

CASE NO. 13-9876

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 3

GRANDLANDS CIRCUS, INC.,

Appellant/Cross-Respondent,

vs.

HOBBS COUNTY ANIMAL SAFETY DEPARTMENT,

Respondent,

CHRIS SAMUELSON & MARA'S HOPE WILDLIFE SANCTUARY,

Appellant.

APPELLANT'S/CROSS-RESPONDENT'S BRIEF

Appeal from the Superior Court of Hobbs County
Case No. CV-2014-TCS-81013 (EMH)
The Honorable Ellis M. Heiberg

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STATEMENT OF ISSUES

I. DID THE SUPERIOR COURT ABUSE ITS DISCRETION IN DENYING SAMUELSON AND MARA’S HOPE’S MOTION FOR LEAVE TO INTERVENE?

Grandlands Circus answers, “No.”

Chris Samuelson & Mara’s Hope Wildlife Sanctuary answer, “Yes.”

Trial Court answers, “No.”

II. DID THE SUPERIOR COURT ABUSE ITS DISCRETION IN DENYING CIRCUS’S MOTION FOR PRELIMINARY MANDATORY INJUNCTIVE RELIEF?

Grandlands Circus answers, “Yes.”

Hobbs County Animal Safety Department answers, “No.”

Trial Court answers, “No.”

STATEMENT OF THE CASE

Grandlands Circus (“Circus”) filed this action on October 11, 2013, seeking mandamus and money damages resulting from lost profits.¹ (Mem. Op. at 1). Circus sought an order compelling the Hobbs County Animal Safety Department (“Department”) to reissue its 12-Month Performing Animal Permit, issued in June 2013, challenging that Department acted in an arbitrary and capricious manner and revoked the permit without cause. (*Id.* at 2).

Circus also filed a motion for a preliminary mandatory injunction, seeking an order compelling the Department to reissue the permit pending the outcome of the lawsuit, which the Department opposed. (*Id.* at 2). Additionally, Chris Samuelson, an individual, and Mara’s Hope Wildlife Sanctuary (“Mara’s Hope”) jointly filed a motion for leave to intervene. (*Id.* at 2, 4). The Circus opposed this motion. (*Id.* at 2). The motions for injunctive relief and leave to

¹ The Superior Court determined that Circus adequately exhausted its administrative remedies and satisfied all pre-filing requirements, including those set forth in California Government Code Section 945.4. Therefore, the Circus was able to proceed with judicial review of the permit revocation that is at issue in action pending in the Superior Court.

intervene were consolidated and heard on October 28, 2013 in the Superior Court of the State of California for the County of Hobbs, Case No. CV-2014-TCS-81013 (EMH). (*Id.* at 3). The Superior Court denied both motions. (*Id.* at 3). Samuelson and Mara’s Hope appeal from the Superior Court’s denial of leave to intervene, and Circus appeals from the Superior Court’s denial of preliminary mandatory injunction.

STATEMENT OF FACTS

Grandlands Circus, Inc. (“Circus”) was established in 1962 and operates a traveling circus consisting of human acrobatic performances and animal performances. (Mem. Op. 3). In its animal performances, the Circus uses lions, tigers, elephants, and horses. (*Id.*) In 2013, the Circus performed in 22 cities and counties throughout the United States, including in Hobbs County. (*Id.*) Many cities and counties, including Hobbs County, require traveling circuses to apply for and receive a Performing Animal Permit, or the equivalent, in order to perform in that venue. The Circus has received Performing Animal Permits from the Hobbs County Animal Safety Department (“Department”) for the past seven years without incident, most recently in June 2013. (*Id.* at 2, 4). Performances in Hobbs County occur twice daily, each lasting approximately 90 minutes. (*Id.* at 4). In September 2013, Circus performed in Hobbs County for 17 days (September 6 – 22). (*Id.*) This visit earned the Circus approximately \$95,200 in net revenue. (*Id.*)

On October 7, the Department revoked Circus’ permit, citing revocation provisions of Hobbs County Municipal Code § 63.14 (attached as App. 2). (*Id.* at 2). Department has refused to consider re-issuance until June 2014, making it impossible for Circus to perform in April 2014 as planned. (*Id.* at 3). The Department’s actions were based on an administrative complaint filed by Chris Samuelson (“Samuelson”) and Mara’s Hope Wildlife Sanctuary (“Mara’s Hope”) on

September 24, 2013. (*Id.* at 6). Samuelson is the Director of Education and Outreach for Mara's Hope. (*Id.* at 4). He holds a Bachelor of Science degree in zoology and a Master of Fine Arts degree in photography from California University and co-founded Mara's Hope in 1997, after he spent several years photographing wildlife in East Africa and working as an animal caregiver for retired chimpanzees. (*Id.*) Mara's Hope rescues captive animals that have been discarded by private owners, zoos, or the entertainment industry. (*Id.*) There are no elephants at Mara's Hope. (*Id.*)

Samuelson has never attended the Circus' performance, but his assistant, Penny Hall visited the Circus in April 2012 and told Samuelson that she was concerned about the Circus' animals because they looked different from the animals she was used to seeing at Mara's Hope. (*Id.* at 5). Ms. Hope is originally from West Edmond, Texas, where the Circus visited up until January 2012. (*Id.*) A few days after Ms. Hope expressed her concerns to Samuelson, her brother submitted a Freedom of Information Act Request to West Edmond and obtained a copy of a veterinarian's report that was prepared for West Edmond Animal Care and Control in June 2011 ("West Edmond report" or "report," attached as Exhibit 1). (*Id.* at 5). The report focused exclusively on the Circus' elephants, with no reference to species housed by Mara's Hope. (*Id.*) Samuelson received the West Edmond report on September 18, 2013, and the report was ultimately submitted in conjunction with Samuelson and Mara's Hope's administrative complaint, dated September 24, 2013. (*Id.* at 6).

The Department held an evidentiary hearing on September 27, 2013 to consider the following: "(1) whether the concerns identified in the 2011 West Edmond report also applied to Hobbs County performances; (2) whether Circus was in violation of California Penal Code § 597, et seq., irrespective of any criminal charges; (3) whether Circus would be willing to act to

remedy any identified violations to the Department's satisfaction; and (4) whether the Circus' permit should ultimately be revoked." (*Id.* at 6). The Department did not consider at the hearing whether Circus was in violation of California Penal Code § 596.5. Circus personnel were in attendance at the hearing, as was Samuelson. (*Id.*). Circus denied the overall findings and conclusions of the West Edmond report, but stipulated that the information contained in the medical records, the transportation car measurements, and the duration of tethered travel time and time spent in transportation cars generally are accurate. (*Id.* at 7). Circus offered not to perform the three oldest elephants in Hobbs County, but was unable to make any other concessions. (*Id.*).

On October 7, 2013, Department issued in writing its decision to revoke Circus' permit, based on its finding that Circus was in violation of Hobbs County Municipal Code § 63.14, subdivisions (A)(i)-(iii), and California Penal Code §§ 596.5 and 597t. (*Id.* at 7). Grandlands Circus ("Circus") filed this action on October 11, 2013, seeking mandamus and money damages resulting from lost profits. (*Id.* at 1). Chris Samuelson, an individual, and Mara's Hope Wildlife Sanctuary ("Mara's Hope") jointly filed a motion for leave to intervene. (*Id.* at 2, 4). The Circus opposed this motion. (*Id.* at 2). The motions for injunctive relief and leave to intervene were consolidated and heard on October 28, 2013 in the Superior Court of the State of California for the County of Hobbs, Case No. CV-2014-TCS-81013 (EMH). (*Id.* at 3). The Superior Court denied both motions. (*Id.* at 3). Samuelson and Mara's Hope appeal from the Superior Court's denial of leave to intervene, and Circus appeals from the Superior Court's denial of preliminary mandatory injunction.

SUMMARY OF THE ARGUMENT

I. This Court should uphold the Superior Court's decision denying Samuelson and Mara's Hope's motions for leave to intervene. Under the California Code of Civil Procedure petitioners may seek both mandatory and permissive leave to intervene. Samuelson and Mara's Hope do not satisfy the requirements of mandatory intervention because no legal provision mandate their intervention nor do they have a legal interest in the Circus's revoked Animal Performance Permit. Additionally, the Superior Court did not have discretion to authorize leave for permissive intervention because Samuelson and Mara's Hope do not have a direct and immediate interest in the action, their inclusion would enlarge the issues before the trial court by including a moral and ethical discussion of performance animals, and the Circus's pecuniary and reputational interests outweigh any general political interest asserted by Samuelson and Mara's Hope.

II. This Court should reverse the Superior Court's decision denying the Circus' motion for a mandatory preliminary injunction. Under California law, mandatory injunctive relief is properly granted where a revoking agency cannot show a likelihood of success on the merits or, alternatively, if the revoking agency is likely to sustain lesser interim harm if the injunction is issued than the entity seeking the injunction would sustain if the injunction is denied. Not only is the Circus likely to prevail on the merits, it would also sustain greater interim harm in the absence of the injunction that the Department will sustain if the injunction is issued.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE SUPERIOR COURT'S DECISION DENYING SAMUELSON AND MARA'S HOPE'S MOTION FOR LEAVE TO INTERVENE BECAUSE NEITHER PARTY HAS LEGAL NOR A DIRECT AND IMMEDIATE INTEREST IN THE PROCEEDINGS.

Standard of Review. This Court recognizes that whether parties may intervene in an action is best decided by the trial court. *City of San Francisco v. State*, 27 Cal. Rptr. 3d 722, 727

(Cal. Ct. App. 2005). This Court may not overturn a trial court’s decision regarding permissive intervention unless Samuelson and Mara’s Hope prove that the trial court abused its discretion. *Id.* An abuse of discretion only occurs where there has been a miscarriage of justice. *Id.* at 727. The abuse of discretion standard is highly deferential to the trial court, and abuse does not occur unless “the court exceeds the bounds of reason.” *Id.* at 727. The standard of review for mandatory intervention has not been affirmatively decided, *see Siena Court Homeowner Ass’n v. Green Valley Corp.*, 79 Cal. Rptr. 3d 915, 922 (Cal. Ct. App. 2008) (indicating that either de novo or abuse of discretion may be the proper standard to apply), but this Court has applied abuse of discretion to mandatory intervention cases. *E.g., Reliance Ins. Co. v. Superior Court*, 100 Cal. Rptr. 2d 807, 809-11 (Cal. Ct. App. 2000).

The California Code of Civil Procedure provides for permissive and mandatory intervention by third parties in civil proceedings. Cal. Civ. Proc. Code § 387; *Hodge v. Kirkpatrick Dev. Inc.*, 30 Cal. Rptr. 3d 303, 307 (Cal. Ct. App. 2005). The purposes of intervention are protection of interests of those persons directly affected by the judgment and obviation of delay and multiplicity of actions. *People v. Superior Court (Good)*, 552 P.2d 760, 762 (Cal. 1976). An intervenor’s interest in the action must be direct, not consequential, and determinable in the proceeding. *Id.* This Court should uphold the decision of the Superior Court denying Samuelson and Mara’s Hope’s petition to intervene, as neither potential intervenor has a direct interest in the matter.

a. Mandatory Intervention

A nonparty to the proceedings has a right to intervene under the California Code of Civil Procedure § 387(b):

If any provision of *law confers an unconditional right to intervene* or if the *person seeking intervention claims an interest relating to the property or transaction which is the subject of the action* and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties

§ 387(b) (emphasis added). As the Superior Court held in its Memorandum Opinion, the facts of this case do not confer a right for mandatory intervention for petitioners Samuelson and Mara's Hope. (Mem. Op. 8). The issues before in the actions pending before the Superior Court are limited to Grandlands Circus's mandamus claim for reinstatement of its Performing Animal Permit and lost profit damages as a result of the arbitrary revocation of the permit. (Memo. Op. 2-3). No provision of law grants Samuelson and Mara's Hope a legally conferred right to intervene. *See Animal Legal Def. Fund v. Mendes*, 72 Cal. Rptr. 3d 553, 555-61 (Cal. Ct. App. 2008) (no standing or private right of action under an animal cruelty statute). In addition, neither Samuelson nor Mara's Hope have an "interest relating to the property or transaction" in these proceedings. § 387(b).

Other than filing an administrative complaint with the Department, Samuelson has had no dealings with the Circus. (Mem. Op. 4-6). Mara's Hope is a privately funded animal sanctuary that takes in discarded captive animals; the sanctuary does not have elephants. (*Id.* at 4). The only dealing Mara's Hope has had with the Circus is that an employee of Mara's Hope, Penny Hall, attended the Circus once in 2012. (*Id.* at 4-6). This brief contact of a single employee with the Circus is unrelated to the "transaction" at issue in this case: the Circus's Performing Animal Permit issued by the Department in June 2013. In *California Physicians' Services v. Superior Court*, 162 Cal. Rptr. 266, 269-71 (1980) this Court held that an insurer did not have a right to intervene in an insured's claim against a hospital and doctors even though the insurance policy

had a right to reimbursement clause and the plaintiffs/insured parties informed the insurance company of its intent to repudiate the clause. This Court ruled that the transaction at issue was the tortious claim of the plaintiffs. *Id.* at 270. The insurance company's contract with the plaintiffs was not the subject of the litigation and the insurer had no interest in the tort claim, despite its right to reimbursement clause that would be affected by the outcome of the litigation. *Id.* Here, the "transaction" at issue is the permit, in which Samuelson and Mara's Hope have no interest. Samuelson has never dealt with the Circus. Mara's Hope has the weak tie of a single employee's attendance at a performance in 2012, made even weaker because the current permit was not issued until 2013.

Even if this Court finds that Samuelson or Mara's Hope had a proper interest in the transaction – which they do not – their interests are "adequately represented" by the Department. § 387(b). In *City of Malibu v. Cali. Coastal Com'n*, 27 Cal. Rptr. 3d 501, 507 (Cal. Ct. App. 2005), this Court held that a denial of intervention was not an abuse of discretion in part because the intervenor had an identical interest in preventing use of an easement as with the existing party. Here, Samuelson and Mara's Hope have an identical interest with the Department: opposing the claim that the revocation of the permit was improper. Therefore, Samuelson and Mara's Hope's interests are adequately represented and they have no authority to intervene.

For the reasons stated above, this Court should uphold the Superior Court's decision denying mandatory intervention for Samuelson and Mara's Hope.

b. Permissive Intervention

The California Code of Civil Procedure §387(a) provides for permissive intervention for "any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." The Supreme Court of California, the only binding legal

precedent on this Court,² has recently had little to say regarding denial of permissive intervention. *See, e.g., Perry v. Brown*, 265 P.3d 1002, 1020 n. 15 (Cal. 2011) (briefly reciting the doctrine’s irrelevance). In *Good*, the most recent case speaking substantively to the issue, the Supreme Court held that the “statute protects the interests of others affected by the judgment, obviating delay and multiplicity” and that this interest must be counterbalanced by the “interest of the original parties in pursuing their litigation unburdened by others.” *Good*, 552 P.2d at 762. Additionally, the “intervenor’s interest must be direct rather than consequential, and determinable in the action.” *Id.* For instance, in that case, depending on the outcome of the litigation, the intervenors stood to directly receive monetary gain as a result of the judgment and therefore the lower court did not abuse its discretion in granting permissive intervention. *Id.* at 763.

The Court of Appeals has issued consistent opinions consistent with the Supreme Court’s precedent that should be considered persuasive by this Court. This Court has consistently held that three factors must be present for a trial court to have discretion to permit intervention: 1) “the proposed interven[o]r’s interest in the matter in litigation . . . must be of such a *direct and immediate character* that [he] will either *gain or lose by the direct legal operation and effect of the judgment*”; 2) “[t]he *issues of the action may not be enlarged* by the proposed intervention”; and 3) “[a]nd, all important, the *intervention must be denied if the reasons therefor are outweighed by the rights of the original parties* to conduct their lawsuit on their own terms.” *Fireman’s Fund Ins. Co. v. Gerlach*, 128 Cal. Rptr. 396, 398 (Cal. Ct. App. 1976) (emphasis added); *see also San Francisco*, 27 Cal. Rptr. 3d at 727. If this Court finds that the Superior

² The California Court of Appeals is vertically bound by the California Supreme Court’s precedent, but there is no “horizontal stare decisis” between the panels of the Court of Appeals, regardless of division or district. *Apple Valley Unified Sch. Dist. v. Vavrinek, Trine, Day & Co.*, 120 Cal. Rptr. 2d 629, 638 (Cal. Ct. App. 2002); *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 870 (Cal. Ct. App. 2001). The persuasiveness of a Court of Appeals’ decision depends on its consistency with Supreme Court precedent. *Apple Valley*, 120 Cal. Rptr. at 638.

Court acted reasonably in finding that even a single of these requirements was not present, this Court must uphold the Superior Court's reasoning as properly within the court's discretion. *See San Francisco*, 27 Cal. Rptr. 3d at 727.

i. Direct and Immediate Interest

A potential intervenor has a direct and immediate interest in the proceedings if the judgment itself will detract from or add to the potential intervenor's legal rights without reference to rights and duties not a part of the action. *San Francisco*, 27 Cal Rptr. 3d at 728. An interest is consequential and therefore insufficient where the proceedings do not directly affect the interest, including where the proceedings indirectly benefit or harm the interest's owner. *Id.* While an impact on the potential intervenor's interests need not be inevitable, the impact must be substantially probable. *Simpson Redwood Co. v. State*, 242 Cal. Rptr. 447, 451 (Cal. Ct. App. 1987). In *Jersey Maid Milk Products Co. v. Brock*, 91 P.2d 599, 600-01 (Cal. 1939), the California Supreme Court held that a group of milk producers did not have a sufficient interest to intervene in an action where the state was enforcing a milk stabilization act against a different group of milk producers because the judgment of the proceedings would have no legally binding effect on the potential intervenors.

In contrast, in *Simpson* the proposed intervenor, an environmental organization, had an interest sufficient for intervention. 242 Cal Rptr. at 448, 450-52. The proceedings in *Simpson* involved a private property owner seeking to quiet title to land that the organization had donated to the state for purposes of a park. *Id.* This Court held that the organization had substantial interest in the case because its members frequented the park; the organization had donated the land to the state for the sole and express purpose of inclusion of the land in the park; the land had memorial groves dedicated to members that would not be maintained in the present condition if

the action to quiet title succeeded; and the organization had the goal of conserving lands of the nature of the land in question. *Id.* Additionally, the court stressed that the organization's reputation as an environmental organization would suffer a direct and immediate impact if the land that had been given to the organization through donation, which the organization then donated to the state for a park, was transferred to private hands that would exploit the land. *Id.* The court noted that this harm would likely decrease support and donations. *Id.* Stressing that neither the donation nor the frequent use of the land by members alone were enough to create a valid interest, this Court held that the combination of the facts above supported a sufficient direct and immediate interest. *Id.*

In *People ex rel. Rominger v. Cnty. of Trinity*, 195 Cal. Rptr. 186, 190-91 (Ct. App. 1983), this Court similarly held that the Sierra Club had a sufficiently direct and immediate interest to support intervention where the Club sought to intervene in an action involving the preemption by state law of an ordinance regarding spraying of certain herbicides. *Id.* at 190. Sierra Club sought to uphold the ordinance, and this Court held that its interest was sufficient because the members of the organization were in the category of those people the ordinance sought to protect. *Id.* This Court stressed that a general interest in upholding the ordinance or any environmental law was not enough to support intervention. *Id.* Instead, in *Rominger*, the Sierra Club had sufficient interest because “[w]here a statute exists specifically to protect the public from a hazard to its health and welfare that would allegedly occur without such statute, members of the public have a substantial interest in the protection and benefit provided by such statute.” *Id.*

a. Samuelson

The Superior Court did not abuse its discretion in finding that Samuelson lacked a direct and immediate interest in the proceedings. As in *Jersey Maid*, the judgment in this case is not

binding on the potential intervenor. 91 P.2d at 600-01. Though Samuelson has a general interest in animal welfare as an animal caregiver and Director of Education and Outreach at Mara's Hope, he does not deal with elephants, nor could such a general interest in elephants support intervention. (Mem. Op. 4). Additionally, although Samuelson photographed wildlife, his photography took place in Africa. (*Id.* at 4). The elephants owned by Circus are Asian elephants (West Edmond Report, attached as Exhibit 1), a species of elephant that is not found in Africa. *Asian Elephants*, Smithsonian National Zoological Park, <http://nationalzoo.si.edu/animals/asianelephants/factasianelephant.cfm> (last visited Jan. 1, 2014). This shows Samuelson's lack of concrete interest in the particular animals in question and his inability therefore to allege a perceptible harm.³ In addition, importantly, other than preparing and filing an administrative complaint against the Circus, he has had no dealings with the Circus. (Mem. Op. 4-6). He never even attended the Circus, let alone a performance of the elephants. (Mem. Op. 5). Regardless of the determination of the Superior Court in this action, Samuelson's interests will not be affected. Samuelson will not even be indirectly harmed or benefited from this action, let alone directly and immediately impacted.

As stated in *Rominger*, a general interest in upholding a law is not a sufficient interest to justify intervention. 195 Cal. Rptr. at 190-91. Samuelson merely has a general interest in the Department enforcing the ordinance against the Circus. Even if the Circus's permit is not

³ As explained by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566-67 (1992):
It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. . . . It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.

reinstated, the elephants will still be in possession of the Circus. The judgment of the court regarding the permit revocation will in no way affect Samuelson. Samuelson may gain a feeling of moral superiority if the permit remains revoked, but such feelings are indirect and cannot form a legal basis for intervention. As the Superior Court stated, Samuelson’s “intervention would result in a broader consideration of the moral and ethical issues relating to performing animals, which [the Superior Court] believe[d] is not a necessary or proper consideration in resolving the dispute. (Mem. Op. 9).

As this Court stated in a case regarding a neighbor’s inability to intervene in litigation regarding a neighbor’s easement to a beach, “the possibility of what some ill-mannered citizens [using the easement] might do cannot create an entitlement for landowners up and down the Malibu coast to interject themselves into every dispute regarding the right of public access to the beach.” *Coastal Comm’n*, 27 Cal. Rptr. 3d at 507. Similarly, if anyone who had a mere general political or moral interest in a subject could intervene, the court would be overwhelmed. Here, Samuelson’s mere political and moral interest cannot form the basis of permissive intervention. To allow for such an unprecedented interruption of legal proceedings would set an unnecessary and harmful precedent and subject many cases to the whims of persons with no real interest in the action.

b. Mara’s Hope

Similarly, the Superior Court therefore did not abuse its discretion in denying Mara’s Hope’s petition to intervene because Mara’s Hope does not have a direct and immediate interest in the proceedings. Mara’s Hope is a privately owned sanctuary that provides care for animals discarded from private owners, zoos, or the entertainment industry. (Memo. Op. 4). Mara’s Hope does not house any elephants. (*Id.* at 4). The sanctuary also seeks to educate people regarding the

harms of keeping wild and exotic animals in captivity. (*Id.* at 4). One of the sanctuary's employees attended the Circus once in April 2012 while the Circus was operating under an earlier 12-month permit issued by Hobbs County. (*Id.* at 5). Through this employee's brother, Mara's Hope obtained a copy of a veterinarian's report from June 2011 when the Circus was in West Edmond, Texas. (*Id.* at 5). Samuelson, also an employee of Mara's Hope, filed an administrative complaint with the Department after the sanctuary obtained the records (*Id.* at 6).

These minimal connections to the Circus do not form a valid legal basis for permissive intervention in the current proceedings, which focus on whether the Department properly revoked the Circus's permit. As with Samuelson, Mara's Hope's interests in the proceedings are a general political interest in enforcement of Hobbs County's performing animal ordinance and in litigating the morality of performance animals. This case can have no binding effect on Mara's Hope and therefore is not a sufficient interest for intervention. *Jersey Maid*, 91 P.2d at 600-01. Unlike in *Simpson*, Mara's Hope's members do not frequent the Circus; the sanctuary can claim no past ownership and subsequent donation of the permit or any of the animals; and Mara's Hope has offered no facts to support its contention that the judgment would harm its reputation. 242 Cal Rptr. at 448, 450-52. Whether the permit is reinstated does not change the Circus's ownership of the elephants and does not necessarily preclude the Circus's use of the elephants at other venues. Further, in *Simpson*, the organization's reputation was at stake because the land at issue had been donated to the organization over the course of a decade before the organization deeded the land to the state for a park, and that land was at risk of being exploited. *Id.* at 449, 451. Here, Mara's Hope has no history of dealing with the Circus, permit, or animals that would support an argument that its reputation is at stake.

Additionally, unlike in *Rominger*, Mara's Hope does not have an interest in upholding the ordinance in question because Mara's Hope and its staff are not a category of persons that the ordinance seeks to protect. 195 Cal. Rptr. at 190-91. Mara's Hope may try to argue that the ordinance seeks to protect animals, such as those in the sanctuary, and therefore, Mara's Hope's interests are substantial and direct under the ordinance. However, in *Rominger*, the members of Sierra Club were faced with direct harms to their health and welfare as a result of the judgment in the proceedings. *Id.* at 190. The Sierra Club members interest in the impact on the environment was not the harm that granted the proper interest for intervention, but instead the sufficient interest was the direct impact on the human member's health and welfare that the herbicides would cause. *Id.* In fact, this Court held in *Rominger* that a general interest in upholding the law or protecting the environment was not sufficient for intervention. *Id.* Here, a general interest in protecting animals is not sufficient. Additionally, the issue here is not the validity of the ordinance generally, as the Circus does not challenge its constitutionality, but whether the application was proper in this particular instance, an issue in which Mara's Hope has even less of an interest. (Mem. Op. 2).

For these reasons, Mara's Hope's interests are not direct and immediate, and therefore the Superior Court did not abuse its discretion in denying permissive intervention.

ii. The Issues May Not Be Enlarged

In determining the propriety of permissive intervention, a trial court has no discretion to permit intervention where the person seeking to intervene will enlarge the issues before the court as stated by the original parties. *San Francisco*, 27 Cal. Rptr. 3d at 727. As stated by the Superior Court, the only possible interest of Samuelson and Mara's Hope in the proceedings "relates to the practice of animals performing in circuses and related activities generally." (Memo. Op. 9).

The Superior Court described Samuelson and Mara's Hope argument regarding interest in that matter as having an interest "as residents of Hobbs County and as an organization and individual that seek to protect animals, including wild animals like those exhibited in the Circus." (*Id.* at 7). One of Mara's Hope's goals is "to educate about the "harms of keeping wild and exotic animals in captivity." (*Id.* at 4). Again, the issues before the Superior Court in this proceeding are whether the permit was improperly revoked and whether the Circus is entitled to damages. (*Id.* at 2-3). The validity of the ordinance is not at issue. (*Id.* at 2).

Though Samuelson and Mara's Hope allege that their interests are aligned with the Department, both potential intervenors' interests are distinguishable from the Department such that inclusion of the parties would enlarge the issues before the court. Samuelson and Mara's Hope both seek to prevent the harms of animals in captivity. This case, at its heart, has nothing to do with prevention of harm to animals in captivity. The issue before the court is whether the permit was improperly revoked. While the Hobbs County Municipal Code governing the issuance of Performing Animal Permits has animal welfare requirements, revocation of a permit has no legal effect on the permitted party's actions regarding its animals other than that it may not perform them in Hobbs County. *See* Hobbs County Municipal Code Section 63.14 (attached as Exhibit 2). Revocation of the permit means only that the Circus cannot perform in Hobbs County. The political issues of animal captivity and welfare are only tangentially related here, as the judgment of the court in this case will not have the ability to directly impact either of those concerns. If Samuelson and Mara's Hope were to intervene in this action, their interests would be in the moral and ethical issues of animal captivity, which are not at issue in this case. While the elephants' well-being affects the propriety of revoking the Circus's permit, whether the permit is re-issued or revoked does not necessarily affect the captivity and well-being of the

elephants. Any desire to further these political concerns, therefore, is outside the scope of this litigation.

Because Samuelson and Mara's Hope would introduce issues beyond the scope of the original dispute between the Department and the Circus, their intervention would enlarge the issues in the proceedings, and the Superior Court properly denied intervention.

iii. Balancing the Potential Intervenors' Interests Against the Parties Right to Litigate on Their Own Terms

Finally, "intervention must be denied if the reasons therefor are outweighed by the rights of the original parties to conduct their lawsuit on their own terms." *Fireman's Fund*, 128 Cal. Rptr. at 398. Put another way, "the reasons for intervention [must] outweigh any opposition by the existing parties." *Truck Ins. Exch. v. Superior Court*, 70 Cal. Rptr. 2d 255, 257 (1997).

Samuelson and Mara's Hope allege that their interests are aligned with the Department and that they have interests as residents of Hobbs County and as an individual and organization seeking to protect animals. (Memo. Op. 7). As discussed *supra*, these interests are not proper for intervention. Further, such general political interests cannot outweigh the Circus's opposition to intervention.

The Circus has a strong interest in a determination of whether its permit will be reinstated before April 2014, when its next performance is scheduled, or as quickly as possible to prevent further pecuniary loss. (Memo. Op. 7). By including an individual and organization that have interests broader than the determination of the permit and whose interests will not be affected by the outcome of the judgment, the proceedings will be delayed and affect the Circus's ability to function. Because of this pecuniary loss and because a purpose of intervention is to prevent delay, the delay caused by the proposed intervenors' intervention must be considered as an important factor weighing against intervention. *See Rominger*, 195 Cal. Rptr. at 189. Because neither

Samuelson nor Mara's Hope would have standing to sue, and therefore cannot bring a separate action, not allowing intervention would prevent any delay. *See Mendes*, 72 Cal. Rptr. 3d at 555-61 (no standing under unfair business practices law or private right of action under an animal cruelty statute for ALDF where milk ranchers were selling milk not in compliance with animal welfare statute); *Defenders of Wildlife*, 504 U.S. at 566 (holding a moral or professional interest in a species of animals was not an injury sufficient for standing).

In addition, the Circus has an interest in preventing the litigation from becoming centered around general notions of animal welfare, not just because of delay and irrelevance to the action, but because the public may see such a debate as reflective of the Circus's ethics. California evidence law provides that a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352 (West 2013). Though not directly on point, California's evidence law indicates that California is concerned about the impact of undue prejudice and confusion regarding a party and its claim in considering whether an issue is properly before the court. Here, Samuelson and Mara's Hope's introduction of its supposed interests will do all these things that California evidence law seeks to prevent, not just in the courtroom, but in the public eye. The prejudice and confusion caused by such interests diminishes their already lacking importance.

Further, Samuelson and Mara's Hope's interests in seeing that the permit remains revoked are sufficiently protected by the Department. The Department's role in the litigation is to defend the permit's revocation, the only legally cognizable issue. Where an intervenor's interests are sufficiently protected by an existing party, as here, this indicates that the

intervenor's reason for intervention is weakened, if not destroyed. *See Simpson*, 242 Cal. Rptr. at 453. Therefore, Samuelson and Mara's Hope's supposed interests are even further subjugated by to the Circus's interests. For these reasons, Samuelson and Mara's Hope's alleged interests do not outweigh the Circus's interest in preventing their intervention.

The Superior Court did not abuse its discretion in denying Samuelson and Mara's Hope's petitions to intervene because neither potential intervenor had a legal interest to support mandatory intervention, nor would the judgment have a direct and immediate effect on any of their interests. Therefore, the Superior Court's denial of intervention must be upheld as a proper exercise of discretion.⁴

II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN DENYING CIRCUS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF AND THE DEPARTMENT SHOULD BE COMPELLED TO REISSUE CIRCUS' PERFORMING ANIMAL PERMIT PENDING THE OUTCOME OF THIS ACTION.

Standard of Review. A trial court's ruling on an application for a preliminary injunction will not be disturbed on appeal absent a showing that the trial court has abused its discretion. *Hunt v Superior Court*, 987 P.2d 705, 716 (Cal. 1999). The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. *Estate of Gilkison*, Cal.Rptr.2d 463, 466 (Cal. Ct. App. 1998). There is an abuse of discretion when the trial court's determination of the facts does not support its decision. *Shamblin v. Brattain*, 749 P.2d 339, 342 (Cal. 1988).

The Circus sought an order from the Superior Court compelling the department to re-issue the 12-month Performing Animal Permit ("the Permit") that was revoked on October 7,

⁴ Even though Samuelson and Mara's Hope cannot intervene as parties, they may have the opportunity to present their views to the court on the proceedings in an amicus brief. *San Francisco*, 27 Cal. Rptr. at 734 (citing *Jersey Maid*, 91 P.2d at 601).

2013. (MO p 2). In support of this order Circus claimed that the Department applied the applicable ordinance in an arbitrary and capricious manner in deciding to revoke Circus's permit. (*Id.*) Separately, Circus moved for preliminary injunctive relief to require the Department re-issue Circus's Performing Animal Permit, pending the outcome of Circus's action against the Department. (*Id.*) The Circus cited numerous bases for its motion, including loss of profits and inability to reschedule its performance. (*Id.* at 3). The Circus argued that the Department's decision to revoke Circus's permit was arbitrary and capricious, and unsupported by the factual record. (MO p. 10). The Circus contends that the evidence upon which the Department relied does not set forth adequate grounds justifying revocation of its permit in light of the harm that it will suffer as a result. (*Id.* at 11).

In considering a motion for preliminary injunction, a court must consider two factors: (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. *See Best Friends Animal Soc'y v. Macerich Westside Pavilion Property, LLC*, 193 Cal. Rptr. 3d 277 (2011); *see also Salsedo v. California Dep't of Parks & Recreation*, 97 Cal. Rptr. 3d 493 (2009) (mandatory injunctive relief is appropriate when a revoking agency cannot show a likelihood of success on the underlying merits). In the case at bar, it is highly likely that Circus will prevail on the merits at trial. Additionally, Circus is likely to sustain significant interim harm without the injunction, and the Department is likely to suffer much less harm if it is compelled to reissue the permit.

- a. Circus will prevail on the merits at trial because the Department will be unable to justify revocation of its permit based solely on Circus' alleged violations of the Hobbs County Municipal Code or the California Penal Code, or both, or any other applicable state or federal law.**

In the case at bar, there is a high likelihood that the plaintiff Circus would prevail on the merits at trial. As the Superior Court stated, likelihood of the Circus's success on the merits depends ultimately on the Department's ability to demonstrate that it acted within its discretion in finding the Circus violated Hobbs County Municipal Code § 63.14, or any of the California Penal Code sections cited therein. (Memo. Op. 12). The Circus would be able to show at trial that the Department's decision was arbitrary and capricious, as well as unsupported by the factual record. The Department wrongfully revoked the Circus's permit because the Department acted under the mistaken belief that the Circus was violating provisions of the Hobbs County Municipal Code and the California Penal Code.

Mandatory injunctive relief is properly granted where a revoking agency cannot show a likelihood of success on the merits. *Salsedo*, 97 Cal.Rptr.3d 493. The Department revoked the permit under provisions of Hobbs County's Municipal Code § 63.14, specifically subdivisions A(i), A(ii), and A(iii). (Memo. Op. 10). The Department also based its decision on alleged violations of California Penal Code §§ 596.5 and 597t. (*Id.*) The Superior Court found that the Department had no factual basis for finding violations of Hobbs County Municipal Code § 63.14, subdivisions A(i) and A(ii). (*Id.* at 13). Additionally, there was no factual basis for finding a violation of California Penal Code § 596.5. (*Id.*). However, the Superior Court also found that the Department had a reasonable basis for revocation based on its finding that the Circus was in violation of subdivision A(iii) and Penal Code § 597t. (Memo. Op. 13). The Circus disagrees.

- i. *Circus is not in violation of Hobbs County Municipal Code or provisions of the California Penal Code, including but not limited to §§ 596.5 and 597.*

Hobbs County Municipal Code § 63.14, subdivision A(i), requires permit holders make available medical records and health certificates for all animals, including specifically that any elephant on display had a trunk wash culture and that the elephant tested free of tuberculosis. While Circus did not of its own accord provide the Department with medical records, Circus maintains medical records for all of its performing animals. (Memo. Op. 7). The Superior Court found no violation of subdivision A(i) because, as the court rightly stated, the Department should have known immediately whether it received the requisite veterinary records, and if not, it could have easily requested them. (*Id.* at 13). Subdivision A(i) merely requires permit holders “make available” medical records and health certificate, with no specification of when or how such records must be made available. Revocation may have been justified if the Department requested records and Circus refused to comply, but that simply is not the case here.

Subdivision A(ii) requires permit holders “utilize appropriate transport vehicles and transfer cages *when moving* [animals] to the exhibition location.” (*See* Exhibit 2 (emphasis added)). Circus has not violated this provision because the transport cars used provide adequate space for elephants in transit, and are therefore appropriate for moving to the exhibition location. The cars are only slightly short of the American Zoological Association’s recommendation for elephant transport cars. *See* West Edmond report, attached as Exhibit A. Furthermore, the Department did not specify what it considered to be transport vehicles, and therefore the Superior Court considered transport vehicles and transportation containers to be separate. In this case, the transport vehicles are not merely the cars wherein the elephants travelled, but consist of everything from the engine to the back of the transport car. There has been no complaint that the vehicle itself is inadequate, so this issue is beyond the scope of the permit revocation.

Subdivision A(iii) requires permit holders to disclose whether any other city, county or state agency has revoked a permit within the past three years, giving the reasons for such revocation. (*See* Exhibit 2). The Department has argued that West Edmond's refusal to re-issue the permit was akin to a revocation. (Mem. Op. 13). While the Superior Court found merit in this argument, the Circus respectfully disagrees. The Circus does not dispute that it no longer holds a permit from West Edmond Animal Care and Control. However, the record shows that West Edmond refused to issue Circus a new permit. (Mem. Op. 6). This is different from revoking a permit. The record does not contain West Edmond's reasoning for their refusal to issue a permit to Circus. The report, upon which the Department relied in making its argument as to why Circus should have disclosed its lack of a West Edmond permit, discusses the elephants' physical conditions but makes no recommendation, nor could it, regarding the issuance of a permit. *See* West Edmond report, Exhibit A. The report's conclusions were informed by one person's opinions and findings in one location at one particular time. Although the evaluator's opinions and findings were informed by standards of the Association of Zoos and Aquariums ("AZA") and standards of the American Veterinary Medical Association ("AVMA") (*see* Exhibit A), those findings are particular to the elephants' condition in West Edmond in June 2011. The findings do not discuss the elephants' current condition, and therefore the report cannot be relied upon as an adequate basis for permit revocation.

Furthermore, there are numerous reasons for agencies to refuse to issue permits, including but not limited to overflow of permit applications or a desire to limit a certain activity in the area. In this case, West Edmond may have decided on a policy level not to encourage circuses or other animal exhibitions in general, and so decided not to issue a permit. The record

does not speak to West Edmond's reasoning, but it is quite clear that Circus' permit was never revoked. (Mem. Op. 5-6).

Subdivision A(vii) requires permit holders "[b]e in compliance with the requirements and prohibitions set forth in the California Penal Code relating to animals, including §§ 596.5 and 597t." Penal Code § 596.5 states: "It shall be a misdemeanor for any owner or manager of an elephant to engage in abusive behavior towards the elephant, which behavior shall include the discipline of the elephant" Cal. Penal Code § 596.5 (West 2013). No evidence supports a conclusion that the elephants in this case were being disciplined or were maintained in an abusive condition. In fact, the West Edmond report, upon which the Department is heavily reliant to support revocation of Circus' permit, clearly states that the two youngest elephants are in adequate physical condition. (Exhibit 1). Additionally, Circus explicitly agreed not to perform the three oldest elephants, and the report does not indicate any signs of physical abuse. Therefore, Circus has not engaged in any sort of abusive behavior towards the elephants.

Penal Code § 597t states:

Every person who keeps an animal confined in an enclosed area shall provide it with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain shall be affixed in such a manner that it will prevent the animal from becoming entangled or injured and permit the animal's access to adequate shelter, food, and water. Violation of this section constitutes a misdemeanor. This section shall not apply to an animal which is in transit, in a vehicle, or in the immediate control of a person.

Cal. Penal Code § 597t (West 2013). The Superior Court relied on the Circus's stipulation that the Circus elephants are confined in a space that is 50 square feet short of the AZA recommended space per elephant for extended periods of time, and tethered without an adequate exercise area. (Mem. Op. 13-14; *see also* Exhibit 1). The Superior Court stated that this stipulation supports the proposition that the Circus was in violation of California Penal Code §

597t. However, § 597t by its own language does “not apply to an animal which is in transit [or] in a vehicle.” Cal. Penal Code § 597t. The alleged violations leading to permit revocation relate to elephants in their transport vehicles. Therefore, §597t is inapplicable.

The Department also alleged that the Circus was in violation of California Penal Code § 596.5. Penal Code § 596.5 states: “It shall be a misdemeanor for any owner or manager of an elephant to engage in abusive behavior towards the elephant” The Department contends that requiring the elephants to perform for the Circus despite adverse health effects satisfies the statutory meaning of “abusive.” (Mem. Op. 11). However, the 2011 West Edmond report supports a conclusion that the two youngest elephants were in adequate physical condition to perform. (*See* Exhibit 1). Furthermore, Circus offered not to perform the three oldest elephants in Hobbs County (Mem. Op. 7), so this argument is moot as to those elephants. Having established that the 2011 West Edmond report, upon which the Department bases its arguments in favor of permit revocation, found the young elephants to be in adequate physical condition, and combining that with the fact that the Circus has agreed not to perform the three oldest elephants, it is clear that the Circus has not engaged in abusive behavior towards the elephants.

Furthermore, at the hearing on September 27, 2013, the Department did not consider whether Circus was in violation of the requirements of California Penal Code § 596.5. (Mem. Op. 6). Consequently, the Circus was not afforded adequate opportunity to respond and defend itself against the alleged violations of Section 596.5. A fundamental requisite of the due process of law afforded to individuals and organizations in administrative proceedings is the opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). An administrative hearing must be at a meaningful time, and in a meaningful manner. *Id.* In this case, the hearing was at a meaningful time because it occurred while Circus was still in close enough proximity to Hobbs County to

attend an in-person hearing. (Mem. Op. 6). However, the hearing was not in a meaningful manner insofar as it did not afford Circus the opportunity to defend itself against allegations that it was in violation of Penal Code § 596.5.

ii. *Circus is not in violation of any other applicable state or federal laws*

The federal Animal Welfare Act (“AWA”), 7 U.S.C. 54, oversees the transportation, sale, and handling of exhibition animals. The term “animal” under the AWA means any warm-blooded animal which the Secretary determines is being used or may be used for research, testing, experimentation, or exhibition purposes, with some exceptions. 7 U.S.C. 54 § 2132(g) (2013). Elephants are included in this definition. *Id.* The term “exhibitor” means any person exhibiting animals, and explicitly includes circuses. *Id.* at § 2132(h). Therefore, the AWA applies to Circus.

Circus is not in violation of the AWA. First, the United States Department of Agriculture’s Animal and Plant Health Inspection Service (“APHIS”) has inspected the Circus and has not reported any violations of the AWA. (Mem. Op. 10). There is no evidence in the record that Circus is not licensed by AWA. No evidence points the the Circus maintaining inadequate records for purposes of compliance with the AWA, and nothing in the record indicates that Circus is in violation of regulations promulgated pursuant to AWA.⁵

iii. *Neither the standards adopted by the American Zoo and Aquarium Association nor the policy enunciated by the American Veterinary Medical Association are relevant standards for determining whether Department had grounds to revoke Circus’ permit.*

The relevant inquiry in this appeal is whether the Department was justified in finding that the Circus was in violation of provisions of the Hobbs County Municipal Code or applicable California or federal law. Neither of these sources of law discuss standards adopted by the AZA or the AVMA’s policy regarding tethering, both of which can be found attached to Exhibit 1.

⁵ These regulations can be found at 9 C.F.R. § 1.1 et seq.

The AZA standards apply specifically to “the husbandry and management of . . . elephants in AZA accredited institutions, AZA related facilities, and non-member participants in the AZA Elephant Species Survival Plan.” (Exhibit 1). The Circus does not fall into any of these categories. It is not an AZA accredited institution, nor is it a participant in the AZA Elephant Species Survival Plan. It similarly is not found on the list of AZA related facilities. *See List of Currently Certified Related Facilities*, Association of Zoos & Aquariums, <http://www.aza.org/current-cert/> (last updated Jan. 2014). Furthermore, the AZA standards provide only recommendations and were used by the West Edmond department as guidelines, not as mandatory requirements.

The AVMA policy is consistent with the Department of Agriculture’s expectations for use of elephant guides and tethers in circuses. *See AVMA News*, Policy addresses use of elephant guides, tethers, May 2008 (attached as part of Exhibit 1). The policy states that “the AVMA supports the use of tethers for the shortest time required for specific management purposes.” Circus tethers its elephants only during transit and when the elephants are not being warmed up, cooled down, or performing. The elephants spend approximately two hours warming up, performing, and cooling down as part of their performing process. *See Exhibit 1*. Circus performances only last 90 minutes. (Mem. Op. 4). Therefore, the elephants are untethered and moving about approximately 30 minutes longer than the Circus’ performances, which in turn leads to the conclusion that the elephants are not unnecessarily tethered when the Circus is performing.

b. Circus is likely to sustain greater interim harm if the injunction is denied than the Department is likely to sustain if the injunction is issued.

Even if the Circus is unlikely to prevail on the merits, injunctive relief may be appropriate if the harm to the Circus without the requested injunctive relief would significantly

outweigh the harm that the Department would suffer if the requested relief is granted. *Macerich*, 122 Cal. Rptr. 3d 277; (Mem. Op. 14). The determination of whether Circus will suffer irreparable harm requires the Court to balance the interests of the Circus in having the permit re-issued against the interests of the Department in revoking the permit. *Macerich*, 122 Cal. Rptr. 3d 277.

The lower court found this question to be a close call, recognizing that permit revocation is a harsh remedy. (Mem. Op. 15). In this case, revocation is unreasonably harsh because the alleged violations are *de minimus*. The Department was reaching to find some reason, no matter how far-fetched, to revoke the Circus's permit. The alleged violations concern at best three of the many animals that are exhibited by the Circus, as it has been established that two of the five elephants are in adequate physical condition to perform. *See* Exhibit 1. Furthermore, the Circus has suffered and will continue to suffer an economic loss as a result of the permit revocation. (Mem. Op. 4). The Circus may also lose bookings in other venues if injunctive relief is not granted. (*Id.* at 15). If other venues learn that the Department revoked the Circus' permit, it is possible the other venues will cancel the Circus' performances somehow, regardless of whether or not the Department was justified in permit revocation. The Department, on the other hand, has not suffered any real harm.

The Circus stands to lose any and all proceeds it would have received from the April performances in Hobbs County. (*Id.*). In September 2013, Circus earned approximately \$95,200 in net revenue over the course of its 17-day visit to Hobbs County. (*Id.*). Circus had expected a similar amount of revenue from its April visit, but as a result of Department's actions Circus will be losing out on nearly \$100,000 in revenue. (*Id.*). The Circus may also lose bookings in other venues, if the other venues discover that Circus's permit was revoked in Hobbs County. (*Id.*).

The Circus has agreed not to perform its three oldest elephants (Mem. Op. 7) and the two youngest elephants have been determined to be in adequate physical condition to perform. *See* Exhibit 1. The Circus did not refuse to disclose the fact that it had not received a permit from West Edmond; the fact is that the Circus has not held a West Edmond permit since late 2011. (Mem. Op. 5-6, stating that West Edmond Animal Care and Control did not issue a permit to the Circus in January 2012. There is nothing in the record to indicate that the Circus applied for a permit from West Edmond in January 2013).

The Department's only argument is that it would suffer harm if the permit were re-issued because it has a duty to protect the animals within its jurisdiction by ensuring that local ordinances are enforced. The Department has no power over the Circus' performing animals once the Circus leaves Hobbs County. The Superior Court stated that the Department would undoubtedly "be subject to protracted litigation if a citizen were to be harmed as a result of lax enforcement [of Hobbs County ordinances]." (Mem. Op. 16). However, there is no valid allegation of harm to Hobbs County citizens. No citizen has attempted to claim they have suffered a harm, nor would any citizen prevail on such an argument under current statutory or case law. *See Animal Legal Def. Fund v. Mendes*, 72 Cal. Rptr. 3d 553, 555-61 (Cal. Ct. App. 2008) (no standing under unfair business practices law or private right of action under an animal cruelty statute for ALDF where milk ranchers were selling milk not in compliance with animal welfare statute); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmental groups challenged federal regulation regarding protection of endangered species, arguing that a suit can be brought by anyone with an interest in seeing or studying endangered animals and by anyone with a professional interest in such animals; Court held that plaintiffs did not assert a sufficiently imminent injury to have standing); *Citizens to End Animal Suffering & Exploitation, Inc. v. New*

England Aquarium, 836 F. Supp. 45 (D. Mass. 1993) (animal welfare organization sued to protect transfer of dolphin and court held that allegations of individual harm by members of the organization were insufficient to establish standing).

Furthermore, permit revocation does not ensure that animals will be protected. The Circus can easily perform in other cities and counties, though it would mean a considerable financial loss in terms of the April 2014 performance that was scheduled in Hobbs County. Permit revocation merely prevents the Circus from visiting Hobbs County, which would be a loss to Hobbs County citizens as well as the Circus itself.

For the preceding reasons, the Superior Court abused its discretion in denying Circus's motion for preliminary mandatory injunction. The Circus is likely to succeed on the merits of the case at trial because it is not in violation of any of the applicable laws or ordinances. Additionally, the Circus will suffer irreparable financial and reputational harm if an injunction requiring the Department to re-issue the Performing Animal Permit is not issued.

CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, Circus respectfully requests this Honorable Court UPHOLD the Superior Court's denial of leave to intervene for Mara's Hope and Samuelson and REVERSE the Superior Court's denial of mandatory injunctive relief and REMAND to the Superior Court for proceedings consistent with this decision.

Respectfully Submitted,

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Dated: January 14, 2014

APPELLANT'S APPENDIX

EXHIBIT 1

REPORT REGARDING CONDITION OF GRANDLANDS CIRCUS PERFORMING ELEPHANTS IN WEST EDMOND, TEXAS, DATED JUNE 21, 2011

SUMMARY

Criteria used to make this evaluation were derived from the standards of the Association of Zoos and Aquariums (“AZA”) and the standards of the American Veterinary Medical Association (“AVMA”), which inform this evaluator’s opinions and findings. These criteria were further informed by this evaluator’s own experience, as well as observations made during the unloading of the animals, examination of the cars in which the animals were transported, visual inspection of the animals, review of certain medical histories provided by Grandlands Circus, and this evaluator’s observations made before, during, and after the performances.

FINDINGS REGARDING THE FIVE ASIAN ELEPHANTS (ELEPHAS MAXIMUS)

Five female elephants were observed during the time frame of Friday, June 2, 2011 through Sunday, June 19, 2011. These observations took place at random times and intervals.

The two youngest elephants have been owned by Grandlands for one year. The three oldest elephants have been owned by Grandlands for between 6 and 12 years.

Upon arrival: Prior to being unloaded from their cars, several of the elephants demonstrated stereotypic behavior of stress, such as exaggerated swaying from side to side. Such stereotypic behaviors can result in nail cracks, caused by abnormal pressure on the nails.

Upon unloading: All five elephants appear stiff and unsteady upon being unloaded, with diminished range of motion. The elephants appeared fatigued and showed no interest in their surroundings. Examination of the transport cars reveals that all five elephants remained tethered during the duration of their journey, the most recent journey being approximately 30 hours. The elephants were transported in two separate cars with an average of approximately 350 square feet per elephant. The elephants are also kept tethered in these same transportation cars when not performing or being warmed up or cooled down for performances. Performance warm-ups and cool-downs usually last around two total hours per performance.

During performance rehearsal: The elephants were required to performing a series of choreographed exercises, always turning clockwise. All laydown routines required them

to lay on their left sides. The performances of the younger two elephants were completed without hesitation or noticeable signs of discomfort. These two elephants seemed disinterested during the performance and performed mechanically. The three oldest elephants approached the rehearsal area slowly and exhibited stiffness and an observable degree of lameness. However, when they began performing at a rapid pace, these issues became less noticeable. Despite the increased pace during performing, the oldest elephant showed reluctance to perform hind leg stands. No external signs of injury were apparent on the elephants, including on their skin.

Review of medical records: Not all medical records were provided, despite request. However, the available medical records revealed that two of the elephants were treated in the past two years for possible tuberculosis, and leg lameness. All five elephants had been treated for nail cracks, with the three oldest elephants (ages 32, 25 and 40) having been treated for varying degrees of arthritis. Although treatment with analgesics may minimize discomfort and swelling, it is likely that the conditions will continue to deteriorate with repeated performances. This conclusion is supported by the veterinary texts indicating that “[o]steoarthritis occurs in older equine, zebra and pachyderm. The articular cartilage is usually destroyed, leaving a raw painful boney surface.” This suggests that the condition of the three oldest elephants will continue to deteriorate over time. All elephants are receiving non-steroidal anti-inflammatory drugs (NSAIDS). The oldest elephant had been treated for chronic severe nail bed abscesses.

CONCLUSION

It is my opinion that the three oldest elephants are suffering from chronic pain, arthritis, and are effectively crippled. These elephants should be retired from performing. The two youngest elephants appear to be in an acceptable physical condition. All of the elephants are exposed to forced, non-species typical behaviors that include rigorous and repetitive activities.

RELEVANT GUIDELINES CONSIDERED

The AZA Standards for Elephant Management and Care minimum standards for indoor space recommend that at least 400 square feet of space per animal be provided. (Association of Zoos and Aquariums, Standards for Elephant Management and Care, adopted 21 March 2001 [updated 5 May 2003].) With respect to tethering, the “AVMA only supports the use of tethers for the shortest time required for specific management purposes.” (AVMA, policy, elephant guides and tethers, located at www.avma.org.) Both the AZA Standards for Elephant Management and Care and the AVMA policy on guides and tethering are appended to this report.

American Zoo and Aquarium Association
STANDARDS FOR ELEPHANT MANAGEMENT AND CARE
Adopted 21 March 2001, Updated 5 May 2003

The following standards apply to the husbandry and management of both African (*Loxodonta africana*) and Asian (*Elephas maximus*) elephants in AZA accredited institutions, AZA related facilities, and non-member participants in the AZA Elephant Species Survival Plan (SSP). The intelligence, strength, and social needs of these magnificent animals can pose many challenges for captive managers. Institutions desiring to hold elephants should therefore understand the substantial human, financial, and ethical commitments involved in appropriately maintaining these large and potentially dangerous species (Hutchins and Smith 1999). These standards have been developed to guide institutions that are planning and improving their elephant programs and are considered during the AZA accreditation process and non-member SSP participant evaluation. The AZA Board of Directors has instructed the Accreditation Commission to immediately require written verification from AZA member institutions holding elephants, certifying that they are meeting the required standards (BOD 3/25/03).

The AZA Board of Directors believes that the Association performs a valuable role in the cooperative development of standards for zoo and aquarium animal management and care, which are designed to advance the collective mission of AZA and its members. The development of these standards and the adoption of them through the AZA accreditation process is what sets AZA members apart from roadside animal attractions. The Board understands that there will be differences of opinion as to what constitutes appropriate standards. Standards evolve over time reflecting changes in knowledge, expertise, and public perception.

The AZA Board of Directors has asked the AZA Elephant SSP/TAG to begin formulating a draft vision for the future of elephant management in AZA accredited zoos. Because current standards are expected to change over time, it is recommended that members seeking to plan new elephant exhibits/care programs look to the vision, rather than the current standards, for guidance on where to go in the future.

Compliance with some minimum housing (specifically space, enclosure design, and elephant restraint device (ERD) requirements) must be implemented no later than five years from the issuance of these standards (1 May 2006). Institutions must have written implementation plans for compliance with these standards no later than three years from their issuance (1 May 2004). AZA accredited and related facilities must meet all other provisions described here within one year (1 May 2002) of the issuance of these standards, unless the Accreditation Commission approves a variance. Failure to meet basic AZA standards for elephant management and care will be noted during accreditation inspections. Current non-member participants in the SSP will be given the same time schedule for compliance, but new non-member participants must meet all new standards prior to approval.

Highlighted sections are recommendations or standards for which variances may be obtained.

Abiotic Environmental Variables

1.1. Temperature

- 1.1.1. Elephants must be kept outside on natural substrates as much as possible. Institutions should consider designing exhibits that allow elephants outdoor access twenty-four hours a day -- weather, health, and safety permitting. During daylight hours, elephants kept outdoors can tolerate moderate temperature extremes. Provisions must be made to protect animals from adverse weather, including intense sunlight, chilling rain, sleet, etc. Animals kept outdoors must be monitored frequently at temperatures below 40 degrees F (4.4 degrees C). Facilities may install outdoor heat sources to extend the amount of time the animals are able to remain outside.
- 1.1.2. While outdoors, all elephants must have access to shade during daylight hours in temperatures above 80 degrees F (27 degrees C) and when they are exposed to direct sunlight.
- 1.1.3. Indoor holding areas must be ventilated, and heated to a minimum temperature of at least 55 degrees F (12.8 degrees C) at all times of the year. One room must be capable of maintaining a temperature of at least 70 degrees F (21.1 degrees C) and be free of drafts, for accommodating sick or debilitated animals.

1.2. Humidity – There are no standards for humidity at this time. Information is limited, but this does not seem to be of major concern for elephant management.

1.3. Illumination

- 1.3.1. Natural daylight cycles are adequate for elephants, even in temperate regions. Indoor areas must be well illuminated during daylight hours, followed by a period of darkness. Fluorescent lighting provides a sufficient spectrum of illumination; skylights, in addition to interior lighting, are highly recommended. Ample interior lighting must be available, as it is especially important to maintain staff safety.

1.4. Space

- 1.4.1. Indoor space must provide adequate room for animals to move about and lie down without restriction. A minimum of 400 sq. ft (37.2 sq. m) is required for a single animal, approximately 800 sq. ft (74.3 sq. m) for two animals, and so on (AZA 1997). Because of their size and space requirements, bulls or cows with calves must have a minimum of at least 600 sq. ft (55.7 sq. m) (AZA 1997).
- 1.4.2. Outdoor yards must have at least 1,800 sq. ft (167.2 sq. m) for a single adult individual and an additional 900 sq. ft (83.6 sq. m) must be added for each additional animal (AZA 1997). If this space is the only location for exercise, then it is recommended that the space per elephant should be even greater.

** Note: Institutions can petition for a variance from the current minimum indoor or outdoor space standards. The applicant must explain why their facilities are adequate, even though they do not meet the minimum size standard. Accreditation inspectors will take a holistic approach to accreditation inspections, rather than focusing on specific size measurements. Context is particularly important. For example, it may not be a problem that the indoor space requirements are under the standard by a small amount if a zoo is located in a warmer climate and the animals

are outside most of the time. If, however, the zoo is located in a cooler climate and the animals are kept inside for many months during the winter, then the indoor space requirements must be met or, preferably, exceeded. Environmental enrichment programs should also be taken into consideration when evaluating space available.

- 1.4.3. Mature animals can reach a vertical height of 20 ft (6.1 m). Consideration of this must be given with regard to ceiling heights and fixtures (e.g., lights, heating units, plumbing, etc.) so that animals do not harm themselves or the facility.
- 1.4.4. All facilities must have the ability to separate and isolate animals to address behavioral concerns or allow veterinary procedures to occur (EMA 1999).
- 1.4.5. Outdoor yard surfaces must consist primarily of natural substrates (e.g., soil, sand, grass) that provide good drainage and have a cleanable, dry area for feeding (EMA 1999).
- 1.4.6. While outdoors, elephants must have access to sand or soil at all times for dust bathing (EMA 1999).
- 1.4.7. Rocks, tree stumps, or large sturdy objects must be provided in the exhibit so that the animals may use them for rubbing and scratching.
- 1.4.8. Elephant containment barriers must be in good condition and able to prevent elephant escapes. A wide variety of building materials can be used as long as they are able to withstand the animals' strength, contain the elephant in a specific space, and prohibit direct contact between elephants and the public.
- 1.4.9. Door and gate design is extremely important to ensure the safety of both elephants and keeper staff. Both doors and gates must be engineered to withstand extreme force. If mechanical opening devices, such as hydraulic or electrically powered drives are used, they must be able to be operated manually or with a backup generator in the case of a power failure.
- 1.4.10. Enclosures must be cleaned of excrement daily. Frequent daily manure removal is recommended and may be necessary for the maintenance of both sanitary and esthetic conditions (EMA 1999).
- 1.4.11. If the AZA Elephant SSP-managed population is to become sustainable, it is necessary to create housing for many more adult males (Wiese 2000, Wiese and Olson 2000). All institutions considering new construction for elephants should include holding space for adult males. Institutions modifying existing facilities should also make provisions for bull housing.
- 1.4.12. There are no standards on the visual, acoustic, and olfactory needs of elephants at this time.
- 1.4.13. There are no specific standards for the transportation of elephants at this time, but see Fowler (1995).

1.5. Water and Moats

- 1.5.1. While outdoors and weather permitting, elephants must have regular access to a water source, such as a pool, waterfall, misters/sprinklers, or wallow that provides enrichment and allows the animals to cool and/or bathe themselves.
- 1.5.2. Standing water in indoor floor areas can cause foot problems and become a breeding ground for bacteria. Floors must therefore be impervious to water, quick to dry, and sloped to a drain. Floor surfaces must be relatively smooth, but not

enough so that they become slippery when wet. Conversely, very rough surfaces may cause excessive wear or irritate footpads.

- 1.5.3. Dry moats can pose a substantial threat to elephants and their use must be limited with the ultimate goal that they are eventually phased out. Moats that are deep, narrow-sided, and hard-bottomed can be particularly dangerous. Although there should be no risk of animals falling or being pushed into the moat, written animal extraction protocols must be in place for any moat that is more than 3 ft (1 m) deep, less than 10 ft (3 m) wide, and/or hard-bottomed.

2. Biotic Variables

2.1. Food and Water

- 2.1.1. Elephants must have access to clean, fresh drinking water (EMA 1999). When water containers are used, drinking water must be cleaned and refreshed at least twice a day. Containers must also be cleaned daily.
- 2.1.2. Fresh browse and produce should be used as dietary supplements and enrichment for the animals.

2.2. Group Composition

- 2.2.1. The minimum age offspring must remain with their mothers is three years. Some flexibility is necessary in cases of maternal rejection and when infants cannot be reestablished in their social group.
- 2.2.2. Institutions must have the ability to manage social compatibility as well as dominance and aggression among an elephant group (EMA 1999).
- 2.2.3. Institutions must have the ability to manage introductions and separations of a new female to a herd and, if the institution is a breeding facility, females to males for breeding, newborn calf to its mother, and calf and mother to the herd.
- 2.2.4. Institutions must provide an opportunity for each elephant to exercise and interact socially with other elephants (Taylor and Poole 1998, EMA 1999).
- 2.2.5. Adult males (six years and above) may be housed alone, but not in complete isolation (opportunities for tactile, olfactory, visual, and/or auditory interaction with other elephants must be provided) (Rasmussen et al. 1982).
- 2.2.6. A behavioral profile must be maintained for each individual elephant and updated annually.
- 2.2.7. All holding institutions must have a written environmental enrichment plan for their elephants and show evidence of implementation (Shepherdson et al. 1998, EMA, 1999, Shepherdson 1999).
- 2.2.8. Staff must be aware of each animal's social compatibility and the dominance hierarchies of the herd (EMA 1999).

2.3. Group Size

- 2.3.1. Zoos should make every effort to maintain elephants in social groupings. It is inappropriate to keep highly social female elephants singly (see Sukumar 1992, Taylor and Poole 1998, EMA 1999). Institutions should strive to hold no less than three female elephants wherever possible. All new exhibits and major renovations must have the capacity to hold three or more female elephants.

****Note:** It is understood that obtaining additional elephants for zoo exhibits can be difficult at this time. Temporary variances will therefore be considered regarding group size requirements. Institutions that do not currently meet the group size standard should demonstrate that they have requested assistance from the SSP in obtaining additional animals.

It is recognized that some socially aberrant adult females currently exist and these elephants can be managed singly if the institution has made every effort to introduce them to a social group and the SSP agrees that the anti-social behavior is not correctable.

2.4. Human-animal Interactions – A minimum of two qualified elephant keepers must be present during any contact with elephants. A qualified keeper is a person the institution acknowledges as a trained, responsible individual, capable of and specifically experienced in the training and care of elephants.

2.5. Introductions – There are no specific standards for elephant introductions at this time, but see Lindburg and Robinson (1986) and Krantz (1996).

3. **Health and Nutrition**

3.1. Diet

- 3.1.1. High quality and nutritionally correct food must be provided in sufficient quantities to maintain animal health and appropriate weight (EMA 1999). Hay and grain should be formulated to provide a complete diet as recommended by the Elephant SSP Nutrition Advisor.
- 3.1.2. There are no specific standards for elephant nutrition at this time, but see Dierenfeld (1995), Oftedahl et al. (1996) and Ullrey et al (1997).

3.2. Medical Management

- 3.2.1. A veterinarian with experience in large mammal medicine must be on call at all times to deal with routine elephant health evaluation and treatment and medical emergencies.
- 3.2.2. Each elephant must be given a thorough annual physical examination (Mikota et al. 1994).
- 3.2.3. All elephants must be visually inspected on a daily basis (EMA 1999). A general assessment must be made and any unusual activities should be recorded in the daily log at each inspection. Specifically, reports should include observations such as condition of urine and feces, eating and drinking patterns, administration of medications (if any), and general condition and behavior.
- 3.2.4. A veterinarian or trained veterinary technician must perform fecal examinations to look for parasites and other problems at least twice a year (Samuel et al. 2001). Results should be recorded.
- 3.2.5. All elephants must be trained to permit a complete body daily exam (include feet, eyes, ears, open mouth and tongue, teeth, and tusks) for any sign of abnormalities. Results should be recorded.
- 3.2.6. All elephants' body weight must be assessed and recorded at least twice a year (EMA 1999) through actual weighing or through the use of standardized body

- measurement tables, photographs, or similar, previously validated techniques (e.g., Nirmalan and Sreekumar 1990).
- 3.2.7. For management purposes, all elephants must be trained to accept injections, oral medications, insertion of ear or leg vein catheters, treatment of wounds, enemas, and urogenital examinations (Mikota et al. 1994, EMA 1999).
 - 3.2.8. All elephants must be trained to accept regular collection of blood, urine, feces, saliva, semen, skin biopsy, and temporal gland secretion (Brown 1998, EMA 1999). Biological specimens should be stored according to the SSP Veterinary Advisor's guidelines on biomaterials collection.
 - 3.2.9. All elephants' skin must be thoroughly inspected on a daily basis and cared for as needed through bathing, removal of dead skin, and treatment of dry skin or other skin problems (Mikota et al. 1994, EMA 1999).
 - 3.2.10. Each elephant facility must have a written protocol for routine foot care and show evidence of its implementation (Mikota et al. 1994, Csuti et al. 2001). This protocol must include daily cleaning and inspection of each elephant's feet.
 - 3.2.11. Baseline foot radiographs or thermographs of all adult elephants must be taken and kept on file. In some facilities, it may be appropriate to annually monitor selected elephants (i.e., those that have a history of chronic foot problems) (Csuti et al. 2001).
 - 3.2.12. A written daily exercise program for each individual animal must be designed and followed (Taylor and Poole 1998). The program should be developed in consultation with the elephant manager, elephant handlers, and the staff veterinarian(s).
 - 3.2.13. When forming new herds, Asian and African elephants should not be placed together in the same enclosure. Herpes viruses endemic to one species can be fatal in the other (Richman et al. 1996, 1999). In addition, there is concern that behavioral differences between the two species may lead to problems with dominance and aggression (Hutchins and Smith 1999).
 - 3.2.14. Institutions must adhere to USDA APHIS requirements for testing and treatment of tuberculosis (USDA APHIS 2000, Mikota et al. 2000).

4. Reproduction

- 4.1. Each male and female elephant of reproductive age (8 to 35 years) must have an initial reproductive assessment and follow-up assessments on a regular basis by transrectal ultrasound to verify reproductive status and assess overall reproductive health (Hermes et al. 2000, Hildebrandt et al. 2000 a,b). Exceptions include elephants with known reproductive problems, actively breeding animals, or those with documented medical/behavioral conditions that preclude them from breeding.
- 4.2 Each male and female elephant of reproductive age (8 to 35 years) must have hormone (progesterone or testosterone) values assessed through weekly (or bi-weekly) collection of blood samples (Brown 1998, 2000). Exceptions are elephants with known reproductive problems or those with documented medical/behavioral conditions that preclude them from breeding.

5. Behavior management

5.1. Training

- 5.1.1. Electrical devices designed for use on livestock, such as commercially manufactured electric prods and shocking collars/belts, are prohibited as routine training tools or for handling animals during exhibition. Electric prods are permissible only as an emergency safety device; however, their use is restricted to situations in which keepers feel the imminent need to defend themselves against elephant attacks, or to protect an elephant from possible injury (see Schanberger et al. 2001).
- 5.1.2. Elephant training terminology and descriptions of specific behaviors are outlined in the *AZA Schools for Zoo and Aquarium Personnel Principles of Elephant Management (PEM) Course Notebook* (AZA Board of Regent's 2001). Trained behaviors should allow the elephant staff access to the animal in order to accomplish all necessary animal care and management procedures and permit inter-institutional consistency. The PEM-recommended list of commands and their corresponding behaviors are ones that every elephant and elephant keeper must know so that basic husbandry and veterinary practices can be accomplished. Behaviors should be reinforced so that all elephants attain close to 100% compliance upon request of the elephant staff (Sevenich et al. 1998).

Appropriate elephant training may employ several training aids or "tools" (see PEM Course notebook for a list and description of some elephant training tools and procedures). The goal of a good trainer is to be able to reduce the amount of time any particular training aid is used (Roocroft and Zoll 1994).

The AZA considers the following training tools/techniques to be inappropriate for use at member institutions:

- a. Insertion of any implement into any bodily orifice, unless directed by a veterinarian specifically in connection with training for a medical or reproductive procedure.
- b. Striking an elephant with anything more substantial than an ankus (a traditional training tool used by elephant trainers)
- c. Striking an elephant with any sharp object, including the hook of an ankus (Fowler 1995).
- d. Striking an elephant on or around any sensitive area, such as the eyes, mouth, ears, or genital region.
- e. No tools used in training should be applied repeatedly and with such force that they cause any physical harm to an animal (i.e., breaking of the skin, bleeding, bruising, etc.).
- f. Withholding or reducing an animal's daily-recommended amount of food and or water.
- g. Withholding veterinary care for any reason.

If properly executed training procedures are ineffective in eliminating aggressive or inappropriate behavior in a given animal, institutions should consider other alternatives, including transfer to a facility with more experienced staff or a different management system. Protracted and repeated use of corporal discipline in training is of serious ethical concern and AZA considers abusive training practices to be unacceptable. Further, elephants that are untrained, unexercised, or unable to complete minimum behavioral requirements may be considered neglected and thereby abused.

- 5.2. Management Systems – Different elephant management systems have both advantages and disadvantages (Desmond and Laulie 1991, Doyle 1993, Preist et al. 1998, Schmid 1998). AZA standards for elephant management recognize that a diversity of approaches exist, but encourage members to continue to experiment with the goal of maximizing elephant health and reproduction and minimizing risk of injury to keeper staff (Lenhardt 1991, 2001, Chapple and Ridgway 2001). System definitions have been defined in the PEM Course and are as follows:

Free Contact – The direct handling of an elephant when the keeper and elephant share the same unrestricted space. Neither the use of chains nor the posture of the elephant alters this definition.

Protected Contact – Handling of an elephant when the keeper and the elephant do not share the same unrestricted space. Typically in this system the keeper has contact with the elephant through a protective barrier of some type while the elephant is not spatially confined and is free to leave the work area at will. This includes confined contact, where the handling of an elephant through a protective barrier where the elephant is spatially confined, as in an Elephant Restraint Device (ERD).

- 5.3. Management Protocols – Each AZA member institution and related facility that holds elephants must have a written elephant management policy. This policy must be consistent with AZA standards for elephant management and care, and must, at minimum, include a description of the institution's:
- a. Elephant management program's missions and goals (EMA 1999).
 - b. Elephant management policies, including guidelines for handling, training, and translocation (EMA 1999).
 - c. Plan to separate animals from each other, safely manage elephants that are aggressive toward other elephants, safely move elephants from one location to another, and safely manage elephants that are aggressive toward humans (EMA 1999).
 - d. Staff management policies, including guidelines for keeper safety (EMA 1999).
 - e. Individual elephant profiles and incident reports for all cases in which elephants show aggression toward keepers or the public, regardless if any injury actually resulted.
 - f. Emergency response protocol. Institutions should be able to demonstrate readiness to respond to an emergency situation, such as an elephant escape or keeper injury (EMA 1999).

5.4. Safety

- 5.4.1. All elephant-holding institutions must undertake at least a semi-annual elephant facility and program safety assessment, identify safety needs, and fully implement any corrective measures. Each facility shall establish a safety assessment team. The team may include elephant staff, management staff, animal health care staff, and experts in the area of risk management and safety. Each facility should establish the make-up of the team based on its own needs and resources. A written record must be kept for each inspection and that record be reviewed and its recommendations acted upon.
- 5.4.2. In the interest of public safety, AZA strongly discourages visitor-elephant interactions, outside of the primary enclosure. AZA strongly discourages the practice of walking elephants in public areas during public hours (BOD 3/25/03).
- 5.4.3. In the interest of safety, AZA strongly encourages members to discontinue public elephant rides (BOD 3/21/00).

5.5. Restraint

- 5.5.1. Chaining is acceptable as a method of temporary restraint (Fowler 1995). However, elephants must not be subjected to prolonged chaining (for the majority of a 24-hour period) unless necessary for veterinary treatment or transport. Institutions that regularly use chains for some portion of a day must alternate the chained foot on a daily basis. All new construction and major renovations must be constructed in a manner that minimizes or eliminates the need for chaining (Schmid 1995, Gruber et al. 2000).
****Note: If AZA policies on chaining require new construction, rather than procedural changes, then institutions will have five years to comply with this requirement. Plans must be in place within three years and institutions must apply for a variance from the AZA Accreditation Commission.**
- 5.5.2. All elephant holding facilities should install an Elephant Restraint Device (ERD) (Schmidt et al. 1991). However, all bull-holding facilities, as well as those that manage elephants in protected contact, must have an ERD. Use of the ERD should not be weather dependent.
- 5.5.3. Each elephant must be trained to enter and stay in the ERD, if one is available, for husbandry, veterinary, reproductive assessment, and other procedures to occur in a safe and efficient manner (Schmidt 1991).
- 5.5.4. If a facility does not have an ERD, staff must demonstrate a method of restraint that allows necessary husbandry, veterinary, and reproductive procedures to occur in a safe and efficient manner (Fowler 1995).

6. **Staff Organization and Training**

- 6.1. Each institution must have one person, designated as the elephant manager. This individual is responsible for (1) staff training; (2) developing and maintaining the program; and (3) communicating with others about the elephant program. The elephant manager must also demonstrate knowledge about all emergency protocols and continually improve elephant management techniques as the industry standards evolve.

6.2. All elephant managers must attend the AZA Principles of Elephant Management Course (BOD 3/25/03), preferably within 18 months following acceptance/promotion to the position. In addition, every elephant keeper is encouraged to attend this course. The BOD directs the Board of Regents to develop a mechanism for the PEM graduates to remain current in best practices in elephant management (BOD 3/25/03).

6.3. The BOD instructs the Board of Regents to hold best practices workshops on elephant management systems and transitioning from one management system to another (BOD 3/25/03).

7. Conservation, Education, and Research

7.1. Education Programs

7.1.1. Every institution should institute a program to educate zoo visitors about elephant and elephant conservation issues (EMA 1999, Smith and Hutchins 2000). Assistance is available from the Elephant SSP Education Advisor

7.1.2. Every institution should have up-to-date educational graphics and/or information about elephants on display to the public.

7.2. Conservation and Research Activities

7.2.1. AZA zoos that currently exhibit or desire to exhibit elephants should make every effort to maintain elephants in their collections so that they can contribute to conservation through public education, scientific research, and the support of field conservation. Elephants are an important flagship species and the cornerstone of many members' African and Asian exhibit areas. (BOD 3/21/00)

7.2.2. Every institution should contribute in some way to elephant research activities (Keele and Dimeo-Ediger 1997, EMA 1999, Smith and Hutchins 2000). Involvement in one or more of the following disciplines is strongly recommended: behavior, cognition, reproduction, communication, enrichment, health (disease/pathology, nutrition), and education.

7.2.3. Every institution should contribute in some way to *in situ* conservation of elephants and their habitats (EMA 1999, Smith and Hutchins 2000).

7.2.4. AZA members are strongly encouraged to provide financial, personnel, logistical, and other support for priority research and conservation initiatives listed in the AZA Elephant SSP/TAG Action Plan (Wiese and Hutchins 1994).

8. Cooperative Management (BOD 3/21/00)

8.1. SSP Participation

8.1.1. SSP participants should be given highest priority in elephant dispositions, whether through breeding or importation.

8.1.2. AZA institutions should cooperate among themselves to pursue self-sustainability with their elephant populations. Since self-sustainable elephant populations are not possible currently within AZA, then cooperation with outside organizations should be considered on a case-by-case basis.

8.1.3. AZA zoos may provide elephants or their gametes to approved non-members on a case-by-case basis.

8.2. Importation

- 8.2.1. All elephant imports must be approved within the AZA Elephant SSP/TAG. Periodic importation may be used as a way to maintain population viability in the North American Elephant SSP/TAG population. The SSP/TAG and participating institutions will employ a combination of breeding and importation with the goal of eventually creating a self-sustaining population. When acquiring elephants for the SSP/TAG, first consider captive animals in substandard conditions in North America, then captive animals outside the U.S., then wild animals surplus to the needs of the managed population or those to be captured or killed because of human-animal conflicts (especially those that are going to be killed).
- 8.2.2. An effort should be made to assess the potential for cooperating with sister organizations, such as the European Association of Zoos and Aquariums (EAZA).

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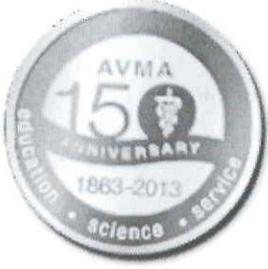
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AVMA NEWS

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EXECUTIVE BOARD COVERAGE

Policy addresses use of elephant guides, tethers - June 1, 2008

Policy addresses use of elephant guides, tethers

posted May 15, 2008



Courtesy of Joanne Smith/Have Trunk Will Travel

Gary Johnson of Have Trunk Will Travel, which provides elephants for movies, uses a guide as a cue to allow Dr. Jerry Rutz to take radiographs of this elephant's tusks. The young male elephant has brittle tusks that easily splinter, so dentists created

metal caps for him to wear.

A new AVMA policy describes the appropriate use of guides and tethers as training and management tools for elephants—and condemns abusive handling.

On a few occasions, allegations of elephant mishandling have implicated misuse of guides and tethers, leading groups to push for prohibition of these tools. An AVMA member requested that the Association adopt a policy to assist in retaining access to these tools to protect the health and safety of elephants and humans.

Appropriate use of elephant guides and tethers allows handlers to safely perform procedures such as foot care, checks of reproductive status, and tuberculosis testing.

The Executive Board approved the policy on "Elephant guides and tethers" at its April meeting. The policy is consistent with the Department of Agriculture's expectations for use of elephant guides and tethers in zoos, circuses, exhibitions, and other activities covered under the Animal Welfare Act.

The AVMA policy states the following:

ELEPHANT GUIDES AND TETHERS

Elephant guides are husbandry tools that consist of a shaft capped by one straight and one curved end. The ends are blunt and tapered, and are used to touch parts of the elephant's body as a cue to elicit specific actions or behaviors, with the handler exerting very little pressure. The ends should contact, but should not tear or penetrate the skin. The AVMA condemns the use of guides to puncture, lacerate, strike or inflict harm upon an elephant.

Tethers provide a means to temporarily limit an elephant's movement for elephant or human safety and well-being. Tethers can be constructed of rope, chain, or nylon webbing, and their use and fit should not result in discomfort or skin injury. Forelimb tethers should be loose on the foot below the ankle joint, and hind limb tethers should fit snugly on the limb between the ankle and knee joints. Tether length should be sufficient to allow the elephant to easily lie down and rise. The AVMA only supports the use of tethers for the shortest time required for specific management purposes.

A backgrounder on "Welfare implications of elephant training" is available at www.avma.org by clicking on "Animal welfare," then on "Backgrounders."

EXHIBIT 2

Hobbs County Municipal Code Section 63.14

The Hobbs County Animal Safety Department (“Department”) is hereby invested with the authority to issue permits to any person for the keeping, maintaining, or exhibiting of any wild, exotic, dangerous or non-domestic animal or reptile within Hobbs County. Any person exhibiting an animal in a circus, exhibition, television or movie production, act, display, or any other lawful exhibit, including but not limited to animals requiring restricted species permits pursuant to California Code of Regulations, Title 14, Section 671, must obtain a Performing Animal Permit from the Hobbs County Animal Safety Department.

- A) Permit applicants and permit holders must meet the following conditions:
- i. Make available medical records and health certificates for all animals, including proof that within the past twelve months a trunk wash culture was performed on any elephant on display and that the elephant tested free of tuberculosis.
 - ii. Utilize appropriate transport vehicles and transfer cages when moving them to the exhibition location.
 - iii. Specify any permits previously held in any other city, county or state that have been revoked by the issuing agency at any time within the past three years and the reasons for such revocation.
 - iv. Not been cited within the past three years by the USDA under the Animal Welfare Act Regulations.
 - v. Compliance with all applicable Federal law.
 - vi. Have no convictions for violations of California state law, including but not limited to California Penal Code §596.5 and §597, et seq.
 - vii. Be in compliance with the requirements and prohibitions set forth in the California Penal Code relating to animals, including §§596.5 and 597t, irrespective of whether the applicant or permit holder has ever been charged with any criminal violation of such statutes.
- B) An issued permit shall not be revoked or suspended except as provided in this section:
- i. No permit shall be revoked or suspended until a hearing upon written notice to the permittee shall have been had by the Department or other person having authority to do so.
 - ii. If a complaint has been filed with the Department against a permittee, a true and correct copy of such complaint shall be served on the permittee. Otherwise, the notice of hearing shall state the basis for the contemplated revocation and the time and place the hearing is to be held.

- iii. At any such hearing the permittee shall be given an opportunity to be heard and defend himself, herself or itself, and may call witnesses.
- iv. After conducting such hearing, the Department may suspend or revoke any such permit or certificate upon such terms and conditions as, in the exercise of its reasonable and sound discretion based on the above-listed factors, it shall determine.