

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF CALIFORNIA**

South Carolina Advocates for
Captive Exotics,
Plaintiff,

v.

United States Fish and Wildlife
Service,
Defendant.

Case No. _____

**Complaint for Declaratory and
Injunctive Relief**

1. Plaintiff, South Carolina Advocates for Captive Exotics (SCACE), challenges the U.S. Fish and Wildlife Service’s (FWS) decision to deny SCACE’s petition for rulemaking pertaining to the regulatory definition of the phrase “industry and trade” as that term is used in the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544. Plaintiff brings this suit for declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (APA), against Defendant FWS seeking to overturn the agency’s decision to disregard a broad statutory mandate to protect endangered species when they are used in the course of *any* activity of “industry or trade” by maintaining a regulatory definition that impermissibly limits protections to only those animals who are bought and sold and denies protections to animals used in other interstate for-profit enterprises. In denying Plaintiff’s petition, Defendant has acted contrary to law in violation of the APA. 5 U.S.C. § 706(2).

JURISDICTION AND VENUE

2. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 706(1) and 28 U.S.C. § 1331.

3. Venue is proper in this district under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e) because it is where a substantial part of the events giving rise to the claim occurred.

PARTIES

4. SCACE is a nonprofit organization and animal protection charity. SCACE's mission is to end the exploitation of captive exotic animals. The organization advocates on behalf of captive exotic animals from South Carolina, including but not limited to a tiger named Calixta. SCACE's efforts on behalf of these animals include monitoring and documenting the conditions in which they are kept, conferring with experts about these conditions, reporting apparent violations related to these conditions to officials, and engaging in public education and media campaigns. The vast majority of this work is conducted within the state of South Carolina.

5. SCACE's ability to obtain information from government agencies regarding investigations into the treatment and conditions of captive exotic animals is essential to the organization's work. SCACE regularly obtains information from state and local agencies about South Carolina-based captive exotic animals and uses this information to participate in administrative and legislative lobbying and to keep its members, the public, and the media informed. SCACE educates the public through various means, including, but not limited to, demonstrations, outreach, literature, media work, its website, and its email distribution list. When SCACE is unable to obtain information relating to captive exotic animals, the organization is hindered in its ability to meaningfully inform the public, its members, and the media.

6. Defendant FWS is a federal agency within the Department of the Interior. The FWS is charged with implementing the ESA with respect to land animals.

STATUTORY AND REGULATORY FRAMEWORK

7. Section 9 of the ESA, 16 U.S.C. § 1538, provides, in relevant part, that “it is unlawful for any person subject to the jurisdiction of the United States to . . . deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any” species that the agency has listed as “endangered.” *Id.* § 1538(a)(1)(E).

8. Section 9 of the ESA also includes a separate provision making it illegal to “sell or offer for sale in interstate or foreign commerce any such species.” *Id.* § 1538(a)(1)(F).

9. Section 10 of the ESA, *id.* § 1539, allows for exceptions to Section 9’s prohibitions in strictly limited circumstances. It allows the FWS to issue permits for activities prohibited by Section 9 only “for scientific purposes or to enhance the propagation or survival of the affected species.” *Id.* § 1539(a)(1)(a).

10. The FWS has recognized that the exhibition of endangered species does not “enhance the propagation or survival” of the species. Nor is such exhibition “scientific.”

11. The tiger, *Panthera tigris*, is one of the species that the FWS has listed as endangered, as a result of extreme threats to its survival. 50 C.F.R. § 17.11.

12. The drafters of the ESA recognized the serious ways in which commercial activities imperil species and the ESA accordingly defines “commercial activity” broadly as “*all* activities of industry and trade, including, *but not limited to*, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however*, That it

does not include exhibitions of commodities by museums or similar cultural or historical organizations.” 16 U.S.C. § 1532(2) (first and second emphases added).

13. Congress amended the definition of “commercial activity” in 1976 specifically to include the proviso that “museums or similar cultural or historical organizations” were exempt from the “commercial activity” definition. During these same hearings, Congress rejected an amendment proposed by the animal exhibition industry that would have excluded “ordinary activities of a zoo, circus, menagerie or other similar exhibition, other than a sale or transfer of a threatened or endangered species for gain.” To Amend the Endangered Species Act of 1973: Hearings before the Subcomm. on Environment of the Senate Comm. on Commerce, 94th Cong. 2d Session, at 87 (May 6, 1976), *available at* <http://catalog.hathitrust.org/Record/003221851>.

14. Despite this legislative history and despite the ESA’s clear statutory text, the FWS’s implementing regulations narrowly define “industry or trade” in the definition of “commercial activity” in the Act as “the actual or intended transfer of wildlife or plants from one person to another in pursuit of gain or profit.” 50 C.F.R. § 17.3. This regulatory definition, which functions to categorically exclude from many of the ESA’s protections those animal transported in interstate commerce for commercial gain or profit who have not been sold from one person to another, is manifestly contrary to the statute, and thus cannot control the meaning of “commercial activity” in 16 U.S.C. § 1538(b)(1)(B).

15. The APA provides, in relevant part, that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be”: “not in accordance with law.” 5 U.S.C. § 706(2)(A).

FACTS GIVING RISE TO PLAINTIFF’S CLAIM

16. SCACE monitors and documents the conditions of captive exotic animals at facilities across the state of South Carolina. One of these facilities is

Mabel Moxie's Cantankerous Cats (MMCC), a South-Carolina based for-profit corporation that exhibits animals.

17. One of SCACE's numerous campaigns is focused on the well-being of a tiger named Calixta. Calixta is owned by MMCC. SCACE's Calixta campaign has been active for a number of years.

18. MMCC's South Carolina facility is the company's "home base" and where it holds all of the animals it owns. In exchange for a fee, members of the public can tour this facility and observe numerous animals, including Calixta.

19. SCACE is able to monitor and document the conditions of the animals held by MMCC by paying a fee to enter like any other member of the public.

20. SCACE has been monitoring and documenting Calixta's conditions in this manner for years, and the group has shared its documentation, along with related expert statements, with its members, the public, and the media. When the evidence it obtains warrants it, SCACE also files complaints with officials regarding Calixta's conditions. A number of these complaints have resulted in citations from local law enforcement. SCACE has developed a good working relationship with officials, and regardless of whether citations are issued, law enforcement routinely follow-ups with SCACE about its complaints and provides the organization with the results of investigations into the complaints. SCACE incorporates the information that it obtains in this way into its public education and media campaigns.

21. Although SCACE has monitored hundreds of captive exotic animals at dozens of substandard facilities across the state, the evidence it has gathered about Calixta's conditions have been particularly concerning.

22. Among other things, SCACE has documented, on video, MMCC staff striking and jabbing Calixta with metal poles. SCACE has also documented MMCC staff shocking the tiger with an electric prod on multiple occasions. Additional evidence gathered by the organization shows Calixta pacing back and

forth in her small enclosure at MMCC's facilities, a stereotypic behavior that is a well-recognized sign of poor welfare, as well as wounds on Calixta's face, likely caused by repetitively rubbing against the chain link fence that holds her captive.

23. On information and belief, Calixta also suffers painful joint problems as a result of being kept unnaturally on concrete without any soft surfaces on which to walk or lie down.

24. The size of the small enclosure in which Calixta is held at MMCC is a tiny fraction of the vast habitat that tigers in the wild normally roam.

25. Last year, MMCC entered into a long-term contract with the University of Agatha in California. In this contract, MMCC agreed to transport Calixta to Agatha each September in exchange for a fee paid by the university, so that the tiger can be exhibited at the Agatha Tigers' home football games as a mascot. Under the agreement, Calixta is to be held in California throughout the football season each year and then returned to South Carolina. The fee the university pays to MMCC exceeds the cost of transporting and caring for Calixta. In addition to the fee, the contract guarantees MMCC ten percent of the team's profits from home game ticket sales.

26. Pursuant to this contract, last fall Calixta was transported to and from California to be exhibited. Calixta will be transported again this fall—and every fall for the foreseeable future—for this purpose.

27. MMCC makes a handsome profit off of this arrangement—which it apparently increases even further by saving on animal-care expenses and depriving Calixta of everything that is natural and important to her. Tigers have vast home ranges in the wild, but while in Agatha Calixta is confined to an even smaller enclosure than the one in which she is held at MMCC's home facility: In Agatha, Calixta is confined to an approximately ten foot by ten foot enclosure. She is also subjected to the loud noises of football fans cheering for their home team, with no means of escape. During transport Calixta is locked in a trailer that is still smaller.

On information and belief, the trailer also lacks adequate ventilation and has a hard substrate, which can cause and aggravate foot and joint problems. Moreover, although tigers regulate their body temperatures by immersing themselves in water—and even though fall temperatures in Agartha can reach over 90 degrees Fahrenheit—Calixta does not have access to a pool while in transport or at the university.

28. In order to continue monitoring and documenting Calixta’s conditions while she is outside of South Carolina, SCACE sends staff and equipment to Agartha.

29. As long as MMCC sends Calixta to California—or to any other state—to be displayed, MMCC will continue to send staff to monitor the tiger’s wellbeing.

30. The conditions to which Calixta is subjected at the Agartha football games, and while in transport, are even crueler than the conditions of her confinement at MMCC’s home facility.

31. Because MMCC’s sole experience working with animal protection laws before MMCC’s arrangement with the university involved state and local provisions in South Carolina, the organization also expended resources to retain an attorney to advise it on potential legal violations involving Calixta in California and in interstate transport.

32. One of the numerous complaints that SCACE has filed on behalf of Calixta as a result of her transport to California was a complaint with Defendant FWS, urging the agency to enforce the Endangered Species Act against MMCC.

33. In its detailed complaint, SCACE asked the FWS to take action to remedy MMCC’s clear violation of the ESA’s prohibition on “transport . . . in interstate . . . commerce . . . in the course of a commercial activity,” 16 U.S.C. § 1538(a)(1)(E). SCACE also set forth the reasons that MMCC could not possibly obtain a permit to engage in this unlawful activity even if it tried to do so (which it

had not), because transporting Calixta in order to make money from exhibiting her at football games is not “scientific” and does nothing whatsoever to enhance the propagation or survival of the tiger species. *See id.* § 1539(a).

34. The FWS responded to SCACE’s complaint dismissively, claiming that no violation had occurred. According to the FWS’s response:

The ESA defines the term “commercial activity” to mean, “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.” 16 U.S.C. § 1532(2).

To inform this definition, FWS promulgated a regulation that provides: “Industry or trade in the definition of ‘commercial activity’ in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.” 50 C.F.R. § 17.3. Because MMCA never transferred, or intended to transfer, ownership of Calixta, it was not engaged in an “activit[y] of industry and trade” and, thus, the transport of Calixta was not “in the course of a commercial activity” within the meaning of the ESA.

35. The regulatory definition of “industry and trade” relied upon by the FWS to justify its refusal to protect Calixta is fundamentally inconsistent with the broad statutory definition of “commercial activity” in the ESA, as well as the statute’s broad remedial purposes and legislative history.

36. Accordingly, SCACE, through counsel, filed a formal, detailed petition for rulemaking requesting that the FWS revisit and revise its regulatory definition of the phrase “industry and trade.”

37. SCACE’s petition specifically requested that the FWS adopt a broader definition of the phrase, one that would cover more than transfers of ownership for

profit, including interstate transport of endangered animals like Calixta to exhibit them.

38. Almost as promptly as it had rejected SCACE's complaint, the FWS denied organization's petition for rulemaking. The agency claimed that the current, overly narrow, definition was within the scope of its broad discretion. The FWS's response also referenced "more important competing priorities and limited resources."

39. On information and belief, the FWS is refusing to adopt a regulatory definition of "industry and trade" that is consistent with the ESA's statutory language as a result of pressure from the animal-exhibition industry, including, in particular, MMCC and others that exhibit endangered species as mascots, exhibitors that profit off of allowing the public to interact with and be photographed with infant tigers and other endangered animals, and circuses.

40. SCACE's organizational activities have been harmed as a direct result of the FWS's denial of its petition for rulemaking because the denial has forced SCACE to divert a significant portion of its resources to address activities outside of South Carolina, where it normally works.

41. SCACE's petition for rulemaking would have made activities like MMCC's transport of Calixta to California unlawful. But for the FWS's denial of SCACE's petition, SCACE would not have had to divert—and would not have to continue to divert, year after year—resources to monitor Calixta in California.

42. SCACE's ability to fulfill its mission has been impaired by the FWS's denial of its petition. The denial has forced SCACE to choose between not being able to monitor and advocate on behalf of Calixta during the months that she is trucked out of South Carolina every year, or diverting its scarce resources to monitor and advocate on her behalf.

43. Among other things, SCACE resources have been and, absent a court order, will continue to be, diverted to: send staff to California to monitor and

document Calixta's conditions there, retain California counsel and research state and local laws in order to ensure that laws intended to protect animals are properly enforced as to Calixta, and starting from scratch, build relationships with California and Agartha officials, press outlets, and citizens on Calixta's behalf. This last item has proven particularly difficult despite SCACE's efforts and expenditures, and to date California and Agartha officials have not been responsive to the organization's complaints—despite the fact that they are well organized, with compelling documentary evidence as well as expert statements and describe clear violations of law. Relatedly, SCACE has also been unable to obtain information from state and local officials in California pertaining to its complaints, as it is able to do—and relies upon—in South Carolina.

COUNT ONE

Defendant Violated the APA by Denying Plaintiff's Petition for Rulemaking

44. Plaintiff realleges paragraphs 1 through 43 as if fully stated herein.

45. By unlawfully denying Plaintiff's petition for rulemaking, and thereby authorizing interstate transport of endangered animals—including Calixta—in the course of commercial activities so long as there is no transfer of ownership, Defendant acted contrary to law, in violation of the APA, 5 U.S.C. § 706(2).

46. Defendant's unlawful denial of Plaintiff's petition impaired Plaintiff's mission, injuring Plaintiff in the manner described in the preceding paragraphs. But for Defendant's denial, Plaintiff would not have suffered these injuries.

47. Defendant's unlawful denial of Plaintiff's petition also forced Plaintiff to divert and expend organizational resources, further injuring Plaintiff in the manner described in the preceding paragraphs. But for Defendant's denial, Plaintiff would not have suffered these additional injuries.

48. Plaintiff will continue to suffer the injuries detailed above absent judicial intervention to afford the relief sought herein. If it prevails in this action, Plaintiff will no longer have to divert resources monitoring and advocating for

South Carolina-based captive endangered animals outside of South Carolina. Those resources would then be directed to other SCACE projects, in furtherance of its overall mission.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court issue an order:

- (1) declaring that Defendant’s denial of Plaintiff’s petition for rulemaking violates the APA;
- (2) setting aside as unlawful Defendant’s denial of the petition;
- (3) declaring that the “industry and trade” definition currently set forth at 50 C.F.R. § 17.3 is contrary to the ESA and does not control the meaning of “commercial activity” in 16 U.S.C. § 1538(b)(1)(B);
- (4) awarding Plaintiff its costs and reasonable attorneys’ fees; and
- (5) awarding Plaintiff any other relief that is just and proper.

Date: December 30, 2013

Respectfully submitted,

Amanda Matthews

Attorney for Plaintiff