Understanding The New US Fish and Wildlife CITES and Endangered Species Act

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The information in this presentation is not intended as legal advice and may not be relied upon for any specific matter.

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• The presentation addresses several laws and administrative orders concerning importing, exporting or trading in endangered species (there are others not discussed here):

• The Endangered Species Act of 1973 ("ESA").
• Director’s Order 210, including Appendix & Amendments ("DO201").
• Proposed Rule for revising the section 4(d) Rule, soon to become a Final Rule ("Final Rule"). This presentation assumes the legal standards in the Proposed Rule will be adopted in the Final Rule.
• The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").
• Marine Mammal Act of 1972 ("MMPA").
There is a difference between Commercial and Non-Commercial Trade in Endangered Species:

- **Commercial = Acquisition.**
  - Held in the course of a commercial activity after the date the ESA entered into effect (December 28, 1973) or the date the final rule listing the species under the ESA was published in the Federal Register, whichever is later.

- **Non-commercial = Donation or Loan.**
  - Not held in the course of a commercial activity after the date the ESA entered into effect (December 28, 1973) or the date the final rule listing the species under the ESA was published in the Federal Register, whichever is later.
  - The Proposed Rule makes clear that a donation to a museum, even if there is a tax advantage to the donor, is not a commercial transaction (technically, only African elephant ivory).
• The importer and/or exporter of endangered species must identify the species of the animal from which material was taken:

• Standard of proof is “best available evidence.”

• USFWS has the burden of disproving the species determination.
• Bird Feathers and Parts:

• **NO**: commercial/non-commercial trade in bald and golden eagles under the Bald & Golden Eagle Protection Act

• **NO**: commercial/non-commercial trade in migratory birds under the Migratory Birds Treaty Act of 1918.

• **NO**: commercial/non-commercial wild birds under the Wild Bird Conservation Act

• **YES**: limited commercial/non-commercial trade in other bird species under the ESA and CITES, subject to specific requirements.

  • [http://www.fws.gov/le/laws-regulations.html](http://www.fws.gov/le/laws-regulations.html)

**Pearlstein & McCullough LLP**
• Non-Commercial Trade in Ivories

• **African Elephant** Ivory:

• **YES**: non-commercial import of worked African elephant ivory that:
  • Under **ESA**, is pre-Act or antique; and,
  • Under **DO210** and the **Final Rule**, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
    • Part of a musical instrument; or
    • Part of a traveling exhibition.

• **YES**: non-commercial export of worked African elephant ivory that:
  • Under **ESA**, is pre-Act or antique; or,
  • Under the **Final Rule**, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
    • Part of a musical instrument; or
    • Part of a traveling exhibition.

• **YES**: non-commercial interstate and intrastate movement within the United States of legally acquired ivory is allowed.
• Bird Feathers and Parts:

• **NO:** commercial/non-commercial trade in bald and golden eagles under the Bald & Golden Eagle Protection Act

• **NO:** commercial/non-commercial trade in migratory birds under the Migratory Birds Treaty Act of 1918.

• **NO:** commercial/non-commercial wild birds under the Wild Bird Conservation Act

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      • Under **DO210** and the **Final Rule**, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
        • Part of a musical instrument; or
        • Part of a traveling exhibition.
    • **YES**: non-commercial export of worked African elephant ivory that:
      • Under **ESA**, is pre-Act or antique; or,
      • Under the **Final Rule**, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
        • Part of a musical instrument; or
        • Part of a traveling exhibition.
    • **YES**: non-commercial interstate and intrastate movement within the United States of legally acquired ivory is allowed.
• Non-Commercial Trade in Ivories

• **African Elephant** Ivory:

• **YES**: non-commercial import of worked African elephant ivory that:
  • Under *ESA*, is pre-Act or antique; *and*,
  • Under *DO210* and the *Final Rule*, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
    • Part of a musical instrument (Loans only); or
    • Part of a traveling exhibition (Loans only).
• **Non-Commercial Trade in Ivories**

• **African Elephant** Ivory:

• **YES**: non-commercial export of worked African elephant ivory that:
  • Is pre-Act or **ESA** antique; or
  • Under the **Final Rule**, was legally acquired and removed from the wild prior to February 26, 1976, and is either:
    • Part of a musical instrument (Loans only); or
    • Part of a traveling exhibition (Loans only).
• Non-Commercial Trade in Ivories

• **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):
  
  • **YES**: non-commercial import of Asian Elephant ivory that:
    
    • Is pre-Act; or
    
    • Is an ESA antiques.
  
  • **YES**: non-commercial export of Asian Elephant ivory that:
    
    • Is pre-Act; or
    
    • Is an ESA antiques.
  
  • **YES**: non-commercial interstate and intrastate movement within the United States of legally acquired Asian Elephant ivory is allowed.

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• Non-Commercial Trade in Ivories
  • **Asian Elephant** Ivory (and All other **ESA**-listed species not restricted elsewhere):

  • **YES**: non-commercial import of Asian Elephant ivory that:
    • Is pre-Act:
      • Not held for commercial purposes on or after June 14, 1976.
    Or
    • Is an **ESA** antiques:
      • Outside expert’s **ESA** antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973);
      • Outside expert’s determination of species;
      • **CITES** pre-Convention certificate issued by the country of export, and,
      • Must be imported into the US through an antique port.

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• Non-Commercial Trade in Ivories

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  • **YES**: non-commercial import of Asian Elephant ivory that:
    • Is pre-Act; or
    • Is an ESA antiques.
  
  • **YES**: non-commercial export of Asian Elephant ivory that:
    • Is pre-Act; or
    • Is an ESA antiques.
  
  • **YES**: non-commercial interstate and intrastate movement within the United States of legally acquired Asian Elephant ivory is allowed.
• Non-Commercial Trade in Ivories
  • **Asian Elephant** Ivory (and All other **ESA**-listed species not restricted elsewhere):

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    • Is pre-Act:
      • Not held for commercial purposes on or after June 14, 1976.
    Or
    • Is an **ESA** antiques:
      • Outside expert’s **ESA** antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973);
      • Outside expert’s determination of species;
      • **CITES** pre-Convention certificate issued by the country of export, and,
      • Must be imported into the US through an antique port.

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• Non-Commercial Trade in Ivories

• **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):

• **YES:** non-commercial export of Asian Elephant ivory that:
  • Is pre-Act:
    • Not held for commercial purposes on or after June 14, 1976.
  Or
  • Is an **ESA** antiques:
    • Owner affidavit stating continuous possession in US since prior to 9/22/1982 (or legally imported thereafter with a CITES pre-convention certificate);
    • Documentation supporting continuous possession in US since prior to 9/22/1982, such as a purchase receipt, dated photographs, inventory records, insurance records, dated appraisals, etc.; and,
    • Outside expert’s ESA antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973); and,
    • CITES pre-Convention certificate issued by US Fish and Wildlife Service.

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• Commercial Trade in Ivories

• African Elephant Ivory:
  
  • NO: import into United States under DO210.

  • YES: commercial export of ESA antiques.

  • YES: interstate commercial trade of ESA antiques or *de minimis* amounts.
• **Commercial Trade in Ivories**

• **African Elephant** Ivory:

- **YES**: commercial export of ESA antiques:
  - Owner affidavit stating continuous possession in US since prior to 9/22/1982 (or legally imported thereafter with a CITES pre-convention certificate); and,
  - Documentation supporting continuous possession in US since prior to 9/22/1982, such as a dated: purchase receipt, photograph, inventory or insurance records, appraisals, etc.;
  - Outside expert’s ESA antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973);
  - Outside expert’s determination of species.

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• **Commercial Trade in Ivories**

• **African Elephant** Ivory:

• **YES**: limited interstate commercial trade of ESA antiques or de minimis amounts:
  • Owner affidavit stating continuous possession in US since prior to 9/22/1982 (or legally imported thereafter with a CITES pre-convention certificate); and,
  • Documentation supporting continuous possession in US since prior to 9/22/1982, such as a dated purchase receipt, photograph, inventory or insurance records, appraisals, etc.; and,
  • Outside expert’s ESA antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973) —or— expert’s ESA **de minimis** calculation (that ivory comprises less than 200 grams) and meets the other *de minimis* requirements; and
  • Outside expert’s determination of species.

• If you are in a state where there are no regulations, then you must follow the Federal rules. If you are in a state with regulations, then you must follow both Federal and State rules.

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• Commercial Trade in Ivories

• **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):

  • **YES**: commercial import **ESA** antiques into United States.

  • **YES**: commercial export of **ESA** antiques.

  • **YES**: limited interstate commercial trade of **ESA** antiques.
• Commercial Trade in Ivories

• **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):

• **YES**: commercial import into United States with:
  • Outside expert’s **ESA** antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973);
  • Outside expert’s determination of species; and,
  • **CITES** export permit from the country of export.
Commercial Trade in Ivory:

- **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):

- **YES**: commercial export of ESA antiques:
  - Owner affidavit stating continuous possession in US since prior to 9/22/1982 (or legally imported thereafter with a CITES pre-convention certificate);
  - Documentation supporting continuous possession in US since prior to 9/22/1982, such as a purchase receipt, dated photographs, inventory records, insurance records, dated appraisals, etc.; and,
  - Outside expert’s ESA antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973);
  - Outside expert’s determination of species; and,
  - CITES pre-Convention certificate issued by US Fish and Wildlife Service.
• Commercial Trade in Ivories
  
  • **Asian Elephant** Ivory (and All other ESA-listed species not restricted elsewhere):
    
  • **YES**: interstate commercial trade of ESA antiques:
    • Owner affidavit stating continuous possession in US since prior to 9/22/1982 (or legally imported thereafter with a CITES pre-convention certificate); and,
    • Documentation supporting continuous possession in US since prior to 9/22/1982, such as a dated: purchase receipt, photograph, inventory or insurance records, appraisals, etc.;
    • Outside expert’s determination of species; and,
    • Outside expert’s ESA antique affidavit (at least 100 years old and not restored with restricted material since 12/28/1973).

• If you are in a state where there are no regulations, then you must follow the Federal rules. If you are in a state with regulations, then you must follow both Federal and State rules.

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• Non-Commercial and Commercial Trade in Marine Mammals

• Dolphins, porpoises, whales, seals, sea lions, manatees, dugongs, sea cows, marine (sea) otters, polar bears and walruses (under jurisdiction of the U.S. Fish and Wildlife Service) are protected under the MMPA.

• NO: Import, Export or Interstate Trade in material taken from the wild after December 21, 1972.

• YES: Non-Commercial and commercial Import, Export or Interstate Trade in compliance with ESA, CITES & MMPA requirements with a permit from NOAA (except for walrus). Note: there are special exemptions from ESA and MMPA for Alaskan Native materials.