

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 09-0175
)	
Bodie S. Knapp, an individual,)	
d/b/a The Wild Side,)	
)	
Respondent)	Decision and Order on Remand

PROCEDURAL HISTORY

On June 3, 2013, I issued a Decision and Order: (1) finding Mr. Knapp purchased and sold 235 animals in violation of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act], and the regulations issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-2.153) [Regulations]; (2) assessing Mr. Knapp a \$42,800 civil penalty for 214 of Mr. Knapp’s 235 violations of the Animal Welfare Act and the Regulations; (3) assessing Mr. Knapp a \$353,100 civil penalty for Mr. Knapp’s 214 knowing failures to obey the Secretary of Agriculture’s cease and desist orders issued in *Coastal Bend Zoological Ass’n.*, 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.); and (4) ordering Mr. Knapp to cease and desist from violating the Animal Welfare Act and the Regulations.¹

Mr. Knapp filed a petition for review with the United States Court of Appeals for the Fifth Circuit. The Court granted in part and denied in part Mr. Knapp’s petition for review and remanded the proceeding to the United States Department of Agriculture, as follows:

¹ Knapp, 72 Agric. Dec. 189 (U.S.D.A. 2013).

CONCLUSION

While most of Knapp's contentions lack merit, we find that the Judicial Officer did not sufficiently explain his reasons for treating aoudad, alpaca, and miniature donkeys as "animals," and not "farm animals." Nor did he sufficiently explain his conclusion that twenty-two of the sales to Lolli Brothers had a regulated purpose. We therefore GRANT in part and DENY in part the petition for review and REMAND to the agency to set out more fully the facts and reasons bearing on these two decisions.

Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 468 (5th Cir. 2015) (emphasis in original).

On October 20, 2015, I conducted a telephone conference with Phillip Westergren, counsel for Mr. Knapp, and Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], to discuss the manner in which to proceed on remand.² Ms. Carroll and Mr. Westergren agreed that remand of this proceeding to the Office of Administrative Law Judges, United States Department of Agriculture, to adduce additional evidence was unnecessary, but each requested the opportunity to file a brief on remand and agreed to a briefing schedule.³ Ms. Carroll requested four amendments to the briefing schedule. Mr. Westergren did not object to any of Ms. Carroll's requests, and I granted each of the requests to amend the briefing schedule.⁴

² Sherida Hardy, the legal assistant employed by the Office of the Judicial Officer, United States Department of Agriculture [Office of the Judicial Officer], also participated on the conference call.

³ Knapp, AWA Docket No. 09-0175, 2015 WL 7687427 (U.S.D.A. Oct. 20, 2015) (Order Setting Schedule for Filing Brs. on Remand).

⁴ Knapp, AWA Docket No. 09-0175, 2015 WL 9500720 (U.S.D.A. Nov. 25, 2015) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692533 (U.S.D.A. Jan. 12, 2016) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692534 (U.S.D.A. Jan. 14, 2016) (Order Amending Schedule for Filing Brs. on Remand); Knapp, AWA Docket No. 09-0175, 2016 WL 692535 (U.S.D.A. Jan. 28, 2016) (Fourth Order Amending Schedule for Filing Brs. on Remand).

On February 1, 2016, the Administrator filed Complainant's Brief on Remand, and, on March 23, 2016, Mr. Knapp filed Respondent's-Petitioner's Brief on Remand [Mr. Knapp's Brief on Remand]. On March 28, 2016, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision on remand.

DISCUSSION

The Farm Animal Issue

The United States Court of Appeals for the Fifth Circuit found I did not sufficiently explain my reasons for treating twenty-one alpacas, two aoudads, and twenty-five miniature donkeys as "animals"⁵ regulated under the Animal Welfare Act and not "farm animals"⁶ excluded from regulation under the Animal Welfare Act.⁷

The Administrator contends I correctly found the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question are "animals," as that term is defined in the Animal Welfare Act and the Regulations, and correctly concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when he purchased and sold these forty-eight "animals" without first having obtained an Animal Welfare Act license.⁸ The

⁵ The term "animal" is defined in 7 U.S.C. § 2132(g) and 9 C.F.R. § 1.1.

⁶ The term "farm animal" is defined in 9 C.F.R. § 1.1.

⁷ Knapp v. U.S. Dep't of Agric., 796 F.3d 445, 459 (5th Cir. 2015).

⁸ I concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when, without an Animal Welfare Act license, Mr. Knapp: (1) bought twenty-five miniature donkeys from or at Lolli Brothers Livestock Market, Inc., on April 12, 2008 (Findings of Fact ¶ 17, Conclusions of Law ¶ 9); (2) sold one alpaca and one aoudad to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008 (Findings of Fact ¶ 19, Conclusions of Law ¶ 11); (3) bought one alpaca from or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 22, Conclusions of Law ¶ 14); (4) bought four alpacas from or at Lolli Brothers Livestock Market,

Administrator does not base his contentions on the record that was before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), but, instead, bases his contentions on texts and websites that are not part of the record. The Administrator requests that I take official notice of the materials and texts cited in the Complainant’s Brief on Remand.⁹

The rules of practice applicable to this proceeding¹⁰ provide that, as part of the procedure for hearing, official notice shall be taken, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence*—

....

(6) *Official notice*. Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

7 C.F.R. § 1.141(h)(6). Mr. Knapp objects to my taking official notice of the materials and texts cited in the Complainant’s Brief on Remand because “the parties agreed that there would be no further evidence in the case,” the parties agreed that they “would proceed on the record already

Inc., on April 10, 2009 (Findings of Fact ¶ 24, Conclusions of Law ¶ 16); (5) bought one aoudad from or at Lolli Brothers Livestock Market, Inc., on July 11, 2009 (Findings of Fact ¶ 26, Conclusions of Law ¶ 18); (6) bought six alpacas from or at Lolli Brothers Livestock Market, Inc., on September 26, 2009 (Findings of Fact ¶ 27, Conclusions of Law ¶ 19); (7) bought three alpacas from or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 29, Conclusions of Law ¶ 21); and (8) bought six alpacas from or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 31, Conclusions of Law ¶ 23). *See Knapp*, 72 Agric. Dec. 189, 214-19 (U.S.D.A. 2013).

⁹ Complainant’s Br. on Remand ¶ IIIA-C at 6-11.

¹⁰ The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

before the Judicial Officer,” and the materials and texts cited by the Administrator “are not reliable” and “not the kind of source upon which reasonable people tend to rely.”¹¹

I agree with Mr. Knapp’s assertion that the parties agreed that on remand they would file briefs based on the record before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013). Therefore, in light of the agreement of the parties during the October 20, 2015, conference call, I decline to take official notice of the materials and texts cited in the Complainant’s Brief on Remand.¹² I find my conclusion in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), that the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question are “animals,” as that term is defined in the Animal Welfare Act and the Regulations, is error,¹³ and I dismiss this case as it relates to the twenty-one alpacas, two aoudads, and twenty-five miniature donkeys in question.

The Intended Purpose Issue

The United States Court of Appeals for the Fifth Circuit also found I did not sufficiently explain my reasons for concluding that Mr. Knapp sold twenty-two animals (one alpaca, one aoudad, two zebras, one wildebeest, two addaxes, seven buffalo, three nilgais, four chinchillas, and one axis deer) to or at Lolli Brothers Livestock Market, Inc., for a regulated purpose notwithstanding Mr. Knapp’s argument that his sale of these animals to or at Lolli

¹¹ Mr. Knapp’s Br. on Remand at 1, 6.

¹² I make no ruling on the reliability of the materials and texts cited in the Complainant’s Brief on Remand.

¹³ I make no finding regarding alpacas, aoudads, and miniature donkeys in general as future cases may contain sufficient evidence on to which base a conclusion that alpacas, aoudads, and miniature donkeys are “animals,” as that term is defined in the Animal Welfare Act and the Regulations.

Brothers Livestock Market, Inc., did not require an Animal Welfare Act license because he did not know the purchasers' intended purpose for the animals.¹⁴

The Administrator contends I correctly found Mr. Knapp sold the twenty-two animals in question for a regulated purpose and correctly concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when he sold the twenty-two animals in question to or at Lolli Brothers Livestock Market, Inc., without first having obtained an Animal Welfare Act license.¹⁵ Again, the Administrator does not base his contentions on the record that was before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), but, instead, the Administrator states he “does not share the [United States Court of Appeals for the Fifth Circuit’s] view that the [Animal Welfare Act] requires the agency to establish the specific ‘end use’ to which animals consigned to another dealer will be – or are intended to be – put.”¹⁶ The Administrator argues: (1) aoudads, zebras, wildebeest, addaxes, nilgais, and axis deer are generally used for a regulated purpose, namely, exhibition; (2) although alpacas and chinchillas are used for fiber, given the number of alpacas and chinchillas Mr. Knapp consigned to Lolli Brothers Livestock Market, Inc., it

¹⁴ *Knapp v. U.S. Dep’t of Agric.*, 796 F.3d 445, 461-62 (5th Cir. 2015).

¹⁵ I concluded Mr. Knapp violated the Animal Welfare Act and the Regulations when, without an Animal Welfare Act license, Mr. Knapp: (1) sold one alpaca and one aoudad to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008 (Findings of Fact ¶ 19, Conclusions of Law ¶ 11); (2) sold two zebras, one wildebeest, and one addax to or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 21, Conclusions of Law ¶ 13); (3) sold three buffalo, one addax, and three nilgais to or at Lolli Brothers Livestock Market, Inc., on April 10, 2009 (Findings of Fact ¶ 23, Conclusions of Law ¶ 15); (4) sold four chinchillas to or at Lolli Brothers Livestock Market, Inc., on July 11, 2009 (Findings of Fact ¶ 25, Conclusions of Law ¶ 17); (5) sold three buffalo and one axis deer to or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 28, Conclusions of Law ¶ 20); and (6) sold one buffalo to or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 30, Conclusions of Law ¶ 22). *See Knapp*, 72 Agric. Dec. 189, 214-19 (U.S.D.A. 2013).

¹⁶ Complainant’s Br. on Remand ¶ IV at 12.

would be reasonable to conclude that the alpacas and chinchillas were intended for use as pets; and (3) although buffalo are used for food, Mr. Knapp's consignment of the buffalo to Lolli Brothers Livestock Market, Inc.'s exotics auction, rather than to Lolli Brothers Livestock Market, Inc.'s regular livestock auction, suggests the buffalo were intended to be used for exhibition.¹⁷

As an initial matter, the Court did not state that the Animal Welfare Act "requires the agency to establish the specific 'end use' to which animals consigned to another dealer will be – or are intended to be – put" as the Administrator contends.¹⁸ Instead, the Court states I "did not discuss the *likely* intended use of the twenty-two additional animals that Knapp sold to Lolli Brothers."¹⁹

While the Administrator posits plausible arguments in support of his contention that purchasers of the twenty-two animals in question used or intended to use the animals for a regulated purpose, the Administrator's arguments are not based on any evidence in the record that was before me when I decided *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013). Therefore, I find my conclusion in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), that Mr. Knapp sold the twenty-two animals in question for a regulated purpose, is error, and I dismiss this case as it relates to the twenty-two animals in question.

The Sanction on Remand

In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I found Mr. Knapp purchased or sold 235 animals without the required Animal Welfare Act license and concluded that each purchase and

¹⁷ Complainant's Br. on Remand ¶ IV at 12-13.

¹⁸ Complainant's Br. on Remand ¶ IV at 12.

¹⁹ *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 461 (5th Cir. 2015) (emphasis added).

sale constituted a separate violation of the Animal Welfare Act and the Regulations.²⁰ However, for the reasons fully explained in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I assessed no civil penalty for Mr. Knapp's sale of twenty-one hoof stock and assessed Mr. Knapp a civil penalty for only 214 of his 235 violations of the Animal Welfare Act and the Regulations.²¹

In light of my conclusions in this Decision and Order on Remand that I erroneously treated forty-eight animals as "animals" regulated under the Animal Welfare Act and erroneously concluded Mr. Knapp sold twenty-two animals to or at Lolli Brothers Livestock Market, Inc., for a regulated purpose, on remand I find Mr. Knapp purchased or sold 167 animals without the required Animal Welfare Act license.²² For the reasons articulated in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I assess no civil penalty for Mr. Knapp's sale of five hoof stock and assess Mr. Knapp a civil penalty for only 162 of his 167 violations of the Animal Welfare Act and the Regulations.²³ For the reasons stated in

²⁰ *Knapp*, 72 Agric. Dec. 189, 204 (U.S.D.A. 2013).

²¹ *Id.* at 200-01.

²² Two animals (one alpaca and one aoudad which Mr. Knapp sold to or at Lolli Brothers Livestock Market, Inc., on July 12, 2008) of the twenty-two animals that I erroneously concluded Mr. Knapp sold for a regulated purpose are also included in the forty-eight animals that I erroneously found are "animals," as that term is defined in the Animal Welfare Act and the Regulations. Therefore, I reduced the number of Mr. Knapp's violations that I found in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), by sixty-eight violations from 235 to 167 violations.

²³ In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I declined to assess a civil penalty for Mr. Knapp's sale, without an Animal Welfare Act license, of twenty-one hoof stock in violation of the Animal Welfare Act and the Regulations. On remand, I find Mr. Knapp's sale of sixteen of these twenty-one hoof stock was not in violation of the Animal Welfare Act or the Regulations: (1) Mr. Knapp's sale of two zebras, one wildebeest, and one addax to or at Lolli Brothers Livestock Market, Inc., on September 27, 2008 (Findings of Fact ¶ 21, Conclusions of Law ¶ 13); (2) Mr. Knapp's sale of three buffalo, one addax, and three nilgais to or at Lolli Brothers Livestock Market, Inc., on April 10, 2009 (Findings of Fact ¶ 23, Conclusions of Law ¶ 15); (3) Mr. Knapp's sale of three buffalo and one axis deer to or at Lolli Brothers Livestock Market, Inc., on April 10, 2010 (Findings of Fact ¶ 28, Conclusions of Law ¶ 20); and (4) Mr. Knapp's sale of one buffalo to or at Lolli Brothers Livestock Market, Inc., on July 10, 2010 (Findings of Fact ¶ 30, Conclusions of Law ¶ 22). *See Knapp*, 72 Agric. Dec. 189, 215-16, 217-19 (U.S.D.A. 2013). I decline to assess a civil penalty for Mr. Knapp's sale, without an Animal Welfare Act

Knapp, 72 Agric. Dec. 189 (U.S.D.A. 2013), I assess Mr. Knapp a civil penalty of \$200 for each animal that Mr. Knapp purchased or sold in violation of the Animal Welfare Act and the Regulations (except for five hoof stock), and, therefore, on remand I assess Mr. Knapp a \$32,400 civil penalty for 162 of his 167 violations of the Animal Welfare Act and the Regulations.

In *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), I also found Mr. Knapp's 214 violations of the Animal Welfare Act and the Regulations constitute knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Coastal Bend Zoological Ass'n.*, 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), and I assessed Mr. Knapp the \$1,650 civil penalty required to be assessed for each of Mr. Knapp's knowing failures to obey the Secretary of Agriculture's cease and desist orders.²⁴ For the reasons stated in *Knapp*, 72 Agric. Dec. 189 (U.S.D.A. 2013), the civil penalty required to be assessed for Mr. Knapp's 162 knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *Coastal Bend Zoological Ass'n.*, 65 Agric. Dec. 993 (U.S.D.A. 2006), and *Knapp*, 64 Agric. Dec. 1668 (U.S.D.A. 2005) (Order Den. Mot. for Recons.), is \$267,300.

license, of five hoof stock in violation of the Animal Welfare Act and the Regulations: (1) Mr. Knapp's sale of one blackbuck to or at Huntsville Exotic Sales, Inc., on October 27, 2006 (Finding of Facts ¶ 14, Conclusions of Law ¶ 6); and (2) Mr. Knapp's sale of four addaxes to Victor E. Garrett, in February 2006 (Findings of Fact ¶ 16, Conclusions of Law ¶ 8). *See* *Knapp*, 72 Agric. Dec. 189, 213-14, 216 (U.S.D.A. 2013).

²⁴ *See* *Knapp*, 72 Agric. Dec. 189, 205-07 (U.S.D.A. 2013), wherein I discuss the civil penalty required by 7 U.S.C. § 2149(b) to be assessed for each knowing failure to obey a cease and desist order issued by the Secretary of Agriculture under 7 U.S.C. § 2149. *See also* *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 465-66 (5th Cir. 2015).

For the foregoing reasons, the following Order on Remand is issued.

ORDER ON REMAND

1. Mr. Knapp, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from operating as a dealer without an Animal Welfare Act license. Paragraph 1 of this Order on Remand shall become effective upon service of this Order on Remand on Mr. Knapp.

2. Mr. Knapp is assessed a \$299,700 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA APHIS GENERAL
PO Box 979043
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA APHIS GENERAL within sixty days after service of this Order on Remand on Mr. Knapp. Mr. Knapp shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0175.

Done at Washington, DC

January 26, 2017

William G. Jenson
Judicial Officer