UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE DEPARTMENT OF AGRICULTURE

In re:	)	
	)	
WYOMING DEPARTMENT OF PARKS AND CULTURAL RESOURCES	)	
	)	
And	)	
	)	
KEVIN SKATES	)	AWA Docket No. 07-0022
	)	
And	)	
	)	
WADE HENDERSON	)	
	)	
Respondents	)	**DECISION AND ORDER**

Disposition

I have decided that the Secretary of Agriculture has jurisdiction under the Animal Welfare Act (7 U.S.C. §§ 2131-2159; "the Act"), to require an agency of the State of Wyoming to be licensed by the United States Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS") and to comply with regulations and standards issued under the Act, when the Wyoming agency engages in the activities of an "exhibitor" as that term is defined in the Act. I have further decided that under the uncontested facts in this proceeding, a cease and desist order should be entered against the Wyoming agency to require such licensing and compliance. However, civil penalties are not being assessed, and the complaint is being dismissed in respect to Wyoming's two Park Superintendents whom the Complaint had included as Respondents.

Procedural Background

On November 15, 2006, APHIS filed a Complaint against the Respondents, the Wyoming Department of Parks and Cultural Resources and two of its Park Superintendents, for violating the Act and regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1-3.142; "the Regulations"). In the Complaint, APHIS contends that the operation of two of the State's thirty-one parks requires an exhibitor's license under the Act and the Regulations in that bison and elk are maintained at those parks for public viewing. The complaint requests a cease and desist order and the assessment of civil penalties against the Respondents.

On December 6, 2006, the Respondents filed their Answer in which they admitted many of the factual allegations of the Complaint including the maintenance of bison and elk at the two parks for public viewing, but deny that the United States Department of Agriculture has subject matter or personal jurisdiction over the State of Wyoming and its agencies and employees. The Answer asserts that the remedies APHIS seeks against the Respondents are barred under sovereign immunity; that the Complaint fails to state a claim against them; and that the relief sought is inappropriate, improper and contrary to law. The Answer requests that the Complaint be dismissed.

On February 15, 2007, APHIS filed a motion for judgment on the pleadings. On April 2, 2007, Respondents filed a response to the motion with a cross-motion for judgment on the pleadings. On April 27, 2007, APHIS filed its response to the cross-motion.

On May 16, 2007, I requested the parties to answer questions respecting the differences, if any, in the amount of oversight APHIS seeks to exercise in respect the two

Wyoming State Parks in comparison to the oversight APHIS exercises, if any, in respect to National Parks such as Yellowstone. APHIS filed its response to the questions on June 12, 2007 and the Respondents filed their response on July 19, 2007.

Findings

1. Respondent Wyoming Department of Parks and Cultural Resources is an agency of the State of Wyoming. Its primary business address is 2301 Central Avenue, Cheyenne, Wyoming 82002. It operates no fewer than thirty-one State Parks and Historic Sites within the State of Wyoming, including, Hot Springs State Park, a Wyoming State Park located at 220 Park Street, Thermopolis, Wyoming 82443 ("Hot Springs"), and Bear River State Park, a Wyoming State Park located at 601 Bear River Drive, Evanston, Wyoming 82930 ("Bear River").

2. Respondent Kevin Skates is the Park Superintendent of Hot Springs.

3. Respondent Wade Henderson is the Park Superintendent of Bear River.

4. A herd of adult and yearling bison is maintained at Hot Springs for public viewing. Hot Springs is a resort complex that includes facilities and amenities for overnight lodging (Holiday Inn and Plaza Hotel), aquatic recreation (Star Plunge Water Park), and a rehabilitation hospital (Gottsche Rehabilitation Center).

5. Captive bison and elk are kept at Bear River for public viewing. Bear River is located along Interstate 80 and contains a rest stop for travelers on I-80 with a Travel Information Center that acts as, in the words of a Wyoming State brochure: "a distribution point for information about Wyoming's many aspects and events that make our state a splendid place to visit."

6. On April 11, 2002, the Director of the APHIS Western Region for Animal Care, wrote to the Park Superintendent of Hot Springs and suggested that the State of Wyoming might be conducting activities that required licensing by APHIS, and enclosed a packet of materials including copies of the Regulations and Standards for his review.

7. On June 4, 2003, in response to a request from the Park Superintendent of Hot Springs, the Director of the APHIS Western Region for Animal Care sent him forms and information for obtaining an APHIS license.

8. On May 29, 2004, the Park Superintendent of Hot Springs completed an application for an APHIS license.

9. On September 29, 2004 a pre-license inspection of Hot Springs was conducted by an APHIS Animal Care Inspector who reported that the facility was inadequate for licensing because a written program of veterinary care had not been completed; there were no barriers between the animals and the public; no employee/attendant was present during times the public has access to the animals; and the facility only had a buck rail styled fence and lacked a secondary restriction/containment perimeter fence.

10. On October 18, 2004, a pre-license inspection of Bear River was conducted by an APHIS Veterinary Medical Officer who reported that the facility was inadequate for licensing because it lacked appropriate fencing and secondary barriers to prevent public contact or an attendant to monitor potential public contact.

11. Subsequent to these pre-licensing inspections and reports by APHIS, no further effort to obtain an APHIS license was made by the Wyoming Department of Parks and Cultural Resources.

12. The Wyoming Department of Parks and Cultural Resources has not and does not hold a valid Exhibitor's License issued by APHIS that section 2.1a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) requires of any person meeting the Act's definition of "exhibitor" set forth at 7 U.S.C. § 2132 (h).

Conclusions

1. It is appropriate to enter a decision and order in this proceeding without holding an evidentiary hearing.

Under the controlling rules of practice:

Any motion will be entertained other than a motion to dismiss on the pleading.

7 C.F.R. § 1.143 (b)(1). The Respondents, however, have challenged the jurisdictional authority for initiating this proceeding against an agency and employees of a sovereign State. This jurisdictional issue must necessarily be first addressed.

Moreover, there is no dispute as to the essential material facts needed to arrive at a decision and order in this proceeding. Both sides have moved for a judgment to be entered without a hearing. To the extent a different designation than "motion for judgment on the pleadings" is needed to satisfy the cited rule of practice, complainant has suggested that its motion may be construed as a motion for summary judgment. At any rate, I have concluded that adjudicatory economy shall be best served by resolving the issues raised in this proceeding without conducting an evidentiary hearing.

2. The Secretary has jurisdiction to regulate a State Agency that "exhibits" animals within the meaning of the Act, and I have jurisdiction to conduct this administrative proceeding to enforce the terms of the Act in respect to such a State Agency.

Respondents contend that this proceeding should be dismissed because the Secretary and I lack subject matter and personal jurisdiction over State agencies and

employees acting on a State's behalf. They assert they are protected from being sued under the doctrine of sovereign immunity that generally applies under the United States Constitution, and because the language of the Act does not include a State as a "person" that the Secretary may require to be licensed.

Apparently, Wyoming was initially agreeable to the request by APHIS that it obtain a license to exhibit the herds of bison and elk that the public view in their two State Parks. It was the filing of a license application on behalf of Wyoming for its two parks that caused APHIS to conduct pre-license inspections. But those inspections resulted in APHIS conditioning license issuance on the preparation of a written program of veterinary care; the erection of barriers between bison, elk and the public; and the presence of an employee/attendant when the public has access to the bison or elk. APHIS does not attempt to similarly control the viewing of animals by the public at neighboring National Parks, and these licensing conditions evidently were considered to be unduly burdensome by Wyoming[1]. It then consulted its Attorney General and on his advice, has asserted sovereign immunity defenses, and argues that under the language of the Act, a State may not be required to submit to licensing and oversight by APHIS.

Under the Eleventh Amendment, a State may not be sued by private persons without its consent. But "… nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 138, at 140, 85 S.Ct. 808, at 815

[1] In response to my questions, APHIS advised that National Parks and other Federal agencies exhibiting animals are not regulated by APHIS except on a voluntary basis such as the National Zoo. This is due to an interpretation by APHIS that Section 2144 of the Act (7 U.S.C.§ 2144) requires Federal agencies exhibiting animals to directly comply with the standards promulgated by the section without the need for licensing and oversight by APHIS.

(1965). Therefore, the controlling issue in this proceeding is whether the language of the Act authorizes the regulation of a State agency that maintains animals for public viewing.

The Act subjects an animal "exhibitor" to licensing by the Secretary of Agriculture, and to standards, rules and regulations promulgated by the Secretary governing the humane handling, care, treatment and transportation of animals 7 U. S.C. §§ 2132-2143. An "exhibitor" is defined as follows:

> The term "exhibitor" means any person (public or private) exhibiting any animals which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

7 U.S.C. § 2132(h). This definition was added to the Act by its amendment in 1970. As originally enacted in 1966, the Act applied to "dealers" and "research facilities". When amended in 1970 to extend its licensing requirements and control to the activities of exhibitors, the Act employed the term "person" as part of the definition of "exhibitor" and left its definition of "person" unchanged from the way it was originally stated in 1966. When further amended in 1976 to, among other things, extend coverage to prevent the mistreatment of animals while being transported and to make it a crime to engage in animal fighting, the definitions of "person" and "exhibitor" were both left unchanged. The Act continues to define "person" in the identical language used in 1966, as follows:

> The term "person" includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

7 U.S.C. § 2132(a). The motions of APHIS and Wyoming debate whether the Act's definition of "exhibitor" that incorporates this definition of "person", is intended to bring a State agency or its employees within the Secretary's jurisdiction. Both cite *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 120 S.Ct.1858 (2000), as authority for their opposing positions.

The controlling issue in *Vermont, supra*, was whether the word "person" as used in the statute being considered by the Court, permitted a cause of action on behalf of the United States to be asserted against a State. Justice Scalia, speaking for the majority, explained how this statutory question should be decided:

> We must apply to this text our longstanding interpretive presumption that "person" does not include the sovereign. See *United States v. Cooper Corp*., 312 U.S. 600, 604, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); *United States v. Mine Workers*, 330 U.S. 258, 275, 67 S.Ct. 677, 91 L.Ed. 884 (1947)*(footnote reference omitted*).The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.' *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The presumption is, of course, not a 'hard and fast rule of exclusion,' *Cooper Corp*., *supra*, at 604-605, 61 S.Ct. 742, but it may be disregarded only upon some affirmative showing of statutory intent to the contrary. See *International Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 83, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991).
>
> *Vermont, supra*, at 789-780, 120 S.Ct.1866.

The full statement of the referenced opinion in *Cooper Corp., supra*, is:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

As both *Vermont* and the Court's earlier decision in *Cooper*, make clear, the intent of Congress is controlling in deciding this statutory question, and the legislative history of the Act needs to be reviewed.

This review shows that when originally enacted in 1966, State and municipal governments were not intended to come within the Act's definition of "persons" subject to the Secretary's jurisdiction.

The Senate's section-by-section analysis of the House bill that was enacted into law in 1966, stated:

> **Section 2**.—This section contains definitions of eight terms used in the bill.
>
> (a) The term "person" is limited to various private forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs, cats, monkeys, guinea pigs hamsters, or rabbits. It is *not* intended to include public agencies or political subdivisions of State or municipal governments.

1966 U.S. Code Cong. & Adm. News 2635, 2637. The section-by-section analysis of the Conference report on the House bill similarly stated:

> **Section 2**. ---This section contains definitions of eight terms used in the bill:
>
> (a) The term "person" is limited to various forms of business organizations. It is, however, intended to include nonprofit or charitable institutions which handle dogs and cats. It is *not* intended to include public agencies or political subdivisions of State or municipal governments or their duly authorized agents. It is the intent of the conferees that local or municipal dog pounds or animal shelters shall not be required to obtain a license since these public agencies are not a "person" within the meaning of section 2(a). Accordingly, research facilities would not (under sec.3) be prohibited from purchasing or acquiring dogs and cats from city dog pounds or similar institutions or their duly authorized agents because these institutions are not "persons" within the meaning of section 2(a). Section 2(a) is identical to section 2(a) of the House bill which is broader in scope than the comparable provision in section 2(a) of the Senate amendment.

1966 U.S. Code Cong. & Adm. News at 2652. In 1970, when the Act was amended to give the Secretary jurisdiction over the activities of exhibitors, the definition

of a "person" was left unchanged while the definition of "exhibitor" was set forth as meaning:

"…any person (public or private) exhibiting any animals…"

7 U.S.C. § 2132(h). The legislative history of the 1970 amendments to the Act consists entirely of the House report unaccompanied by a Senate or Conference report. The House's section-by-section analysis does address the new definition of "exhibitor", but is silent in respect to whether it was intended to apply to State governments or their agencies.

However, the fact that the phrase "public or private" is used in the "exhibitor" definition as a modifier of the term "person", has led the author of a treatise on the Animal Welfare Act published in AGRICULTURAL LAW, Vol. II (Matthew Bender, 2004 edition), to conclude, at 87-8:

> The term "person," as used in the Act, includes individuals, partnerships, corporations, associations, and other legal entities. It does not cover public persons, such as state and local governments. State and local governmental bodies, however, are included in the definition of an "exhibitor" under the Act.

The author explains his rationale for this conclusion as part of his footnote 7 appearing at the bottom of page 87-8:

Rationale: If the term "person" were construed to include public persons such as state and local governments, it would mean that the statutory definition of "exhibitor" to mean "any person (public or private)" would be redundant and serve no useful purpose.

The State of Wyoming in its Response to Complainant's Motion for Judgment and its Cross Motion for Judgment, at page 11, argues that the use of "(public or private)" to modify "person" in the "exhibitor" definition should be interpreted as modifying only those individuals, partnerships, firms, joint stock companies, corporations, associations, trusts, estates, or other legal entities who are "persons" as specified in 7 U.S.C. § 2132(a).

When so viewed "… 'public or private' would include public or private corporations, not-for-profits or any other number of non-sovereign legal persons whether traded publicly or privately held."

However, not-for-profits were always covered by the Act's definition of person. *See* the Senate and Conference reports, *supra*. Furthermore, the offered interpretation is both contrary to the conclusion reached in the quoted treatise published in AGRICULTURAL LAW, *supra*, and to the definition of "public or private" found in older versions of BLACK'S LAW DICTIONARY[2]:

> **Public and private.** A public corporation is one created by the state for political purposes and to act as an agency in the administration of civil government….
>
> Private corporations are those founded by and composed of private individuals for private purposes, as distinguished from governmental purposes, and having no political or governmental franchises or duties.

BLACK'S LAW DICTIONARY, 4th edition, page 409. More importantly and decisively, Wyoming's interpretation of this operative language of the Act is inconsistent with the interpretation given it for over thirty years by the officials who administer the provisions of the Act for the Secretary that:

> … a state actor is just as capable of acting as an exhibitor and operating what is essentially a zoo. (The regulations define 'zoo' to mean 'any park, building, cage, enclosure, or other structure or premise in which a live animal or animals are kept for public exhibition or viewing, regardless of compensation' 9 C.F.R. § 1.1). Indeed, no fewer than twenty-one (21) states and state agencies are currently listed as exhibitors under the Act.

Complainant's Motion for Judgment on the Pleadings, at page 10. Complainant was careful to explain in its Response to Respondent's Cross-Motion for Judgment on the Pleadings, at page 6, footnote 4, that the referenced twenty-one States and State agencies

[2] Recent additions of BLACK'S do not include a definition of the phrase. After stating the definition, the older 4th edition cited early cases that employed it in reaching various decisions.

are listed by APHIS as exhibitors holding required exhibitors' licenses for operating Animal Care Facilities covered under the Act and the Regulations and are not merely entities who may have voluntarily become registered exhibitors.

After the Act's amendment, in 1970, to extend its coverage to exhibitors, the Act was amended in 1976, to further extend its coverage. Other amendments were made by Congress in 1984, 1985, 1990, 1991 and 1995.

In 1990, section 2158 was added to the Act to require pounds or shelters owned and operated by a State, county, or city, and those privately owned that are operated on behalf of a State, county or city, to observe a five day holding period after acquiring a dog or cat before selling it to a dealer (7 U.S.C. § 2158). By that time, any reluctance by Congress to regulate a State, county or city was no longer apparent.

Ostensibly, whenever the Act came before Congress for consideration and amendment during the past thirty years, Congress accepted the Department's interpretation that the "exhibitor" definition properly includes State agencies, and, for that reason, that definition together with the one for "person" was not altered

In *Doris Day Animal League v. USDA*, 315 F.3d 297 (DC Cir. 2003), the Court of Appeals for the District of Columbia Circuit reversed a district court decision that held against the Secretary for continuing to employ, even after conducting rulemaking in which 36,000 comments were received on the need for change, a regulatory definition of "retail pet store" that included residential operations as coming within the term. The district court believed the regulation was inconsistent with the Act's use of the term to exempt "retail pet stores" from dealer licensing requirements. In reaching its decision to reverse the district court, the Circuit Court stated:

> The regulation's basic definition of 'retail pet store' to mean 'any outlet,' without distinguishing homes from traditional business locations, dates back to 1971….
>
> * * * *
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> While the regulation's definition of 'retail store' does not exactly leap from the page, there is enough play in the language of the Act to preclude us from saying that Congress has spoken to the issue with clarity. From what we can make out, Congress has paid little attention to the question posed in this case. Still, it is true that in the years since the passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of 'retail pet store' although it has amended the Act three times. One line of Supreme Court cases holds that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974)). The quotation fits this case perfectly….
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> * * * *
>
> Taken together, the Secretary's decision to retain the regulatory definition of 'retail pet store' reflects the judgment of the agency entrusted with administering the Animal Welfare Act to fulfill the purpose of the Act as effectively as possible. For the reasons given, the regulation is a permissible construction of the statutory term 'retail pet store.'

In the instant proceeding, there is even more reason to defer to the interpretation of the pertinent statutory language by the officials of APHIS who administer the Animal Welfare Act. Their interpretation is not only a permissible one of long standing; it is consistent with an identical interpretation expressed in the treatise published in AGRICULTURAL LAW, *supra*, and the definition of "public and private" found in older editions of BLACK'S LAW DICTIONARY, *supra.*

Respondents further argue that because the public view the bison and elk at the two State Parks without charge, the Respondents are outside the ambit of that part of the "exhibitor" definition which limits its application to "exhibiting animals….to the public for compensation." This argument is unavailing in light of controlling Departmental

decisions. In *Lloyd A. Good, Jr*., 49 Agric. Dec. 156, 163-164 (1990), it was held that an animal exhibited in conjunction with a resort is exhibited for compensation within the meaning of the Act and the Regulations. Additionally, under the Regulations "any park…in which a live animal or animals are kept for public exhibition or viewing regardless of compensation" is defined to be a "zoo" (9 C.F.R. § 1.1), and thereby comes within the "exhibitor" definition regardless of whether the exhibition is for compensation. *See James Petersen and Patricia Petersen*, 53 Agric. Dec. 80, 90-91 (1994).

For these reasons, I conclude that the Secretary does have jurisdiction over the Wyoming Department of Parks and Cultural Resources, and that I have jurisdiction to impose a cease and desist order requiring its licensing and compliance with governing Regulations and Standards.

3. The Wyoming Department of Parks and Cultural Resources should be ordered to cease and desist from operating as an "exhibitor" without holding a valid license issued by APHIS and failing to comply with the Regulations and Standards.

The issuance of a cease and desist order is appropriate and needed to assure that the Wyoming agency will no longer exhibit animals at its State Parks without holding a valid license and will, in the future, observe the Regulations and Standards.

On the other hand, inasmuch as the Wyoming Agency legitimately believed that it was not subject to the Secretary's jurisdiction under the Act, it is not appropriate to assess civil penalties against it. It acted on the basis of advice it was given by the Wyoming Attorney General's Office in a case of first impression.

Furthermore, the Complaint is being dismissed in respect to the two Park Superintendents who were also named as Respondents. They were sued as individuals in their official capacities under a doctrine announced in *Ex parte Young*, 209 U.S. 123

(1908), to overcome the possible application of sovereign immunity under the Eleventh Amendment. (*See* the discussion at pages 11-12 of Complainant's Motion for Judgment on the Pleadings). Inasmuch as this provision of the Constitution does not prevent a State's being sued by the United States for the reasons enunciated in *United States v. Mississippi*, *supra*, the inclusion of the two Park Superintendents as subjects of the order is superfluous and unnecessary.

Accordingly the following Order is being entered.

ORDER

It is hereby ORDERED that the Wyoming Department of Parks and Cultural Resources shall cease and desist from (1) exhibiting animals at its State Parks without holding a valid Exhibitor's license issued by the United States Department of Agriculture's Animal and Plant Health Inspection Service; and from (2) failing to comply with the Regulations and Standards issued under the Animal Welfare Act governing the activities of animal exhibitors.

This decision and order shall become effective and final 35 days from its service upon the parties who have the right to file an appeal with the Judicial Officer within 30 days after receiving service of this decision and order by the Hearing Clerk as provided in the Rules of Practice (7 C.F.R. § 1.145).

Dated:_____ _____

Victor W. Palmer
Administrative Law Judge