

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 09-0175

In re: Bodie S. Knapp, an individual
doing business as The Wild Side

Respondent

Decision and Order

Appearances: Colleen A. Carroll, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC for the Complainant
Phillip Westergren, Esquire, Corpus Christi, Texas for the Respondent

Preliminary Statement

This action was initiated by Kevin Shea, then the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS) by the filing of a Complaint on August 19, 2009 alleging that the Respondent Bodie S. Knapp (Respondent or Knapp) and another individual¹ violated the Animal Welfare Act (the Act or AWA). 7 U.S.C. §2131, *et seq.* Respondent Knapp's Answer was filed on September 11, 2009 and the case was assigned to the docket of Senior United States Administrative Law Judge Victor W. Palmer. Following an adverse ruling upon Respondent's Motion for Discovery, the matter was initially set for hearing in Corpus Christi, Texas to commence on March 10, 2010.

¹ As filed, the Complaint named as Respondents Bodie S. Knapp and Kimberley G. Finley. A Consent Decision was entered as to Kimberley G. Finley on March 10, 2010 and the case proceeded thereafter solely against the Respondent Knapp. Docket No. 27.

Complainant then filed a Motion for Leave to File an Amended Complaint on February 5, 2010, following which the Respondent sought a continuance of the hearing. The continuance was granted and the matter was then reset for hearing to commence on May 18, 2010. On May 18, 2010, Knapp's Answer to the Amended Complaint was filed. The following day, in response to a number of complaints from witnesses who had been subpoenaed who would have to cancel events and travel on Memorial Day, the hearing was again postponed and rescheduled a third time to commence on September 28, 2010.

Respondent then filed a Motion for Summary Judgment on June 29, 2010. Complainant responded on August 4, 2010 and by ruling entered on August 16, 2010, Judge Palmer denied the Motion for Summary Judgment. On September 3, 2010, the hearing set for September 28, 2010 was cancelled. On November 17, 2010, a telephonic conference was held; leave was granted for the Complainant to file a Second Amended Complaint; and the matter was set for hearing for the fourth time, this time on June 21, 2011. On December 8, 2010, Respondent filed his Answer to the Second Amended Complaint.

On February 3, 2011, the case was reassigned to my docket. On May 18, 2011, Complainant sought to "correct" the Second Amended Complaint. Respondent opposed the Motion and another teleconference was conducted on June 8, 2011. During the teleconference, I denied Complainant's Motion to correct the Second Amended Complaint, noting the stipulation that the parties had entered into concerning the bulk of the factual allegations, and granted Respondent leave to supplement their witness list.

The oral hearing of this matter commenced on June 21, 2011 in Corpus Christi, Texas. At the hearing, Complainant called six witnesses. Respondent called three

witnesses, including the Respondent Bodie S. Knapp.² Twenty-five agency exhibits and twelve Respondent exhibits were admitted.³

Following the hearing, both parties submitted post hearing briefs and the matter is now ripe for disposition.

Statutory and Regulatory Framework

The term “animal” is statutorily defined as:

The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used , or is intended to be used for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes ...(3) other farm animals, such as, but not limited to livestock and poultry.....7 U.S.C. §2132(g)

Section 2133 of the AWA provides:

The Secretary shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as he may prescribe.... 7 U.S.C. §2133.

Section 2134 provides:

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

Section 2151 provides:

The Secretary is authorized to promulgate such rule, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter. 7 U.S.C. §2151.

Exotic animals are defined as:

² References to the transcript of the proceeding will be indicated as Tr. and the page number.

³ Agency exhibits are identified as CX-1 through CX-30; in computing the number of agency exhibits, certain exhibits had subsections and were counted separately, i.e, CX-3 and 3a and CX-17a , 17b and 17c. Respondent’s exhibits are identified as RX-1 through RX-12. Exhibits RX-11 and RX-12 are the two photographs taken during the hearing but submitted with Respondent’s brief.

Exotic animal means any animal not identified in the definition of “animal” provided in this part that is native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad. This term specifically includes animals such as, but not limited to, lions, tigers, leopards, elephants, camels, antelope, anteaters, kangaroos, and water buffalo, and species of foreign domestic cattle, such as Ankole, Gayal, and Yak. 7 C.F.R. §1.1

Farm animals are further defined under the Regulations as:

Farm animal means any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used for or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for the purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals. 7 C.F.R. §1.1

The Regulations require:

Any person operating or intending to operate as a ...dealer...must have a valid license...except persons who are exempted from the licensing requirements under paragraph 3(a) of this section must have a valid license. 9 C.F.R. §2.1(a);

The exemptions include:

(viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is otherwise not required to obtain a license. 9 C.F.R. §2.1(a)(3)(viii);

Discussion

The Animal Welfare Act enacted in 1970 (P.L. 91-579) draws its genesis from and is an amendment of the Laboratory Animal Welfare Act (P.L. 89-54) which had been enacted in 1966 to prevent pets from being stolen for sale to research laboratories, and to regulate the humane care and handling of dogs, cats and other laboratory animals. The 1970 legislation amended the name of the prior provision to the Animal Welfare Act in

order to more appropriately reflect its broader scope.⁴ Since that time Congress periodically has acted to strengthen enforcement, expand coverage to more animals and activities, or conversely, curtail practices viewed as cruel or dangerous.⁵ Farm animals and those used only for the purposes of food and fiber are specifically not covered by the Act.⁶

Respondent Bodie S. Knapp is a former exhibitor⁷ and Animal Welfare Act license holder (74-C-0533) with a history of continued difficulty with respect to APHIS regulators. A Complaint was first filed against him and others by the Administrator on March 17, 2004.⁸ The violations in that case followed the entry on October 17, 2003 of a Consent Decision and arose from provisions requiring the Corpus Christi Zoological Association to “place all of its animals...by donation or sale, with persons who have demonstrated the ability to provide proper care for said animals in accordance with the Act and the Regulations, and as approved by the complainant.”

⁴ The Congressional statement of policy is set forth in 7 U.S.C. §2131 which provides in pertinent part: “The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent or eliminate burdens on such commerce, in order –

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from theft of their animals by preventing the sale or use of animals which have been stolen.

⁵ A 1976 amendment added Section 26 of the Act making illegal a number of activities that contributed to animal fighting. Haley’s Act (H.R. 1947) introduced in the 100th Congress made it unlawful for animal exhibitors and dealers (but not accredited zoos) to allow direct contact between the public and large felids such as lions and tigers.

⁶ 7 U.S.C. §2132(g)(3); *See also*, 7 C.F.R. §1.1 **Definitions**.

⁷ A Class “C” licensee (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an “exhibitor” (§1.1), and whose business involves the showing or displaying of animals to the public. A class “C” licensee may buy and sell animals as a minor part of the business in order to maintain or add to his animal collection. 7 C.F.R. §1.1 **Definitions**.

⁸ *In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc., a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp*, AWA Docket No. 04-0015, Decision and Order of Judge Palmer entered on August 31, 2006, 65 Agric. Dec. 993 (2006).

During the pendency of the first action, a second disciplinary Complaint was filed against Knapp by the Administrator on August 31, 2004.⁹ Knapp failed to answer that Complaint in a timely manner and pursuant to the Rules of Practice, 7 C.F.R. §1.130, *et seq.*, by such failure was deemed to have admitted willfully committing 84 violations of the Act, Regulations and Standards.¹⁰ Judge Hillson's Decision and Order entered on January 4, 2005 concluded that Knapp had willfully violated the Act, ordered Knapp to cease and desist from future violations, and revoked his AWA license. Knapp appealed Judge Hillson's decision to the Departmental Judicial Officer who affirmed the decision¹¹ and subsequently denied a motion filed on Knapp's behalf for reconsideration.¹² Following denial of the motion for reconsideration, the revocation became effective September 10, 2005.

On April 19-22, 2005 and August 30-31, 2005 (after the entry of Judge Hillson's decision in the second case), Judge Palmer presided over the hearing in the first case which had been initiated against Knapp and others in the *Coastal Bend Zoological Association* action and entered his decision on August 31, 2006. Although the greatest part of the decision dealt with the zoo and the individuals involved with its operation, Judge Palmer found Knapp's violations which resulted in the overdosing and subsequent

⁹ *In re Bodie S. Knapp*, AWA Docket No. 04-0029.

¹⁰ Examination of the decision reflects that although there were violations involving potential danger to animals or public, the majority of the 84 violations were far less serious and subject to remedial or corrective action, including allegations involving involved rust observed in animal enclosures (31 instances), other enclosure related issues, and housekeeping violations, including the failure to remove excessive excreta, a substance which Bess Truman tried unsuccessfully to have her husband call fertilizer (14 instances). 64 Agric. Dec. 253, 274-288 (2005).

¹¹ *In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005).

¹² *In re Bodie S. Knapp*, 64 Agric. Dec. 1668 (2005).

death of two lions and two tigers particularly egregious, but in light of Knapp's financial condition imposed a minimal fine of \$5,000.00.¹³

Contrary to the earlier two cases, the allegations in the instant action do not involve violations of the Act arising from the exhibition of regulated animals, danger to the animals or public, or any issues regarding deficiencies of his facility or the care, treatment or well being of animals which he and members of his family members own, but rather the Second Amended Complaint alleges that the Respondent's transactions in buying, selling and transporting animals are regulated, require an AWA license (which he no longer possesses or is eligible for) and amount to violations of the Act and Regulations. The Second Amended Complaint, which supplanted the First Amended Complaint, alleged thirty violations involving the sale, purchase, offer for sale or purchase, delivery for transportation, transportation, negotiation for sale or purchase of 419 animals between the period of November of 2005 and September 25, 2010.¹⁴

Respondent denies certain of the allegations and takes the position that the other transactions, the greatest number of which were the subject of a stipulation,¹⁵ fall beyond the parameters of regulated conduct.

Four of the alleged violations (involving five animals) involve transactions with Christian Bayne Gray of Bolingbroke, Georgia (and Pensacola, Florida). Those transactions alleged include the sale of one lemur to Gray on April 1, 2007, the offer for

¹³*In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc., a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp*, 65 Agric. Dec. 993 (2006). The fine remains unpaid.

¹⁴ In her Post Hearing Brief, possibly because the alleged violations were not listed in chronological order, Counsel for the Complainant identifies the period of violations as being only between September 10, 2006 and September 25, 2010 (Agency Brief, Docket Entry 68, at page 29); however, examination of the allegations contained in the Complaint include three alleged violations before that onset date, *i.e.* November of 2005, February of 2006 and May 2, 2006. Second Amended Complaint, Docket Entry 58, paras. 7e, f and g.

¹⁵ Document Entry No. 60.

sale, delivery for transportation, sale, or negotiation of sale of one lemur to Gray on August 15, 2007, the transportation, purchase, or negotiation of purchase of two lemurs from Gray on August 27, 2007, and the offer for sale, delivery for transportation, transportation, sale or negotiation for sale of one zebra to Gray on October 14, 2007. Gray failed to appear as a witness.¹⁶ The documentary evidence proffered by Complainant was recanted and subjected to question in a subsequent affidavit from Gray obtained by the Respondent.¹⁷ Given the irreconcilable nature of the documentary evidence, without Mr. Gray's testimony, I am unable to assess Gray's credibility and as the Respondent did not have the ability to confront the witness, I will find there is inadequate evidence to support a finding of any violation as to those transactions.¹⁸

Knapp asserts that no violations occurred as to the remaining counts on the grounds that the transactions are exempt from regulation variously, because (a) Knapp had "an absolute right to sell this animal [a camel sold to Kimberly G. Finley] to close out his exhibitor's business; (b) the transaction with the Texas Zoo was not a sale, but rather a gift; (c) a number of the animals involved were farm animals specifically excluded from regulation under the Act; (d) the animals purchased by Knapp were intended for his own use or pleasure as permitted by 7 C.F.R. §2.1(a)(3)(viii); (e) Policy #23 contained in the Licensing Exemption provisions of the Animal Care Resource Guide, Dealer Licensing Guide permits the sale of 10 or fewer exotic hoofstock animals in any 12-month period (RX-2); and (f) no license is required for sales of animals through

¹⁶ A subpoena had been issued for Mr. Gray's attendance at an earlier hearing which remained in effect and he was advised of the change of hearing date; however, efforts to serve him with a new subpoena for the hearing were unsuccessful. Tr. 74-75. Absent his testimony, the record amounts to dueling affidavits without the means to determine which version was entitled to controlling weight.

¹⁷ RX-5.

¹⁸ No motion was made to withdraw those allegations and although the Complainant's brief failed to discuss them, those allegations were included in the Proposed Finding of Fact. Complainant's Brief, Docket Entry 68.

auctions where the intended use of the animals sold is unknown pursuant to the *Miscellaneous Activities* section of the Licensing Exemptions found in the Animal Care Resource Guide, Dealer Licensing Guide at 3.4.6. (RX-2).

Knapp's claim of exemption concerning the sale of the camel to Kimberly G. Finley is without merit. While Knapp could have disposed of the camel within the 60 day period allowed by the Judicial Officer before his license revocation became effective or upon application with the permission of APHIS after that date, the sale was a regulated transaction requiring a license and was effected in November of 2005 better than a month after the effective date of the license revocation. Not only is a camel specifically listed as an exotic animal in the Regulations, but as the sale was to the spouse of a licensee who was an exhibitor who predictably would exhibit the animal,¹⁹ any claim that the animal was a farm animal to be used as a pack animal or for fur or fiber simply is not worthy of belief. Although some farms in this country may have camels, the camel is not a species normally and historically raised on farms in this country. Moreover, a camel cannot be considered hoofstock, as camels have pads with toe nails rather than hooves.²⁰ Given the high probability that camels (camelids) sold would be destined for exhibition use rather than any exempted purpose (meat, fiber, or use as a pack animal), the sales of one camel on September 27, 2008, three camels on April 10, 2010 and two camels on September 25, 2010 will be considered regulated transactions requiring a dealer's license which Knapp no longer possessed at the time of those transactions. Of lesser probability of use in

¹⁹ The camel in question had been gelded and accordingly could not be used for breeding purposes and had been used in the past as a "ride" camel. Both Knapps acknowledged that they expected the animal to continue to be used to give ride. Tr. 185, 216.

²⁰ Knapp first testified that a camel is hoof stock, but then later acknowledged that he did not know. Tr. 243. Even were I not familiar with the characteristics of camel's feet from past exposure to them in Iraq and elsewhere, one need only to refer to Wikipedia for confirmation of the characteristics.

exhibitions, but still regulated are the sales on April 10, 2010 of a guanaco which despite its physical resemblance of its appearance to a llama or alpaca is a camelid and the subsequent sale on September 25, 2010 of four other guanaco are regulated sales under the Act. It further appears that there are no exemptions applicable to the sales on July 12, 2008 of two kinkajou (a species of honey bear) on July 11, 2009.²¹ While I will find no violation in acquiring such animals, their subsequent sale does constitute a violation in each case.

Knapp claims that no violation of the Act occurred as a result of the September 10, 2006 transaction with the Texas Zoo as he gave the two lemurs to the Zoo and that the Zoo on a later date without consideration gave him two zebras. Tr. 202-206. While Knapp's acquisition of the two zebras may be found exempt as being for either breeding or for his own use and pleasure, his claim of donating the animals is refuted by the APHIS Form 7020 which is signed by Knapp identifying him as the "owner" and the disposition is described as an exchange or transfer. CX-1.

Consideration will next be given to the extent that the sale of farm animals may be regulated transactions subject to the Act. The Act expressly excludes other farm animals in the definition of animals²² and the previously cited definition of farm animals contained in the Regulations specifically lists domestic species of cattle, sheep, swine, goats, llamas, and horses. The adjective "domestic" is not defined in the Act, but will be

²¹ It is possible that the sale of the four chinchilla could have been for their fur as the animals were sold at auction and the intended use of the purchaser was not known. Use of the animals' pelts as fur is common. It may be coincidental, but Knapp purchased the identical number of four chinchillas on April 10, 2009 for his children to breed. Tr. 188. Although chinchilla are sometimes sold as pets, they are often "mean" and generally not considered suitable for small children. Tr. 272.

²² 7 U.S.C. §2132(g)(3).

given its usual meaning as defined by Webster as tame or domesticated.²³ Examination of the allegations of the sales enumerated in the Second Amended Complaint identifies two species of cattle (zebu and watusi), one species of swine (2 bearded pigs), three species of goat (aoudad,²⁴ ibex and 3 pygmy goats), one llama and an alpaca.

Despite the vast number of cattle now in this country,²⁵ cattle are not native to the United States,²⁶ but rather were introduced from abroad and were first brought to this hemisphere in 1493 when Columbus brought Spanish cattle with him on his second voyage to the New World and landed on Santa Domingo. Shortly thereafter in 1519, Cortez also brought Spanish cattle with him when he landed in Mexico.²⁷ The common existing breeds of cattle **all** have been imported or developed from foreign stock.²⁸ Zebu cattle are generally thought to be derived from Asian stock and came to this hemisphere

²³ Webster, *Ninth New Collegiate Dictionary*, Merriam-Webster, 1990. An alternate definition is indigenous; however, is not applicable to cattle.

²⁴ According to Wikipedia, the aoudad (*Ammotragus lervia*) is also known as a Barbary sheep, but is a species of caprid (goat). In this country, the breed is most frequently encountered in Texas, New Mexico and California.

²⁵ The United States and Brazil are the top beef producing countries in the world. All 50 states in the United States have beef cattle and 30 states each have at least 10,000 cattle farms and ranches. The United States produces about 25% of the world beef supply. There are some 900 different recognized breeds of cattle, with many able to trace their ancestry back 600 years or more. It is generally thought that cattle were first domesticated in Europe and Asia during the Stone Age. Modern domestic cattle all evolved from a single ancestor, the aurochs, the last of which was killed in 1627 near Warsaw, Poland.

www.cyberspaceag.com/farmanimals/beefcattle/beefhistory.htm.

²⁶ Although children born in this country are considered citizens regardless of the citizenship of their parents or their parents' immigration status, under the AWA Regulations, certain animals are to retain their exotic character if not native to the United States, or if introduced from abroad. The Act contains references to farm animals and excludes them from the definition of a regulated animal. 7 U.S.C. §2132(g)(3).

²⁷ In 1690, a herd of about 200 head were driven northward from Mexico to a mission near the Sabine River in what later would become Texas. These early imports were the ancestors of the Texas Longhorn which later would populate the Great Plains. During the 1600s nearly every ship from Europe brought a few head of cattle to begin the cattle industry in this country. The earliest recognized breed (the Shorthorn) was imported to Virginia in 1783. Henry Clay is credited with bringing the Hereford breed to this country in 1817. The Angus breed was introduced here from Scotland in 1873. Not only are the beef cattle imports, but the same is true of dairy cattle, with Guernsey, Jersey and Holstein breeds all being brought to this country from overseas. *See generally*, Charles E. Ball, *Building the Beef Industry, A Century of Commitment*, Saratoga Publishing, Saratoga, WY (1997) and *Historical Overview of Beef Production and Beef Organizations in the United States*. Proceedings of the Western Section, ASAS, 2000 and www.bovinebazaar.com.

²⁸ Some breeds have been developed in this country, *i.e.* the Brahman, which was the result of breeding of different types of Indian cattle back in the 1850s. www.bovinebazaar.com

(Brazil) in the early twentieth century. In this country and elsewhere, the breed is frequently crossed with Charolais to improve meat quality.²⁹ Originally from Africa, watusi were brought to this country in the 1960s. While not as common a breed as many others, their ability to utilize poor forage and handling qualities have increased their appeal to breeders and the breed's numbers in this country have steadily increased.³⁰ While the Regulations list species of foreign domestic cattle, such as Ankole, Gayal and Yak as exotic animals, given the foreign origin of **all** cattle in this country, the attempt by APHIS to include the above cattle transactions appears inconsistent with the intent and express statutory language of the Act.

Bearded pigs are clearly swine, and regardless of whether an aoudad is considered a sheep or a goat, both categories are listed within the above provision. A cursory search on the internet reflects multiple commercial sources of domestically bred aoudad for sale. Although ibex can be found to roam wild in the Florida Mountains of New Mexico, parts of Texas and elsewhere where they are hunted, a growing breeding industry exists for commercially raised domestic animals sold to breeders and collectors.³¹ The three pygmy goats sold on July 12, 2008 are still goats, again animals commonly sold at stockyards across the country. The llama is a specifically listed farm animal and although an alpaca is not, alpacas are normally and historically found in significant numbers on farms throughout the country and can be used for meat or more commonly for their wool. The definition of farm animals found in the Regulations contains no limiting language as to size (regular or miniature), but requires only that the animals be domestic, that they be

²⁹ In 1999, researchers at Texas A & M successfully cloned a zebu.

³⁰ Jennifer Knapp testified that the family ate watusi beef on occasion. Tr.192.

³¹ The fact that Knapp had maintained the animals on his property and was able to load them and take them to the auction for sale is some indication that the animals were in fact domestic.

normally and historically kept and raised on farms, and used or intended for use as food or fiber, or for other specified purposes including breeding. Accordingly, I will find that the sales of the above cattle, sheep, swine, goats, llamas and the alpaca (a total of fifteen animals) are not transactions regulated by the Act.³²

Knapp next argues that his sales of hoofstock³³ do not require a license, relying upon the specific language found in the Licensing Exemptions set forth in the Animal Care Resource Guide Dealer Inspection Guide published by USDA. RX-2. Policy #23 of that publication sets forth published “guidance” as to what transactions do not require a license.³⁴ The pertinent provisions in “Licensing Exemptions” provide:

Hoofstock [Policy #23]

A license is **not** required for anyone who sells *wild/exotic hoofstock*, such as deer, elk and bison:

- nonregulated purposes
- to game ranches
- to private collectors for breeding purposes only
- 10 or fewer wild/exotic hoofstock in a 12-month period for regulated purposes.

Accepting the contents of the cited enchiridion *pro arguendo* as a guide to interpreting the Regulations and applying its provisions to the allegations, one sees that the language not only exempts limited sales made for regulated purposes, but it is also apparent that the specified quantity threshold was not exceeded by Knapp in any given 12-month period. In 2006, only five hoofstock animals were sold (four addax [a type of antelope] and one blackbuck [also an antelope]). In 2007, no hoofstock were sold. In 2008, only four hooved animals were sold (two zebras, one wildebeest [an antelope] and one addax

³² Further support for finding these transactions do not require a license is also found in the Licensing Exemptions contained in the 4/00 version of the Animal Care Guide Dealer Inspection Guide at 3.4.4.

³³ The term “hoofstock” is not defined in the Regulations.

³⁴ Policy #23 remained in effect at all times pertinent to the violations alleged in this action. It has since been superseded by Policy #8 of the Animal Care Resource Guide, March 25, 2011. RX-3.

[an antelope]. In 2009, three buffalo,³⁵ one addax [antelope], three nilgai [antelope], or a total of seven hooved animals were sold. In 2010, only five animals were sold, (four buffalo and one deer).

Complainant argues that Knapp's reliance on the Licensing Exemptions contained in the Dealer Inspection Guide is without merit and argues, based upon the Judicial Officer's ruling in *In re Jerome Schmidt, d/b/a Top of the Ozark Auction*, that what is termed "policy" is to be considered no more than "a useful tool to improve the quality and uniformity of inspections, documentation, and enforcement of the Animal Care Program" and [i]t does not add to, delete from, or change current regulatory requirements or standards – nor does it establish policy.³⁶ *Schmidt* at 66 Agric. Dec. 159, 214 (2007). In that case, the Judicial Officer found that despite a provision in the Resources Guide indicating that exit interviews were to be conducted, the Inspector was not required to conduct post inspection exit interviews, and that the Inspector's failure to conduct such interviews had no bearing upon whether Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint. *Id.*

Contrary to the factual setting in the *Schmidt* case, the stated "policy" which Respondent relies upon has a direct bearing upon whether a violation in fact occurred and while the Guide may not add to, delete from or change current regulatory policy, consideration must be given to whether Knapp might reasonably rely upon published explanatory information which has been placed in the public domain by the same

³⁵ I have included the buffalo as a hooved animal; however, in many parts of the country, buffalo are commercially raised, bought and sold for meat, similar to beef.

³⁶ Given its characterization in the terminology used in the publication, the argument that Policy #23 was not in fact USDA policy at the time is disingenuous.

Department that seeks to regulate him.³⁷ Statutory interpretations made by agencies that do not have the force of law, such as opinion letters, policy statements (as in the instant case), agency manuals, and enforcement guidelines while not entitled to *Chevron* deference,³⁸ are nonetheless entitled to *Skidmore* deference.³⁹ *Christensen v. Harris County*, 120 S. Ct. 1655 (2000). *Skidmore* deference while less compelling than *Chevron* deference requires federal courts to defer to such interpretations to the extent that the interpretation have the “power to persuade.” While it is clear from *F.C.C. v. Fox Television Stations, Inc.* 556 U.S. ____ (2009) that an agency can change its enforcement policy from time to time, there are sound reasons why such changes should not be applied retroactively. Policy #23 appears to be a clear and unambiguous statement which is consistent with the Act and is worthy of being considered persuasive evidence that the Department intended that no license be required for the sales of less than 10 wild/exotic hoofstock in any 12 month period.

Of the 30 allegations contained in the Second Amended Complaint, 16 of the allegations involve purchases of animals by Knapp. Given the broad exemption extended to individuals who buy animals solely for their own use or enjoyment and do not sell or exhibit [regulated] animals, it is difficult (with the exception of the violations already identified) to find violations when the animals are purchased, the stated purpose for their acquisition comes within the broad exemption, and there is no proof to the contrary.⁴⁰

³⁷ A contrary conclusion might be reached by applying Humpty Dumpty’s approach in his exchange with Alice concerning the meaning of words in Lewis Carroll’s *Through the Looking Glass*.

³⁸ *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

³⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁴⁰ One of the items purchased on October 13, 2006 was what was alleged to be a lion skeleton. Whatever the animal was, the only evidence that it was the skeleton of a lion was the description provided on CX-3a. Other witnesses testified that it was not a lion as the Complaint alleges. Significantly, when asked, Dr. Flynn testified that he was unable to identify what the animal was. Tr. 208. As Complainant failed to prove that even had the animal been a lion that the skeleton was being used for an improper purpose, no violation

Both Knapp's testimony and the pattern observed of significantly greater numbers of animals purchased than sold lend support and credence to Knapp's testimony that the animals were for his own use and enjoyment.⁴¹ No evidence was produced suggesting that Knapp has continued to exhibit his animals and while the Regulations grant substantial latitude in allowing purchases of otherwise regulated animals, it is clear that individuals such as Knapp have to exercise significant care when disposing of any animals purchased, lest a violation be triggered by a sale.⁴² Except in those eight instances where I found violations to have occurred and the 2007 Gray transactions where there was irreconcilable conflicting evidence, I found basis for finding the remainder of the transactions to either be exempt or otherwise permissible. Accordingly, it is unnecessary for me to address further the applicability of the *Miscellaneous Activities* in the Licensing Exemptions concerning the issue of whether the sales at the Lolli Brothers Livestock Market, Inc. or any other auction house could also be considered exempted from the requirement to have a license as the intended use by the purchaser of the animals sold was unknown. The evidence establishes that Knapp, with the exception of the transgressions previously identified, complied with USDA policy as articulated in the Licensing Exemptions, selling only farm animals exempt under the Act (*See*, 7 C.F.R. §1.1) and limited, but permissible, quantities of wild/exotic hoofstock during four separate 12 month periods from 2006 to 2010.⁴³

will be found for this acquisition. Despite the invitation to do so, I decline Complainant's suggestion that I should infer an improper use on Knapp's part.

⁴¹ While the Complainant argues in its brief that Knapp failed to produce reliable evidence that he only bred animals for his own use. Complainant's Brief, Docket Entry No. 68 at p. 27. As APHIS brought this action, the burden of proving improper use is upon the Complainant. No such testimony was received.

⁴² It is abundantly clear that the revised Animal Care Resource Guide has significantly decreased the latitude and exemptions which previously existed prior to March 25, 2011.

⁴³ Given the changes in the Animal Care Welfare Guide, Knapp would do well to consult with and obtain permission before selling animals in the future that may be considered regulated by APHIS.

In determining the appropriate sanction, I have considered both the Complainant's recommendation that I impose a civil penalty of \$75,000.00 for the violations and an additional \$33,000.00 for violations of the cease and desist orders as well as Mr. Knapp's affidavit concerning his financial condition and the demands of his large family. While in no way minimizing the violations that I found, considering the available information concerning Knapp's financial condition, I consider a civil penalty of \$15,000.00 a sufficient sanction to preclude future violations by him.⁴⁴

Although I have found that Knapp did commit eight violations of the Act and Regulations, in bringing this action APHIS alleged a far greater number of violations, leaving Knapp the prevailing party as to those allegations. As I will also find that APHIS was not substantially justified in including those allegations on which it did not prevail, an award of attorney's fees and expenses is warranted pursuant to the Equal Access to Justice Act (E.A.J.A.).⁴⁵ 5 U.S.C. §504; 7 C.F.R. §1.180, *et seq.*; *See, Fox v. Vice*, (No. 10-114, United States Supreme Court, *Slip Opinion*, [June 6, 2011]) In *Fox*, the Supreme Court articulated a "but for" test, allowing that portion of the fees that the party would have incurred because of, but only because of, what in that action was termed a frivolous [non-prevailing] claim. *Id at 8*. In submitting a petition for such fees, counsel should include specific detail in the description of the hours expended that only that appropriate portion of the fees are included.

Based upon all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

⁴⁴ Should future violations come before me by this Respondent, more draconian measures may well result.

⁴⁵ The AWA is specifically covered by E.A.J.A. 7 C.F.R. §1.183.

Findings of Fact

1. Respondent Bodie S. Knapp is an individual residing in the State of Texas, with a mailing address in Beesville, Texas. At times, he has done business as The Wild Side and Wayne's World Safari.
2. Prior to September 10, 2005, Knapp was licensed under the Act as an exhibitor and held Class "C" AWA License No. 74-C-0533.
3. Knapp has a history of prior disciplinary action being taken against him by APHIS. His AWA license was revoked by the decision and order of then Chief Judge Marc. R. Hillson in AWA Docket No. 04-0029 entered in January of 2005. That decision was later affirmed on appeal and again upon motion for reconsideration. *Aff'd., In re Bodie S. Knapp*, 64 Agric. Dec. 253 (2005); *Mot. for reconsid. den., In re Bodie S. Knapp*, 64 Agric. Dec. 1668 (2005). A prior filed, but later decided, disciplinary action resulted in a cease and desist order and imposition of a civil penalty in the amount of \$5,000.00 imposed against Knapp.⁴⁶ *In re Coastal Bend Zoological Association, f/k/a Corpus Christi Zoological Assoc., a Texas corp. d/b/a Corpus Christi Zoo, Robert Brock, Michelle Brock, Bodie Knapp, and Charles Knapp*, 65 Agric. Dec. 993 (2006).
4. In September of 2005, Bodie S. Knapp sold a camel to Kimberly G. Finley without possessing a license to engage in a regulated transaction.
5. On September 10, 2006, Bodie S. Knapp sold two lemurs to the Texas Zoo without possessing a license to engage in a regulated transaction.
6. On July 12, 2008, Bodie S. Knapp sold a kinkajou without possessing a license to engage in a regulated transaction.

⁴⁶ The civil penalty of \$5,000.00 imposed upon Knapp in that action remains unpaid.

7. On September 27, 2008, Bodie S. Knapp sold a camel without possessing a license to engage in a regulated transaction.
8. On April 10, 2009, Bodie S. Knapp sold a guanaco without possessing a license to engage in a regulated transaction.
9. On April 10, 2010, Bodie S. Knapp sold three camels without possessing a license to engage in a regulated transaction.
10. On July 10, 2010, Bodie S. Knapp, operating as a dealer, sold four guanaco without possessing a license to engage in a regulated transaction.
11. On September 25, 2010, Bodie S. Knapp, operating as a dealer, sold two camels without possessing a license to engage in a regulated transaction.
12. Zebu are a breed of domestic cattle which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.
13. Watasi are a breed of domestic cattle which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.
14. Bearded pigs are swine which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.
15. Auodad, sometimes called Barbary sheep, are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes.

16. Ibex are a species of goat which is considered a farm animal and which exists in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes.

17. Pygmy goats are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food and breeding purposes.

18. A llama is a farm animal which exists in significant numbers on farms in the United States and is raised for both wool, food, work and breeding purposes.

19. An alpaca is a farm animal which exists in significant numbers on farms in the United States and is raised for both wool, food, work and breeding purposes.

20. Addax, blackbucks, zebras, wildebeest, nilgai, and deer are all wild/exotic hooved animals.

21. Buffalo (bison) are animals which are native to the United States and which are not included in the definition of exotic animals contained in the Regulations. For well over than a decade, the meat has been commercially available for home consumption and by patrons of restaurants.

22. Published USDA policy articulated in Policy #23 found in the Licensing Exemptions set forth in the Animal Care Resource Guide Dealer Inspection Guide in effect at the time of the violations alleged in this action allowed the sale of 10 or fewer wild/exotic hoofstock for regulated purposes.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. In September of 2005, Bodie S. Knapp, operating as a dealer, sold a camel to Kimberly G. Finley without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
3. On September 10, 2006, Bodie S. Knapp, operating as a dealer, sold two lemurs to the Texas Zoo without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
4. On July 12, 2008, Bodie S. Knapp, operating as a dealer, sold a kinkajou without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
5. On September 27, 2008, Bodie S. Knapp, operating as a dealer, sold a camel without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
6. On April 10, 2009, Bodie S. Knapp, operating as a dealer, sold a guanaco without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
7. On April 10, 2010, Bodie S. Knapp, operating as a dealer, sold three camels without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.
8. On July 10, 2010, Bodie S. Knapp, operating as a dealer, sold four guanaco without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

9. On September 25, 2010, Bodie S. Knapp, operating as a dealer, sold two camels without possessing a license to engage in a regulated transaction and in so doing, violated the Act and Regulations.

10. No violation occurred by reason of the sales of farm animals, including cattle, sheep, swine, goats, and llamas (and alpacas) which are excluded from regulation under the Act. 7 U.S.C. §2132(g)(3).

11. No violation occurred by reason of the sales of 10 or fewer wild/exotic hoofstock in any 12-month period which sales were made in reliance upon interpretations of the Act and Regulations promulgated and published by USDA then in effect and denominated as Policy #23.

12. Given the conflicting evidence as to the 2007 transactions alleged to have taken place between Knapp and Christian Bayne Gray, insufficient evidence exists to support a finding that a violation or violations occurred.

13. Purchases of animals solely for personal enjoyment by an individual who does not sell or exhibit animals are not regulated transactions under the Act and do not require a dealer's license.

14. Although Knapp was found to have violated the Act in the instances specified in this decision, the award of attorney fees to his attorney under the Equal Access to Justice Act is nonetheless warranted for prevailing as to the multiple allegations brought by the Complainant which were found not to constitute violations. Those allegations brought by the Secretary are found not to be substantially justified.

Order

1. Bodie S. Knapp, his agents, employees, successors and assigns shall cease and desist from further violation of the Act and its Regulations.

2. Bodie S. Knapp is assessed a civil penalty of \$15,000.00 for his violations herein. Payment of such fine shall be by certified check or money order payable to the Treasurer of the United States and sent to:

Colleen A. Carroll, Esquire
United States Department of Agriculture
1400 Independence Avenue, SW
South Building
Washington, DC 20250-1417

3. Counsel for the Respondent shall submit his Petition for Award of Attorney fees and expenses not later than 60 days after service of this decision, provided this decision is not appealed by either party,.

4. This Decision and Order shall become final without further proceedings 35 days from service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice. 7 C.F.R. §1.145.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

September 26, 2011

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Colleen A. Carroll, Esquire
Phillip Westergren, Esquire

Hearing Clerk's Office
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