

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 07-0022
)
Wyoming Department of Parks)
and Cultural Resources; Kevin)
Skates, in his official capacity as)
Park Superintendent, Hot Springs)
State Park; and Wade Henderson,)
in his official capacity as Park)
Superintendent, Bear River State)
Park,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Acting Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 15, 2006. The Acting Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal

Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Acting Administrator alleges that, since on or about April 11, 2002, the Wyoming Department of Parks and Cultural Resources; Kevin Skates, the Park Superintendent of Hot Springs State Park; and Wade Henderson, the Park Superintendent of Bear River State Park [hereinafter Respondents], operated as an “exhibitor,” as that term is defined in the Animal Welfare Act and the Regulations and Standards, without being licensed, in willful violation of section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)) (Compl. ¶¶ 15-17). The Acting Administrator contends two of Wyoming’s 31 parks, Hot Springs State Park and Bear River State Park, require an exhibitor’s license under the Animal Welfare Act and the Regulations and Standards in that Respondents maintain bison and elk at those parks for public viewing. The Acting Administrator requests issuance of an order assessing Respondents a civil penalty and requiring Respondents to cease and desist from operating as an exhibitor without an Animal Welfare Act license (Compl. at 4-5).

On December 5, 2006, Respondents filed “Respondents’ Answer” in which Respondents admitted many of the factual allegations of the Complaint, including the maintenance of bison and elk for public viewing at Hot Springs State Park and Bear River State Park, but deny that the Secretary of Agriculture has jurisdiction over the State of Wyoming and its agencies and employees. Respondents assert: (1) the remedies the

Acting Administrator seeks against Respondents are barred under sovereign immunity; (2) the Complaint fails to state a claim against Respondents; and (3) the relief sought is inappropriate, improper, and contrary to law. Respondents request dismissal of the Complaint.

On February 15, 2007, the Acting Administrator filed “Complainant’s Motion For Judgment On The Pleadings” asserting the material facts are not in dispute and a judgment on the merits should be issued by relying on the pleadings, matters incorporated by reference in the pleadings, and facts of which the administrative law judge may take official notice. On April 9, 2007, Respondents filed “Respondents’ Response To Complainant’s Motion For Judgment On The Pleadings And Cross-Motion For Judgment On The Pleadings.” On April 27, 2007, the Acting Administrator filed “Complainant’s Response To Respondents’ Cross-Motion For Judgment On The Pleadings.”

On May 16, 2007, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] requested that the parties answer questions respecting the differences in the amount of oversight the Secretary of Agriculture seeks to exercise in respect to Hot Springs State Park and Bear River State Park in comparison to the oversight the Secretary of Agriculture exercises in respect to national parks, such as Yellowstone National Park. The Acting Administrator filed his response to the questions on June 12, 2007, and Respondents filed their response on July 19, 2007.

On August 23, 2007, the ALJ issued a Decision and Order [hereinafter Initial Decision]: (1) concluding the Secretary of Agriculture has jurisdiction, under the Animal Welfare Act, to require the Wyoming Department of Parks and Cultural Resources [hereinafter Wyoming Department of Parks] to be licensed and to comply with the Animal Welfare Act and the Regulations and Standards, when the Wyoming Department of Parks engages in the activities of an “exhibitor,” as that term is defined in the Animal Welfare Act; (2) concluding the Wyoming Department of Parks operated as an “exhibitor,” as that term is defined in the Animal Welfare Act and the Regulations and Standards, without being licensed, in willful violation of section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)); (3) dismissing the Complaint as to Kevin Skates and Wade Henderson; and (4) ordering the Wyoming Department of Parks to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and from operating as an “exhibitor,” as that term is defined in the Animal Welfare Act, without being licensed.

On September 24, 2007, the Wyoming Department of Parks filed “Respondent’s Appeal Petition From The Administrative Law Judge’s Decision And Order” [hereinafter Wyoming’s Appeal Petition]. On October 15, 2007, the Acting Administrator filed “Complainant’s Reply Brief In Opposition To Respondents’ Appeal Petition And Cross-Appeal” [hereinafter Acting Administrator’s Appeal Petition]. On November 5,

2007, the Wyoming Department of Parks filed “Respondents’ Response To Complainant’s Cross-Appeal.”

The parties jointly requested that I stay the proceeding in order to provide the parties time to settle. I granted the parties’ request; however, on November 10, 2008, I conducted a conference call in which the parties informed me they had been unable to settle and requested that I issue a decision based on the limited record before me. After careful consideration of that record, I affirm the ALJ’s August 23, 2007, Initial Decision.

DECISION

Decision Summary

I conclude the Secretary of Agriculture has jurisdiction, under the Animal Welfare Act, to require the Wyoming Department of Parks to obtain an Animal Welfare Act exhibitor’s license and to comply with the Regulations and Standards, when the Wyoming Department of Parks engages in the activities of an “exhibitor,” as that term is defined in the Animal Welfare Act and the Regulations and Standards. Further, I order the Wyoming Department of Parks to cease and desist from operating as an exhibitor without an Animal Welfare Act license and from failing to comply with the Regulations and Standards; however, I do not assess the Wyoming Department of Parks a civil penalty. Finally, I dismiss the Complaint against Kevin Skates, the Park Superintendent of Hot Springs State Park, and Wade Henderson, the Park Superintendent of Bear River State Park.

Findings of Fact

1. The Wyoming Department of Parks is an agency of the State of Wyoming (Answer ¶ 1).
2. The Wyoming Department of Parks' primary business address is 2301 Central Avenue, Cheyenne, Wyoming 82002 (Answer ¶ 1).
3. The Wyoming Department of Parks operates no fewer than 31 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, and Bear River State Park, a Wyoming state park located at 601 Bear River Drive, Evanston, Wyoming 82930 (Answer ¶ 1).
4. Kevin Skates is the Park Superintendent of Hot Springs State Park (Answer ¶ 1).
5. Wade Henderson is the Park Superintendent of Bear River State Park (Answer ¶ 1).
6. A herd of adult and yearling bison is maintained at Hot Springs State Park for public viewing. Hot Springs State Park has overnight lodging (Holiday Inn and Plaza Hotel), aquatic recreation (Star Plunge Water Park), and a rehabilitation hospital (Gottsche Rehabilitation Center) (Answer ¶¶ 3-4; Complainant's Motion For Judgment On The Pleadings Ex. A).

7. Captive bison and elk are kept at Bear River State Park for public viewing. Bear River State Park is located along Interstate 80 and contains a rest stop for travelers on Interstate 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.” (Answer ¶¶ 5-6, 8; Complainant’s Motion For Judgment On The Pleadings Ex. B.)

8. On April 11, 2002, the Regional Director-Animal Care, Western Region, Animal and Plant Health Inspection Service, wrote to the Park Superintendent of Hot Springs State Park stating he may be conducting activities that would require an Animal Welfare Act license and enclosing materials related to the Animal Welfare Act, including a copy of the Regulations and Standards, for the Park Superintendent’s review (Complainant’s Motion For Judgment On The Pleadings Ex. C).

9. On June 4, 2003, in response to a request from the Park Superintendent of Hot Springs State Park, the Regional Director-Animal Care, Western Region, Animal and Plant Health Inspection Service, sent him forms and information for obtaining an Animal Welfare Act license (Complainant’s Motion For Judgment On The Pleadings Ex. D).

10. On May 29, 2004, the Park Superintendent of Hot Springs State Park completed an application for an Animal Welfare Act exhibitor’s license (Complainant’s Motion For Judgment On The Pleadings Ex. E).

11. On September 29, 2004, a pre-license inspection of Hot Springs State Park was conducted by an Animal and Plant Health Inspection Service 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 perimeter fence (Complainant's Motion For Judgment On The Pleadings Ex. F).

12. On October 18, 2004, a pre-license inspection of Bear River State Park was conducted by an Animal and Plant Health Inspection Service veterinary medical officer who reported that the facility was inadequate for licensing because a written program of veterinary care had not been completed (Complainant's Motion For Judgment On The Pleadings Ex. G).

13. In a telephone conference conducted on November 10, 2008, counsel for the parties informed me that the Wyoming Department of Parks currently holds a valid Animal Welfare Act exhibitor's license.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The Wyoming Department of Parks is an "exhibitor," as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1).

3. The Wyoming Department of Parks is a “person (public or private),” as that term is used in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1 (definition of the term “exhibitor”)).

4. The Wyoming Department of Parks exhibits animals to the public at Hot Springs State Park and Bear River State Park for “compensation,” as that term is used in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations and Standards (9 C.F.R. § 1.1 (definition of the term “exhibitor”)).

5. Hot Springs State Park is a “zoo,” as that term is defined in the Regulations and Standards (9 C.F.R. § 1.1).

6. Bear River State Park is a “zoo,” as that term is defined in the Regulations and Standards (9 C.F.R. § 1.1).

7. The Wyoming Department of Parks is not a “person,” as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(a)) and the Regulations and Standards (9 C.F.R. § 1.1).

8. As an exhibitor, the Wyoming Department of Parks is required to have an Animal Welfare Act exhibitor’s license and to comply with the Animal Welfare Act and the Regulations and Standards.

9. The Complaint against Kevin Skates, in his official capacity as Park Superintendent of Hot Springs State Park, and Wade Henderson, in his official capacity as Park Superintendent of Bear River State Park, is dismissed.

Discussion

I. The Eleventh Amendment

Respondents contend that this proceeding should be dismissed because the Secretary of Agriculture lacks jurisdiction over state agencies and state employees acting on a state's behalf. Respondents 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 Animal Welfare Act does not include a state as a "person" that the Secretary of Agriculture may require to be licensed.

The Eleventh Amendment to the Constitution of the United States provides:

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. 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. 128, 140 (1965). Therefore, the controlling issue in this proceeding is whether the language of the Animal Welfare Act authorizes the regulation of a state agency that maintains animals for public viewing.

*II. The Wyoming Department Of Parks Is An Exhibitor Under
7 U.S.C. § 2132(h), But Not A Person Under 7 U.S.C. § 2132(a)*

The Animal Welfare Act requires animal “exhibitors” to be licensed by the Secretary of Agriculture. An “exhibitor” is defined, as follows:

§ 2132. Definitions

When used in this chapter—

....

(h) 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). The definition of the term “exhibitor” was added to the Animal Welfare Act by amendment in 1970. When Congress amended the Animal Welfare Act in 1970, the Animal Welfare Act employed the term “person” as part of the definition of “exhibitor,” but left the definition of the term “person” unchanged from the way it was originally defined in 1966, and the Animal Welfare Act continues to define “person” in the identical language used in 1966, as follows:

§ 2132. Definitions

When used in this chapter—

(a) 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 Acting Administrator and Respondents debate whether the Animal Welfare Act’s definition of the term “exhibitor” that incorporates this definition of “person,” is intended to bring a state agency or its employees within the Secretary of Agriculture’s jurisdiction. Both cite *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765 (2000), as authority for their opposing positions.

The controlling issue in *Vermont* 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. The Court 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 Agency of Nat. Resources v. United States, 529 U.S. 765, 780-81 (2000).

The full statement of the referenced opinion in *United States v. Cooper Corp.* 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.

United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941) (footnotes omitted).

As both *Vermont* and *Cooper* make clear, the intent of Congress is controlling in deciding this statutory question, and the legislative history of the Animal Welfare Act must be reviewed. This review shows that when originally enacted in 1966, state and municipal governments were not intended to come within the Animal Welfare Act's definition of "person."

The Senate Report applicable to H.R. 13,881, which was enacted into law in 1966, states:

SECTION-BY-SECTION ANALYSIS

....

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.

S. Rep. No. 1281 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2635, 2637. The section-by-section analysis of the Conference report applicable to H.R. 13,881 similarly states:

SECTION BY SECTION ANALYSIS

....

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 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.

Conf. Rep. No. 1848 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2635, 2652.

In 1970, when the Animal Welfare Act was amended to give the Secretary of Agriculture jurisdiction over exhibitors, the definition of “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 House report, which was not accompanied by a Senate report or a Conference report, applicable to the 1970 amendments to the Animal Welfare Act does address the new definition of “exhibitor,” but is silent in respect to whether it was intended to apply to state governments and state agencies (H.R. Rep. No. 91-1651 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5103, 5108-09).

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. 11 (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. (Footnote omitted.)

The author explains his rationale for this conclusion as part of 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 Wyoming Department of Parks argues that the use of “public or private” to modify “person” in the definition of the term “exhibitor” 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) (Wyoming Appeal Pet. at 3-6). The Wyoming Department of Parks’ interpretation is contrary to the conclusion reached in the quoted treatise published in Agricultural Law, Vol. 11 at 87-8 (Matthew Bender, 2004 edition), and, more importantly, is inconsistent with the interpretation given it for over 30 years by the officials who administer the Animal Welfare Act: namely, that a state is just as

capable of acting as an exhibitor as a private individual. Indeed, no fewer than 21 states and state agencies are currently listed as exhibitors under the Animal Welfare Act (Complainant's Motion For Judgment On The Pleadings at 10).

After the 1970 amendment of the Animal Welfare Act to extend its coverage to exhibitors, the Animal Welfare Act was amended eight times. Ostensibly, whenever the Animal Welfare Act came before Congress for consideration and amendment during the past 30 years, Congress accepted the United States Department of Agriculture's interpretation that the "exhibitor" definition properly includes state agencies, and, for that reason, that definition together with the definition of the term "person" was not altered.¹

In the instant proceeding, there is even more reason to defer to the interpretation of the pertinent statutory language by the officials 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*, Vol. 11 at 87-8 (Matthew Bender, 2004 edition). For these reasons, I conclude the Secretary of Agriculture does have jurisdiction over the Wyoming Department of Parks.

The Acting Administrator asserts the ALJ impliedly found that the Wyoming Department of Parks is a "person," as that term is defined under the Animal Welfare Act

¹When 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. *CFTC v. Schor*, 478 U.S. 833, 846 (1986); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Doris Day Animal League v. Veneman*, 315 F.3d 297, 298 (D.C. Cir.), *cert. denied*, 504 U.S. 822 (2003).

(7 U.S.C. § 2132(a)), and the ALJ erroneously failed to make his implicit finding explicit (Acting Administrator's Appeal Pet. at 13-14). The Wyoming Department of Parks disagrees with the Acting Administrator's reading of the ALJ's Initial Decision, stating the ALJ held the term "person," as defined in the Animal Welfare Act, does not include state agencies, such as the Wyoming Department of Parks.

I agree with the Wyoming Department of Parks' reading of the ALJ's Initial Decision and find the ALJ did not impliedly find the Wyoming Department of Parks is a "person," as that term is defined under the Animal Welfare Act (7 U.S.C. § 2132(a)). The ALJ specifically found that state agencies, such as the Wyoming Department of Parks, are covered in the definition of "exhibitor" in 7 U.S.C. § 2132(h), but are not "persons," as that term is defined in 7 U.S.C. § 2132(a).

III. The Wyoming Department Of Parks Receives Compensation

Respondents argue that, because the public view the bison and elk at Hot Springs State Park and Bear River State Park 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." The ALJ found Respondents' argument unavailing in light of controlling United States Department of Agriculture decisions. In *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 163-64 (1990), the Judicial Officer held that, where an animal is exhibited to the public with the expectation of economic benefit to a resort, the exhibition is "for compensation," even though no fee is charged for

viewing the animal's performance. Similarly, in a more recent case, *In re Daniel J. Hill*, ___ Agric. Dec. ___, slip op. at 13-14 (May 16, 2008), I held that, even though no fee is charged to view animals, the display of animals for economic benefit is sufficient to meet the compensation requirement in 7 U.S.C. § 2132(h).

The Wyoming Department of Parks asserts it receives no economic benefit and does not expect to receive economic benefit from its exhibition of animals at Hot Springs State Park and Bear River State Park; therefore, the Wyoming Department of Parks is not an "exhibitor" as that term is defined in the Animal Welfare Act (Wyoming's Appeal Pet. at 6-7).

I disagree with the Wyoming Department of Parks' contention that it receives no economic benefit from its exhibition of animals at Hot Springs State Park and Bear River State Park. The Wyoming Department of Parks' argument is belied by Wyoming statutes and regulations that govern Wyoming Department of Parks' facilities and by Wyoming's own publications. While it is true that the Wyoming Department of Parks does not charge the public a fee to view the animals at Hot Springs State Park or Bear River State Park, nor own or operate the facilities at the resort complex located at Hot Springs State Park, Wyoming enjoys an economic benefit from Hot Springs State Park and Bear River State Park. For instance, the undisputed facts indicate that the facilities at Hot Springs State Park are located within the park, on state land (Answer ¶ 3; Complainant's Motion For Judgment On The Pleadings Ex. A) and thus, by statute, such facilities operate pursuant to

a lease or rental agreement in which the money received for the lease or rental is paid into the state treasury (Wyo. Stat. Ann. § 36-8-303 (2008)). Additionally, the Wyoming Division of State Parks and Historic Sites² is required to charge concessionaires fair and reasonable contract fees based upon a percentage of gross revenue (024-380-004 Wyo. Code. R. § 2(b) (Weil 2007)).

The animals are clearly used to attract visitors, as evidenced by Complainant's Motion For Judgment On The Pleadings Ex. A-B, and the economic benefit that comes from operating the facilities at Hot Springs State Park are passed directly to Respondents by way of lease or rental agreements. This form of concrete economic benefit is greater than the economic benefit that the Judicial Officer has held to constitute "compensation" in previous cases.³ Thus, in so far as the animals are used to attract customers to the various facilities at Hot Springs State Park in which Respondents have an economic stake, Respondents exhibit animals to the public "for compensation." The Wyoming

²The Wyoming Division of State Parks and Historic Sites is an agency within the Wyoming Department of Parks and Cultural Resources (Wyo. Stat. Ann. § 9-2-2017(c)(i) (2008)), and both Bear River State Park and Hot Springs State Park are administered by the Division of State Parks and Historic Sites, Wyoming Department of State Parks and Cultural Resources (Complainant's Motion For Judgment On The Pleadings Ex. A-B).

³See *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 173-74 (1993) (finding animals are exhibited "for compensation" where there is some indication that the respondent might receive economic benefit and it is conceivable that the presence of the animals might influence some customers to go to respondent's establishment); *In re Lloyd A. Good, Jr.*, 49 Agric. Dec. 156, 163-64 (1990) (finding an animal is exhibited "for compensation" where the animal is an unitemized service which the resort provides to its patrons, as well as an advertised attraction to draw patrons to the resort).

Department of Parks’ argument on appeal that it receives no economic benefit by maintaining the animals at Bear River State Park and Hot Springs State Park (Wyoming’s Appeal Pet. at 6) are contradicted by the Wyoming statutes and regulations that govern Respondents’ facilities and by Respondents’ own publications.

IV. Hot Springs State Park And Bear River State Park Are Zoos

The ALJ held, even if the Wyoming Department of Parks did not exhibit animals to the public for *compensation*, the Wyoming Department of Parks would be an “exhibitor,” as that term is defined in the Animal Welfare Act because Hot Springs State Park and Bear River State Park are “zoos” (Initial Decision at 14). The Wyoming Department of Parks appealed the ALJ’s holding that Hot Springs State Park and Bear River State Park are “zoos” (Wyoming’s Appeal Pet. at 7-8).

The Animal Welfare Act defines the term “exhibitor” to include zoos, as follows:

§ 2132. Definitions

When used in this chapter—

. . . .

(h) The term “exhibitor” means any person (public or private) exhibiting any animals . . . to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and *zoos* exhibiting . . . animals whether operated for profit or not[.]

7 U.S.C. § 2132(h) (emphasis added).

The Regulations and Standards define the term “zoo,” as follows:

§ 1.1 Definitions.

.....

Zoo means 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. Hot Springs State Park and Bear River State Park are clearly parks in which animals are kept for public exhibition or viewing; thus Hot Springs State Park and Bear River State Park are zoos, as that term is used in 7 U.S.C. § 2132(h) and defined in 9 C.F.R. § 1.1. Therefore, the Wyoming Department of Parks, by virtue of exhibiting animals to the public in two zoos comes within the “exhibitor” definition regardless of whether the exhibition of the animals in Hot Springs State Park and Bear River State Park is for compensation.⁴

V. Dismissal Of Kevin Skates And Wade Henderson

The Acting Administrator contends the ALJ erroneously dismissed the Complaint as to the two park superintendents, Kevin Skates and Wade Henderson, based on the ALJ’s determination that the inclusion of Messrs. Skates and Henderson in the cease and desist order is “superfluous and unnecessary” (Acting Administrator’s Appeal Pet. at 14-15).

The Animal Welfare Act defines the term “exhibitor” as “any person . . . exhibiting any animals . . . to the public for compensation, as determined by the Secretary” (7 U.S.C. § 2132(h)) and provides that the Secretary of Agriculture shall issue licenses to exhibitors

⁴*In re James Petersen*, 53 Agric. Dec. 83, 90-91 (1994).

(7 U.S.C. § 2133). Similarly, the Regulations and Standards requires any person operating as an exhibitor to obtain a valid Animal Welfare Act license (9 C.F.R. § 2.1(a)(1)). I conclude the Wyoming Department of Parks is an exhibitor and must have a valid Animal Welfare Act license in order to exhibit animals. The record does not clearly establish that Kevin Skates and Wade Henderson, by virtue of their employment by the Wyoming Department of Parks, are also exhibitors. Moreover, even if I were to infer that Messrs. Skates and Henderson are exhibitors (which I do not so infer), I would not find that they, in addition to their employer, the Wyoming Department of Parks, must obtain Animal Welfare Act licenses.

In numerous Animal Welfare Act cases that have come before me, persons who have been employed by an Animal Welfare Act licensee have not also been required to be licensed, even though these employees actually participate in the exhibition of animals. While the Animal Welfare Act authorizes the Secretary of Agriculture to require all employees of a licensed exhibitor, who themselves fall within the definition of “exhibitor” to also obtain Animal Welfare Act licenses, such a requirement would be a departure from current policy and, without more explanation from the Acting Administrator, I decline to require all employees of licensed exhibitors to obtain a license, even in those situations in which the employees are themselves exhibitors. Therefore, I reject the Acting Administrator’s contention that Messrs. Skates and Henderson, as well

as the Wyoming Department of Parks must obtain Animal Welfare Act licenses,⁵ and I affirm the ALJ's dismissal of the Complaint against Messrs. Skates and Henderson.

VI. The Sanction

The Acting Administrator sought the imposition of an order requiring the Wyoming Department of Parks to cease and desist from violating the Animal Welfare Act and the Regulations and Standards and the assessment of a civil penalty against the Wyoming Department of Parks (Compl. at 4-5). The ALJ issued an order requiring the Wyoming Department of Parks to cease and desist from: (1) exhibiting animals at its state parks without holding a valid Animal Welfare Act exhibitor's license; and (2) failing to comply with the Regulations and Standards (Initial Decision at 15). The ALJ further found, in light of the Wyoming Department of Parks' legitimate belief that it was not subject to the Secretary of Agriculture's jurisdiction under the Animal Welfare Act, the assessment of a civil penalty against the Wyoming Department of Parks would be inappropriate (Initial Decision at 14).

The Wyoming Department of Parks appeals the ALJ's conclusion that the Secretary of Agriculture has jurisdiction over this matter, but does not specifically appeal either the ALJ's imposition of a cease and desist order or the ALJ's determination that the assessment of a civil penalty is not appropriate. Moreover, the Acting Administrator

⁵See *In re Daniel J. Hill*, __ Agric. Dec. ___, slip op. at 11-12 (May 16, 2008) (holding that Montrose Orchards, Inc., was an exhibitor required to obtain an Animal Welfare Act license, but that Montrose Orchard, Inc.'s president was not also required to obtain an Animal Welfare Act license).

appeals neither the cease and desist order issued by the ALJ nor the ALJ's determination that the assessment of a civil penalty is not appropriate. Finally, in a teleconference conducted on November 10, 2008, the parties informed me that the Wyoming Department of Parks currently holds a valid Animal Welfare Act exhibitor's license.

I agree with the ALJ's imposition of a cease and desist order and the ALJ's determination that the assessment of a civil penalty against the Wyoming Department of Parks would be inappropriate. The Wyoming Department of Parks' current compliance with the Animal Welfare Act and the Regulations and Standards is not relevant to the issuance of a cease and desist order. The purpose of a cease and desist order is to deter future violations of the Animal Welfare Act and the Regulations and Standards by the violator and other potential violators.⁶ Therefore, except for minor non-substantive changes, I adopt the cease and desist order imposed by the ALJ against the Wyoming Department of Parks.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Wyoming Department of Parks, its agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and, in particular, shall cease and desist from engaging in any activity for which a license is

⁶*In re Fred Hodgins* (Decision on Remand), 60 Agric. Dec. 73, 86 (2001), *aff'd*, 33 F. App'x 784 (6th Cir. 2002).

required under the Animal Welfare Act and the Regulations and Standards without being licensed, as required.

2. The Complaint against Kevin Skates, in his official capacity as Park Superintendent of Hot Springs State Park, and Wade Henderson, in his official capacity as Park Superintendent of Bear River State Park, is dismissed.

This Order shall become effective on the day after service of this Order on the Wyoming Department of Parks, Kevin Skates, and Wade Henderson.

RIGHT TO JUDICIAL REVIEW

The Wyoming Department of Parks has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Decision and Order. The Wyoming Department of Parks must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁷ The date of entry of the Order in this Decision and Order is November 24, 2008.

Done at Washington, DC

November 24, 2008

William G. Jenson
Judicial Officer

⁷U.S.C. § 2149(c).