Health and Safety Code, if the Dangerous Wild Animal Act is violated, the sheriff is obligated to revoke the registration.<sup>78</sup> Jacki King asserted that the Dangerous Wild Animal Act had been violated, but the Court of Appeals of Texas affirmed that King, who resides a few miles down the road from Azzopardi, did not have standing to sue to compel the sheriff to revoke the registration of Azzopardi’s big cats.<sup>79</sup>

Problems with state enforcement are clearly illustrated by this case. Although Azzopardi was a past animal offender, local officials had reason to know about his exotic animal violations, state law requires that violations must result in a revocation of the ownership certificate, *and* a neighbor worried about her safety sued to enforce this statute, nothing was done to remove these big cats from Azzopardi’s ownership. In fact, the court goes on to say:

[H]ow she is in ‘imminent’ threat of injury goes unexplained. Nor does she describe being injured or how her

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<sup>74</sup> *Id.* at 5; see also *Summary of Federal Case Law*, WILDCAT CONSERVATION LEGAL AID SOCIETY, 5 (2009), <http://wcclas.org/images/forms/FederalCaseLawSum092009.pdf>.

<sup>75</sup> WILDCAT CONSERVATION LEGAL AID SOCIETY, *supra* note 74, at 5.

<sup>76</sup> See *Buy a Big Cat*, BIG CAT RESCUE, <http://bigcatrescue.org/buy-a-big-cat/> (last visited Jan. 30, 2014).

<sup>77</sup> *In re King*, 07-11-0457-CV, 2012 WL 2281971 at \*1 (Tex. Ct. App. June 18, 2012), *review denied* (Oct. 5, 2012).

<sup>78</sup> *Id.*; see also TEX. HEALTH & SAFETY CODE ANN. § 822.105(b) (West 2012).

<sup>79</sup> *King*, 2012 WL 2281971 at \*1.

injury is likely to occur if Azzopardi fails to comply with any particular aspect of the statute. And, to the extent that she does mention something about two animal attacks having occurred, they were attacks upon Azzopardi, not her. . . . [W]hat we have here is “injury couched in terms of potentialities or events that ‘may’ happen.”<sup>80</sup>

The court underestimates the imminence of a threat from a facility that is violating safety regulations—anything more imminent would probably be too late for a court to stop. A big cat that has escaped, and has attacked its owner, poses a threat not just to its owner, but anyone in the vicinity. Once a big cat is out of its enclosure, there is no way to stop an attack.

A big cat facility that is violating a Health and Safety Code constitutes a significant problem. The state of Texas has clearly realized this, as evidenced by the requirement that if a violation of the Health and Safety Code is found, the ownership certificate must be revoked.<sup>81</sup> However, in this instance the law was not enforced. This failure to enforce the statute endangers the public, and big cats.

#### *B. Federal Enforcement—USDA*

Under the current system of big cat regulation, the USDA penalties under the Animal Welfare Act are often too weak to deter repeat violations; the USDA also needs to use revocation of the USDA permit as a penalty more frequently. Examples of USDA adjudication demonstrate the laxity of current punishments for violations of USDA regulations.

The USDA first identified James Brandon Garretson in 1994, when they found he was operating as a dealer and exhibitor without a license.<sup>82</sup> In 1999 the USDA’s Administrative Law Judge issued another

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<sup>80</sup> *Id.* The statute requires, among other things, that an animal attack be reported to the animal registration agency within forty-eight hours, and that dangerous wild animals are confined in a manner that protects and enhances the public’s safety and prevents escape by the animal. TEX. HEALTH & SAFETY CODE ANN. § 822.110(a) (West); TEX. HEALTH & SAFETY CODE ANN. § 822.111(b) (West).

<sup>81</sup> TEX. HEALTH & SAFETY CODE ANN. § 822.105(b) (stating “[i]f the animal registration agency finds, after inspection, that a registered owner . . . has not complied with this subchapter [E], the animal registration agency shall revoke the certificate of registration”) (emphasis added).

<sup>82</sup> *In re James B. Garretson*, 55 Agric. Dec. 1095 (U.S.D.A. 1996), 1996 WL 936225. This was the first indication that he was unsuitable to own dangerous wild animals.

Order assessing fines for further noncompliance.<sup>83</sup> In 2001 Ms. Ammon was denied a USDA license under the Animal Welfare Act (“AWA”) because she was the business partner of Garretson, working for the same company, and to allow her a license would circumvent the order disqualifying Garretson.<sup>84</sup> However, the USDA did reach a deal with her anyway, and gave her a license.<sup>85</sup>

Then, in 2003 the tigers owned by Garretson and Ammon’s company were not fed for four days.<sup>86</sup> A tiger reached out of its pen, grabbed a helper watering its cage, and when the helper reached her arm out to try to stop herself from being pulled in, the tiger ripped off her arm.<sup>87</sup> She died within two hours.<sup>88</sup> The USDA Administrative Law Judge finally permanently revoked their licenses.<sup>89</sup> Ammon was assessed a civil penalty of \$20,940 and Garretson \$32,560.<sup>90</sup>

It should not take a person’s death to permanently revoke a USDA license. If the USDA does not have the resources to annually inspect big cats’ living quarters, then it should be more sparing in giving out licenses, and certainly not give permits to repeat–past offenders, or knowingly permit the circumvention of past court orders.

## V. THE ROLE OF THE USDA AND THE USFWS

### A. USDA

The USDA’s role as an agency is primarily to ensure that food products are safe for human consumption.<sup>91</sup> The USDA’s role of enforcing the Animal Welfare Act makes much less sense when the animals it is inspecting are not raised for food. There are many problems that arise

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<sup>83</sup> WILDCAT CONSERVATION LEGAL AID SOCIETY, *supra* note 74, at 7.

<sup>84</sup> *In re: James Brandon Garretson*, AWA Docket No. 04-A032 (formerly AWA 04-0032) 2007 WL 3170309 at \*2 (U.S.D.A. Mar. 22, 2007).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*4.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at \*1.

<sup>90</sup> *In re James Brandon Garretson*, 2009 WL 3170309 at \*23.

<sup>91</sup> The USDA’s mission statement is: “We provide leadership on food, agriculture, natural resources, and related issues based on sound public policy, the best available science, and efficient management.” *Mission Statement*, UNITED STATES DEPARTMENT OF AGRICULTURE, [http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION\\_STATEMENT](http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT) (last visited Jan. 30, 2014).

from a farm animal-oriented Agency regulating wild animals not intended for human consumption.

First, as described above, the owners of big cats are pushed into engaging in commerce (either breeding and selling or exhibiting their animals) because the USDA does not regulate animals outside the stream of commerce.<sup>92</sup> Many states have prohibited or regulated big cats as pets, but allow private big cat ownership with a USDA permit, so owners are pushed into the commerce in order to qualify for a permit.<sup>93</sup>

In 1996, the Office of the Inspector General (“OIG”) conducted an audit of the USDA permitting process for dangerous exotic animals and found that 70% of the permits audited with four or fewer animals were actually given to pet owners, not exhibitors.<sup>94</sup> More than ten years later, and after the USDA implemented a plan to reduce the number of permits given to pet owners, the OIG again conducted an audit.<sup>95</sup> This time, 36% of the permits audited with four or fewer animals were pet owners.<sup>96</sup> These owners could produce no documentation of exhibiting to the public, and in fact, a few indicated that they had bought the animals as pets.<sup>97</sup> In response to these facts, the USDA APHIS regional officials indicated the Office of the General Counsel “verbally informed them that they could not deny an individual a USDA exhibitor’s license on the grounds that they were not exhibiting their animals.”<sup>98</sup> The OIG found no evidence that the Office of the General Counsel had been considering this issue.<sup>99</sup>

During the permitting process, applicants have to state that they intend to exhibit the animals in the future; it must be a future intention, not a current act, because the exhibiting is not allowed until the permit is

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<sup>92</sup> USDA’s APHIS inspects animals pursuant to the Animal Welfare Act. The Act applies only to animals in commerce. 7 U.S.C.A. § 2131 (West) (stating “[t]he Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof”).

<sup>93</sup> See 2010 Audit Report, *supra* note 56 (stating “it is still possible for individuals to obtain and keep APHIS exhibitor licenses to assist them in circumventing State and local laws which restrict the ownership of dangerous exotic animals”).

<sup>94</sup> *Id.* at 2, n.7.

<sup>95</sup> *Id.* at 5.

<sup>96</sup> *Id.* at 16, n.27.

<sup>97</sup> *Id.* at 19 (“One licensee stat[ed] that he obtained his bears so his son could have a pet.” “A second licensee stated . . . her ‘boyfriend sometimes brings people to the facility to show them the animals,’ and that this was how she met APHIS’ requirements to be a USDA licensed exhibitor.”).

<sup>98</sup> *Id.* at 16.

<sup>99</sup> 2010 Audit Report, at 16.

issued.<sup>100</sup> Then, once the permit has been issued, although it is reviewed every year, APHIS officials did not believe that they had the authority under the AWA to require documentation of the exhibiting activities.<sup>101</sup> Clearly, the regulations can be circumvented without difficulty.

Second, wild animals are so fundamentally different from domestic animals that the experience any USDA official has with domestic animals may be detrimental. Most domestic animals are not particularly dangerous if they escape; however most big cats are.

A “safe” cage for a big cat is very different than one for a domestic animal; experts say a safe big cat cage requires at least two layers of fences/barriers, and either a strong roof or a fence above sixteen feet.<sup>102</sup> APHIS does have public safety standards for big cat cages, but they are vague. They require that exhibits have “enclosures sufficient to contain the animals,” that “provide a sufficient distance/barrier to keep the public safe,” and dangerous animals have a perimeter fence at least eight feet high.<sup>103</sup> The first two standards are extremely vague, and the third seems surprisingly inadequate.

The audit by OIG asserted that these vague standards create problems for the APHIS inspectors.<sup>104</sup> In judging whether an enclosure was sufficient to contain the animal, the inspector would consider the age and condition of the animal in determining whether the animal could escape, calling it “performance based inspection criteria.”<sup>105</sup> This necessarily involves a good deal of guesswork.

Even those dedicated to working with wild animals full time misjudge big cat’s abilities. The San Francisco Zoo had an open-air tiger exhibit with a moat and a fence only 12.6 feet high.<sup>106</sup> On December 22, 2006, Tatiana the tiger ate the hand and most of the arm of her zoo-keeper during feeding time, with over 30 horrified onlookers watching.<sup>107</sup>

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<sup>100</sup> *Id.* at 15.

<sup>101</sup> *Id.*

<sup>102</sup> See Cecilia Vega, *S.F. Zoo’s Big Cats Return to Outdoor Grottos*, SAN FRANCISCO CHRON. (Feb. 19, 2008, 4:00 AM), <http://www.sfgate.com/default/article/S-F-Zoo-s-big-cats-return-to-outdoor-grottos-3225813.php>.

<sup>103</sup> 2010 Audit Report, *supra* note 56, at 9 (citing 9 C.F.R. 2.131(c)(1), dated July 14, 2004, 9 C.F.R. 3.125(a), dated November 2, 1979, and 9 C.F.R. 3.127(d), dated November 28, 2000, respectively).

<sup>104</sup> See 2010 Audit Report, at 7.

<sup>105</sup> *Id.*

<sup>106</sup> See Vega, *supra* note 102.

<sup>107</sup> Patricia Yollin, *Horrified Zoogoer Recalls Tiger Attack*, SAN FRANCISCO CHRON. (Jan. 1, 2007, 4:00 AM), <http://www.sfgate.com/default/article/Horrified-zoogoer-recalls-tiger-attack-Keeper-s-2626456.php#page-2>.

Then in 2007, Tatiana, possibly provoked, leapt over the 12.6 foot fence and attacked a group of teenage boys, killing one and injuring another.<sup>108</sup> Even animal trainers and zookeepers were surprised by the feat of strength it would have taken to leap out of the cage.<sup>109</sup> As big cat behaviorist and Animal Planet documentary maker Salmoni says:

Even with the nicest animals, there's no such thing as a tame wild cat. You can train them, but you can't tame them. No matter how you treat them, they are opportunists. They are predators . . . until you see a cat who you think loves you try to kill you—until you see that for yourself—you wouldn't believe it.<sup>110</sup>

The OIG audit found that even if the inspectors had heard of this incident, they had not learned what the dimensions of the San Francisco enclosure were, and had not reviewed other exhibits to see whether they had similar dimensions.<sup>111</sup> By interpreting “enclosures sufficient to contain the animals,”<sup>112</sup> to include the capabilities of that particular animal, and “to mean that a particular enclosure, enclosure area, or public barrier can be evaluated as safe based on the grounds that there had been no prior escapes or attacks,”<sup>113</sup> APHIS has essentially rendered these standards solely up to the judgment of the inspectors.<sup>114</sup>

Unfortunately, the audit also found that the knowledge base and training of the inspectors often did not rise to the minimum level that

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<sup>108</sup> See Kevin Fagan, *Tiger Grotto Wall Shorter Than Thought, May Have Contributed to Escape and Fatal Attack*, SAN FRANCISCO CHRONICLE (Dec. 28, 2007, 4:00 AM), <http://www.sfgate.com/default/article/Tiger-grotto-wall-shorter-than-thought-may-have-3232519.php#photo-2375205>.

<sup>109</sup> See Fox News reports that “Jack Hanna, former director of the Columbus Zoo and a frequent guest on TV, said such a leap would be an unbelievable feat, and ‘virtually impossible.’” *Police: San Francisco Tiger Attack May Have Been Provoked*, FOXNEWS.COM (Dec. 26, 2007), <http://www.foxnews.com/story/0,2933,318365,00.html#ixzz280x0ywcZ>. Apparently it was possible.

<sup>110</sup> Yollin, *supra* note 107.

<sup>111</sup> 2010 Audit Report, *supra* note 56, at 11.

<sup>112</sup> *Id.* at 6 (citing 9 C.F.R. 2.131(c)(1) (2004)).

<sup>113</sup> *Id.* at 7.

<sup>114</sup> And as discussed above, it is nearly impossible for anyone to judge what a big cat is physically able to do. The sheer difference in strength between humans and big cats can lead to some of the confusion, as does applying limited knowledge to the varied dimensions of enclosures. Additionally, when a big cat is motivated, either by hunger or frustration, it may be extremely unpredictable—or predictably dangerous.

might be expected.<sup>115</sup> One of the audited enclosures exhibited an alarming amount of similarities to the old San Francisco Zoo enclosure; the inspectors were completely unaware of this.<sup>116</sup> Even the clearest of the criteria, that the perimeter fence must be at least eight feet, was overlooked on site visits, the OIG audit found.<sup>117</sup>

With respect to APHIS's other criteria—that exhibits are approved based upon whether there were any prior animal escapes, the inspectors did not require the exhibitors to report whether there had been any escapes.<sup>118</sup> The audit noted a circumstance where a cheetah escaped from its enclosure and was found by visitors.<sup>119</sup> The owner returned the cheetah and made some changes to the enclosure.<sup>120</sup> The inspector did not notice the escape or the changes and continued to “deem the enclosures sufficient.”<sup>121</sup>

This incident is illustrative of the fact that USDA APHIS is simply rubber-stamping the safety requirements of dangerous big cat enclosures. The inspectors do not study the dimensions of other escapes, or even try to learn about escapes from the very enclosures they are inspecting.<sup>122</sup> Apparently, the only way to demonstrate that a facility does not meet APHIS criteria is for the inspector to actually stumble upon the animal outside of its cage. This is an appallingly low standard of safety.

It would seem that animal welfare enforcement by the USDA is underfunded and understaffed because exotic animal oversight is peripheral to the USDA's core mission. In 2009, the year of the audit, APHIS had ninety-seven inspectors who performed over 4300 inspections of more than 2700 exhibitors.<sup>123</sup> These inspectors were primarily charged with ensuring that the exhibitors comply with the AWA.<sup>124</sup> They inspected all zoos, circuses, roadside menageries, and private owners with a USDA permit.<sup>125</sup> They inspected all animals on the premises, from penguins to primates to elephants to big cats.<sup>126</sup>

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<sup>115</sup> 2010 Audit Report, at 11.

<sup>116</sup> *Id.* at 11–12.

<sup>117</sup> *See id.* at 10.

<sup>118</sup> *Id.* at 11.

<sup>119</sup> *Id.* at 12.

<sup>120</sup> *Id.*

<sup>121</sup> 2010 Audit Report, at 12.

<sup>122</sup> *See id.* at 11.

<sup>123</sup> *See id.* at 5.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 4.

<sup>126</sup> *See id.* at 5.

APHIS has only three specialists that the inspectors may consult on animal-specific issues: one for primates, one for elephants, and one for big cats.<sup>127</sup> The big cat expert also consulted for all other animals (besides primates and elephants).<sup>128</sup> The OIG audit found that “[o]f nine Animal Care inspectors we interviewed who expressed concerns that written requirements for public barriers were too broad to be useful, only three had *ever* consulted with APHIS’ animal experts to resolve public safety questions during inspections.”<sup>129</sup> The inspectors were not often availing themselves of the big cat expert when assessing the unique dimensions of different cages.<sup>130</sup> This is a major problem, because even a rough knowledge of what big cats are capable of requires a large knowledge base about other enclosures and big cat escapes.

The big cat safety expert was aware of the 2007 zoo escape and killing,<sup>131</sup> and the audit found that:

APHIS’ standard practice of not disseminating such information—either directly to Animal Care inspectors or through the designated animal experts—caused at least two Animal Care inspectors to repeatedly approve exhibits that, according to APHIS’ animal expert, could use additional review, as these exhibits were similar to other exhibits at which incidents involving dangerous animals had occurred.<sup>132</sup>

The lack of clear criteria in enforcing safety standards, failure to cite clear violations, failure to disseminate critical information, failure to solicit critical information, understaffing, and allowance of loopholes to circumvent state laws demonstrate that the USDA has not adequately regulated dangerous big cats.

The USDA is not suited to the regulation of captive wildlife, or to setting the standard of care that these exotic animals require. Because the USDA was thrust into the role of regulation of non-food animals, the agency does not have sufficient resources. The USDA has not hired enough inspectors, does not prioritize this responsibility that does not conform

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<sup>127</sup> 2010 Audit Report, at 9, n.19.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 9 (emphasis added).

<sup>130</sup> *Id.* at 12.

<sup>131</sup> *Id.* at 11.

<sup>132</sup> *Id.*

well with its mission statement, and it may be lulled into setting domestic-animal-type safety standards that are not safe for the public.

### B. USFWS

Another federal agency, such as the USFWS, would be better suited to regulating captive wildlife. This could include issuing licenses to keep big cats, setting minimum standards for health and safety, and doing annual inspections on their living quarters. Under the ESA, the USFWS is already charged with licensing the ownership of endangered species, which includes tigers.<sup>133</sup> The USFWS would regain control of all tigers, pure-bred and generic, if it adopts the rule that it proposed in the Federal Register in 2011.<sup>134</sup>

It becomes more politically difficult to expand the role of the USFWS regulation beyond tigers to all big cats. To expand the USFWS' purview beyond endangered species would require a bill passed by Congress that wrests control away from the USDA and gives it to the USFWS. It would also require funding and job changes. This may be more difficult politically, but would be an important step forward.<sup>135</sup>

## VI. ARGUMENT

The best bill that Congress could pass would be one that eliminates private ownership of big cats altogether, negating the need for the USDA or the USFWS to inspect any privately owned big cats. This is what the proposed Big Cats and Public Safety Protection Act ("Act") does, and it would eliminate many of the current problems concerning big cat ownership. First, the Act makes a *Gonzales v. Raich*-like argument,<sup>136</sup> recounting the total market for big cats, stating that even intrastate big cats are part of a larger national market for big cats, and thus should be regulated as part of interstate commerce.<sup>137</sup> The bill clearly has commerce clause worries in mind, and therefore recites a number of congressional

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<sup>133</sup> The USFWS issues permits under 50 C.F.R. § 13.12 (2012).

<sup>134</sup> 76 Fed. Reg., at 52,297.

<sup>135</sup> The USFWS already devotes resources toward conserving endangered species, and the oversight of big cats would be in line with this goal.

<sup>136</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that under the Commerce Clause, the United States Congress may criminalize homegrown cannabis, even though it does not cross state lines, because it is a part of a larger (black) market).

<sup>137</sup> See H.R. 4122.

findings related to the big cat trade, in order to stand on as strong footing as possible.<sup>138</sup> If passed, this bill would eliminate the current incentive that big cat owners have to breed or exhibit their animals, because all big cats would be regulated, not just those in the stream of commerce.<sup>139</sup>

Second, the Act would eliminate the exception for USDA APHIS permit-ownership entirely.<sup>140</sup> By eliminating the exception, the Act makes most kinds of private ownership illegal.<sup>141</sup> It retains the other exceptions for zoos, universities, research facilities, and wildlife sanctuaries that do not exhibit their animals.<sup>142</sup> The Act grandfathers current owners of any big cats already owned,<sup>143</sup> with the idea that over time, private ownership will approach zero.<sup>144</sup>

The benefits of passing this Act would be enormous, and it is the best change that could be made for big cat ownership in the United States. First, it would solve the problem of uneven state laws and of unevenly enforced state laws. That is, the Act is preferable to state legislatures, which have been mostly reactive to issues concerning big cats, only gaining the impetus to pass restrictive legislation after a disaster happens.<sup>145</sup> In fact, as seen in the case of Azzopardi,<sup>146</sup> sheriffs who are fully aware of dangerous situations sometimes simply choose not to enforce the laws,

<sup>138</sup> *Id.* The Congress finds the following:

(1) The global illicit trade in wildlife may be worth up to \$20,000,000,000 annually and the value of United States legal wildlife trade was recently estimated at \$2,800,000,000 annually . . .

(4) Activities related to prohibited wildlife species that are not an integral part of the interstate or foreign commerce in such species, such as private ownership and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after breeding, many prohibited wildlife species are transported in interstate commerce; and

(B) privately owned prohibited wildlife species have been transported in interstate commerce before transfer of ownership.

*Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See* H.R. 4122.

<sup>144</sup> There will, of course, still be a black market trade in big cats. This probably could never be totally eliminated, but it would presumably be significantly less than the number of big cats in private hands today.

<sup>145</sup> *See* Johnson, *supra* note 65.

<sup>146</sup> *In re King*, No. 07-11-0457-CV, 2012 WL 2281971 at 1 (Tex. App. June 18, 2012), *review denied* (Oct. 5, 2012).

even when suit is brought against them. This Act would deal with all of these issues by getting rid of private ownership of big cats.

Second, federal money spent to review applications and inspect big cat owners would be saved. Due to the dangerous nature of big cats, their cage setup and care standards need to be examined.<sup>147</sup> The taxpayer pays for these inspections and USDA workers. These big cats can be seen at zoos instead, where they have full time staff looking after their feeding and safety requirements.

Third, there would be much fewer big cat maulings and killings a year. As the OIG audit revealed, the safety inspections currently being conducted do not keep the public safe.<sup>148</sup> The human deaths from big cat attacks continue to add up.<sup>149</sup> The standards are vague, the exhibitors (and pet owners) are not cited for violations, information about escapes are not solicited, and the inspectors often do not have knowledge of other big cat escapes.<sup>150</sup> These lax standards, and an unfortunate habit of not learning from past mistakes, contribute to the injuries caused every year.<sup>151</sup> Although theoretically many of these issues could be fixed, past example says otherwise. In fact, USDA APHIS was audited in 1997 and many of the same problems were found and plans developed to fix the issues; in reality little changed.<sup>152</sup> It would be best to eliminate most of the problem by getting rid of roadside menageries and private pet ownership altogether. Zoos would still be investigated, but with a public reputation to maintain, they are often in much better shape, both in terms of safety and animal care.

However, due to the political environment, it is unlikely that the Big Cats and Public Safety Protection Act will be passed. It may be seen as an intrusive act by the federal government, and a restriction on personal and state freedom. For others, the memory of the Ohio incident has already long since faded, and this issue is simply not on a list of priorities.

If the Act is not politically feasible to pass, then efforts should be concentrated on the USFWS. The agency has the ability to take back control of tiger ownership in the United States, by promulgating the

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<sup>147</sup> See 2010 Audit Report, *supra* note 56.

<sup>148</sup> *Id.* at 1 (stating that the auditors visited thirty-one exhibits and questioned the safety of fifteen of them).

<sup>149</sup> See Todd, *supra* note 29 (stating that in the past 11 years there have been 246 reported maulings and 21 reported dead from captive big cats in the United States).

<sup>150</sup> See 2010 Audit Report, *supra* note 56, at 7, 9–11.

<sup>151</sup> *Id.* at 9, n.18, 11.

<sup>152</sup> *Id.* at 1, 4, n.10.

regulations that it has published. This step should be taken. Next, the feasibility of USFWS regulation of other big cats, such as lions and mountain lions, should be assessed for potential political support and viability. The USFWS, with its efforts on conservation, is a better match to oversee the best interests of big cats in the United States.

#### CONCLUSION

If passed, the Big Cats and Public Safety Act will improve both big cat welfare and the safety of the public. However, due to political concerns, and perhaps a lack of interest, it is unlikely to pass the House and Senate. Although a small step, the USFWS proposed rule is an alternative that is much more likely to be enacted, both because it does not need congressional support, only agency support, and also because it simply takes back a power already granted to the USFWS by the ESA.

Extending the reach of the USFWS by having the USFWS serve as the primary agency to issue big cat ownership permits would be an important next step. The mission and goals of the USFWS make it a better agency to oversee big cat ownership than the USDA, and this transition should be gradually worked towards, if private ownership of big cats is not banned entirely by the Act.