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PERSPECTIVE

Do alligators and crocodiles provide a blueprint for protecting commercial trade in wildlife?

By David Frulla and Bret Sparks

Last month, the Eastern District of California in *April in Paris v. Becerra* granted a preliminary injunction against the state of California regarding Penal Code Section 653o(b). 19-2471, 19-2488 (E.D. Cal., Oct. 13, 2020). This law would ban the commercial importation, possession with intent to sell, and sale of alligators, crocodiles, and their parts and products in the state of California. The court's injunction allows trade in three crocodilian species — American alligator, Nile crocodile, and saltwater crocodile — to continue while the litigation proceeds. These three species make up the lion's share of domestic and international trade in alligator and crocodile skins — a market worth well over $100 million annually.

Eleven plaintiffs representing nearly every facet of the supply chain, from alligator farmers in Louisiana to high-end luxury boutiques on Rodeo Drive, brought the case. Since 2006, the California Legislature deferred the statute's alligator and crocodile ban, with periodic sunsets. The Legislature did not extend the deferral in 2019, and the ban was to become effective in 2020. Fearing potential lost sales, liquidated inventories, disrupted world-wide commerce, and the potential for complete business dissolutions, these plaintiffs brought their claims against California on Dec.13, 2019. By Dec. 20, the state had agreed to a temporary restraining order, postponing arguments on Section 653o(b)'s validity to the preliminary injunction stage.

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While the court's recent decision is not yet final, the injunction is nevertheless significant. It represents one of the few victories over a California law attempting to ban or limit trade in wildlife products. Indeed, *April in Paris* runs against the recent trend of courts approving bans or trade restrictions regarding products such as veal, pork, and eggs. The question, then, is what makes alligators and crocodiles so unique?

A viable preemption argument represents the key distinction. Instead of relying on factual analyses and a court's weighing and balancing of parties' interests in the dormant commerce clause context (the claim on which the preceding cases focused), a preemption argument simplifies decision-making to essentially a legal question based on applicable laws and regulations. Yet, the source of the preemption in *April in Paris* may seem surprising.

The federal Endangered Species Act traditionally thought of as a restraint on commercial activity, also authorizes sustainable trade in certain wildlife species. This authority is derived from the Convention on International Trade in Endangered Species of Wild Fauna and Flora, also called CITES — which Congress ratified via the ESA in 1979. Since its inception, CITES has established a comprehensive legal framework to regulate trade in certain protected species, while banning trade in others. Species for which international trade is permitted but controlled are categorized as Appendix II, and include American alligator as well as populations of Nile and saltwater crocodiles in certain countries.

Once CITES categorizes a species as Appendix II, the United States may authorize trade in those species via special rules promulgated under the ESA. As *April in Paris* explained, these special rules are "exemptions" to the general prohibition on trade in ESA-listed species. Both CITES and the ESA special rules provide detailed and closely monitored regulations authorizing trade in those products throughout the supply chain. Under the ESA's federalism provision, 16 U.S.C. Section 1535(f), a state cannot prohibit what federal law allows. *April in Paris* found the ESA alligator and crocodile special rules most likely preempted Section 653o(b).

CITES, and the ESA regime implementing CITES, promote conservation via sustainable use. Indeed, the CITES program and ESA special rules have led, for instance, to a prolific recovery of American alligators from just thousands in the 1960s to several million today. Moreover, by law, farming operations in Louisiana must supplement the wild populations. Rather than reflexively opposing all trade, as Section 653o(b) does, the CITES program stimulates greater

protections for these species *because* of their commercial value. In fact, the Louisiana Department of Wildlife and Fisheries, along with Louisiana landowners, have brought their own consolidated action, claiming Section 653o(b) would thwart their federally promoted alligator conservation efforts. What makes the plaintiffs' position in *April in Paris* so unique, moreover, is demonstrated support from the international conservation community.

Declarations from present and former high-ranking international conservation officials in *April in Paris* state, as follows:

"The management and trade mechanisms developed for crocodilian species [are] the greatest conservation success story of the previous century." (Hon. Eugene LaPointe, former CITES secretary general, 1982-1990.)

"I witnessed first-hand the success of CITES … in making the crocodile trade sustainable and its products traceable, as well as in eliminating corruption and illegal trade." (Hon. Willem Wijnstekers, former CITES secretary general, 1999-2010.)

"CITES works. Regulated and sustainable trade works. Sustainable use works. I could cite many examples of successes but let me mention just one. Crocodiles were listed in 1975, in response to severe depletion. The crocodile industry is now worth over 100 million dollars a year, the illegal trade has all but vanished, and crocodiles are far more abundant than they were 50 years ago." (Dr. Dilys Roe, chair of the Sustainable Use and Livelihoods Specialist Group for the International Union for the Conservation of Nature.)

These declarations, and *April in Paris* generally, present fundamental public policy questions for laws like Section 653o(b). For instance, if the international and federal regimes (put into place by conservation experts) are working, won't prohibitionist laws by individual states only serve to undermine these conservation efforts and stimulate the potential for illegal markets? And if so, are there further applications of these preemption arguments that could prevent that from happening?

As to the latter, Section 653o likewise bans from commercial trade a number of other species categorized under CITES Appendix II and regulated by similar ESA special rules. Perhaps *April in Paris* can provide a blueprint for other industries looking to re-solidify federal and international management of these species, as well as to re-open California's valuable markets to sustainable trade and the many people world-wide whose livelihoods depend on it. ■

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