

# 'Tiger King' Shines Light On An Endangered Species Act Quirk

By **Stephanie Clark**

The sweeping and rapid ascent to popularity of Netflix Inc.'s "Tiger King" documentary series has fueled new interest in two congressional bills that stalled in committee last year, and has drawn public attention to a quirk of the Endangered Species Act, or ESA.

The series, which focuses on the strange and true story of Joseph "Joe Exotic" Maldonado-Passage, broadly covers the existence of private zoos in the U.S., with a specific focus on big cat zoos and sanctuaries.

As the series notes from the beginning, each of the big cats featured in these zoos is an endangered species whose numbers have dwindled significantly in the wild. How, then, are these private zoo owners permitted to breed captive endangered species, such as tigers?



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This is a quirk of the ESA. While the ESA protects these species from take "wherever found," it also allows for captive-bred wildlife to exist within the U.S., and provides an exception from the take prohibition for registered captive-bred wildlife. Specifically, the ESA's captive-bred wildlife program and a variety of other laws and regulations govern the keeping, breeding and transfer of wildlife that is otherwise endangered but located in zoos and sanctuaries in the U.S.

## **What does the ESA prohibit?**

The ESA prohibits "taking" of endangered species. "Take" is defined to mean harm, harass, pursue, hunt, shoot, wound, kill, trap, capture or collect. The ESA also makes it illegal to import, export, deliver, receive, carry, transport, ship in interstate or foreign commerce, sell or offer for sale in interstate or foreign commerce, take on the high seas, possess, ship, deliver, carry, transport, sell, or receive unlawfully taken wildlife.

These prohibitions apply equally to live and dead animals, their progeny, and parts or products derived from live or dead animals. All subspecies of tigers were separately listed as endangered species under the ESA in 1970. The listing was amended in 1972 to generally protect the species *Panthera tigris*.

Because the species as a whole is listed as endangered, this means that generic tigers — ones that cannot be identified as a specific subspecies — are also protected under the ESA. However, the U.S. Fish and Wildlife Service issues permits that allow a variety of activities that would otherwise be prohibited by the ESA. For an endangered species, permits may be issued for scientific research, enhancement of propagation or survival, and taking that is incidental to an otherwise lawful activity.

For the sale of captive-bred wildlife in the U.S., the service provides a registration system that permits someone to buy and sell live, nonnative endangered or threatened animals that were captive-born in the U.S. for enhancement of species propagation, provided that both parties in the transaction are registered with the service for the same species.

The registration does not permit the sale of protected species for use as pets, or for hybridization (e.g., creating cross-breeds of tigers and lions, or "ligers"). There is a different permit that is required by the service to import or export protected species.

### **Do other laws apply?**

In addition to the ESA, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or CITES, provides protection to endangered species, restricting the sale of protected animals, parts of those animals, and byproducts of protected animals in the countries who have signed onto and ratified CITES. CITES went into effect in 1975, and the U.S. and 179 other countries are signatories.

There are also specific protections that apply to tigers and rhinoceros under the Rhinoceros and Tiger Conservation Act, or RTCA. The RTCA went into effect in 1994, and established a fund for the service to support international antipoaching programs, habitat and ecosystem management, development of nature reserves, wildlife surveys and monitoring, and other conservation-related efforts for rhinoceroses and tigers in the countries where they occur naturally.

The RTCA also prohibits the sale, importation and exportation of products intended for human use containing, or labeled or advertised as containing, any substance derived from any species of rhinoceros or tiger. This, however, is primarily directed at addressing international trade in rhinoceros and tigers, and products made from these species.

### **What about captive tigers?**

The 2003 Captive Wildlife Safety Act, or CWSA, specifically regulates captive wildlife within the U.S. The CWSA, in addition to the ESA and CITES, protects captive tigers in the U.S.

In order to import, export, transport, sell, receive, acquire or purchase live large cats, including tigers, in either interstate or foreign commerce, a group, person or institution must be licensed or registered with the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture, under the Animal Welfare Act. Any groups, people or institutions who are not registered or licensed by the USDA cannot legally import, export, transport, sell, receive, acquire or purchase live large cats.

The USDA also controls authorization and registration for private zoos, sanctuaries and other institutions to run and maintain breeding programs for large cats, including tigers. The CWSA, along with 2016 changes to the ESA's implementing regulations, is what "Tiger King" refers to when stating that many private zoos can no longer sell the tiger cubs bred in captivity.

In 2016, the service amended the regulations implementing the ESA to bring crossbred and generic tigers (those which cannot be identified as a member of a specific subspecies of tiger) within the regulations. As of May 6, 2016, the amendment expanded ESA's captive-bred wildlife program to all kinds of captive-bred tigers within the U.S. Prior to the amendment, the restrictions on breeding, selling and transporting tigers in the U.S. only applied to tigers who could be clearly identified as a specific subspecies of tiger.

The prior captive-bred wildlife regulations did require that holders of crossbred or generic tiger specimens keep accurate written records of births, deaths, transfers of specimens, etc., and make those records accessible to service agents for inspection upon request. But the more onerous documentation requirements and restrictions on sale of captive-bred endangered animals had not applied.

Additionally, the captive-bred wildlife restrictions on interstate sale of tigers solely for the purposes of education or display still required prior authorization of an ESA permit both before and after the 2016 amendment.

The service stated that its rationale for amending the regulations in 2016 was, in part, that it was difficult to distinguish between legal and illegal activities involving tigers, due to the service's inability to distinguish between crossbred tigers versus clear tiger subspecies. The idea was to make regulation and enforcement of the restrictions on the breeding and trade in captive-bred wildlife easier.

The principal reason for allowing private zoos to operate has been to enhance public education regarding wildlife and its conservation. This is why the ESA and its implementing regulations have historically imposed different and less stringent restrictions on captive-bred protected species than on members of the same protected species in the wild.

However, as the service recognized in its 1993 rule, public education through exhibition alone does not encourage responsible breeding that is specifically designed to help conserve the species involved. This is why zoos and sanctuaries engaged in breeding programs that are meant to create populations for possible reintroduction to their natural habitat are treated differently from private zoos that mainly breed crossbred or generic tigers, which are not suitable for reintroduction to the wild.

In short, the ESA allows private zoos to maintain captive tiger specimens, but the ESA and a variety of other laws place restrictions on the breeding, sale, transfer, receipt, import and export of such captive or captive-bred tigers. Special authorization or registration with the service and the USDA is required to run and maintain a captive breeding program, and various other restrictions apply, including restrictions regulating the methods for euthanizing tigers.

It is these regulations that were at issue in the indictment against Joe Exotic, discussed in the latter part of the documentary series. Specifically, the superseding indictment filed against him in November of 2018 alleged:

- That he violated the ESA by killing five separate tigers (i.e., unauthorized take) (counts 3-7);
- That he violated the ESA by offering tiger cubs for sale across state lines without the proper authorization from the service through its captive-bred wildlife program (count 8);
- That he violated the ESA by selling three separate tiger cubs across state lines without proper authorization from the service through its captive-bred wildlife program and without proper registration with the USDA (counts 9-11); and

- That he submitted false documentation for various lions and tigers sold to zoos all over the U.S. (counts 12-20).

He was convicted on every count, including every alleged violation of the ESA.

### **What about additional regulation?**

The documentary prominently features a proposed bill regarding the safety of big cats kept in captivity. It is called, perhaps unsurprisingly, the Big Cat Public Safety Act. Two different versions of this act were introduced in 2019 — one in the House of Representatives, H.R. 1380, and one in the Senate, S. 2561.

Both bills were referred to congressional committees for review in September 2019. Until the debut of the Netflix documentary series, it appeared that both bills had stalled in committee — meaning that neither were likely to get a floor vote. Renewed public interest in the subject, however, suggests that one or both bills may be brought back to life.

What these bills would do, specifically, is amend the Captive Wildlife Safety Act to: (1) make it illegal to "breed or possess any prohibited wildlife species"; (2) prohibit licensed facilities from allowing direct contact between the public and prohibited wildlife species; and (3) add additional criminal penalties for breeding or possessing any prohibited wildlife species in violation of the act.

Only time will tell if the Big Cat Public Safety Act gets out of committee, and if Joe Exotic's appeal succeeds, or whether his separate false arrest lawsuit filed against, among others, the federal government, survives the magistrate judge's April 7 recommendation to dismiss.

In the meantime, the multiple regulatory and statutory restrictions on the ownership and sale of captive-bred tigers in the U.S. continue to regulate the sale and keeping of tigers — though the existing regulations do not address whether private zoos may continue to engage in breeding programs when they permit direct contact between large cats and the public, such as photo ops with tiger cubs.

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