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Dana Mirsky, "Very Complex Questions": Zoos, Animals, and the Law, 46 Wm. & Mary Env’t L. & Pol'y Rev. 217 (2021), https://scholarship.law.wm.edu/wmelpr/vol46/iss1/6

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“VERY COMPLEX QUESTIONS”: ZOOS, ANIMALS, AND THE LAW

DANA MIRSKY

INTRODUCTION

In Sulawesi, Indonesia—forty-five thousand years ago, an artist painted what is now the world’s oldest known cave painting—a life-size image of a wild pig.1 Forty thousand years later, the elite of Hierakonpolis, Egypt, housed elephants, hippos, and baboons in the world’s oldest known zoo.2 Today, individuals keep exotic fish, reptiles, and birds as pets while zoos and aquariums display some of the largest and rarest animals on the planet.3 The human fascination with wild animals is clearly not a new phenomenon, but how and why we keep wild animals have evolved over time.4 Zoos in particular have changed dramatically just over the past few decades. Once filled with bare, concrete cages and focusing exclusively on human entertainment, the American zoological industry now

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2 Roger Atwood et al., Top 10 Discoveries of 2009, 63 ARCHAEOLOGY 20, 25 (2010).

3 See Pets and Other Animals, CDC, https://www.cdc.gov/healthypets/pets/index.html [https://perma.cc/MJ44-N7J3]; see, e.g., Ocean Voyager Built by the Home Depot, GA. AQUARIUM, https://www.georgiaaquarium.org/gallery/ocean-voyager/ [https://perma.cc/VVP3-TB95] (last visited Nov. 3, 2021) (describing the aquarium’s Ocean Voyager exhibit as “one of the largest single aquatic exhibits in the world” and “specially designed to house whale sparks, the largest fish species in the world”); Help Center, SAN DIEGO ZOO, https://zoo.sandiegozoo.org/help-center [https://perma.cc/WUY7-SEVS] (last visited Nov. 3, 2021) (describing the zoo as having 100 acres with over 3,000 animals, including the only platypuses currently outside of Australia).

prides itself on prioritizing animal welfare. Many zoos now house animals in naturalistic habitats and work hard to educate the public about conservation and wildlife issues in addition to contributing directly to global efforts to preserve endangered species and their environments.

Although zoos and aquariums remain popular destinations, public backlash in response to the perceived welfare issues associated with keeping larger and more intelligent species in human care has escalated in recent years. In addition to boycotts, social media campaigns, and sensationalized documentaries, zoo and aquarium facilities

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9 See, e.g., Brian Clark Howard, Schoolchildren and Musicians Boycott SeaWorld in “Blackfish” Flap, NAT’L GEOGRAPHIC (Dec. 21, 2013), https://www.nationalgeographic.com/news/2013/12/131220-seaworld-blackfish-boycott-field-trip-musicians-animals/[https://perma.cc/73M3-4QN4] (discussing SeaWorld boycotts in response to the “Blackfish” film); Freedom for Animals, FACEBOOK, https://www.facebook.com/freedomforanimals/[https://perma.cc/P43M-7CVL] (last visited Nov. 3, 2021) (Facebook page for an organization “campaigning against the use of animals in entertainment”). The three most famous documentary-style productions within the last fifteen years are most likely: THE COVE (Participant Media 2009) (a documentary about modern dolphin hunts in Japan); BLACKFISH (Manny O. Pros. 2013) (a film purporting to depict the problem of keeping orcas in human care); and, most recently, TIGER KING (Netflix 2020) (a documentary series focused on self-proclaimed “Tiger King” Joe Exotic, his large cat collection, and conflicts with other “big cat” owners). All of these movies have been subject to criticism, some directly from the zoological community. Critics of THE COVE denounced the film’s implication that most zoological facilities continue to collect animals from the wild and are therefore partially responsible for the Japanese dolphin hunts, even though the United States banned the collection of marine mammals from the wild in 1972 with the passage of the Marine Mammal Protection Act. See, e.g., Roger Moore, SeaWorld Rejects Condemnation by ‘The Cove’, ORLANDO SENTINEL (Aug. 5, 2007, 3:00 AM), https://www.orlandosentinel.com/entert
also face a variety of legal challenges. This includes both legislation\(^\text{10}\) and litigation; animal rights\(^\text{11}\) groups regularly bring zoos and aquariums to court, often seeking to, *inter alia*, expand the legal scope of animal rights or prove animal mistreatment in a particular facility.\(^\text{12}\)

Several federal statutes confer a variety of protections on animals both in and out of zoos.\(^\text{13}\) However, the structure and nature of these statutory schemes make lawsuits concerning alleged animal mistreatment
challenging for courts as well as attorneys. In addition, animal facilities—such as zoos, aquariums, and sanctuaries—do not regulate or even define themselves or each other consistently. Misleading or inaccurate—but popular—ideas about the best so-called solutions for animals in zoos only add to the confusion. This Note uses both court cases and the example of the real-life “Free Willy”14 to explore this unique intersection of the legal system and the zoological industry, looking in particular at what courts and zoos can do if a facility does not adequately care for its animals.

Plaintiffs in these animal mistreatment cases generally ask the court to order the transfer of the animals in question—often specifically to a sanctuary rather than a zoo; typically, plaintiffs also alternatively request that the court at least order the defendant facility to somehow remedy its treatment of the animals.15 On a few occasions, courts have granted such relief, requiring a facility to either surrender the animals or make specific animal husbandry changes.16 One particular request—for the transfer of one or more killer whales, or orcas17 to a “sea pen”—has not yet been granted.18 A sea pen is an offshore area—often a bay or partially enclosed area on a coastline—separated from the rest of the ocean by nets stretching from the sea floor to the ocean’s surface.19 Sea pens are often suggested as a potential “happy ending” for orcas in human care.20

This Note examines the advantages and disadvantages of these three options—transferring animals to a different facility (the “transfer option”), ordering a defendant facility to change its treatment of the animals (the “treatment option”), or moving orcas or dolphins21 to a sea pen (the “sea pen option”). Part I provides background on the oversight,

14 The failed attempt to release Keiko, the killer whale star of FREE WILLY, resulted in Keiko’s death in 2003. MARK A. SIMMONS, KILLING KEIKO 27–29, 381 (2014) [hereinafter KILLING KEIKO]. See also infra note 197; discussion infra Part III.
15 See discussion infra Part II.
16 See discussion infra Part II.
17 Orcas are also known as killer whales—this Note will use both terms interchangeably. Killer Whale, NOAA FISHERIES, https://www.fisheries.noaa.gov/species/killer-whale [https://perma.cc/6SNF-S5KT] (last visited Nov. 3, 2021).
18 See discussion infra Part III.
19 KILLING KEIKO, supra note 14, at 125, 187.
21 Taxonomically, killer whales are considered the largest member of the dolphin family; “dolphins” throughout this Note refers to other species of dolphins kept in aquariums, most of which are bottlenose dolphins. See Killer Whale, supra note 17; TERRY S. SAMANSKY, STARTING YOUR CAREER AS A MARINE MAMMAL TRAINER 20 (2001).
regulation, and definition of animal facilities. Part II explores the transfer and treatment options, while Part III evaluates the sea pen option. The conclusion considers wider lessons to be learned from these case studies.

I. REGULATING, DEFINING, AND SUING ZOOLOGICAL FACILITIES

To appreciate the dilemma courts find themselves in, it is necessary to understand both the relevant regulatory schemes as well as several key aspects of the zoological world. Multiple federal statutes protect zoo animals; however, these statutes each have their own goals and means of implementation. Neither the law nor the animal management industry itself clearly or formally distinguishes “zoos” from “sanctuaries.” Finally, animal facilities of either type may choose to accept additional regulation by participating in one or more voluntary accreditation programs.

A. Federal Legal Protections for Animals

Zoos cannot necessarily treat animals however they please or keep any animal from any source for any reason. A handful of federal statutes dictate not only if a person or organization may collect animals from the wild, but also when and how facilities may display, transport, and care for certain animals. This includes—but is not limited to—the Animal Welfare Act (“AWA”), the Endangered Species Act (“ESA”), and the Marine Mammal Protection Act (“MMPA”).

1. The Animal Welfare Act

The AWA sets “basic standards for care and treatment” for animals in zoological facilities. It covers most “warm-blooded” animals,


with exemptions for animals used for various agricultural purposes (such as food or fiber) as well as “cold-blooded” animals.24 The U.S. Department of Agriculture ("USDA") administers the AWA through its Animal and Plant Health Inspection Service ("APHIS") and requires regulated facilities to obtain licenses and undergo periodic inspections.25 Regulated entities include anyone trading in, exhibiting, transporting, or researching animals protected by the AWA.26

Whether public or private, “[a]nimal exhibits open to the public must be licensed” as exhibitors.27 AWA regulations define an “exhibitor” as "any person . . . exhibiting any animals . . . to the public for compensation . . . whether operated for profit or not."28 “Exhibitor” is interpreted broadly; it has been applied even to the exhibition of a single animal and is satisfied “simply by making [animals] available to the public.”29 A recent ruling suggests that the utilization of virtual platforms such as Cameo and OnlyFans30 also constitutes exhibition for AWA purposes.31

24 Id.; 7 U.S.C. § 2132(g). Though generally regarded as an oversimplification by scientists, “warm-blooded” typically refers to animals that can regulate their internal body temperature, e.g., mammals and birds, while “cold-blooded” animals, e.g., fish and reptiles, cannot—instead, their internal body temperature is largely dictated by their environment. Howard Bennett, Ever Wondered About Warm-Blooded and Cold-Blooded Animals?, WASH. POST (Nov. 29, 2015), https://www.washingtonpost.com/lifestyle/kidspost/ever-wondered-about-warm-blooded-and-cold-blooded-animals/2015/11/27/575d30ca-6c57-11e5-aa5b-f78a9895699_story.html [https://perma.cc/WP7E-H7KJ].


29 In re Good, Jr., 49 Agric. Dec. 156, 164, 174 (U.S.D.A. 1990). In 2018, Animal and Plant Health Inspection Service ("APHIS") amended the AWA to expand a de minimis rule exempting from licensing persons exhibiting small numbers of animals—fewer than four or eight animals, depending on the type of activity involved, i.e., breeding or exhibition. 83 F.R. 25549.


Regulations promulgated pursuant to the AWA set minimum standards for housing and sanitation, personnel, transport, food and water, and veterinary care.\(^{32}\) Intended to ensure “humane handling, care, or treatment, and transportation of animals,”\(^{32}\) these regulations include specific subparts covering dogs and cats, guinea pigs and hamsters, rabbits, non-human primates, marine mammals, and other warm-blooded animals.\(^{34}\) Regulations for specific types of animals include requirements tailored to those animals’ needs; for example, nonhuman primate regulations include particular standards for enrichment\(^{35}\) while marine mammal regulations include requirements for water quality as well as interaction or “swim-with-the-dolphin” programs.\(^{36}\) Failure to comply with AWA regulations may result in license suspension or revocation, civil penalties, or criminal prosecution;\(^{37}\) however, the AWA does not contain a citizen suit provision, leaving enforcement up to APHIS.\(^{38}\)

2. The Endangered Species Act

The ESA protects all species officially listed as endangered.\(^{39}\) Many zoos contribute directly or indirectly to the conservation of endangered species and habitats by displaying and breeding representatives of such species in their collections.\(^{40}\) These zoos must therefore comply with the

\(^{32}\) AWA Factsheet, supra note 23, at 5.


\(^{38}\) See In Def. of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 103 (1991); AWA Factsheet, supra note 23, at 5–6.


\(^{40}\) See Judy P. Che-Castaldo et al., *Evaluating the Contribution of North American Zoos and Aquariums to Endangered Species Recovery*, 8 SCI. REPS. 1, 1 (2018) (evaluating “the means and extent to which North American zoos and aquariums contribute to the recovery of species listed under the [ESA]”).
ESA with respect to any listed species they hold. The U.S. Fish and Wildlife Service (“FWS”) implements the ESA for terrestrial and freshwater species, while the National Marine Fisheries Service (“NMFS” or “NOAA Fisheries”) administers the ESA for marine species. In addition to enforcement by these agencies, the ESA also includes a citizen suit provision. The ESA provides endangered species with various habitat protections and restricts not only the transport and sale of these species, but also the “taking” of any such species within the United States.

The ESA defines “taking” or to “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” FWS regulations further define both “harass” and “harm,” and plaintiffs can prove ESA violations using either definition. The definition of “harass” specifies that “when applied to captive wildlife, [this definition] does not include generally accepted: (1) Animal Husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA].” However, a record of AWA compliance does not necessarily preclude ESA liability, and multiple courts, in the course of ESA suits, have “examine[d] the evidence surrounding an exhibitor’s animal husbandry practices” and required plaintiffs to “show that [a facility’s] treatment of [its animals] does not amount to generally accepted, AWA-compliant animal husbandry practices.”

3. The Marine Mammal Protection Act

The MMPA protects all marine mammals, defining marine mammals as “any mammal which . . . is morphologically adapted to the marine

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41 NMFS is part of the National Oceanic and Atmospheric Administration, or NOAA, and is also called “NOAA Fisheries.” About Us, NOAA Fisheries, https://www.fisheries.noaa.gov/about-us [https://perma.cc/3FKK-4Q3X] (last visited Nov. 3, 2021).
48 50 C.F.R. § 17.3 (2021).
49 Graham, 261 F. Supp. 3d at 744, 748.
environment . . . or . . . primarily inhabits the marine environment.”50 It therefore covers not only whales, dolphins, seals, and sea lions, but also manatees, sea otters, and polar bears.51 Just as the ESA protects endangered species and their habitats, the MMPA focuses on the protection of wild marine mammals and their habitats; the care of marine mammals at zoos and aquaria therefore falls under the jurisdiction of APHIS and the AWA.52 Like the ESA, multiple agencies implement the MMPA.53 NMFS protects “whales, dolphins, porpoises, seals, and sea lions” while FWS protects “walrus, manatees, sea otters, and polar bears.”54 Unlike the ESA, however, the MMPA does not contain a citizen suit provision.55

The MMPA prohibits the “take” of any marine mammal, defining take as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill”56 and “harassment” as “any act of pursuit, torment, or annoyance which . . . has the potential to injure a marine mammal” or “has the potential to disturb a marine mammal . . . by causing disruption of behavior patterns.”57 Because the MMPA prohibits the capture of marine mammals as a take, a facility can only collect or import a wild-caught marine mammal if issued a permit by NMFS; however, while the MMPA sets requirements for facilities displaying marine mammals, it does not require such facilities to obtain a permit for this activity.58 To display marine mammals, the MMPA requires facilities to provide educational or conservation programming meeting industry standards, hold a license or registration as required by APHIS under the AWA, and be “open to the public on a regularly scheduled basis.”59 Any facility that a marine mammal is exported to must also meet these requirements.60

52 16 U.S.C. § 1361 (2018);
53 Law & Policies: Marine Mammal Protection Act, supra note 51.
54 Id.
56 16 U.S.C. § 1362(13) (2018). Note that the MMPA’s definition of “take” varies slightly from the ESA’s, which is “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19) (2018).
The MMPA also establishes the Marine Mammal Health and Stranding Response Program.61 The MMPA mandates the development of “objective criteria . . . to provide guidance for determining at what point a rehabilitated marine mammal is releasable to the wild.”62 NMFS regulations require the release of rehabilitated marine mammals within six months of rescue unless the veterinarian believes that:

(i) The marine mammal might adversely affect marine mammals in the wild;

(ii) Release of the marine mammal to the wild will not likely be successful given the physical condition and behavior of the marine mammal; or

(iii) More time is needed to determine whether the release of the marine mammal to the wild will likely be successful.63

Those responsible for the animal must provide a recommendation of release, non-releasability, or postponement to NMFS, which in turn, decides whether to require release, continued rehabilitation, or “other disposition.”64 If NMFS determines that the animal is non-releasable, the animal may be transferred to a facility for public display if the recipient facility complies with the MMPA’s public display requirements65 and the recipient “agrees to hold the marine mammal in conformance with all applicable requirements and standards.”66 The NMFS Office of Protected Resources determines placement based on factors including the species and unique needs of the animal.67

64 50 C.F.R. §§ 216.27(a)(2), (3) (2021).
B. Zoos vs. Sanctuaries

Petitions, news articles, and court filings often call for the transfer of animals from a zoo to a sanctuary, suggesting or implying that sanctuaries are inherently superior to zoos.\(^\text{68}\) However, this assumption is at best, unsubstantiated and at worst, harmful to the animals themselves—the structure of the AWA and its regulations means that in many cases, sanctuaries receive less regulation and oversight than zoos.

Zoos and sanctuaries are not explicitly or formally distinguished either legally or within the animal management industry; however, they are nevertheless arguably “distinct business types” that are regulated differently.\(^\text{69}\) A zoo may be described as “[a] business that maintains a stationary collection of exotic animals for the primary purpose of public exhibition,” and a sanctuary as “[a] non-profit business that maintains a stationary collection of rescue animals for the primary purpose of providing them a permanent home.”\(^\text{70}\) Many zoos breed as part of conservation programs, train animals for health and programming purposes, and provide educational presentations or interpreters.\(^\text{71}\) Sanctuaries generally only house “rescue[d]” animals and do not trade or breed those animals.\(^\text{72}\)

Most zoos, as exhibitors, must have a license under the AWA. The AWA’s definition of exhibitor specifies that “such term includes . . . zoos exhibiting such animals whether operated for profit or not.”\(^\text{73}\) AWA regulations specifically define “zoo” as “any park, building, cage, enclosure, or other structure or premises in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation.”\(^\text{74}\)

Neither the AWA nor its regulations refer to or discuss sanctuaries;\(^\text{75}\) however, the Captive Wildlife Safety Act (“CWSA”), which made the


\(^\text{70}\) Id.

\(^\text{71}\) Id.

\(^\text{72}\) Id.


\(^\text{74}\) 9 C.F.R. § 1.1 (2021).

\(^\text{75}\) See AWA LICENSING, supra note 26, at 14–16.
trade of “big cats” (e.g., lions, tigers, and the like) illegal,\textsuperscript{76} provides an exemption for “accredited wildlife sanctuar[ies].”\textsuperscript{77} To qualify as “accredited” under the CWSA,\textsuperscript{78} the sanctuary must:

1. be a registered non-profit under 501(c)(3);
2. “not commercially trade in” prohibited wildlife species;
3. “not propagate” any such species; and
4. “not allow direct contact between the public and animals.”\textsuperscript{79}

If a facility billing itself as a sanctuary exhibits animals to the public, it is subject to USDA regulation as an exhibitor; however, facilities not exhibiting animals to the public do not fall under the “exhibitor” definition or any other regulated term in the AWA, and therefore do not fall under AWA/USDA jurisdiction.\textsuperscript{80} In addition, any facility exhibiting animals excluded from the definition of “animal” in the AWA is similarly not regulated as an exhibitor.\textsuperscript{81} A sanctuary closed to the public, or open to the public but only housing unregulated animals is therefore not required to conform to AWA requirements or even possess a USDA license.

C. Accreditation

The USDA encourages regulated facilities to implement standards beyond the basic requirements of the AWA.\textsuperscript{82} Many facilities—zoos as well as sanctuaries—choose to do so by participating in one or more of the voluntary accreditation schemes available to animal facilities. Accreditation can signal a facility’s commitment to animal welfare—these schemes

\textsuperscript{76} U.S. Fish & Wildlife Serv., Dep’t of the Interior, Captive Wildlife Safety Act: What Big Cat Owners Need to Know (2007), https://www.fws.gov/le/pdf/CaptiveWildlifeSafetyActFactsheet.pdf [https://perma.cc/6YFD-MHCS]. Also exempt are “[p]ersons, facilities, or other entities licensed by [APHIS] under the [AWA] to possess big cats,” such as zoos. Id. The CWSA amended the Lacey Act, which does not address animal treatment but rather prohibits the trade of wildlife, fish, or plants “taken, possessed, transported, or sold” illegally. See id.; 16 U.S.C. § 3372.


\textsuperscript{78} Note that “accredited” here refers specifically to qualifying for the sanctuary exemption under the CWSA—it is not related to any of the voluntary accreditation schemes discussed \textit{infra} Section I.C. See Regulations to Implement the Captive Wildlife Safety Act, 72 Fed. Reg. 45,938, 45,941 (Aug. 16, 2007) (codified at 50 C.F.R. pt. 14).


\textsuperscript{81} See 7 U.S.C. §§ 2132(g), (h) (2018).

\textsuperscript{82} AWA Factsheet, supra note 23, at 5.
generally impose stricter requirements than the USDA, and successful accreditation may therefore serve as additional validation of the facility’s quality, both within the zoological industry and for the public.\footnote{83}{See, e.g., Bale, supra note 9 (explaining accreditation as a way to identify “good” sanctuaries or zoos); Standards & Guidelines, ALL. OF MARINE MAMMAL PARKS & AQUARIUMS, https://www.ammpa.org/membership/standards-guidelines [https://perma.cc/C7G6-YVRT] (last visited Nov. 3, 2021) (describing general requirements and benefits of AMMPA accreditation).}


Schemes for zoos versus sanctuaries are not necessarily mutually exclusive; however, sanctuary criteria may include bans on breeding, commercial activity, and using animals for “entertainment,” which may not fit with a zoo’s mission.\footnote{86}{Who Can Apply, GLOB. FED’N OF ANIMAL SANCTUARIES, https://www.sanctuaryfederation.org/accreditation/definitions/ [https://perma.cc/9QA6-N5T6] (last visited Nov. 3, 2021); Accreditation Criteria, AM. SANCTUARY ASS’N, https://www.americansanctuaries.org/accreditation-criteria [https://perma.cc/QNH3-EU6S] (last visited Nov. 3, 2021); see supra Section I.B (comparing zoos versus sanctuaries).}

AZA also offers a “certification” program with similar requirements to accreditation but for “related facilities.”\footnote{87}{Accreditation vs. Certification, ASS’N OF ZOOS & AQUARIUMS, https://www.aza.org/accreditation-vs-certification [https://perma.cc/2XAC-ZJD7] (last visited Nov. 3, 2021).}

At the time of this writing, at least two of the AZA certified facilities were also accredited by a sanctuary organization.\footnote{88}{Accreditation vs. Certification, ASS’N OF ZOOS & AQUARIUMS, https://www.aza.org/accreditation-vs-certification [https://perma.cc/2XAC-ZJD7] (last visited Nov. 3, 2021).}

organizations, facilities may also receive animal welfare certification89 from American Humane, a humane organization focused on animal welfare and safety that is probably best known for its “No Animals Were Harmed®” logo frequently seen in film credits.90

In addition to signaling a facility’s dedication to animal welfare, accreditation also provides numerous professional benefits for facilities. Not only do zoos preferentially hire personnel with experience at a similarly accredited facility,91 but zoos within the same accreditation scheme may also have access to and share additional resources—not only information and resources from the accrediting organization itself, but also animals.92 Animals move between zoos for numerous reasons, such as breeding programs,93 social grouping or health needs,94 or exhibit renovations.95 A
facility is more likely to transfer to or accept animals from another facility involved in the same or equivalent accreditation programs because the accreditation indicates that the other facility provides a similar standard of care. In addition, NMFS specifically distributes its questionnaire for non-releasable whales and dolphins to members of specific organizations, although non-members may also request notification regarding available animals.

There are various reasons why a facility might choose one accreditation program over another—or even, despite the benefits, no accreditation at all. The Pittsburgh Zoo chose to part ways with AZA after twenty-nine years of AZA accreditation after AZA updated its requirements to prohibit unprotected or “free” contact with elephants. Mill Mountain Zoo in Roanoke, Virginia, lost its AZA accreditation due to its financial situation. Both zoos, however, currently possess ZAA accreditation. A few zoos are accredited by multiple zoological accrediting organizations. Some facilities may simply find certain aspects of accreditation

96 See id.; Benefits of Accreditation, supra note 92.
97 Non-Releasable Marine Mammals, supra note 67.
101 These include the Fort Worth Zoo, Fossil Rim Wildlife Center, Turtle Back Zoo, and others. See Accredited Facilities, ZOOLOGICAL ASS’N OF AM., https://zaa.org/accredited-fa cilities [https://perma.cc/D45V-7GEG] (last visited Nov. 3, 2021); Currently Accredited
beyond their means or abilities. The filing fee alone to apply for AZA accreditation may cost a facility well over $3,000.\textsuperscript{102} Some standards may present practical difficulties, such as the requirement for food and beverage services\textsuperscript{103}—smaller or seasonal facilities may not be able to offer food and beverages cost-effectively. Lack of accreditation may therefore represent a philosophical, financial, or pragmatic choice, rather than a lack of interest in higher animal welfare standards.

D. Lawsuits

When suing zoological facilities, animal rights\textsuperscript{104} organizations—often either People for the Ethical Treatment of Animals (“PETA”), the Animal Legal Defense Fund (“ALDF”), or the Nonhuman Rights Project (“NHRP”)—typically sue either in their own capacity or in support of one or more individual citizens.\textsuperscript{105} Such organizations typically make use of the ESA’s citizen suit provision to allege that a zoo or aquarium’s treatment of its ESA-protected animals amounts to a take and therefore an ESA violation.\textsuperscript{106} In other situations, however, they have attempted to use state law,\textsuperscript{107}

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\textsuperscript{103} See, e.g., \textit{ASS’N OF ZOOS & AQUARIUMS, THE ACCREDITATION STANDARDS & RELATED POLICIES} 41 (2021) [hereinafter AZA ACCREDITATION STANDARDS], https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf [https://perma.cc/66XF-5Q2L] (AZA-accredited facilities “must have certain basic facilities to accommodate guests, including restrooms, food and beverage services, and rest areas.”).


\textsuperscript{106} See, e.g., PETA v. Tri-State, 397 F. Supp. 3d 768; Graham, 261 F. Supp. 3d at 711.

the Constitution, or even petitions for writs of habeas corpus to make their cases.

If a lawsuit successfully proves that a facility mistreats its animals, releasing zoo animals to the wild is generally not a feasible remedy. Most zoo animals—in particular protected animals such as primates, big cats, and marine mammals—are too habituated to humans and lack the skills needed to survive in the wild. NMFS has even suggested that in certain cases, “releasing a captive animal into the wild” could constitute a take in violation of the ESA. With release off the table, only a few other remedies remain—the transfer option, the treatment option, or the sea pen option.

II. THE TRANSFER AND TREATMENT OPTIONS

The transfer and treatment options are both viable choices—each has strengths and weaknesses. For terrestrial animals, a multitude of possible transfer locations, e.g., other zoos and sanctuaries, already exist.


111 80 Fed. Reg. 7380, 7386 (response to comment 14). The failed attempt to release Keiko, the killer whale star of the film Free Willy starkly demonstrates this point—after several months on his own, Keiko died from a combination of chronic negative stress and malnutrition in what has been referred to as “the most famous case of animal abuse the world doesn’t know about.” Pixels at the Parks, Mark Simmons Talking About Killing Keiko at Shark Con, YOUTUBE (July 16, 2015) [hereinafter Shark Con], https://www.youtube.com/watch?v=JdnwQaGerBU [https://perma.cc/7GGH-HBJE]. See also infra note 197; infra Part III.

112 As discussed infra Part III, there are fewer transfer options available for aquatic animals such as whales and dolphins.

113 A 2017 survey found that there were likely approximately 500 zoological facilities in the United States at that time. Rachel Garner, How Many Zoos Are There in the United States?, WHY ANIMALS DO THE THING (Nov. 24, 2017), https://www.whyanimalsdothething.com/how-many-zoos [https://perma.cc/Q4PK-AQUP]. GFAS estimates that there are more than 150 GFAS accredited and verified sanctuaries worldwide. GLOB. FED’N OF
However, moving animals to a new facility presents risks—both in and after transport—and the selection of a recipient facility can present real challenges. Alternatively, a court can require a facility alter its treatment of the animals, e.g., to make specific changes to the facility’s husbandry practices and/or the animals’ environments. Staying in a familiar location can benefit an animal and removes the risks of transfer; however, in some scenarios making the necessary changes could require a significant investment of time and resources from both the facility and the court. Neither option is inherently superior, and, while the selection of one of these remedies over the other should depend on the specifics of a particular situation, there is essentially no formal guidance on how to make this determination.

A. The Transfer Option

Moving an animal from one facility to another is rarely an easy or straightforward task. Challenges include the actual transport of animals between facilities (which presents a variety of logistical hurdles114),

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However, zoos regularly move animals for a variety of reasons, see supra notes 94–96 and accompanying text, and have successfully transported animals as large as elephants and whale sharks over significant distances. See, e.g., Zoo Miami Welcomes New Endangered Asian Elephant from Australia, CBS MIAMI (May 9, 2018, 11:30 PM), https://miami.cbs
finding a willing facility, and, potentially the most difficult of all—selecting a facility. Both in and out of court, many people are quick to push for animals to be moved from a zoo to a sanctuary, under the assumption that sanctuaries are inherently better than zoos. In some cases, plaintiffs name particular sanctuaries. In others, plaintiffs are less specific, asking that the animals move to a “reputable facility,” for the court to appoint a guardian ad litem to find an appropriate location, or for the surrender of the animals to the federal government or an “accredited wildlife sanctuary.” However, selecting an appropriate facility is not as


There are myriad reasons why a facility might turn such an opportunity down. In addition to obvious concerns regarding cost and available space, a facility may be reluctant to accept an animal if there are health concerns. See Sandi Doughton, Zoos Clash with Sanctuaries Over Treatment of Elephant Tuberculosis, SEATTLE TIMES (Mar. 30, 2015, 6:22 PM), https://www.seattletimes.com/seattle-news/zoos-resist-guidelines-that-limit-elephant-tuberculosis/. Furthermore, altering animal social groups can be tricky—even when standard precautions are taken, animal introductions are a risk. See Yonette Joseph, A First Date for Two Rare Tigers Ends in Death at London Zoo, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/world/europe/london-zoo-tiger.html.

See discussion supra Section I.B.


easy as simply picking a sanctuary. Courts must accept or select a facility capable of providing what they believe to be an acceptable level of care to the animals, armed only with scant guidance from the law, the record in front of them, and their own powers of equitable discretion.

1. **Kuehl v. Sellner: Tigers**

   In *Kuehl v. Sellner*, plaintiffs brought an ESA suit against Cricket Hollow Zoo (“CHZ”) in Manchester, Iowa, and successfully demonstrated that CHZ’s treatment of its lemurs and tigers—both endangered species[^121]—amounted to harm and harassment, and therefore a taking in violation of the ESA[^122]. The trial court ordered the transfer of the lemurs and tigers “to an appropriate facility which is licensed by the USDA and is capable of meeting the needs of the endangered species.”[^123] Lacking specific guidance from either the AWA or the ESA, the trial court apparently relied on its “broad grant of equitable power” in making its placement decision.[^124]

   Plaintiffs suggested that the tigers move to The Wild Animal Sanctuary (“TWAS”) in Keenesburg, Colorado; CHZ proposed the Exotic Feline Rescue Center (“EFRC”) in Center Point, Indiana.[^125] Both are USDA-licensed; the court noted that TWAS had over 400 animals in treeless enclosures, approximately 50 employees (including a veterinarian), and over 200,000 visitors a year paying a thirty-dollar admission fee.[^126] EFRC, in contrast, housed about 200 animals in shaded enclosures, engaged less than ten employees, and asked for a ten-dollar minimal donation.[^127] The court chose EFRC:

   Would the EFRC be my first choice for placement of [CHZ’s] tigers? Maybe not. But that is not the question which the Court is required to answer. Instead, the Court must determine whether the EFRC—which is Defendants’

[^123]: Kuehl v. Sellner, 887 F.3d 845, 854 (8th Cir. 2018).
[^125]: Id.
[^127]: Id.
choice—is “capable of meeting the needs” of the tigers. The Court finds that the answer to that question is yes.128

Because both facilities possessed USDA licenses, the court only felt obligated to consider whether the facilities could meet the animals’ needs. It is not clear, however—other than, perhaps, the fact that it was CHZ’s choice—why the court ultimately went with EFRC over TWAS, given its hint of reluctance.

Nothing in the record then or since this disposition suggests that the court chose wrongly. The Eighth Circuit determined that “the district court did not clearly err” and affirmed that court’s decision.129 Both facilities remain licensed and operational; TWAS is GFAS- and ASA-accredited, while EFRC does not appear to have any accreditations.130 In short, other than the comparative accreditation status—which was not mentioned—the most accessible bases for comparison are the factors discussed by the court in the CHZ case—essentially, the basic operations and resources of each facility.

128 Id. at 10.
129 Kuehl, 887 F.3d at 855. At least two other courts have also found TWAS acceptable—the District Court of Maryland in 2019 accepted a proposal to transfer animals at the Tri-State Zoological Park in Cumberland, Maryland, to TWAS; however, the record in that case does not indicate that any other facilities were proposed. Joint Proposed Order & Plaintiff’s Brief Regarding Requested Relief Including Disposition of Defendants’ Tigers & Lion at 3, PETA v. Tri-State, 424 F. Supp. 3d 404 (D. Md. 2019); PETA, 424 F. Supp. 3d at 434. A District Court in Indiana approved PETA’s selection of TWAS in an action against Indiana’s Wildlife in Need over the defendants’ objections; however, the court offered little justification other than noting that TWAS “currently cares for more than 600 rescued animals, and it is accredited by GFAS, so it has to comply with strict standards” and that the animals transferred from Tri-State “now are doing fine.” PETA v. Wildlife in Need & Wildlife in Deed, Inc., No. 4:17-cv-00186-RLY-DML at *3, *7 (S.D. Ind. Sept. 15, 2020) (Bloomberg). Neither the court nor the defendants provided substantial support for their assertions that TWAS either is or is not an appropriate facility for defendants’ animals; therefore it is once again unclear on what basis the court made its decision. See id.; WIN Defendants’ Response Memorandum Objecting to the Plaintiff’s Motion for Summary Judgment at 8, PETA v. Wildlife in Need & Wildlife in Deed, Inc., 476 F. Supp. 3d 765 (S.D. Ind. 2020); Declaration of Patrick Craig at ¶¶ 10–12, PETA, 476 F. Supp. 3d 765 (S.D. Ind. 2020). Most recently, TWAS accepted a number of cats that the federal government seized from TIGER KING’s Jeff Lowe. See infra note 143.
2. *Kuehl v. Sellner: Lemurs*

The lemurs have their own story. Plaintiffs pushed for the lemurs to go to the Prosimian Sanctuary in Jacksonville, Florida, while CHZ advocated for the Special Memories Zoo in Greenville, Wisconsin. The district court selected Special Memories Zoo; as noted by the Eighth Circuit on appeal, plaintiffs’ choice, the Prosimian Sanctuary, “had not been licensed or inspected by the USDA at the time of the hearing” while defendants’ choice, Special Memories Zoo, was:

licensed by the USDA facility and subject to regular inspections. While inspectors have found violations from time-to-time, the Court nonetheless concludes that Special Memories is capable of meeting the animals’ needs. Even if the Court found Special Memories incapable of meeting the lemurs’ needs, because the Prosimian Sanctuary is not licensed by the USDA, Plaintiffs have not suggested a qualified alternative.

The court thus made its decision regarding lemur placement based on USDA licensing—criteria set by the court itself. Plaintiffs knowingly chose to suggest a facility without a USDA license, despite the clear mandate in the trial order—it is not clear whether plaintiffs believed the Prosimian Sanctuary was the optimal choice regardless or simply disregarded the court’s instruction. On appeal, the Eighth Circuit affirmed the placement at Special Memories Zoo.

Although he concurred in the result, agreeing “that the district court did not ultimately abuse its discretion in relocating the lemurs to the Special Memories Zoo,” Judge Goldberg nevertheless expressed some concerns in his concurring opinion:

There is little guidance for courts exercising injunctive power under the ESA to relocate privately-owned animals.

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131 *Kuehl*, 887 F.3d at 854.
132 *Id.*
134 *Kuehl*, 887 F.3d at 854 (“the district court did not clearly err . . . . [or] abuse its discretion”).
However, the express purpose of the ESA, under which this case arises, is the “conservation of endangered species.” . . . “Conservation” is defined as “all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which [ESA protections] are no longer necessary.” . . . I believe this general principal . . . should inform courts exercising their injunctive powers in cases such as these.135

He went on to posit that giving “significant weight to relocating the lemurs to a ‘facility which is licensed by the USDA’” and accordingly rejecting the Prosimian Sanctuary as an option “may have resulted in the lemurs being relocated to the facility less responsive, on the whole, to their complex social, psychological, and environmental needs.”136

As suggested by its name, the Prosimian Sanctuary is specifically dedicated to the care of prosimians, a suborder of primates including lemurs and lorises.137 An Amicus Brief submitted to the court pointed out that although the AWA sets minimum standards for treatment, it does not consider the conservation goals of the ESA—in response, Judge Goldberg concluded that “USDA licensing, while certainly a valid consideration, is insufficient as a proxy for the far-reaching purpose of the ESA.”138 Essentially, Judge Goldberg suggested that although it is not unreasonable to take the presence or lack of a USDA license into consideration, simply having a USDA license does not guarantee that a facility is the best place for an animal.

Subsequent events reinforce Judge Goldberg’s analysis. The district court selected Special Memories Zoo over the Prosimian Sanctuary because the zoo was licensed while the sanctuary was not.139 The district court’s methodology in the CHZ was not, as the Eighth Circuit agreed, unreasonable—USDA’s licensing of Special Memories Zoo meant some type of oversight existed, in contrast to the Prosimian Sanctuary, which lacks (but does not need) a license or any accreditation. However, in early 2021, the ALDF successfully sued to have Special Memories Zoo

135 Id. at 856 (Goldberg, J., concurring) (citations omitted).
136 Id. at 856–57.
138 Kuehl, 887 F.3d at 856 (Goldberg, J., concurring).
139 Id. at 854.
shut down, alleging, *inter alia,* “squalid conditions,” “inadequate shelter,” and a lack of “fresh water and suitable food.” AWA licensing—even compared to an unlicensed facility—is therefore no guarantee that one facility is superior to another.

The Prosimian Sanctuary remains operational, and although it appears to still be both unlicensed and unaccredited, as discussed above, the AWA does not require non-exhibiting facilities to obtain a USDA license, nor does it require outside accreditation for any facility. The Prosimian Sanctuary remains, effectively, an unknown quantity. It is possible—but of course, not certain—that the Prosimian Sanctuary would have provided the lemurs with better welfare than either CHZ or Special Memories Zoo.

If a court determines that animals must be moved to a different facility—or is considering such an order—the existing legal framework does not give that court any meaningful guidance or direction. As *Kuehl v. Sellner* demonstrates, even relying on what little assistance there is in the form of USDA licensing does not guarantee a facility can or will provide an acceptable standard of care to the animals in question. As Judge Goldberg suggested, courts should be wary of basing their decision on any single factor—licensing, zoo or sanctuary status, or a party’s preference.

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142 PROSIMIAN SANCTUARY, *supra* note 137; see discussion *supra* Part I.
143 As this Note was being prepared for publication, the United States seized over 60 big cats from Jeff Lowe, of *Tiger King* fame. Press Release, U.S. Dep’t Just., U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021), https://www.justice.gov/opa/pr/us-government-seizes-68-protected-big-cats-and-jaguar-jeffrey-and-lauren-lowe [https://perma.cc/5VXC-V2FJ]. Given the conditions found at the Lowes’ facility, the ongoing litigation, and the Lowes’ repeated failure to comply with court orders (resulting in a contempt finding), it seems clear that moving the animals to new facilities was clearly in those animals’ best interests. *See id.* The government dispersed the animals to at least five different facilities; however, few details are currently available regarding how the government selected facilities, other than a statement explaining that the Justice Department “will work to ensure that they go to responsible animal preserves where they can be safely maintained rather than exploited.” *Id.*; Josh Frigerio, *Seven Big Cats Rescued from Jeff Lowe’s Tiger King Park Transported to Arizona Sanctuary*, ABC 15 (May 25, 2021, 9:27 PM), https://www.abc15.com/entertainment/events/seven-big-cats-rescued-from-jeff-lowes-tiger-king-park-transported-to-arizona-sanctuary [https://perma.cc/4Z9R-JW2Q] (Keepers of the Wild Nature in Valentine, Arizona); Hicham Raache, *Arkansas-Based Wildlife Refuge Helped Rescue 68 Big Cats from Jeff Lowe’s Tiger King Park, Previously Owned by Joe Exotic*, OKLAHOMA’S NEWS 4 (June 5, 2021).
B. The Treatment Option

As an alternative to transfer, plaintiffs often ask that a court enjoin the alleged violations or order a facility to “remedy its treatment” of its animals.144 Deciding to keep an animal in its current facility naturally

eliminates the various challenges associated with the transfer option. It can also provide other benefits for the animals—in this scenario the animal remains in familiar surroundings with zookeepers and (if applicable) a social group it is accustomed to.\textsuperscript{145} However, the simple phrase “remedy its treatment” encompasses a range of possibilities. Two case studies illustrate how different alternatives may make this option more or less desirable. \textit{Culp v. City of Los Angeles} represents a straightforward and relatively practicable remedy, while \textit{Graham v. San Antonio Zoological Society} demonstrates how a “treatment” remedy can impose potentially significant burdens on both the zoo and the court. As before, little guidance is available to the courts.

1. Case Study: \textit{Culp v. City of Los Angeles}

\textit{Culp v. City of Los Angeles} illustrates a relatively straightforward example of the treatment option. California taxpayers brought state law claims against the \textit{Los Angeles Zoo} (“LAZ”), alleging that LAZ inhumanely used bull hooks\textsuperscript{146} and electric shocks on the elephants, did not give the elephants adequate space, and provided inappropriate substrate,\textsuperscript{147} which gave the elephants foot and joint problems.\textsuperscript{148} The plaintiffs “sought to enjoin the [LAZ] from maintaining its current elephant exhibit, and from building a new, larger elephant exhibit.”\textsuperscript{149} Following a bench trial, “the court issued injunctions prohibiting the [LAZ] from using bullhooks [sic] or electric shock on zoo elephants, and requiring it to

\textsuperscript{145} Some animals are naturally solitary and only come together for mating, such as polar bears. \textit{Polar Bears and RZSS Highland Wildlife Park}, RZSS HIGHLAND WILDLIFE PARK (2017), https://www.highlandwildlifepark.org.uk/animals-attractions/polar-bears-and-rzss-highland-wildlife-park/ [https://perma.cc/RR8D-6QZN].

\textsuperscript{146} Although widely assumed to be inhumane, some within the industry believe bull hooks can be used in a way that is positive to elephants. Karin Brulliard, \textit{Some of America’s Top Zoos Still Use Bullhooks on Elephants. That’s About to Change}, WASH. POST (Aug. 21, 2019), https://www.washingtonpost.com/science/2019/08/21/some-americas-top-zoos-still-use-bull-hooks-elephants-thats-about-change/ [https://perma.cc/N7SW-EJ69]. As of 2019, AZA is phasing out the use of bull hooks in its facilities. \textit{Id.}


\textsuperscript{149} \textit{Id.} at *1.
exercise the elephants and rotill their enclosure regularly.” Rototilling breaks up and “churns” soil, and was presumably intended to address concerns “that due to the exhibits’ relatively small area, the elephants walk over the same ground repeatedly, turning it into a hard, compacted surface that causes the elephants serious foot and joint problems.”

The Supreme Court of California ultimately overturned the case—and therefore the injunctive relief—on unrelated grounds, and thus there is currently no way to assess the relative burden this injunction imposed on the court. However, the particulars of this injunction appeared to be practicable for LAZ. The zoo no longer used electric shock and stopped using bull hooks during the litigation—the court included both in the injunction because LAZ “could resume the use of both tools unless restrained from doing so,” although California passed legislation prohibiting the use of bull hooks several years later. Zoos frequently introduce change or variety into animals’ lives as part of enrichment or training programs; adding or updating an exercise regime for an elephant was not only likely within the LAZ’s abilities, but because LAZ is AZA-accredited, the zoo is required to have an exercise plan in place for its elephants. Finally, most zoos hire horticulture staff to oversee the grounds—including animal exhibits—and LAZ itself is both a zoo and a botanical garden. The rototilling requirement would thus presumably not impose a significant burden on the zoo, and the zoo evidently continues

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150 Leider v. Lewis, 394 P.3d 1055, 1058 (Cal. 2017). The case name changed on appeal—initial lead plaintiff Culp passed away before trial. Id.
152 Culp, 2009 WL 3021762, at *2.
153 Leider, 394 P.3d at 1057.
154 Id. at 1058 n.5.
155 CAL. FISH & GAME § 2128 (West 2018).
157 Currently Accredited Zoos and Aquariums, supra note 101.
158 AZA ACCREDITATION STANDARDS, supra note 103, at 58 (Standard E.3.3.2.4: “Daily exercise”).
to rototill its elephant exhibit even without court oversight. It is therefore at least theoretically possible to configure a practicable injunction relating to animal treatment.

2. Case Study: *Graham v. San Antonio Zoological Society*

Of course, ordering a zoo to change its exhibits or practices is not always as simple as a mandate to exercise, rototill, and stop using bull hooks. In 2015, several individuals supported by ALDF sued the San Antonio Zoo (“SAZ”) over its alleged mistreatment of Asian elephant “Lucky.” The plaintiffs:

alleged four ways in which the [SAZ] is harming and harassing Lucky in violation of the ESA: (1) keeping her alone without any Asian elephant companions; (2) keeping her in a small enclosure which fails to meet minimum size standards set by the [AZA]; (3) depriving her of adequate shelter from the sun; and (4) forcing her to live on a hard, unnatural, species-inappropriate substrate.

The plaintiffs asked the court to, “at a minimum, remedy its treatment of Lucky.” While a particular remedy to SAZ’s treatment was not specified, based on the alleged violations, presumably the SAZ would need to: (1) provide one or more Asian elephant companions for Lucky; (2) enlarge her enclosure; (3) give Lucky a way to shelter from the sun; and (4) change the substrate in Lucky’s exhibit. Making some of these changes is not as simple or straightforward as they appear on paper.

Expanding or updating even one exhibit represents a significant investment of both time and resources. Before this litigation concluded, SAZ completed an assortment of renovations around the zoo, including an overhaul of Lucky’s habitat. In addition to expanding the exhibit,

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162 Id.
163 Id.
164 Id. for Declaratory and Injunctive Relief at 48, *Graham v. San Antonio Zoological Soc’y*, 261 F. Supp. 3d 711 (W.D. Tex. 2017). The plaintiffs’ apparent preferred solution was to transfer Lucky to a particular elephant sanctuary located in Tennessee. *Id.*
165 Elizabeth Lepro, *Zoo Looks for Cutting-Edge Design in Multimillion-Dollar Expansion Project. Plans Include Moves Outside the Site’s Borders*, SAN ANTONIO EXPRESS-NEWS
Lucky received a deeper pool, “new foliage and a new layer of soil and sand.” Together with the other improvements, the updates took over a year and a half to finish and cost the zoo more than $4 million. These numbers are not unusual—the Denver Zoo spent two and a half years and over $2 million on a new tiger exhibit, the Philadelphia Zoo spent $33 million over twelve years on an overhaul of its children’s zoo area, and the National Zoo spent seven years and $56 million on an overhaul of its elephant spaces. Compliance with an order to renovate an exhibit could thus take years, and potentially require the ongoing involvement and oversight of the court.

As noted in Section II.A, bringing in new animals also presents challenges. The required combination of finding the right companion, acquiring the appropriate permits, and coordinating logistics to transport exotic animals can result in a transfer “process” that may take up to a year or more. Shortly after completing its renovations in 2016, SAZ brought in a new elephant to join Lucky. SAZ’s CEO, Tim Morrow, noted at the time of Nicole’s arrival that SAZ had “been working to find Lucky a new companion since shortly after [Morrow] joined the zoo in December 2014.”

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165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Straight, supra note 114; see also supra note 114 and accompanying text (discussion of challenges associated with animal transport).
172 Id.
bring in one or more new animals could entangle the court in a long and complicated process.

The practical effects of such an injunction are again hypothetical. SAZ did make changes—but on its own, without a court order, and likely not because of the litigation. As noted, SAZ started looking for a companion for Lucky in 2014, before litigation commenced, and the scale of the exhibit renovation indicates that planning likely also began well before this litigation. Because of SAZ’s changes, the court ultimately agreed to dismiss the lawsuit. If SAZ did not make these changes and the case had progressed, however, given concerns over moving Lucky at over 50 years of age, there was likely a real possibility of the court issuing some sort of injunction regarding Lucky’s exhibit and possibly her lack of companionship, rather than ordering her transfer to a different facility. Given the considerable time and effort required to implement such changes, the court could have found itself caught up in the case for years—something courts generally prefer to avoid. This case demonstrates that although the treatment option may be viable in some cases, such as Culp, in others it may be impracticable for the zoo and undesirable for the court.

As in Section II.A, the courts in these cases did not have anything beyond the vague guidelines of the statute(s) plaintiffs invoked in each case—and the same will be true for any court facing the transfer vs. treatment decision. These cases highlight the variability within the treatment option. What such a choice will entail, and whether that choice is consequently preferable to transferring the animal(s), will clearly depend on the unique circumstances of each case.

173 Id.
174 See Lepro, supra note 164.
177 SAZ is AZA-accredited and AZA requires that elephants at accredited zoos live with other elephants; however, AZA granted SAZ a variance permitting Lucky to stay by herself. Alex Navarro, Lucky the Elephant to Stay at SA Zoo Despite Protests, KSAT (Nov. 2, 2014, 6:09 PM), https://www.ksat.com/news/2014/11/03/lucky-the-elephant-to-stay-at-sa-zoo-despite-protests/ [https://perma.cc/YVB7-RWZX].
178 See, e.g., Lord & Taylor, LLC v. White Flint, L.P., 780 F.3d 211, 219 (4th Cir. 2015) ("Continuous judicial supervision . . . may place a particular strain on a district court.").
III. The Sea Pen Option

Cetaceans\textsuperscript{179} present a unique challenge. As noted, release is not a viable option, and although zoos can and do move cetaceans between facilities,\textsuperscript{180} compared to the possibilities available for terrestrial animals, there are fewer facilities able to take in transferred cetaceans. There are a number of facilities holding dolphins within the United States;\textsuperscript{181} however, only four currently house killer whales and of those, three are SeaWorld parks and the other is Miami Seaquarium (“Seaquarium”).\textsuperscript{182} Killer whales in particular therefore pose a unique problem—not only are there very few facilities even capable of housing killer whales, but PETA has also sued both SeaWorld and Seaquarium over the alleged mistreatment of the facilities’ killer whales.\textsuperscript{183} Each SeaWorld park holds anywhere from five to ten whales;\textsuperscript{184} given water volume requirements in

\textsuperscript{179} Cetaceans are members of the scientific order Cetacea, which encompasses entirely the aquatic mammals known as whales, dolphins, and porpoises. James G. Mead, Cetacean, BRITANNICA, https://www.britannica.com/animal/cetacean [https://perma.cc/44HD-L8HC] (last visited Nov. 3, 2021). They are one of four groups typically classed as “marine mammals,” two of which include only fully aquatic mammals—cetaceans and “sireniens,” or manatees and dugongs. Marine Mammals, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 1, 2019), https://www.noaa.gov/education/resource-collections/marine-life/marine-mammals [https://perma.cc/M6SQ-KESN]. Other marine mammals split their time between land and the water, meaning they can be treated much like non-aquatic animals. Id. Although sireniens, as fully aquatic mammals, theoretically present many of the same challenges as cetaceans, there are more cetaceans than sireniens in human care and cetaceans appear to be a much greater source of controversy. Viewing, SAVE THE MANATEE, https://www.savethemanatee.org/manatees/manatee-viewing/ [https://perma.cc/P58V-96C2] (last visited Nov. 3, 2021).
\textsuperscript{182} Herrera, supra note 114.
AWA regulations, closing down even one park and sending all of its animals to another would likely be both unpopular as well as impracticable.\textsuperscript{185} For many opposed to keeping killer whales in human care—or at least to SeaWorld—the solution to this apparent dilemma is simple—sea pens.

The idea of sea pens seems relatively simple. Enclose a section of coastline with nets to create a sea pen.\textsuperscript{186} Marine parks can then move their whales there and the problem is solved—the whales will have more space, live in a natural environment, and no longer need to perform in shows.\textsuperscript{187} PETA in particular promotes sea pens as a solution, even attempting to legitimize the concept by presenting it to the courts. In its unsuccessful effort to expand the application of the Thirteenth Amendment by suing SeaWorld on behalf of five of SeaWorld’s killer whales,\textsuperscript{188} PETA asked the court “to effectuate [the whales’] transfer from [SeaWorld’s] facilities to a suitable habitat in accordance with each [whale’s] individual needs and best interests.”\textsuperscript{189} The complaint goes on to explain that another of the “next friends” in the lawsuit “has written protocols . . . including instruction on assessing whether an animal is a candidate for release to his or her native habitat or retirement to a sea pen or natural sea lagoon.”\textsuperscript{190} In its case against Seaquarium, PETA specifically requested the court to order the transfer of killer whale Lolita,\textsuperscript{191} Seaquarium’s only killer whale, to a sea pen.\textsuperscript{192}

\textsuperscript{185} See 9 C.F.R. § 3.104(b) (2021).

\textsuperscript{186} See KILLING KEIKO, supra note 14, at 125, 187.

\textsuperscript{187} See Martín, supra note 20.

\textsuperscript{188} Tilikum ex rel. PETA v. Sea World Parks & Ent., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).


\textsuperscript{190} Id. at ¶ 71.

\textsuperscript{191} Originally captured off the coast of Washington state and British Columbia, Lolita is called “Tokitae” by members of the Lummi Nation in Washington state who consider Lolita/Tokitae to be their relative; she became Lolita upon arrival in Miami. Chad Pawson & Chris Corday, B.C. Marine Mammal Expert Says Moving Killer Whale from Miami a Death Sentence, CBC News (May 28, 2018), https://www.cbc.ca/news/canada/british-columbia/lummi-nation-lolita-seaquarium-miami-andrew-tries-1.4679096 [https://perma.cc/7CLD-MLUP]. Because she is commonly referred to as Lolita in the legal documents, news articles, and social media referenced throughout this Note, this Note will refer to her as Lolita to maintain consistency.

\textsuperscript{192} PETA v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1335 (S.D. Fla. 2016).
As of this writing, the sea pen issue has gone largely unaddressed in court, despite PETA’s efforts. PETA lost both the Seaquarium and SeaWorld cases—lacking standing in the Thirteenth Amendment case and losing to Miami Seaquarium at summary judgment. Nevertheless, activists continue to campaign against these facilities and promote sea pens. A court may one day have to consider the issue, particularly because sea pens are not a completely hypothetical concept. Several facilities in the Florida Keys house their dolphins in natural lagoons, a Danish research center keeps porpoises in a fenced-off harbor, and Klettsvik Bay in Iceland housed killer whale Keiko prior to his deadly “release” and is now the permanent home of two beluga whales. Keiko’s story in
particular provides valuable insight into the practical realities of sea pens, revealing that, as with other viral “fixes,” saying “move the whales to a sea pen” is neither as straightforward nor as productive a solution as it sounds.\textsuperscript{199}

A sea pen, as a facility with marine mammals,\textsuperscript{200} must adhere to both MMPA and AWA requirements.\textsuperscript{201} Essentially, a sea pen must provide a safe, healthy environment suited to the particular marine mammal species while also ensuring their care meets AWA or AWA-equivalent standards. Moving cetaceans to a sea pen thus presents a multitude of obstacles, including siting, cost, legal restrictions, and a host of other practical considerations. These barriers make the idea at best an extremely limited solution and at worst a nearly impossible one.

A. Siting

There are currently no empty sea pens ready and waiting for the arrival of dolphins or killer whales. The Eleventh Circuit touched on this in its first rejection of PETA’s appeal against Seaquarium, pointing out that “counsel for PETA acknowledged the sea pen has not yet been built.”\textsuperscript{202} As it turns out, finding a sea pen location suitable for either


\textsuperscript{200} See 9 C.F.R. § 3.101 (2021).

\textsuperscript{201} See discussion supra Part I.

\textsuperscript{202} PETA v. Miami Seaquarium, 879 F.3d 1142, 1144 n.2 (11th Cir. 2018).
dolphins or multi-ton killer whales is not easy. The search for a suitable location for Keiko required visits to Iceland, Ireland, and Scotland, including some of the remote islands off of the Scottish coast. The teams investigating possible sites explained that they had “to look at every little bay, because the next one around the corner may be the best spot . . . . You can’t pass anything up.” In addition to prioritizing colder, northern waters, the Keiko project had to consider depth, tidal flows, availability of killer whale food, staff accommodations, security, and bureaucracy. These difficulties have not disappeared with time. Even selecting Klettsvík Bay for the belugas, a decade after Keiko left, took four years of searching—because the belugas will definitely remain in human care, the team needed “a location that would allow for the construction of a land-side care facility.”

Individual animals may impose particular restrictions on potential locations. Keiko was taken from the wild as a very young whale off the Icelandic coast. By the time release efforts began, Keiko had developed cutaneous papillomatosis, a skin disease caused by a novel papillomavirus, which continued to occasionally flare up even after moving to Iceland. Both Keiko’s origins and his medical condition resulted in certain siting limitations:

The U.S. National Marine Fisheries Service would never have permitted transfer of a papilloma-infected whale into a sea pen in American waters. Even if Keiko’s papilloma were cured, the NMFS would not have allowed him to enter a pen on the Pacific coast. He was an Atlantic whale that might exchange genes with Pacific females if he escaped.

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203 See Killer Whale, supra note 17.
205 Id. at 99.
206 Keiko was originally caught as a young whale in 1978 off the Icelandic coast. KILLING KEIKO, supra note 14, at 26. Killer whales are “most abundant in colder waters.” Killer Whale, supra note 17.
207 BROWER, supra note 204, at 85, 99–103.
210 Id. at 27, 145.
211 BROWER, supra note 204, at 38.
Although Keiko ultimately went to Iceland, the decision was not without opposition from within Iceland itself, in part due to concerns not only with respect to Keiko specifically (e.g., his papilloma “disease problem”), but also regarding Iceland’s fisheries and whaling.212 The team ran into similar problems when Keiko found his way to Norway213—most of the options for a new bay “were eliminated . . . by potential conflicts with salmon farms and commercial fishing.”214

Geography can also present other significant challenges. During the hunt for a suitable location for Keiko, a report on the site selection process cited some concerns specific to Iceland such as the “harsh conditions most of the year . . . thirty- to fifty-foot seas that were common for extended periods, and the potential frostbite if Keiko spent time at the surface.”215 The belugas currently in Keiko’s old home of Klettsvík Bay were moved to back to their landside holding facility in advance of the “Icelandic winter storm season” in December, 2020, after spending much of the year in Klettsvík Bay itself.216

These impediments are not unique to orcas or belugas. The National Aquarium in Baltimore (“NAIB”) was unable to realize its plan to relocate its dolphins to an ocean sanctuary by 2020 because of the difficulty in finding a location.217 NAIB announced its plans in 2016, and since then NAIB officials have reviewed and rejected over fifty possibilities “in part because of unclean water caused by human development or the

212 Id. at 91–95.
213 Keiko became separated from his trainers on one of his many practice “walks” from his bay pen in Iceland to the open ocean beyond, and over the course of twenty-two days made his way to Norway. KILLING KEIKO, supra note 14, at 360–62, 369.
214 BROWER, supra note 204, at 280. Keiko’s team determined that Keiko, with no other orcas in Norway to potentially join with at that time, “could not simply be let loose to wander the fiords, as there were salmon farms everywhere, and boat traffic was heavy.” Id.
215 Id. at 109. Mark Simmons notes that although “spiteful,” the following description of Iceland was also “not entirely without justification”: “to truly experience Iceland, all one needed to do was sit inside a walk-in freezer with coffee and a newspaper while burning a one hundred dollar bill.” KILLING KEIKO, supra note 14, at 45.
threat posed by climate change–related events such as sea-level rise, rapid seaweed blooms in warming waters and extreme storms.” As of this writing, NAIB has yet to announce a location for its proposed sanctuary. Ultimately, finding an acceptable location for a sea pen may take years, with no guarantee of success. Even when a location is found, considerable obstacles remain.

B. Cost

The Eleventh Circuit recognized a critical component of sea pen construction and operation cost. PETA’s counsel admitted to the court that no sea pen had been built but claimed that PETA had funding for it. The court “asked counsel for a submission directing us to the portion of the record discussing Lolita’s proposed relocation. PETA’s response . . . cite[d] a hyperlink . . . . Although the hyperlinked document describes the relocation plan, it does not demonstrate that PETA has funded the sea pen’s construction in whole or in part.” As noted, the point was ultimately moot; however, the court clearly understood that funding a sea pen constitutes a necessary element of such a project. The court was right to inquire about funding. The Whale Sanctuary Project (“WSP”) has taken the first steps towards creating an orca sea pen—in 2020 the organization identified Port Hilford, Nova Scotia, Canada, as the preferred site for its sanctuary. The project is still in the early development stages—WSP is actively soliciting donations, estimating that its sanctuary will require $12–15 million to create. WSP’s numbers correlate with others’—NAIB also estimates $12–15 million for its dolphin sanctuary. Furthermore, these numbers are only for construction—and the costs do not end there.

218 Id.
219 PETA v. Miami Seaquarium, 879 F.3d 1142, 1144 n.2 (11th Cir. 2018).
220 Id.
221 WSP’s goal is “to establish a model seaside sanctuary” for cetaceans. WHALE SANCTUARY PROJECT, https://whalesanctuaryproject.org/ [https://perma.cc/5EQS-4A3L] (last visited Nov. 3, 2021).
222 Charles Vinick, We Couldn’t Have Chosen a Better Site!, WHALE SANCTUARY PROJECT (May 6, 2020), https://whalesanctuaryproject.org/we-couldnt-have-chosen-a-better-site/ [https://perma.cc/84D2-DQG8].
223 Id.
225 Reed, supra note 217.
226 Id.; About the Whale Sanctuary Project, supra note 224.
WSP states that it will require $2 million per year to care for six to eight whales. The Beluga Whale Sanctuary housing belugas in Klettsvík Bay reports that monthly care for its two belugas costs approximately £37,000, or about $51,500—coming out to around $309,000 per beluga per year. The Dolphin Research Center in Grassy Key, Florida, estimates that its animals—dolphins, sea lions, and others—cost around $300,000 per year without factoring in personnel costs, and former killer whale trainer Mark Simmons states that even one killer whale “costs nearly US $100,000 a year just to feed. This figure does not consider the cost of facility construction, preventative health care, labor, food storage or ongoing facility maintenance (extreme in an open-ocean environment).” Furthermore, many cetaceans live several decades or more, and these facilities must be prepared to bear these costs for the animals’ lifetimes. Essentially, marine mammal facilities require significant financial investments to ensure the long-term well-being of their residents.
considerable resources in order to provide for their animals at least in compliance with all relevant regulations. Funding is plainly a significant piece of the sea pen puzzle; however, once again, this is not the end of the story.

C. **Legal Hurdles**

As discussed in Part I, zoos and aquariums in the United States are not free to house or move marine mammals as they please. Marine mammal facilities must meet the MMPA’s public display requirements in addition to AWA regulations, which list specific requirements for outdoor facilities, such as a perimeter fence. NMFS granted a permit for Keiko’s transfer to Iceland, and the cetacean release criteria guided the team as they prepared Keiko for eventual release. Even a partial release to a sea pen requires consideration not only of the animal in question, but also that animal’s effect on the surrounding environment. Constructing and placing new animals in a sea pen could implicate the ESA or even other aspects of the MMPA if the sea pen is near protected species and/or environments.

Export to another country is technically possible—and indeed appears to be the plan of the WSP, which aims to construct its sea pen in Canada. However, in 2019 the Canadian Parliament “passed legislation

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233 See discussion supra Part I.
235 9 C.F.R. § 3.103 (2021). See also discussion supra Part I.
236 KILLING KEIKO, supra note 14, at 28, 87–89.
237 See discussion of definitions of “take” and protections for wild animals and habitats supra Sections I.B–C.
238 See Vinick, supra note 222.
banning whales, dolphins and porpoises from being bred or held in captivity.\textsuperscript{239} Although the legislation contains exceptions for marine mammals already in human care or those in need of rehabilitation, there is no indication that Canada will permit the import of marine mammals that, by the WSP’s own admission, will never be returned to the wild.\textsuperscript{240} Keeping cetaceans is not illegal in the United Kingdom; however, there have been no cetaceans held there since the 1990s, and public sentiment suggests that this is unlikely to change.\textsuperscript{241} Iceland, as evidenced by the beluga transfer, represents a more realistic possibility, but this may only be an option for other belugas. The SEA LIFE Trust website claims that there is “space for 10 belugas in Klettsvík Bay and we want to see other belugas join [our whales].”\textsuperscript{242} It is not clear whether there are other suitable sites in Iceland—killer whales may have to look elsewhere. Even if a suitable international location is found, the MMPA dictates that the receiving facility “must meet standards that are comparable to those required of a U.S. facility.”\textsuperscript{243} Thus, regardless of where the whales end up, they must receive the same level of care required by the AWA and MMPA.

D. Standards of Care: Daily Operations

Providing an equivalent level of care in a sea pen scenario presents a similar dilemma to the one in Section II.A—moving to a different place does not necessarily mean moving to a better place. Mark Simmons emphasizes two key aspects of this issue—taking into account the animals’ individual learning histories and “what’s familiar to them” and working in and around a marine environment.\textsuperscript{244} These obstacles could affect a sea pen operation’s ability—or inability—to comply with AWA or AWA-equivalent regulations.


\textsuperscript{240} Id.; About the Whale Sanctuary Project, supra note 224.


\textsuperscript{243} Public Display of Marine Mammals, supra note 58; see also 16 U.S.C. §§ 1374(c)(2)(B), (C) (2018).

\textsuperscript{244} Shark Con, supra note 111.
1. History and Training

Simmons compares moving aquarium-raised animals to sea pens as “akin to saying, hey, you grew up in New York City, in a condo, you loved your life, you had a great life, and then I’m going to rip you out of that and put you in the countryside and say there you go, you’re happier now, right?”\(^{245}\) Simmons witnessed this first hand with Keiko when the team began to introduce Keiko into the whole of Klettsvík Bay from smaller pens, noting that “there was no basis for expecting the bay to be either directly or intrinsically appealing to Keiko. He had no history with such an environment which, after all, was counterbalanced by a long-standing and vast history in smaller and more familiar surroundings.”\(^{246}\) Essentially, Keiko had no reason to like or even be interested in the bay. Keiko actually had to be trained to even venture into the bay from the bay pen, and initially:

made no bones about his preference for the old familiar bay pen over that of his new playground. In the first few days . . . he would only leave the pen at our behest. Given the freedom of choice, he would nest himself in the confines of the . . . innermost sanctuary of the bay pen.\(^{247}\)

This is not to say that whales cannot get used to a new environment. Keiko did ultimately adapt to the entire bay as an environment—but in large part due to the concerted efforts of his trainers.\(^{248}\) To animals with long histories in enclosed environments, a sea pen clearly does not represent an inherently superior—or even positive—alternative to life in a zoological institution.

Furthermore, life in a sea pen would not—and in some ways, could not—necessarily be as radically different as is claimed. Critics of the zoological industry frequently complain that zoos “force” whales and dolphins to “do tricks” for shows, solely for human entertainment—in sea pens, they argue, these animals will no longer need to do “tricks” or

\(^{245}\) Id.

\(^{246}\) KILLING KEIKO, supra note 14, at 194.

\(^{247}\) Id. at 197–203.

\(^{248}\) Id. at 208. It is also worth noting that when Keiko reappeared in Norway after several weeks of separation from his trainers, see discussion supra Part I, he actively sought out human interaction. Malene Simon et al., From Captivity to the Wild and Back: An Attempt to Release Keiko the Killer Whale, 25 MARINE MAMMAL SCI. 693, 697–98 (2009).
entertain people. These arguments, however, ignore or misunderstand the use of positive and humane training methods and do not account for the vital role that this training plays in these animals’ lives.

Marine mammal trainers—as well as many zookeepers caring for other species—use positive reinforcement training, which essentially rewards desired behavior while ignoring but not punishing unwanted behavior. Positive reinforcement training is not only humane and extremely effective, but also an essential aspect of marine mammal husbandry. Using positive reinforcement training, trainers ask animals to move from one space to another, present any part of its body for inspection, perform non-invasive procedures such as ultrasounds, collect blood or urine samples, give injections, and even conduct physical therapy sessions—all on a voluntary basis. The rewards used in training are frequently


250 Rachel Garner, How to Understand Zoo Animal Training, WHY ANIMALS DO THE THING (Aug. 27, 2018), https://www.phyanimalsdothething.com/how-to-understand-zoo-animal -training [https://perma.cc/DHN4-8PA9]; KAREN PRYOR, DON’T SHOOT THE DOG! THE NEW ART OF TEACHING AND TRAINING 1 (1999) [hereinafter DON’T SHOOT THE DOG!]; Animal Training Basics, SEAWORLD PARKS & ENT., https://seaworld.org/animals/all-about/train ing/animal-training-basics/ [https://perma.cc/S96Y-HFCH] (last visited Nov. 3, 2021). Early marine mammal trainers developed positive reinforcement training, realizing that historical methods of training, which were coercive and punishing, simply do not work on animals that live entirely in the water—“you cannot use a leash or a bridle or even your fist on an animal that just swims away.” Ken Ramirez, Marine Mammal Training: The History of Training Animals for Medical Behaviors and Keys to Their Success, 15 VETERINARY CLINICS N. AM.: EXOTIC ANIMAL PRAC. 413, 413 (2012); DON’T SHOOT THE DOG!, supra, at xii (“Positive reinforcers . . . were the only tools we had.”). See also CAROL J. HOWARD, DOLPHIN CHRONICLES 120 (1995) (“There is certainly no way you can make a five-hundred-pound dolphin in the water do something it doesn’t want to do.”).

251 DON’T SHOOT THE DOC!, supra note 250, at xi–xvi; Garner, supra note 250. Using positive reinforcement training, people have trained not only zoo animals, id., but also animals such as hermit crabs and sheep. See, e.g., KAREN PRYOR, REACHING THE ANIMAL MIND 12–13 (2009) (training a hermit crab to ring a bell); Franziska Knolle et al., Sheep Recognize Familiar and Unfamiliar Human Faces from Two-Dimensional Images, 4 ROYAL SOC’Y OPEN SCI. at 1, 3 (2017) (training sheep to recognize specific human faces).

food—cetaceans typically get the majority of their diets from training sessions and studies have demonstrated that animals often choose to receive food via training sessions rather than simply having food freely available.

Moving whales and dolphins to a sea pen will not eliminate the need for trainers to feed and provide medical care to these animals. In fact, a sea pen operation will not be able to meet AWA standards without animal training. AWA regulations include feeding and veterinary care requirements, which must consist of, inter alia, physical examinations and records of physical characteristics (e.g., length, weight) and any medical treatments—all requiring training. The Whale Sanctuary Project even includes plans for a “medical pool” that trainers will need to ask animals to move in and out of, and trainers in Iceland continue to provide food and training to the belugas in Klettsvik Bay. Even the supposed “show” behaviors such as jumps and flips serve a purpose beyond entertainment—used effectively, they can help an animal get into shape or keep fit. The major obstacle to providing the care and training required, however, is the environment itself.

2. The Marine Environment

In addition to dealing with the weather—particularly in places like Iceland, as discussed above—caring for animals in a sea pen naturally means dealing with the sea, which poses both maintenance and health challenges. AWA regulations set standards for water quality and sanitation of marine mammal habitats to ensure the animals’ health and

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253 Sabrina Brando, Marine Mammal Training, in ZOO ANIMAL LEARNING AND TRAINING 197, 199 (Vicky A. Melfi et al., eds., 2020).
254 This is known as “contrafreeloading.” See Terry L. Maple & Valerie D. Segura, Advancing Behavior Analysis in Zoos and Aquariums, 38 BEHAV. ANALYST 77, 85 (2015).
258 KILLING KEIKO, supra note 14, at 109, 145, 219.
Saltwater environments notoriously pose a multitude of maintenance challenges. Simmons describes the ocean as “a big pool of corrosive acid . . . just trying to destroy every man-made thing that we put into it.” Indeed, the feasibility of “[c]onstructing an 800-foot-long by fifty-sixty-foot deep net across the mouth of a bay in the North Atlantic . . . was initially deemed impossible by more than a few engineers.” Clearly, this project was ultimately not impossible; however, Simmons explains that “[e]verything about the barrier net was an exercise in overcoming obstacles . . . it [became] a maintenance nightmare to keep in place.” Even after installation, which was completed in temperatures as low as thirty-six degrees Fahrenheit, “[t]hroughout its existence . . . maintenance of the barrier net was a constantly raging battle.” Furthermore, the smaller bay pen Keiko initially lived in “was very dangerous to [Keiko] . . . it was constantly undulating and moving and the nets were coming to the surface and there was [sic] lots of opportunities for jagged edges and other things for him to get stuck in.”

The ocean in its current state presents additional dangers. In short, the ocean is polluted, and moving cetaceans into sea pens means exposing these animals to this pollution. Pollution in the ocean is not only “marine debris,” which ranges “from tiny microplastics, smaller than 5 mm, to derelict fishing gear,” but also contaminants such as heavy metals and toxins. This debris “can harm or kill an animal when it is ingested,” and excess nutrients can cause “red tides”—overgrowths of algae in the marine environment that can be toxic to marine life—or marine dead zones.

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261 Shark Con, supra note 111.
262 Id. at 163–64.
263 Id. at 188.
264 Id. at 207.
265 Shark Con, supra note 111.
267 Id.
268 Id.
Noise pollution is also a serious threat to marine mammals, who rely on sound to navigate and communicate. The effects of man-made noise—which comes from shipping, oil and gas operations, military activities, and other sources—"may range from minor disturbances to injury, and in some cases, death." In short, those proposing the removal of whales to sea pens must also be prepared to provide the necessary care to the animals in accordance with AWA regulations while dealing with complications caused by both Mother Nature and mankind.

The whales themselves could also pose a threat to their wild counterparts—and vice versa. Keiko’s papilloma—and foreign genes—prevented his release into U.S. waters. Viruses such as the morbillivirus can spread among marine mammals—morbillivirus in particular has caused significant mortality events on multiple occasions going back decades. Moving cetaceans to sea pens means potentially exposing them to pathogens they have never encountered and are thus unprepared for. This danger would likely be compounded by the stresses of travel, the sudden submersion into a completely new environment, and potentially new companions.

Ultimately, in addition to finding a suitable physical location, securing funding, and clearing legal hurdles, the construction of a sea pen and the need to provide at least the minimum standard of care to its inhabitants means dealing with myriad other obstacles. In a column addressing the sea pen issue, Mark Simmons summarizes the struggles of keeping Keiko in a sea pen:

I was present (more than once) when the pen was effectively destroyed by a storm. I was present when Keiko would play with (and likely swallow) foreign objects he retrieved from the seafloor. I was present, on more than one occasion, when Keiko fell ill from exposure to pathogens he would never encounter in a zoological setting. Regrettably,

271 Id.
272 BROWER, supra note 204, at 38.
274 See Herrera, supra note 114.
I was not present—sometimes for days at a stretch—when severe weather kept us from tending to him at all.\textsuperscript{275}

A sea pen is not an impossible goal; however, neither is it an easy solution. Even if a suitable sea pen is constructed and funded, maintaining the pen and caring for the whales in compliance with MMPA and AWA requirements is likely to remain a considerable uphill battle for the remainder of the whales’ lives. Until and unless these hurdles are overcome, moving cetaceans to a sea pen should not be considered a practicable solution—in or out of court.

CONCLUSION

As this Note demonstrates, determining what is “best” for animals is not easy. The AWA—and to an extent, the ESA—provide some guidance for how animals should be treated; however, there is little guidance to be found to assist attorneys, courts, or other interested parties in identifying the most appropriate solution in a given situation. Ideas for easy fixes go viral without consideration for whether such ideas are practicable. The transfer and treatment options in particular each present unique advantages and disadvantages, and either may be suitable depending on the specific circumstances of a case. In contrast, moving cetaceans to a sea pen requires overcoming significant hurdles, including finding an acceptable location, funding both construction and operation, navigating legal obstacles, and then ultimately providing treatment that at least meets minimum AWA standards.

The case studies and hypotheticals explored in this Note provide some insight into approaching these scenarios. When animal transfer is on the table, Kuehl v. Sellner illustrates the importance of considering multiple factors rather than relying on any single detail, such as USDA licensing. Judge Goldberg reminded courts that they do not need to “unnecessarily [hamstring] their broad remedial powers.”\textsuperscript{276} When considering the treatment option, Culp v. City of Los Angeles suggests that in some cases it is possible to fashion a practicable “treatment” injunction. However, Graham v. San Antonio Zoological Society serves as a reminder that larger changes may require a significant investment of time and

\textsuperscript{275} Mark Simmons, Sea Pens for Whales Not Ideal Solution, HARTFORD COURANT (Nov. 19, 2015, 8:00 PM), https://www.courant.com/sdut-whales-sea-pens-keiko-2015nov19-story.html [https://perma.cc/EC76-8TLA].

\textsuperscript{276} Kuehl v. Sellner, 887 F.3d 845, 856 (8th Cir. 2018) (Goldberg, J., concurring).
resources from both the facility and the court—and that litigation is likely not the most efficient way to effect such changes. Diving into the practical realities of keeping cetaceans in sea pens reveals the dangers of assuming a solution is practicable just because it sounds desirable and illuminates some of the complexities involved in caring for marine mammals while adhering to all relevant regulations.

There is clearly no “one-size-fits-all” answer when it comes to animals and zoological facilities—in or out of the courtroom. As Mark Simmons notes, we should remember that well-run zoos can “provide the best expertise and environments in the care of their animals.”277 Not all zoos are good—but not all zoos are bad, and it is not always easy to tell the difference. Anyone encountering the issues explored in this Note is urged to evaluate multiple factors and perspectives, gain an understanding of the intricacies of the zoological world, and—most importantly—put the animals first.

277 Killing Keiko, supra note 14, at 385.