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# The “Pit Bull” of Environmental Laws: the Endangered Species Act and its application to captive animals

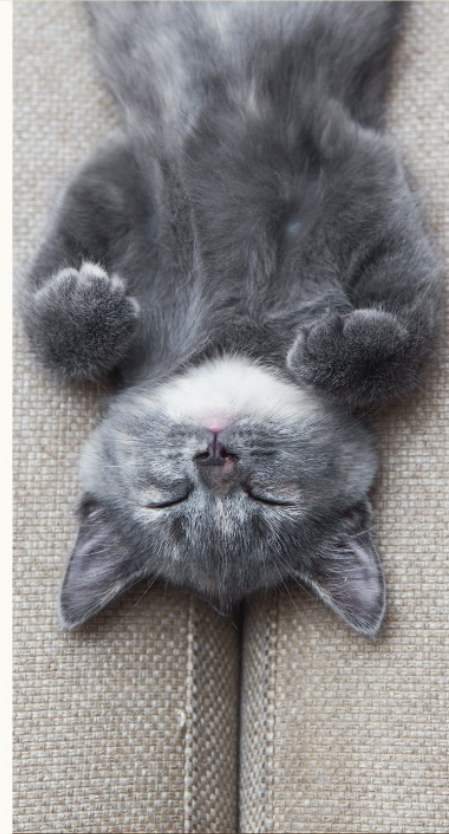


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# Overview



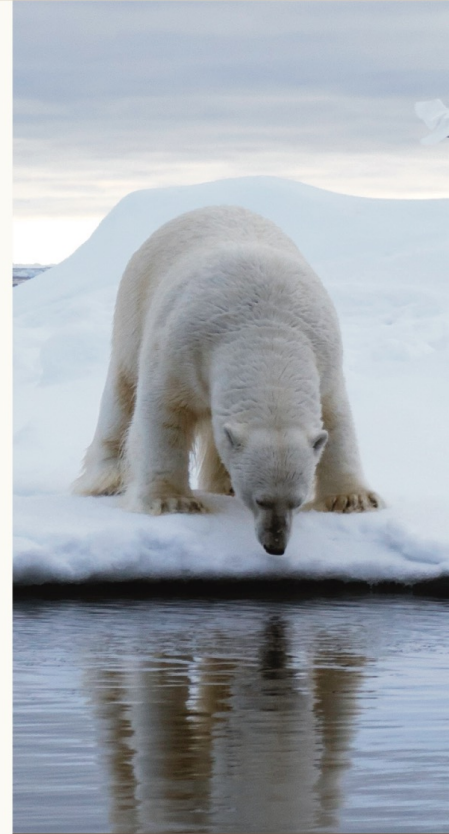
1. Brief background on ALDF and the Litigation Team
2. Overview of the Endangered Species Act (“ESA”)
3. Apply the ESA to animals in captivity
4. Question and Answer



# Personal Views and Opinions



Opinions in this presentation (and slide show) are personal and not necessarily representative of the Animal Legal Defense Fund or any clients



# Animal Legal Defense Fund at-a-glance



- Legislation Program.
  - Texas is a focus state: Dogs in Hot Cars; Convicted Abuser Possession Ban
- Litigation Program
  - Fellowships and clerkships.
  - Pro bono.



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# Animal Legal Defense Fund at-a-glance



Mission:

To protect the lives and advance the interests of animals through the legal system.



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# Animal Legal Defense Fund at-a-glance



- *Justice v. Vercher*, Oregon Court of Appeals

**teen**VOGUE

NEWS AND POLITICS

## A Horse Is Suing His Former Owners for Medical Expenses Stemming From Alleged Neglect

A courtroom drama for horse girls everywhere.



Sarah Mearhoff  
AUG 14, 2018 3:45PM EDT

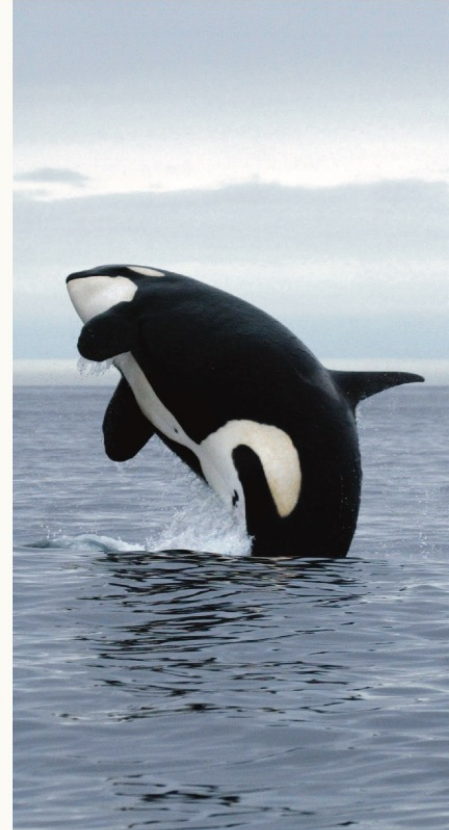


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# Endangered Species Act



*Tennessee Valley Authority (“TVA”) v. Hill*, 437 U.S. 153 (1978)



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# ESA: Key Provisions



## Section 11: Citizen Suit Provision



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# ESA: Key Provisions



Section 9: “Take” Prohibition. (“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect,” or attempt to do any such activity)

Section 11: Citizen Suit Provision



# Examples of Prohibited “Take”



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# Defenses to “Take”



1. Incidental Take Permit → Habitat Conservation Plan

2. Proximate Cause

*Aransas Proj. v. Shaw*,  
775 F.3d 641  
(5th Cir. 2014)



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# ESA: Key Provisions



Section 7: Jeopardy Provision (regulates federal agencies)

Section 9: “Take” Prohibition. (“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect,” or attempt to do any such activity)

Section 11: Citizen Suit Provision





# ESA: Key Provisions



Section 4: Listing Provision



Section 7: Jeopardy Provision (regulates federal agencies)

Section 9: “Take” Prohibition. (“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect,” or attempt to do any such activity)

Section 11: Citizen Suit Provision



# Limits of Endangered Species Act



*Weyerhaeuser Co. v. U.S. FWS,*  
139 S. Ct. 361 (2018)



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# What's Wrong with Captivity?



- From a **rights** perspective
  - Denial of the right to autonomy (individual rights)
  - Denial of the ability to flourish in community and the natural environment (communal rights)
- From a **welfare** perspective
  - Inadequate food, water, or shelter
  - Denial of veterinary care
  - Frustration of instincts / psychological suffering





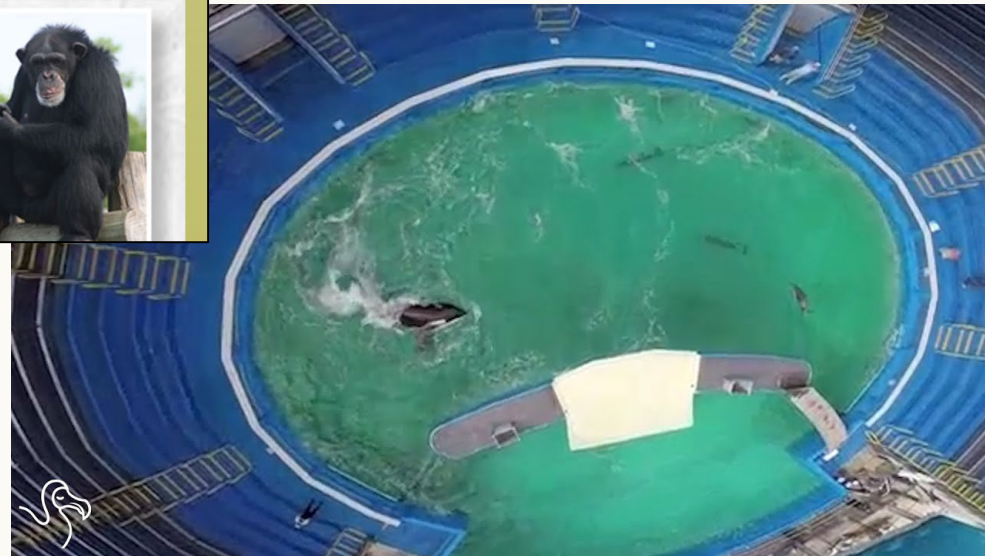
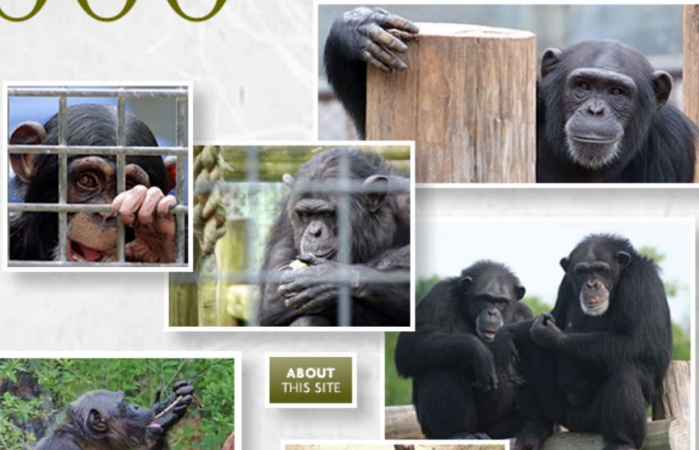
# Step One: Ensuring ESA Even Covers Captive Members of Listed Species



## THE LAST 1,000

For almost 100 years, chimpanzees have been used in biomedical and behavioral research in this country, the last industrialized country to experiment on our next of kin. The end of using chimpanzees as nameless test subjects is near. Already hundreds of research chimpanzees have been retired. In tribute to all who have been forced to serve, here we look forward to the journey to sanctuary of the LAST 1000.

This evolving list of names of the LAST 1000 chimpanzees is presented alphabetically and is color-coded by the facility where they currently live. Many names are still unknown. The goal is to record each individual's journey to sanctuary by turning the color code **GREEN**.



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# Step Two: Who Can Sue?



U.S. Constitution: Art. III, judiciary hears “Cases or Controversies”

*Animal Legal Defense Fund v. Glickman*, 154 F.3d 426  
(D.C. Cir. 1998)



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# Step Two: Who Can Sue?



*Hill v. Coggins*, 867 F.3d 499 (4th Cir. 2017)



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# Step Two: Who Can Sue?



**BUT**

*Am. Soc’y for Prevention of Cruelty to Animals (“ASPCA”) v. Feld Entertainment*, 659 F.3d 13 (D.C. Cir. 2011)



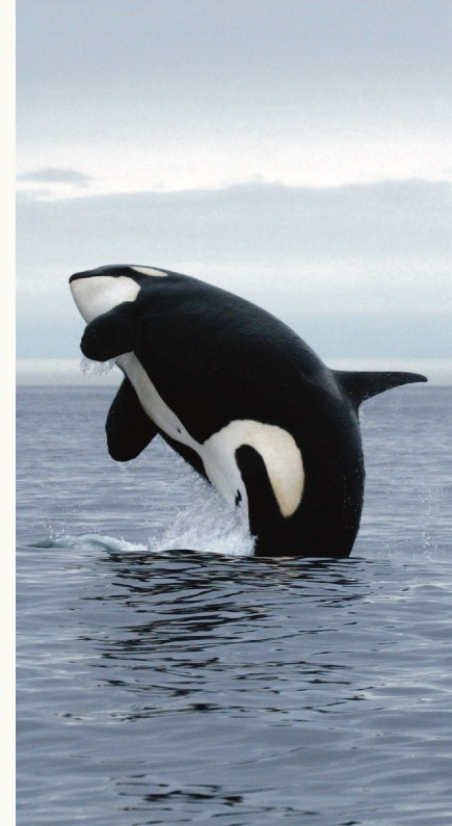
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# The Culmination: Cricket Hollow Zoo



*Kuehl et al. v. Sellner*, 161  
F. Supp. 3d 678 (N.D. Iowa 2016)

*Aff'd* 887 F.3d 845 (8th Cir. 2018)



<http://www.desmoinesregister.com/videos/news/2015/11/04/74648744/>

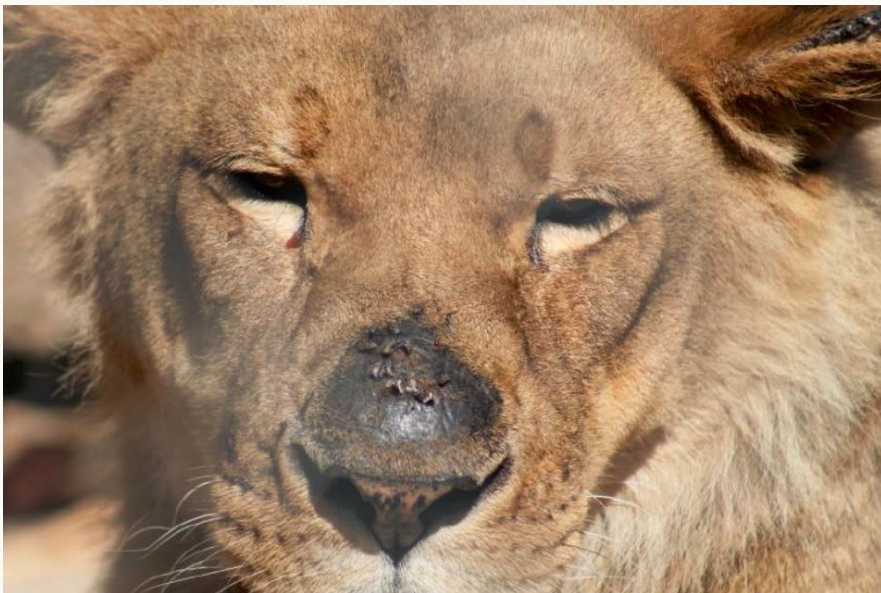
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# The Culmination: Cricket Hollow Zoo



“I noticed [a lion] was being eaten by flies and that’s evidenced by some blood being drawn on her nose by the fly bites and you can see her left ear – that entire ear canal is filled with flies.”



“[T]he first thing that hit me was the smell of the facility . . . [I]t was like more of a rotting type smell that you would smell if there were food items left out or the pens hadn’t been cleaned for quite some time.”



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# Legal Interlude: Deep Dive into “Take”



16 U.S.C. 1532 (Definitions): “The term ‘take’ means to **harass**, **harm**, pursue, hunt . . . wound . . .”

Harm in the definition of “take” in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Harass in the definition of “take” means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

- For captive animals, does not include: **(1)** generally accepted **(2)** husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act . . . **(3)** that are not likely to result in injury.

(50 C.F.R. 17.3)





# The Culmination: Cricket Hollow Zoo



**Elkader Veterinary Clinic**  
February 12, 2013 · 🌐

I don't think vet school prepared me for what it truly means to be a "mixed animal" veterinarian. I mean I knew I would be treating dogs, cats, cattle, horses, and pigs, but I had no idea I would be seeing one of these in practice:)

Like · Comment · Share · 🍷 48 🗨 8

Elkader Veterinary Clinic		Product Analysis For Client			Thursday, February 05, 2015	
		Sellner, Thomas - SELTHO: 04/23/2007 - 02/05/2015				
PRODUCT NAME	PRODUCT #	QUANTITY	GROSS	% OF CAT.	% OF TOTAL	
<b>Supp</b>						
Blades Each #30	BLADESEA	1	\$ 22.99	92.55	0.36	
Syringe 3cc/Needle	SYRINGE3NE	4	\$ 1.85	7.45	0.03	
Totals:		5	\$ 24.84		0.39	
<b>Vacc</b>						
Tetanus Antitoxin 1500ui	TETANUS	1	\$ 10.12	100.00	0.16	
Totals:		1	\$ 10.12		0.16	
<b>VI</b>						
Red Top Blood 10ml Tubes	TUBESRED	1	\$ 0.30	100.00	0.00	
Totals:		1	\$ 0.30		0.00	
<b>Vs</b>						
Dexdomitor per cc	DEXDO	0.5	\$ 0.00	0.00	0.00	
Scalpels 22	SCALPEL22	1	\$ 1.08	5.66	0.02	
Vicryl 3/0 Fs-1 #J452h	VICRY30	2	\$ 18.00	94.34	0.28	
Totals:		3.5	\$ 19.08		0.30	
<b>Worm</b>						
Panacur 1000ml Bottle	PANACUR10	1	\$ 125.00	100.00	1.96	
Totals:		1	\$ 125.00		1.96	
<b>Wormer</b>						
Panacur Suspension 1000ml Bottle	PANACUR10	2	\$ 260.21	100.00	4.09	
Totals:		2	\$ 260.21		4.09	
Report Totals:		1,109.22	\$ 6,363.76		100.00	





# The Culmination: Cricket Hollow Zoo



161

1 **A.** Well, this is -- a hunched posture is that of a  
2 depressed lemur and if the rest of the cage is as barren  
3 as this photograph discloses, then, of course, I could  
4 come to the conclusion that this is pretty harrowing  
5 kind of confinement situation.

6 **Q.** You used the word depressed, Dr.

7 **A.** Yeah.

8 **Q.** Is that in the psychological sense

9 **A.** That's in a physiological sense.

10 **Q.** What do you mean by that?

11 **A.** By that I mean this animal is pro  
12 catatonic state; probably has a very high  
13 undoubtedly has elevated -- elevated  
14 levels and probably is relatively insensit  
15 moment to acoustic stimuli, which is pa  
16 these animals. But that's, in part, spec  
17 course. It's -- this is a momentary sna  
18 knows what the animal could have been  
19 before or a second after.

11 **Q.** If the lemurs had a swing -- tire swing in their  
12 area, would that change your opinion at all about their  
13 enrichment?

14 **A.** Well, again, it would help. All these -- these  
15 suggestions you're making would serve to alleviate the  
16 conditions of isolation, but it doesn't speak to the  
17 main problem that I see with this particular animal,  
18 that it's one of a kind. And as I have said now several  
19 times, the environment of lemur -- of ring-tailed lemurs  
20 if it's going to be appropriate to the species requires  
21 a group. You can't keep those animals healthy and happy  
22 singly or with even just a pair or a trio. They need to  
23 be in a group.

24 **Q.** I think I heard you correctly if you had toys for  
25 the lemurs, that would be something that would be good



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# The Culmination: Cricket Hollow Zoo



Plaintiffs' Trial Brief Attachment 3 – USDA Inspection Reports – Cricket Hollow Zoo, License No. 4-C-0084

Inspection Date	Category of AWA Regulation Violation Identified by APHIS								
	Food/Water	Veterinary	Pests	Psychological	Sanitation, Not Feces	Feces	Ventilation/ Drainage	Enclosures	Employees and Handling
7/29/10	√√	√			√	√	√T	√√√	
11/22/10		√√	√L		√T			√√	
2/16/11					√	√		√√√	
8/16/11	√	√√	√√L		√√	√√L		√√√L	√
12/8/11	√√	√	√		√√	√	√	√√√	√
1/3/12									
5/1/12									
5/16/12			√		√√			√√T	
6/29/12		√√	√		√√	√			
8/20/12			√√			√√L			
11/26/12	√				√√√L	√√√T		√	
2/13/13					√√L	√√TW	√√	√√L	
6/12/13	√√	√	√T		√√		√	√√	
7/31/13	√√√L		√√L	√		√√		√√W	√√
9/25/13	√√		√√√√L	√	√√√√√L	√√√L	√√	√√W	
12/16/13	√	√						√√√	√
1/9/14									
5/21/14	√√√√	√√√	√√		√√√√√L	√√√TW	√	√√√√√√√L T	√√
5/28/14									
8/5/14	√√	√√	√√LTW		√√	√√TW	√	√√√	
10/7/14	√	√T						√√	
11/6/14									
2/19/15									
3/4/15						√√			
5/27/15			√√	√	√√L	√	√√	√	
6/15/15									
6/24/15									





# The Culmination: Cricket Hollow Zoo



The outcome: District court judgment in favor of plaintiffs.

- “Harassing” and “harming” tigers.
- “Harassing” lemurs.





# Regulatory Language: “Harass”



Harass in the definition of “take” means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

- For captive animals, does not include: **(1)** generally accepted **(2)** husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act **(3)** that are not likely to result in injury to the wildlife.

(50 C.F.R. 17.3)



# The Culmination: Cricket Hollow Zoo



## Appeal to the Eighth Circuit



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Appeal from U.S. District Court for the Northern District of Iowa - Waterloo  
(6:14-cv-02034-JSS)

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### **JUDGMENT**

Before WOLLMAN, SHEPHERD, Circuit Judges and GOLDBERG, District Judge.

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in accordance with the opinion of this Court.

April 11, 2018



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# Building upon Cricket Hollow Zoo



*Conley v. Landry's* (S.D. Tex.)



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# Building upon Cricket Hollow Zoo



Deer Haven Mini Zoo (Maryland roadside zoo)



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# Building upon Cricket Hollow Zoo



*Animal Legal Defense Fund v. Olympic Game Farm (W.D. Wash.)*



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# Building upon Cricket Hollow Zoo



*Animal Legal Defense Fund v. The Farmer's Inn (W.D. Pa.)*



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# Questions?



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