AGRICULTURE DECISIONS

Volume 74

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Court Decision.
Decided June 22, 2015.

AMAA – Civil penalties – Eminent domain – Taking – Fifth Amendment – Raisin Administrative Committee – Raisin marketing order – Raisins – Reserve requirement – Property, personal – Property, real.

[Cite as: 135 S. Ct. 2419 (2015)].

Supreme Court of the United States

The Court reversed the Ninth Circuit's decision, holding that, pursuant to the Fifth Amendment, the Government must pay just compensation when it takes personal property just as it does when taking real property. The Court further held that the Government may not require raisin growers to give up their personal property (i.e., raisins), without granting just compensation, as a condition of selling raisins in interstate commerce. In so holding, the Court found that the Raisin Administrative Committee's reserve requirement, which mandates that actual raisins be transferred from the growers to the Government, constitutes a physical taking that requires just compensation.

OPINION OF THE COURT

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Under the United States Department of Agriculture's California Raisin Marketing Order, a percentage of a grower's crop must be physically set aside in certain years for the account of the Government, free of charge. The Government then sells, allocates, or otherwise disposes of the raisins in ways it determines are best suited to maintaining an orderly market. The question is whether the Takings Clause of the Fifth Amendment bars the Government from imposing such a demand on the growers without just compensation.

I

The Agricultural Marketing Agreement Act of 1937 authorizes the

Secretary of Agriculture to promulgate "marketing orders" to help maintain stable markets for particular agricultural products. The marketing order for raisins requires growers in certain years to give a percentage of their crop to the Government, free of charge. The required allocation is determined by the Raisin Administrative Committee, a Government entity composed largely of growers and others in the raisin business appointed by the Secretary of Agriculture. In 2002–2003, this Committee ordered raisin growers to turn over 47 percent of their crop. In 2003–2004, 30 percent.

Growers generally ship their raisins to a raisin "handler," who physically separates the raisins due the Government (called "reserve raisins"), pays the growers only for the remainder ("free-tonnage raisins"), and packs and sells the free-tonnage raisins. The Raisin Committee acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion. It sells them in noncompetitive markets, for example to exporters, federal agencies, or foreign governments; donates them to charitable causes; releases them to growers who agree to reduce their raisin production; or disposes of them by "any other means" consistent with the purposes of the raisin program. 7 CFR § 989.67(b)(5) (2015). Proceeds from Committee sales are principally used to subsidize handlers who sell raisins for export (not including the Hornes, who are not raisin exporters). Raisin growers retain an interest in any net proceeds from sales the Raisin Committee makes, after deductions for the export subsidies and the Committee's administrative expenses. In the years at issue in this case, those proceeds were less than the cost of producing the crop one year, and nothing at all the next.

The Hornes—Marvin Horne, Laura Horne, and their family—are both raisin growers and handlers. They "handled" not only their own raisins but also those produced by other growers, paying those growers in full for all of their raisins, not just the free-tonnage portion. In 2002, the Hornes refused to set aside any raisins for the Government, believing they were not legally bound to do so. The Government sent trucks to the Hornes' facility at eight o'clock one morning to pick up the raisins, but the Hornes refused entry. App. 31; cf. *post*, at 2442 (SOTOMAYOR, J., dissenting). The Government then assessed against the Hornes a fine equal to the market value of the missing raisins—some $480,000—as well as an additional civil penalty of just over $200,000 for disobeying the order to

turn them over.

When the Government sought to collect the fine, the Hornes turned to the courts, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment. Their case eventually made it to this Court when the Government argued that the lower courts had no jurisdiction to consider the Hornes' constitutional defense to the fine. *Horne v. Department of Agriculture,* 569 U.S. ——, 133 S.Ct. 2053, 186 L.Ed.2d 69 (2013) (*Horne I*). We rejected the Government's argument and sent the case back to the Court of Appeals so it could address the Hornes' contention on the merits. *Id.,* at ——, 133 S.Ct., at 2063–2064.

On remand, the Ninth Circuit agreed with the Hornes that the validity of the fine rose or fell with the constitutionality of the reserve requirement. 750 F.3d 1128, 1137 (2014). The court then considered whether that requirement was a physical appropriation of property, giving rise to a *per se* taking, or a restriction on a raisin grower's use of his property, properly analyzed under the more flexible and forgiving standard for a regulatory taking. The court rejected the Hornes' argument that the reserve requirement was a *per se* taking, reasoning that "the Takings Clause affords less protection to personal than to real property," and concluding that the Hornes "are not completely divested of their property rights," because growers retain an interest in the proceeds from any sale of reserve raisins by the Raisin Committee. *Id.,* at 1139.

The court instead viewed the reserve requirement as a use restriction, similar to a government condition on the grant of a land use permit. See *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). As in such permit cases, the Court of Appeals explained, the Government here imposed a condition (the reserve requirement) in exchange for a Government benefit (an orderly raisin market). And just as a landowner was free to avoid the government condition by forgoing a permit, so too the Hornes could avoid the reserve requirement by "planting different crops." 750 F.3d, at 1143. Under that analysis, the court found that the reserve requirement was a proportional response to the Government's interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment.

We granted certiorari. 574 U.S. ——, 135 S.Ct. 1039, 190 L.Ed.2d 907 (2015).

II

The petition for certiorari poses three questions, which we answer in turn.

A.

The first question presented asks "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' *Arkansas Game & Fish Comm'n v. United States,* —— U.S. ——, 133 S.Ct. 511, 518, 184 L.Ed.2d 417 (2012), applies only to real property and not to personal property." The answer is no.

1.

There is no dispute that the "classic taking [is one] in which the government directly appropriates private property for its own use." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 324, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (brackets and internal quotation marks omitted). Nor is there any dispute that, in the case of real property, such an appropriation is a *per se* taking that requires just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 426–435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

[1] The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. It protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings. Clause 28 of that charter forbade any "constable or other bailiff"

from taking "corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Cl. 28 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 329 (2d ed. 1914).

The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property. In 1641, for example, Massachusetts adopted its Body of Liberties, prohibiting "mans Cattel or goods of what kinde soever" from being "pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Massachusetts Body of Liberties ¶ 8, in R. Perry, Sources of Our Liberties 149 (1978). Virginia allowed the seizure of surplus "live stock, or beef, pork, or bacon" for the military, but only upon "paying or tendering to the owner the price so estimated by the appraisers." 1777 Va. Acts ch. XII. And South Carolina authorized the seizure of "necessaries" for public use, but provided that "said articles so seized shall be paid for agreeable to the prices such and the like articles sold for on the ninth day of October last." 1779 S.C. Acts § 4.

Given that background, it is not surprising that early Americans bridled at appropriations of their personal property during the Revolutionary War, at the hands of both sides. John Jay, for example, complained to the New York Legislature about military impressment by the Continental Army of "Horses, Teems, and Carriages," and voiced his fear that such action by the "little Officers" of the Quartermasters Department might extend to "Blankets, Shoes, and many other articles." A Hint to the Legislature of the State of New York (1778), in John Jay, The Making of a Revolutionary 461–463 (R. Morris ed. 1975) (emphasis deleted). The legislature took the "hint," passing a law that, among other things, provided for compensation for the impressment of horses and carriages. 1778 N.Y. Laws ch. 29. According to the author of the first treatise on the Constitution, St. George Tucker, the Takings Clause was "probably" adopted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Blackstone's Commentaries, Editor's App. 305–306 (1803).

Nothing in this history suggests that personal property was any less protected against physical appropriation than real property. As this Court summed up in *James v. Campbell*, 104 U.S. 356, 358, 26 L.Ed. 786 (1882), a case concerning the alleged appropriation of a patent by the Government:

> "[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser."

Prior to this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real. *Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a "regulatory taking"—a restriction on the use of property that went "too far." *Id.*, at 415, 43 S.Ct. 158. And in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court clarified that the test for how far was "too far" required an "ad hoc" factual inquiry. That inquiry required considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.

Four years after *Penn Central*, however, the Court reaffirmed the rule that a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors. In *Loretto*, the Court held that requiring an owner of an apartment building to allow installation of a cable box on her rooftop was a physical taking of real property, for which compensation was required. That was true without regard to the claimed public benefit or the economic impact on the owner. The Court explained that such protection was justified not only by history, but also because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of the "the rights to possess, use and dispose of" the property. 458 U.S., at 435, 102 S.Ct. 3164 (internal quotation marks omitted). That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal

property.

The Ninth Circuit based its distinction between real and personal property on this Court's discussion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), a case involving extensive limitations on the use of shorefront property. 750 F.3d, at 1139–1141. *Lucas* recognized that while an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless," such an "implied limitation" was not reasonable in the case of land. 505 U.S., at 1027–1028, 112 S.Ct. 2886.

Lucas, however, was about regulatory takings, not direct appropriations. Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away. Our cases have stressed the "longstanding distinction" between government acquisitions of property and regulations. *Tahoe–Sierra Preservation Council*, 535 U.S., at 323, 122 S.Ct. 1465. The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike. See 535 U.S., at 323, 122 S.Ct. 1465. (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa" (footnote omitted)).

2.

The reserve requirement imposed by the Raisin Committee is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to the Raisin Committee. App. to Pet. for Cert. 179a; Tr. of Oral Arg. 31. The Committee's raisins must be physically segregated from free-tonnage raisins. 7 CFR § 989.66(b)(2). Reserve raisins are sometimes left on the premises of handlers, but they are held "for the account" of the Government. § 989.66(a). The Committee disposes of what become its raisins as it wishes, to promote the purposes of the raisin marketing order.

Raisin growers subject to the reserve requirement thus lose the entire "bundle" of property rights in the appropriated raisins—"the rights to possess, use and dispose of" them, *Loretto*, 458 U.S., at 435, 102 S.Ct.

3164 (internal quotation marks omitted)—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order. The Government's "actual taking of possession and control" of the reserve raisins gives rise to a taking as clearly "as if the Government held full title and ownership," *id.,* at 431, 102 S.Ct. 3164 (internal quotation marks omitted), as it essentially does. The Government's formal demand that the Hornes turn over a percentage of their raisin crop without charge, for the Government's control and use, is "of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.,* at 432, 102 S.Ct. 3164.

The Government thinks it "strange" and the dissent "baffling" that the Hornes object to the reserve requirement, when they nonetheless concede that "the government may prohibit the sale of raisins without effecting a per se taking." Brief for Respondent 35; *post,* at 2443 (SOTOMAYOR, J., dissenting). But that distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation. A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal,* 260 U.S., at 416, 43 S.Ct. 158.

B.

The second question presented asks "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion." The answer is no.

The Government and dissent argue that raisins are fungible goods whose only value is in the revenue from their sale. According to the Government,

the raisin marketing order leaves that interest with the raisin growers: After selling reserve raisins and deducting expenses and subsidies for exporters, the Raisin Committee returns any net proceeds to the growers. 7 CFR §§ 989.67(d), 989.82, 989.53(a), 989.66(h). The Government contends that because growers are entitled to these net proceeds, they retain the most important property interest in the reserve raisins, so there is no taking in the first place. The dissent agrees, arguing that this possible future revenue means there has been no taking under *Loretto*. See *post*, at 2437 – 2440.

But when there has been a physical appropriation, "we do not ask ... whether it deprives the owner of all economically valuable use" of the item taken. *Tahoe–Sierra Preservation Council*, 535 U.S., at 323, 122 S.Ct. 1465; see *id.*, at 322, 122 S.Ct. 1465 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (citation omitted)). For example, in *Loretto*, we held that the installation of a cable box on a small corner of Loretto's rooftop was a *per se* taking, even though she could of course still sell and economically benefit from the property. 458 U.S., at 430, 436, 102 S.Ct. 3164. The fact that the growers retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless, as it was for one of the two years at issue here.

The dissent points to *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), noting that the Court found no taking in that case, even though the owners' artifacts could not be sold at all. *Post*, at 2440. The dissent suggests that the Hornes should be happy, because they might at least get *something* from what had been their raisins. But *Allard* is a very different case. As the dissent recognizes, the owners in that case retained the rights to possess, donate, and devise their property. In finding no taking, the Court emphasized that the Government did not "compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them." 444 U.S., at 65–66, 100 S.Ct. 318. Here of course the raisin program requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition.

The Government and dissent again confuse our inquiry concerning *per se*

takings with our analysis for regulatory takings. A regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*. That is why, in *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), we held that a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property. The owner retained the value of the use of the property as a shopping center largely unimpaired, so the regulation did not go "too far." *Id.,* at 83, 100 S.Ct. 2035 (quoting *Pennsylvania Coal Co.,* 260 U.S., at 415, 43 S.Ct. 158). But once there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation. See *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 747–748, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) (SCALIA, J., concurring in part and concurring in judgment). That is not an issue here: The Hornes did not receive any net proceeds from Raisin Committee sales for the years at issue, because they had not set aside any reserve raisins in those years (and, in any event, there were no net proceeds in one of them).

C.

The third question presented asks "Whether a governmental mandate to relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking." The answer, at least in this case, is yes.

The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." Brief for Respondent 32 (brackets and internal quotation marks omitted).

"Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law. In *Loretto,* we rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord. We held instead that "a landlord's ability to rent his property may not be conditioned on

his forfeiting the right to compensation for a physical occupation." 458 U.S., at 439, n. 17, 102 S.Ct. 3164. As the Court explained, the contrary argument "proves too much":

> "For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices." *Ibid.*

As the Court concluded, property rights "cannot be so easily manipulated." *Ibid.*

The Government and dissent rely heavily on *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). There we held that the Environmental Protection Agency could require companies manufacturing pesticides, fungicides, and rodenticides to disclose health, safety, and environmental information about their products as a condition to receiving a permit to sell those products. While such information included trade secrets in which pesticide manufacturers had a property interest, those manufacturers were not subjected to a taking because they received a "valuable Government benefit" in exchange—a license to sell dangerous chemicals. *Id.,* at 1007, 104 S.Ct. 2862; see *Nollan,* 483 U.S., at 834, n. 2, 107 S.Ct. 3141 (discussing *Monsanto*).

The taking here cannot reasonably be characterized as part of a similar voluntary exchange. In one of the years at issue here, the Government insisted that the Hornes turn over 47 percent of their raisin crop, in exchange for the "benefit" of being allowed to sell the remaining 53 percent. The next year, the toll was 30 percent. We have already rejected the idea that *Monsanto* may be extended by regarding basic and familiar uses of property as a "Government benefit" on the same order as a permit to sell hazardous chemicals. See *Nollan,* 483 U.S., at 834, n. 2, 107 S.Ct. 3141 (distinguishing *Monsanto* on the ground that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit' "). Selling produce in interstate commerce, although certainly subject to reasonable government regulation, is

similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection. Raisins are not dangerous pesticides; they are a healthy snack. A case about conditioning the sale of hazardous substances on disclosure of health, safety, and environmental information related to those hazards is hardly on point.

Leonard & Leonard v. Earle, 279 U.S. 392, 49 S.Ct. 372, 73 L.Ed. 754 (1929), is also readily distinguishable. In that case, the Court upheld a Maryland requirement that oyster packers remit ten percent of the marketable detached oyster shells or their monetary equivalent to the State for the privilege of harvesting the oysters. But the packers did "not deny the power of the State to declare their business a privilege," and the power of the State to impose a "privilege tax" was "not questioned by counsel." *Id.,* at 396, 49 S.Ct. 372. The oysters, unlike raisins, were "feræ naturæ" that belonged to the State under state law, and "[n]o individual ha[d] any property rights in them other than such as the state may permit him to acquire." *Leonard v. Earle,* 155 Md. 252, 258, 141 A. 714, 716 (1928). The oyster packers did not simply seek to sell their property; they sought to appropriate the State's. Indeed, the Maryland Court of Appeals saw the issue as a question of "a reasonable and fair compensation" *from* the packers *to* "the state, as owner of the oysters." *Id.,* at 259, 141 A., at 717 (internal quotation marks omitted).

Raisins are not like oysters: they are private property—the fruit of the growers' labor—not "public things subject to the absolute control of the state," *id.,* at 258, 141 A., at 716. Any physical taking of them for public use must be accompanied by just compensation.

III

The Government correctly points out that a taking does not violate the Fifth Amendment unless there is no just compensation, and argues that the Hornes are free to seek compensation for any taking by bringing a damages action under the Tucker Act in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1); *Monsanto,* 467 U.S., at 1020, 104 S.Ct. 2862. But we held in *Horne I* that the Hornes may, in their capacity as handlers, raise a takings-based defense to the fine levied against them. We specifically rejected the contention that the Hornes were required to pay the fine and

then seek compensation under the Tucker Act. See 569 U.S., at ——, 133 S.Ct., at 2063 ("We ... conclude that the [Agricultural Marketing Agreement Act] withdraws Tucker Act jurisdiction over [the Hornes'] takings claim. [The Hornes] (as handlers) have no alternative remedy, and their takings claim was not 'premature' when presented to the Ninth Circuit.").

As noted, the Hornes are both growers and handlers. Their situation is unusual in that, as handlers, they have the full economic interest in the raisins the Government alleges should have been set aside for its account. They own the raisins they grew and are handling for themselves, and they own the raisins they handle for other growers, having paid those growers for all their raisins (not just the free-tonnage amount, as is true with respect to most handlers). See *supra*, at 2424 – 2425; Tr. of Oral Arg. 3–4. The penalty assessed against them as handlers included the dollar equivalent of the raisins they refused to set aside—their raisins. 750 F.3d, at 1135, n. 6; Brief for Petitioners 15. They may challenge the imposition of that fine, and do not have to pay it first and then resort to the Court of Federal Claims.

Finally, the Government briefly argues that if we conclude that the reserve requirement effects a taking, we should remand for the Court of Appeals to calculate "what compensation would have been due if petitioners had complied with the reserve requirement." Brief for Respondent 55. The Government contends that the calculation must consider what the value of the reserve raisins would have been without the price support program, as well as "other benefits ... from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and promotional activities." *Id.*, at 55–56. Indeed, according to the Government, the Hornes would "likely" have a net gain under this theory. *Id.*, at 56.

The best defense may be a good offense, but the Government cites no support for its hypothetical-based approach, or its notion that general regulatory activity such as enforcement of quality standards can constitute just compensation for a specific physical taking. Instead, our cases have set forth a clear and administrable rule for just compensation: "The Court has repeatedly held that just compensation normally is to be measured by 'the market value of the property at the time of the taking.' " *United States*

v. 50 Acres of Land, 469 U.S. 24, 29, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984) (quoting *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934)).

Justice BREYER is concerned that applying this rule in this case will affect provisions concerning whether a condemning authority may deduct special benefits—such as new access to a waterway or highway, or filling in of swampland—from the amount of compensation it seeks to pay a landowner suffering a partial taking. *Post*, at 2435 – 2436 (opinion concurring in part and dissenting in part); see *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897) (laying out of streets and subdivisions in the District of Columbia). He need not be. Cases of that sort can raise complicated questions involving the exercise of the eminent domain power, but they do not create a generally applicable exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here. Nothing in the cases Justice BREYER labels "*Bauman* and its progeny," *post*, at 2435, suggests otherwise, which may be why the Solicitor General does not cite them.*

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* For example, in *United States v. Miller*, 317 U.S. 369, 377, 63 S.Ct. 276, 87 L.Ed. 336 (1943), the Court—in calculating the fair market value of land—discounted an increase in value resulting from speculation "as to what the Government would be compelled to pay as compensation" after the land was earmarked for acquisition. In *United States v. Sponenbarger*, 308 U.S. 256, 265, 60 S.Ct. 225, 84 L.Ed. 230 (1939), the Court determined there was no taking in the first place, when the complaint was merely that a Government flood control plan provided insufficient protection for the claimant's land. *McCoy v. Union Elevated R. Co*., 247 U.S. 354, 363, 38 S.Ct. 504, 62 L.Ed. 1156 (1918), similarly involved a claim "for damages to property not actually taken." So too *Reichelderfer v. Quinn*, 287 U.S. 315, 53 S.Ct. 177, 77 L.Ed. 331 (1932). There the Court held that claimants who had paid a special assessment when Rock Creek Park in Washington, D.C., was created—because the Park increased the value of their property—did not thereby have the right to prevent Congress from altering use of part of the Park for a fire station 38 years later. In *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930), the law authorizing the taking did "not permit the offset of benefits for a railroad," and therefore was "not subject to the objection that it fails to provide adequate compensation ... and is therefore unconstitutional." *Id.*, at 367, and n. 1, 50 S.Ct. 299 (quoting *Fitzsimmons & Galvin, Inc. v. Rogers*, 243 Mich. 649, 665, 220 N.W. 881, 886 (1928)). And in *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), the issue was whether an assessment to pay for improvements exceeded a village's taxing power. Perhaps farthest afield are the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 153, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which involved valuation questions arising from the Government reorganization of northeast and midwest railroads. The Court in that case held that the legislation at issue was not "merely an eminent domain statute" but instead was enacted "pursuant to the bankruptcy power." *Id.*, at 151, 153, 95 S.Ct. 335.

In any event, this litigation presents no occasion to consider the broader issues discussed by Justice BREYER. The Government has already calculated the amount of just compensation in this case, when it fined the Hornes the fair market value of the raisins: $483,843.53. 750 F.3d, at 1135, n. 6. The Government cannot now disavow that valuation, see Reply Brief 21–23, and does not suggest that the marketing order affords the Hornes compensation in that amount. There is accordingly no need for a remand; the Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins. This case, in litigation for more than a decade, has gone on long enough.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

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JUSTICE THOMAS, CONCURRING.

I join the Court's opinion in full. I write separately to offer an additional observation concerning Justice BREYER's argument that we should remand the case. The Takings Clause prohibits the government from taking private property except "for public use," even when it offers "just compensation." U.S. Const., Amdt. 5. That requirement, as originally understood, imposes a meaningful constraint on the power of the state—"the government may take property only if it actually uses or gives the public a legal right to use the property." *Kelo v. New London*, 545 U.S. 469, 521, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (THOMAS, J., dissenting). It is far from clear that the Raisin Administrative Committee's conduct meets that standard. It takes the raisins of citizens and, among other things, gives them away or sells them to exporters, foreign importers, and foreign governments. 7 CFR § 989.67(b) (2015). To the extent that the Committee is not taking the raisins "for public use," having the Court of

Appeals calculate "just compensation" in this case would be a fruitless exercise.

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JUSTICE BREYER, WITH WHOM **JUSTICE GINSBURG** AND **JUSTICE KAGAN** JOIN, CONCURRING IN PART AND DISSENTING IN PART.

I agree with Parts I and II of the Court's opinion. However, I cannot agree with the Court's rejection, in Part III, of the Government's final argument. The Government contends that we should remand the case for a determination of whether any compensation would have been due if the Hornes had complied with the California Raisin Marketing Order's reserve requirement. In my view, a remand for such a determination is necessary.

The question of just compensation was not presented in the Hornes' petition for certiorari. It was barely touched on in the briefs. And the courts below did not decide it. At the same time, the case law that I have found indicates that the Government may well be right: The marketing order may afford just compensation for the takings of raisins that it imposes. If that is correct, then the reserve requirement does not violate the Takings Clause.

I

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Clause means what it says: It "does not proscribe the taking of property; it proscribes taking *without just compensation*." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (emphasis added). Under the Clause, a property owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken," which is to say that "[h]e must be made whole but is not entitled to more." *Olson v. United States,* 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934).

On the record before us, the Hornes have not established that the Government, through the raisin reserve program, takes raisins *without just*

compensation. When the Government takes as reserve raisins a percentage of the annual crop, the raisin owners retain the remaining, free-tonnage, raisins. The reserve requirement is intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market. See 7 CFR § 989.55 (2015); 7 U.S.C. § 602(1). And any such enhancement matters. This Court's precedents indicate that, when calculating the just compensation that the Fifth Amendment requires, a court should deduct from the value of the taken (reserve) raisins any enhancement caused by the taking to the value of the remaining (free-tonnage) raisins.

More than a century ago, in *Bauman v. Ross*, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897), this Court established an exception to the rule that "just compensation normally is to be measured by 'the market value of the property at the time of the taking.' " *United States v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S.Ct. 451, 83 L.Ed.2d 376 (1984) (quoting *Olson, supra*, at 255, 54 S.Ct. 704). We considered in *Bauman* how to calculate just compensation when the Government takes only a portion of a parcel of property:

> "[W]hen part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened." 167 U.S., at 574, 17 S.Ct. 966.

"The Constitution of the United States," the Court stated, "contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use." *Id.*, at 584, 17 S.Ct. 966.

The Court has consistently applied this method for calculating just compensation: It sets off from the value of the portion that was taken the value of any benefits conferred upon the remaining portion of the property.

See *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 151, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) ("[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation" (footnote omitted)); *United States v. Miller,* 317 U.S. 369, 376, 63 S.Ct. 276, 87 L.Ed. 336 (1943) ("[I]f the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken"); *United States v. Sponenbarger,* 308 U.S. 256, 266–267, 60 S.Ct. 225, 84 L.Ed. 230 (1939) ("[I]f governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner"); *Reichelderfer v. Quinn,* 287 U.S. 315, 323, 53 S.Ct. 177, 77 L.Ed. 331 (1932) ("Just compensation ... was awarded if the benefits resulting from the proximity of the improvement [were] set off against the value of the property taken from the same owners"); *Dohany v. Rogers,* 281 U.S. 362, 367–368, 50 S.Ct. 299, 74 L.Ed. 904 (1930) (a statute that "permits deduction of benefits derived from the construction of a highway" from the compensation paid to landowners "afford[s] no basis for anticipating that ... just compensation will be denied"); *Norwood v. Baker,* 172 U.S. 269, 277, 19 S.Ct. 187, 43 L.Ed. 443 (1898) ("Except for [state law], the State could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use").

The rule applies regardless of whether a taking enhances the value of one property or the value of many properties. That is to say, the Government may "permi[t] consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages." *McCoy v. Union Elevated R. Co.,* 247 U.S. 354, 366, 38 S.Ct. 504, 62 L.Ed. 1156 (1918). The Federal Constitution does not distinguish between "special" benefits, which specifically affect the property taken, and "general" benefits, which have a broader impact.

Of course, a State may prefer to guarantee a greater payment to property owners, for instance by establishing a standard for compensation that does

not account for general benefits (or for any benefits) afforded to a property owner by a taking. See *id.*, at 365, 38 S.Ct. 504 (describing categories of rules applied in different jurisdictions); Schopflocher, Deduction of Benefits in Determining Compensation or Damages in Eminent Domain, 145 A.L.R. 7, 158–294 (1943) (describing particular rules applied in different jurisdictions). Similarly, "Congress ... has the power to authorize compensation greater than the constitutional minimum." *50 Acres of Land, supra,* at 30, n. 14, 105 S.Ct. 451 (1984). Thus, Congress, too, may limit the types of benefits to be considered. See, *e.g.,* 33 U.S.C. § 595. But I am unaware of any congressional authorization that would increase beyond the constitutional floor the compensation owed for a taking of the Hornes' raisins.

If we apply *Bauman* and its progeny to the marketing order's reserve requirement, "the benefit [to the free-tonnage raisins] may be set off against the value of the [reserve raisins] taken." *Miller, supra,* at 376, 63 S.Ct. 276. The value of the raisins taken might exceed the value of the benefit conferred. In that case, the reserve requirement effects a taking without just compensation, and the Hornes' decision not to comply with the requirement was justified. On the other hand, the benefit might equal or exceed the value of the raisins taken. In that case, the California Raisin Marketing Order does not effect a taking without just compensation. See *McCoy, supra,* at 366, 38 S.Ct. 504 ("In such [a] case the owner really loses nothing which he had before; and it may be said with reason, there has been no real injury"); *Brown v. Legal Foundation of Wash.,* 538 U.S. 216, 237, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) ("[I]f petitioners' net loss was zero, the compensation that is due is also zero"). And even the Hornes agree that if the reserve requirement does not effect a taking without just compensation, then they cannot use the Takings Clause to excuse their failure to comply with the marketing order—or to justify their refusal to pay the fine and penalty imposed based on that failure. See Brief for Petitioners 31 ("The constitutionality of the fine rises or falls on the constitutionality of the Marketing Order's reserve requirement and attendant transfer of reserve raisins" (internal quotation marks omitted)).

II

The majority believes the *Bauman* line of cases most likely does not apply here. It says that those cases do "not create a generally applicable

exception to the usual compensation rule, based on asserted regulatory benefits of the sort at issue here." *Ante,* at 2432. But it is unclear to me what distinguishes this case from those.

It seems unlikely that the majority finds a distinction in the fact that this taking is based on regulatory authority. Cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law" (internal quotation marks omitted)). It similarly seems unlikely that the majority intends to distinguish between takings of real property and takings of personal property, given its recognition that the Takings Clause "protects 'private property' without any distinction between different types." *Ante,* at 2426. It is possible that the majority questions the Government's argument because of its breadth—the Government argues that "it would be appropriate to consider what value all of the raisins would have had *in the absence of the marketing order,*" and I am unaware of any precedent that allows a court to account for portions of the marketing order that are entirely separate from the reserve requirement. But neither am I aware of any precedent that would distinguish between how the *Bauman* doctrine applies to the reserve requirement itself and how it applies to other types of partial takings.

Ultimately, the majority rejects the Government's request for a remand because it believes that the Government "does not suggest that the marketing order affords the Hornes compensation" in the amount of the fine that the Government assessed. *Ante,* at 2433. In my view, however, the relevant precedent indicates that the Takings Clause requires compensation in an amount equal to the value of the reserve raisins adjusted to account for the benefits received. And the Government does, indeed, suggest that the marketing order affords just compensation. See Brief for Respondent 56 ("It is likely that when all benefits and alleged losses from the marketing order are calculated, [the Hornes] would have a net *gain* rather than a net loss, given that a central point of the order is to benefit producers"). Further, the Hornes have not demonstrated the contrary. Before granting judgment in favor of the Hornes, a court should address the issue in light of all of the relevant facts and law.

* * *

Given the precedents, the parties should provide full briefing on this question. I would remand the case, permitting the lower courts to consider argument on the question of just compensation.

For these reasons, while joining Parts I and II of the Court's opinion, I respectfully dissent from Part III.

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JUSTICE SOTOMAYOR, DISSENTING.

The Hornes claim, and the Court agrees, that the Raisin Marketing Order, 7 CFR pt. 989 (2015) (hereinafter Order), effects a *per se* taking under our decision in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). But *Loretto* sets a high bar for such claims: It requires that each and every property right be destroyed by governmental action before that action can be said to have effected a *per se* taking. Because the Order does not deprive the Hornes of all of their property rights, it does not effect a *per se* taking. I respectfully dissent from the Court's contrary holding.

I

Our Takings Clause jurisprudence has generally eschewed "magic formula[s]" and has "recognized few invariable rules." *Arkansas Game and Fish Comm'n v. United States,* 568 U.S. ——, —— – ——, 133 S.Ct. 511, 518, 184 L.Ed.2d 417 (2012). Most takings cases therefore proceed under the fact-specific balancing test set out in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). See *Arkansas Game and Fish Comm'n,* 568 U.S., at ——, 133 S.Ct., at 518–519; *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538–539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Hornes have not made any argument under *Penn Central*. In order to prevail, they therefore must fit their claim into one of the three narrow categories in which we have assessed takings claims more categorically.

In the "special context of land-use exactions," we have held that "government demands that a landowner dedicate an easement allowing

public access to her property as a condition of obtaining a development permit" constitute takings unless the government demonstrates a nexus and rough proportionality between its demand and the impact of the proposed development. *Lingle,* 544 U.S., at 538, 546, 125 S.Ct. 2074; see *Dolan v. City of Tigard,* 512 U.S. 374, 386, 391, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 837, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). We have also held that a regulation that deprives a property owner of "*all* economically beneficial us[e]" of his or her land is a *per se* taking. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (emphasis in original). The Hornes have not relied on either of these rules in this Court. See Brief for Petitioners 42, 55.

Finally—and this is the argument the Hornes do rely on—we have held that the government effects a *per se* taking when it requires a property owner to suffer a "permanent physical occupation" of his or her property. *Loretto,* 458 U.S., at 426, 102 S.Ct. 3164. In my view, however, *Loretto*—when properly understood—does not encompass the circumstances of this case because it only applies where all property rights have been destroyed by governmental action. Where some property right is retained by the owner, no *per se* taking under *Loretto* has occurred.

This strict rule is apparent from the reasoning in *Loretto* itself. We explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' " *Id.,* at 435, 102 S.Ct. 3164 (quoting *United States v. General Motors Corp.,* 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)). A "permanent physical occupation" of property occurs, we said, when governmental action "destroys *each* of these rights." 458 U.S., at 435, 102 S.Ct. 3164 (emphasis in original); see *ibid.,* n. 12 (requiring that an owner be "absolutely dispossess[ed]" of rights). When, as we held in *Loretto, each* of these rights is destroyed, the government has not simply "take[n] a single 'strand' from the 'bundle' of property rights"; it has "chop[ped] through the bundle" entirely. *Id.,* at 435, 102 S.Ct. 3164. In the narrow circumstance in which a property owner has suffered this "most serious form of invasion of [his or her] property interests," a taking can be said to have occurred without any further showing on the property owner's part. *Ibid.*

By contrast, in the mine run of cases where governmental action impacts

property rights in ways that do not chop through the bundle entirely, we have declined to apply *per se* rules and have instead opted for the more nuanced *Penn Central* test. See, *e.g.*, *Hodel v. Irving*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987) (applying *Penn Central* to assess a requirement that title to land within Indian reservations escheat to the tribe upon the landowner's death); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82–83, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (engaging in similar analysis where there was "literally ... a 'taking' of th[e] right" to exclude); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–180, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (applying *Penn Central* to find that the Government's imposition of a servitude requiring public access to a pond was a taking); see also *Loretto*, 458 U.S., at 433–434, 102 S.Ct. 3164 (distinguishing *PruneYard* and *Kaiser Aetna*). Even governmental action that reduces the value of property or that imposes "a significant restriction ... on one means of disposing" of property is not a *per se* taking; in fact, it may not even be a taking at all. *Andrus v. Allard*, 444 U.S. 51, 65–66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).

What our jurisprudence thus makes plain is that a claim of a *Loretto* taking is a bold accusation that carries with it a heavy burden. To qualify as a *per se* taking under *Loretto*, the governmental action must be so completely destructive to the property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task. Simply put, the retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking under *Loretto*.

II

A.

When evaluating the Order under this rubric, it is important to bear two things in mind. The first is that *Loretto* is not concerned with whether the Order is a good idea now, whether it was ever a good idea, or whether it intrudes upon some property rights. The Order may well be an outdated, and by some lights downright silly, regulation. It is also no doubt intrusive. But whatever else one can say about the Order, it is not a *per se* taking if it does not result in the destruction of every property right. The second thing to keep in mind is the need for precision about whose property rights

are at issue and about what property is at issue. Here, what is at issue are the Hornes' property rights in the raisins they own and that are subject to the reserve requirement. The Order therefore effects a *per se* taking under *Loretto* if and only if each of the Hornes' property rights in the portion of raisins that the Order designated as reserve has been destroyed. If not, then whatever fate the Order may reach under some other takings test, it is not a *per se* taking.

The Hornes, however, retain at least one meaningful property interest in the reserve raisins: the right to receive some money for their disposition. The Order explicitly provides that raisin producers retain the right to "[t]he net proceeds from the disposition of reserve tonnage raisins," 7 CFR § 989.66(h), and ensures that reserve raisins will be sold "at prices and in a manner intended to maxim[ize] producer returns," § 989.67(d)(1). According to the Government, of the 49 crop years for which a reserve pool was operative, producers received equitable distributions of net proceeds from the disposition of reserve raisins in 42. See Letter from Donald B. Verrilli, Jr., Solicitor General, to Scott S. Harris, Clerk of Court (Apr. 29, 2015).

Granted, this equitable distribution may represent less income than what some or all of the reserve raisins could fetch if sold in an unregulated market. In some years, it may even turn out (and has turned out) to represent no net income. But whether and when that occurs turns on market forces for which the Government cannot be blamed and to which all commodities—indeed, all property—are subject. In any event, we have emphasized that "a reduction in the value of property is not necessarily equated with a taking," *Andrus*, 444 U.S., at 66, 100 S.Ct. 318 that even "a significant restriction ... imposed on one means of disposing" of property is not necessarily a taking, *id.*, at 65, 100 S.Ct. 318 and that not every " 'injury to property by governmental action' " amounts to a taking, *PruneYard*, 447 U.S., at 82, 100 S.Ct. 2035. Indeed, we would not have used the word "destroy" in *Loretto* if we meant "damaged" or even "substantially damaged." I take us at our word: *Loretto* 's strict requirement that all property interests be "destroy[ed]" by governmental action before that action can be called a *per se* taking cannot be satisfied if there remains a property interest that is at most merely damaged. That is the case here; accordingly, no *per se* taking has occurred.

Moreover, when, as here, the property at issue is a fungible commodity for sale, the income that the property may yield is the property owner's most central interest. Cf. *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1002, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) (noting that the "nature" of particular property defines "the extent of the property right therein"). "[A]rticles of commerce," in other words, are "desirable because [they are] convertible into money." *Leonard & Leonard v. Earle,* 279 U.S. 392, 396, 49 S.Ct. 372, 73 L.Ed. 754 (1929). The Hornes do not use the raisins that are subject to the reserve requirement—which are, again, the only raisins that have allegedly been unlawfully taken—by eating them, feeding them to farm animals, or the like. They wish to use those reserve raisins by selling them, and they value those raisins only because they are a means of acquiring money. While the Order infringes upon the amount of that potential income, it does not inexorably eliminate it. Unlike the law in *Loretto,* see 458 U.S., at 436, 102 S.Ct. 3164 the Order therefore cannot be said to have prevented the Hornes from making *any* use of the relevant property.

The conclusion that the Order does not effect a *per se* taking fits comfortably within our precedents. After all, we have observed that even "[r]egulations that bar trade in certain goods" altogether—for example, a ban on the sale of eagle feathers—may survive takings challenges. *Andrus,* 444 U.S., at 67, 100 S.Ct. 318. To be sure, it was important to our decision in *Andrus* that the regulation at issue did not prohibit the possession, donation, or devise of the property. See *id.,* at 66, 100 S.Ct. 318. But as to those feathers the plaintiffs would have liked to sell, the law said they could not be sold at any price—and therefore categorically could not be converted into money. Here, too, the Hornes may do as they wish with the raisins they are not selling. But as to those raisins that they would like to sell, the Order subjects a subset of them to the reserve requirement, which allows for the conversion of reserve raisins into at least *some* money and which is thus *more* generous than the law in *Andrus*. We held that no taking occurred in *Andrus,* so rejecting the Hornes' claim follows *a fortiori*.

We made this principle even clearer in *Lucas,* when we relied on *Andrus* and said that where, as here, "property's only economically productive use is sale or manufacture for sale," a regulation could even "render [that] property economically *worthless*" without effecting a *per se* taking. *Lucas,* 505 U.S., at 1027–1028, 112 S.Ct. 2886 (citing *Andrus,* 444 U.S., at 66–

67, 100 S.Ct. 318; emphasis added). The Order does not go nearly that far. It should easily escape our opprobrium, at least where a *per se* takings claim is concerned.

B.

The fact that at least one property right is not destroyed by the Order is alone sufficient to hold that this case does not fall within the narrow confines of *Loretto*. But such a holding is also consistent with another line of cases that, when viewed together, teach that the government may require certain property rights to be given up as a condition of entry into a regulated market without effecting a *per se* taking.

First, in *Leonard & Leonard v. Earle*, 279 U.S. 392, 49 S.Ct. 372, 73 L.Ed. 754, we considered a state law that required those who wished to engage in the business of oyster packing to deliver to the State 10 percent of the empty oyster shells. We rejected the argument that this law effected a taking and held that it was "not materially different" from a tax upon the privilege of doing business in the State. *Id.*, at 396, 49 S.Ct. 372. "[A]s the packer lawfully could be required to pay that sum in money," we said, "nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent of such shells." *Ibid.*[1]

Next, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815, we held that no taking occurred when a provision of the Federal Insecticide, Fungicide, and Rodenticide Act required companies that wished to sell certain pesticides to first submit sensitive data and trade secrets to the Environmental Protection Agency as part of a registration process. Even though the EPA was permitted to publicly disclose some of that submitted data—which would have had the effect of revealing trade secrets, thus substantially diminishing or perhaps even eliminating their value—we reasoned that, like the privilege tax in *Leonard & Leonard*, the disclosure requirement was the price Monsanto had to pay for " 'the

[1] The Court attempts to distinguish *Leonard & Leonard* because it involved wild oysters, not raisins. *Ante*, at 2430. That is not an inaccurate factual statement, but I do not find in *Leonard & Leonard* any suggestion that its holding turned on this or any other of the facts to which the Court now points. Indeed, the only citation the Court offers for these allegedly crucial facts is the Maryland Court of Appeals' opinion, not ours. See *ante*, at 2430.

advantage of living and doing business in a civilized community.' " 467 U.S., at 1007, 104 S.Ct. 2862 (quoting *Andrus,* 444 U.S., at 67, 100 S.Ct. 318; some internal quotation marks omitted). We offered nary a suggestion that the law at issue could be considered a *per se* taking, and instead recognized that "a voluntary submission of data by an applicant" in exchange for the ability to participate in a regulated market "can hardly be called a taking." 467 U.S., at 1007, 104 S.Ct. 2862.[2]

Finally, in *Yee v. Escondido,* 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), we addressed a mobile-home park rent-control ordinance that set rents at below-market rates. We held the ordinance did not effect a taking under *Loretto,* even when it was considered in conjunction with other state laws regarding eviction that effectively permitted tenants to remain at will, because it only regulated the terms of market participation. See 503 U.S., at 527–529, 112 S.Ct. 1522.

Understood together, these cases demonstrate that the Government may condition the ability to offer goods in the market on the giving-up of certain property interests without effecting a *per se* taking.[3] The Order is

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[2] The Court claims that *Monsanto* is distinguishable for three reasons, none of which hold up. First, it seems, the Court believes the degree of the intrusion on property rights is greater here than in *Monsanto*. See *ante,* at 2430. Maybe, maybe not. But nothing in *Monsanto* suggests this is a relevant question, and the Court points to nothing saying that it is. Second, the Court believes that "[s]elling produce in interstate commerce" is not a government benefit. *Ante,* at 2430. Again, that may be true, but the Hornes are not simply selling raisins in interstate commerce. They are selling raisins in a regulated market at a price artificially inflated by Government action in that market. That is the benefit the Hornes receive, and it does not matter that they "would rather not have" received it. *United States v. Sperry Corp.,* 493 U.S. 52, 62–63, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989). Third, the Court points out that raisins "are not dangerous pesticides; they are a healthy snack." *Ante,* at 2431. I could not agree more, but nothing in *Monsanto,* or in *Andrus* for that matter, turned on the dangerousness of the commodity at issue.

[3] The Court points out that, in a footnote in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), we suggested that it did not matter for takings purposes whether a property owner could avoid an intrusion on her property rights by using her property differently. See *ante,* at 2430 (quoting 458 U.S., at 439, n. 17, 102 S.Ct. 3164). But in *Yee v. Escondido,* 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), we clarified that, where a law does not on its face effect a *per se* taking, the voluntariness of a particular use of property or of entry into a particular market is quite relevant. See *id.,* at 531–532, 112 S.Ct. 1522. In other words, only when a law requires the forfeiture of *all* rights in property does it effect a *per se* taking regardless of whether the law could be avoided by a different use of the property. As discussed above, the Order is not such a law.

a similar regulation. It has no effect whatsoever on raisins that the Hornes grow for their own use. But insofar as the Hornes wish to sell some raisins in a market regulated by the Government and at a price supported by governmental intervention, the Order requires that they give up the right to sell a portion of those raisins at that price and instead accept disposal of them at a lower price. Given that we have held that the Government may impose a price on the privilege of engaging in a particular business without effecting a taking—which is all that the Order does—it follows that the Order at the very least does not run afoul of our *per se* takings jurisprudence. Under a different takings test, one might reach a different conclusion. But the Hornes have advanced only this narrow *per se* takings claim, and that claim fails.

III

The Court's contrary conclusion rests upon two fundamental errors. The first is the Court's breezy assertion that a *per se* taking has occurred because the Hornes "lose the entire 'bundle' of property rights in the appropriated raisins ... with the exception of" the retained interest in the equitable distribution of the proceeds from the disposition of the reserve raisins. *Ante,* at 2427 – 2428. But if there is a property right that has not been lost, as the Court concedes there is, then the Order has *not* destroyed each of the Hornes' rights in the reserve raisins and does *not* effect a *per se* taking. The Court protests that the retained interest is not substantial or certain enough. But while I see more value in that interest than the Court does, the bottom line is that *Loretto* does not distinguish among retained property interests that are substantial or certain enough to count and others that are not.[4] Nor is it at all clear how the Court's approach will be

[4] The Court relies on *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), for the proposition that " '[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.' " *Ante,* at 2429. But all that means is that a *per se* taking may be said to have occurred with respect to the portion of property that has been taken even if other portions of the property have not been taken. This is of no help to the Hornes, or to the Court, because it in no way diminishes a plaintiff's burden to demonstrate a *per se* taking as to the portion of his or her property that he or she claims has been taken—here, the reserve raisins. As to that specific property, a *per se* taking occurs if and only if the *Loretto* conditions are satisfied.

administrable. How, after all, are courts, governments, or individuals supposed to know how much a property owner must be left with before this Court will bless the retained interest as sufficiently meaningful and certain?

One virtue of the *Loretto* test was, at least until today, its clarity. Under *Loretto,* a total destruction of all property rights constitutes a *per se* taking; anything less does not. See 458 U.S., at 441, 102 S.Ct. 3164 (noting the "very narrow" nature of the *Loretto* framework). Among the most significant doctrinal damage that the Court causes is the blurring of this otherwise bright line and the expansion of this otherwise narrow category. By the Court's lights, perhaps a 95 percent destruction of property rights can be a *per se* taking. Perhaps 90? Perhaps 60, so long as the remaining 40 is viewed by a reviewing court as less than meaningful? And what makes a retained right meaningful enough? One wonders. Indeed, it is not at all clear what test the Court has actually applied. Such confusion would be bad enough in any context, but it is especially pernicious in the area of property rights. Property owners should be assured of where they stand, and the government needs to know how far it can permissibly go without tripping over a categorical rule.

The second overarching error in the Court's opinion arises from its reliance on what it views as the uniquely physical nature of the taking effected by the Order. This, it says, is why many of the cases having to do with so-called regulatory takings are inapposite. See *ante,* at 2428 – 2430. It is not the case, however, that Government agents acting pursuant to the Order are storming raisin farms in the dark of night to load raisins onto trucks. But see Tr. of Oral Arg. 30 (remarks of ROBERTS, C.J.). The Order simply requires the Hornes to set aside a portion of their raisins—a requirement with which the Hornes refused to comply. See 7 CFR § 989.66(b)(2); Tr. of Oral Arg. 31. And it does so to facilitate two classic regulatory goals. One is the regulatory purpose of limiting the quantity of raisins that can be sold on the market. The other is the regulatory purpose of arranging the orderly disposition of those raisins whose sale would otherwise exceed the cap.

The Hornes and the Court both concede that a cap on the quantity of raisins that the Hornes can sell would not be a *per se* taking. See *ante,* at 2428; Brief for Petitioners 23, 52. The Court's focus on the physical nature of

the intrusion also suggests that merely arranging for the sale of the reserve raisins would not be a *per se* taking. The rub for the Court must therefore be not that the Government is doing these things, but that it is accomplishing them by the altogether understandable requirement that the reserve raisins be physically set aside. I know of no principle, however, providing that if the Government achieves a permissible regulatory end by asking regulated individuals or entities to physically move the property subject to the regulation, it has committed a *per se* taking rather than a potential regulatory taking. After all, in *Monsanto,* the data that the pesticide companies had to turn over to the Government was presumably turned over in some physical form, yet even the Court does not call *Monsanto* a physical takings case. It therefore cannot be that any regulation that involves the slightest physical movement of property is necessarily evaluated as a *per se* taking rather than as a regulatory taking.

The combined effect of these errors is to unsettle an important area of our jurisprudence. Unable to justify its holding under our precedents, the Court resorts to superimposing new limitations on those precedents, stretching the otherwise strict *Loretto* test into an unadministrable one, and deeming regulatory takings jurisprudence irrelevant in some undefined set of cases involving government regulation of property rights. And it does all of this in service of eliminating a type of reserve requirement that is applicable to just a few commodities in the entire country—and that, in any event, commodity producers could vote to terminate if they wished. See Letter from Solicitor General to Clerk of Court (Apr. 29, 2015); 7 U.S.C. § 608c(16)(B); 7 CFR § 989.91(c). This intervention hardly strikes me as worth the cost, but what makes the Court's twisting of the doctrine even more baffling is that it ultimately instructs the Government that it can permissibly achieve its market control goals by imposing a quota without offering raisin producers a way of reaping any return whatsoever on the raisins they cannot sell. I have trouble understanding why anyone would prefer that.

* * *

Because a straightforward application of our precedents reveals that the Hornes have not suffered a *per se* taking, I would affirm the judgment of the Ninth Circuit. The Court reaches a contrary conclusion only by expanding our *per se* takings doctrine in a manner that is as unwarranted

as it is vague. I respectfully dissent.
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DEPARTMENTAL DECISIONS

In re: BURNETTE FOODS, INC., a Michigan corporation.
Docket No. 11-0334.
Decision and Order.
Filed June 19, 2015.

AMAA – Canned tart cherries, shelf life of – Canners – Cherry Industry Administrative Board – Handler – Optimum supply – Sales constituency – Tart Cherry Order – Volume restrictions.

James J. Rosloniec, Esq. for Petitioner.
Sharlene Deskins, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Burnette Foods, Inc. [Burnette], instituted this proceeding by filing a petition[1] on August 3, 2011. Burnette instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [the AMAA]; the federal marketing order regulating the handling of "Tart Cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin" (7 C.F.R. pt. 930) [the Tart Cherry Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71).

The AMAA provides that a handler subject to an order may file a written petition with the Secretary of Agriculture stating the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with law and requesting modification of the

[1] Burnette entitles its petition "Petition by Burnette Foods, Inc. Challenging Application of Federal Marketing Order 930 to Burnette Foods, Inc." [Petition].

order or exemption from the order.[2] Burnette, a "handler" as that term is defined in the Tart Cherry Order,[3] requests modification of, and exemption from, the Tart Cherry Order.[4]

Specifically, Burnette seeks: (1) an order declaring that CherrCo, Inc.,[5] is a "sales constituency" as that term is defined in the Tart Cherry Order;[6] (2) an order requiring the appointment of a new Cherry Industry Administrative Board[7] which complies with the Tart Cherry Order;[8] (3) an order revising the formula for determining the "optimum supply"[9] of tart cherries to include cherry products imported into the United States; and (4) an order exempting Burnette from restrictions on the sale of tart cherries [volume restrictions] that Burnette processes into metal cans.[10] On October 3, 2011, the Acting Administrator, Agricultural Marketing Service, United States Department of Agriculture [Administrator], filed "Answer of Respondent" requesting denial of the relief sought by Burnette and dismissal of Burnette's Petition.[11]

On May 15-22, 2012, Administrative Law Judge Jill S. Clifton [ALJ] conducted a hearing in Grand Rapids, Michigan. James J. Rosloniec, Verity Law, PLC, Grand Rapids, Michigan, represented Burnette. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.[12] Burnette called 14 witnesses and the Administrator called five witnesses.[13] Burnette introduced into evidence exhibits which

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[2] 7 U.S.C. § 608c(15)(A).

[3] 7 C.F.R. § 930.11.

[4] Pet. ¶ V at 10-11.

[5] CherrCo, Inc., is an association of cooperatives that meet the requirements of the Capper-Volstead Act (7 U.S.C. §§ 291-292). CherrCo, Inc., engages, on a cooperative basis, in activities in connection with processing, preparing for market, handling, marketing, packing, storing, drying, manufacturing, and selling tart cherries.

[6] 7 C.F.R. § 930.16.

[7] 7 C.F.R. § 930.2.

[8] 7 C.F.R. § 930.20.

[9] 7 C.F.R. § 930.50(a).

[10] Pet. ¶ V at 10-11.

[11] Answer of Resp't at 8.

[12] On June 6, 2014, Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, filed a Notice of Appearance as co-counsel for the Administrator.

[13] References to the transcript of the May 15-22, 2012 hearing are designated as "Tr." and the page number.

are identified as "PX" and the exhibit number. The Administrator introduced into evidence exhibits which are identified as "RX" and the exhibit number. In addition, the ALJ took official notice of the rulemaking proceeding which established the Tart Cherry Order and the 1998, 2007, and 2011 rulemaking proceedings which resulted in amendments to the Tart Cherry Order.

On March 18, 2014, after the parties filed post hearing briefs, the ALJ issued a Decision and Order rejecting Burnette's contentions that: (1) CherrCo, Inc., is a "sales constituency" as that term is defined in 7 C.F.R. § 930.16;[14] (2) the Cherry Industry Administrative Board is controlled by one sales constituency, CherrCo, Inc., in violation of 7 C.F.R. § 930.20(g);[15] and (3) the formula for determining optimum supply of tart cherries is contrary to law because the formula does not include cherry products imported into the United States.[16] However, the ALJ concluded two provisions of the Tart Cherry Order are not in accordance with law: (1) the application of volume restrictions to handlers who process tart cherries into metal cans; and (2) the requirement that handlers, who are not exempt from volume restrictions, absorb the share of volume restrictions that would have been the responsibility of other handlers had those other handlers not been exempt from volume restrictions.[17] The ALJ ordered that: (1) tart cherries delivered from being harvested to a canner and canned with no processing other than canning shall be exempt from volume restrictions; and (2) tart cherry production exempt from volume restrictions must be subtracted from supply for the purpose of calculating restriction percentages.[18]

On April 3, 2014, the Administrator filed an appeal petition, followed on June 23, 2014, by Respondent's Appeal Petition and Brief in Support Thereof [Appeal Brief]. On June 20, 2014, Burnette filed an Appeal Petition, a Brief in Support of Burnette Foods, Inc.'s Appeal Petition [Burnette's Appeal Brief], and a Request for Oral Argument. On August 14, 2014, Burnette filed a response to the Administrator's appeal petition, and the Administrator filed a response to Burnette's appeal

[14] ALJ's Decision and Order ¶ 13 at 13.
[15] ALJ's Decision and Order ¶ 14 at 13-14.
[16] ALJ's Decision and Order ¶ 38 at 21.
[17] ALJ's Decision and Order ¶ 1A-B at 1-3.
[18] ALJ's Decision and Order ¶¶ 40-41 at 22.

petition. On September 3, 2014, Burnette filed a brief rebutting the Administrator's response to Burnette's appeal petition. On September 8, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Burnette's Request for Oral Argument

Burnette's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[19] is refused because Burnette and the Administrator have thoroughly briefed the issues. Thus, oral argument would serve no useful purpose.

Overview of the AMAA and Tart Cherry Order

Congress enacted the AMAA to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce.[20] To achieve orderly marketing of agricultural commodities, Congress authorized the Secretary of Agriculture, after notice and opportunity for hearing, to issue orders that would regulate the handling of agricultural commodities.[21]

The AMAA provides that any handler subject to an order may seek modification of or exemption from the order.[22] A proceeding under 7 U.S.C. § 608c(15)(A) affords a means for adjudicating only whether an order, a provision of an order, or an obligation imposed in connection with an order is not in accordance with law. A proceeding under 7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions of policy, desirability, or effectiveness of order provisions.[23] The burden of proof in

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[19] 7 C.F.R. § 900.65(b)(1).
[20] 7 U.S.C. § 602(1).
[21] 7 U.S.C. § 608c(1), (3)-(4).
[22] 7 U.S.C. § 608c(15)(A).
[23] Am. Dried Fruit Co., 69 Agric. Dec. 1003, 1011 (U.S.D.A. 2010); Lion Raisins, Inc., 64 Agric. Dec. 11, 22 (U.S.D.A. 2004); Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); Strebin, 56 Agric. Dec. 1095, 1133 (U.S.D.A. 1997); Sunny Hill Farms Dairy Co., 26 Agric. Dec. 201, 217 (U.S.D.A. 1967), *aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); Mosby, 16 Agric.

a proceeding instituted under 7 U.S.C. § 608c(15)(A) rests with the handler seeking modification of or exemption from an order.[24]

The Secretary of Agriculture issued the Tart Cherry Order pursuant to the AMAA in 1996 after conducting hearings in 1993 and 1995.[25] Proponents of the Tart Cherry Order were concerned with the short term variation of the supply of tart cherries caused by climatic factors. Variations in the supply of tart cherries can result in gluts and shortages of tart cherries. When gluts occur, large inventories of tart cherries can decrease prices regardless of the anticipated size of the oncoming year's tart cherry crop. The Tart Cherry Order was designed to reduce the impact of fluctuating inventories of tart cherries by establishing an optimum supply to reduce price fluctuations and enhance and stabilize the tart cherry market.[26]

The Cherry Industry Administrative Board administers the Tart Cherry Order.[27] Membership on the Cherry Industry Administrative Board is determined by geographic districts created by the Tart Cherry Order. District representation is based upon tart cherry production levels in the district and the number of members from each district varies from one member to four members.[28] In order to prevent the domination of the Cherry Industry Administrative Board by an entity, the Tart Cherry Order limits the number of Cherry Industry Administrative Board members from one district that can be from, or affiliated with, a single sales constituency, as follows:

§ 930.20 Establishment and membership.

Dec. 1209, 1220 (U.S.D.A. 1957); Roberts Dairy Co., 4 Agric. Dec. 84, 89 (U.S.D.A. 1945); Wright, 2 Agric. Dec. 327 (U.S.D.A. 1943).

[24] Am. Dried Fruit Co., 69 Agric. Dec. 1003, 1010 (U.S.D.A. 2010); United W. Grocers, Inc., 63 Agric. Dec. 557, 573 (U.S.D.A. 2004); Stew Leonard's, 59 Agric. Dec. 53, 69 (U.S.D.A. 2000), *aff'd*, 199 F.R.D. 48 (D. Conn. 2001), *printed in* 60 Agric. Dec. 1 (U.S.D.A. 2001), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002); Cal-Almond, Inc., 56 Agric. Dec. 1158, 1219 (U.S.D.A. 1997), *aff'd*, CV-98-05049-REC/SMS (E.D. Cal. Aug. 13, 1998), *printed in* 58 Agric. Dec. 708 (U.S.D.A. 1999), *aff'd*, 192 F.3d 1272 (9th Cir. 1999), *reprinted in* 58 Agric. Dec. 734 (U.S.D.A. 1999), *cert. denied*, 530 U.S. 1213 (2000).

[25] 61 Fed. Reg. 49,939 (Sept. 24, 1996).

[26] 61 Fed. Reg. 49,940-41 (Sept. 24, 1996).

[27] 7 C.F.R. §§ 930.30-.31.

[28] 7 C.F.R. § 930.20.

> . . . .
> (g) In order to achieve a fair and balanced representation on the Board, and to prevent any one sales constituency from gaining control of the Board, not more than one Board member may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Board; *Provided*, That this prohibition shall not apply in a district where such a conflict cannot be avoided. There is no prohibition on the number of Board members from differing districts that may be elected from a single sales constituency which may have operations in more than one district. However, as provided in § 930.23, a handler or grower may only nominate Board members and vote in one district.

7 C.F.R. § 930.20(g).

One of the duties of the Cherry Industry Administrative Board is to set the optimum supply level for each crop year.[29] The optimum supply represents the desirable volume of tart cherries that should be available for sale in the upcoming crop year.[30] The optimum supply formula is a series of mathematical calculations using sales history, inventory, and production data to determine whether a surplus of tart cherries exists and, if a surplus exists, the volume of tart cherries that should be restricted to maintain optimum supply.[31]

If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and

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[29] 7 C.F.R. § 930.50(a).
[30] 77 Fed. Reg. 12,748-49 (Mar. 2, 2012).
[31] 7 C.F.R. § 930.50.

Mexico.[32] The form of the cherries (frozen, canned, dried, or concentrated juice) a handler places in inventory reserve is at the option of the handler.[33]

Burnette's Appeal Petition

Burnette raises six issues in its Appeal Petition. These six issues relate to three conclusions by the ALJ to which Burnette assigns error.

First, Burnette contends the ALJ erroneously concluded CherrCo, Inc. is not a "sales constituency" as that term is defined in 7 C.F.R. § 930.16.

The Tart Cherry Order limits the number of members of the Cherry Industry Administrative Board that may be from, or affiliated with, a single sales constituency in those districts having more than one seat on the Cherry Industry Administrative Board.[34] CherrCo, Inc. has multiple members on the Cherry Industry Administrative Board and the Cherry Industry Administrative Board would be constituted in violation of 7 C.F.R. § 930.20(g), if CherrCo, Inc. were a sales constituency.

The ALJ concluded CherrCo, Inc. is not a "sales constituency" as that term is defined in 7 C.F.R. § 930.16 and the Cherry Industry Administrative Board is constituted in accordance with the Tart Cherry Order.[35] The Tart Cherry Order defines the term "sales constituency" as follows:

> **§ 930.16 Sales constituency.**
>
> Sales constituency means a common marketing organization or brokerage firm or individual representing a group of handlers and growers. An organization which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.

7 C.F.R. § 930.16.

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[32] 7 C.F.R. § 930.159.
[33] 7 C.F.R. § 930.55(b).
[34] 7 C.F.R. § 930.20(g).
[35] ALJ's Decision and Order ¶ 13 at 13, ¶¶ 30-31 at 17-18.

The ALJ based her conclusion that CherrCo, Inc. is not a sales constituency on CherrCo, Inc.'s status as a Capper-Volstead cooperative, as follows:

> 13. If Cherrco [sic] were not a Capper-Volstead cooperative, I might take Burnette's insistence that CherrCo **is** a sales constituency more to heart. But CherrrCo **is** a Capper-Volstead cooperative, which necessitates that CherrCo do a lot of management on behalf of its members. I find that CherrCo is **not** a sales constituency. *See* paragraphs 30 and 31.
>
> * * *
>
> 31. . . . . As CherrCo manages on behalf of its members, CherrCo exerts control, and the control exerted does not make CherrCo a sales constituency; CherrCo is more correctly characterized as a Capper-Volstead cooperative.

ALJ's Decision and Order ¶ 13 at 13, ¶ 31 at 17-18.

While I find CherrCo, Inc. is a federated Capper-Volstead cooperative, I do not find CherrCo, Inc.'s status as a Capper-Volstead cooperative dispositive of the issue of whether CherrCo, Inc. is a sales constituency. Instead, I conclude CherrCo, Inc. is not a "sales constituency" as that term is defined in 7 C.F.R. § 930.16 because, while CherrCo, Inc. is an organization which receives consignments of tart cherries from member-cooperatives, CherrCo, Inc. does not direct where the consigned tart cherries are sold.

CherrCo, Inc. was created to provide a uniform price structure for its member-cooperatives. CherrCo, Inc. provides a variety of services for its member-cooperatives, including establishment of a minimum price for tart cherries sold by its members, storage of tart cherries, inventory management, and release of tart cherries for shipment to buyers (Tr. at 550-52).

CherrCo, Inc.'s member-cooperatives select their own sales agents (Tr. at 550, 558, 572). The sales agents agree to follow the terms established by CherrCo, Inc. to ensure that all tart cherries sold by CherrCo, Inc.'s member-cooperatives meet CherrCo, Inc.'s minimum conditions for the sale of tart cherries. Once a member-cooperative's sales agent sells tart cherries to a buyer, the sales agent notifies CherrCo, Inc. of the identity of the buyer, the quantity of tart cherries purchased, the price, and other terms of sale (Tr. at 530-48). If the sale meets CherrCo, Inc.'s minimum criteria regarding price and terms, CherrCo, Inc. authorizes release of the tart cherries when the member-cooperative requests release to the member-cooperative's buyer. Thus, each member-cooperative of CherrCo, Inc. directs where its tart cherries are sold and CherrCo, Inc., is not a sales constituency because, while CherrCo, Inc. receives consigned tart cherries from member-cooperatives, CherrCo, Inc. does not direct where the member-cooperatives' tart cherries are sold. Therefore, I reject Burnette's contention that the ALJ's conclusion that CherrCo, Inc. is not a "sales constituency" as defined in 7 C.F.R. § 930.16, is error.

Second, Burnette contends the ALJ erroneously concluded the Cherry Industry Administrative Board is constituted in accordance with the Tart Cherry Order. Burnette's contention that the Cherry Industry Administrative Board is not constituted in accordance with the Tart Cherry Order is based upon Burnette's contention that CherrCo, Inc. is a sales constituency. Specifically, Burnette contends the Cherry Industry Administrative Board has more than one member from, or affiliated with, CherrCo, Inc. in violation of 7 C.F.R. § 930.20(g).

Burnette established, and the Administrator does not dispute, that multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc. However, as I reject Burnette's contention that CherrCo, Inc. is a sales constituency, I also reject Burnette's contention that the Cherry Industry Administrative Board, as constituted, violates 7 C.F.R. § 930.20(g).

Third, Burnette contends the ALJ erroneously concluded that imported tart cherry products are not required to be included in the optimum supply formula.

The Tart Cherry Order provides the method by which optimum supply is determined, as follows:

> **§ 930.50 Marketing policy.**
>
> (a) *Optimum supply*. On or about July 1 of each crop year, the Board shall hold a meeting to review sales data, inventory data, current crop forecasts and market conditions in order to establish an optimum supply level for the crop year. The optimum supply volume shall be calculated as 100 percent of the average sales of the prior three years reduced by average sales that represent dispositions of exempt cherries and restricted percentage cherries qualifying for diversion credit for the same three years, unless the Board determines that it is necessary to recommend otherwise with respect to sales of exempt and restricted percentage cherries, to which shall be added a desirable carryout inventory not to exceed 20 million pounds or such other amount as the Board, with the approval of the Secretary, may establish. This optimum supply volume shall be announced by the Board in accordance with paragraph (h) of this section.

7 C.F.R. § 930.50(a). Nothing in 7 C.F.R. § 930.50(a) requires inclusion of imported tart cherry products in the optimum supply formula and Burnette cites no provision in the AMAA or the Tart Cherry Order requiring that the optimum supply formula include imported tart cherry products. Instead, Burnette asserts the optimum supply formula in 7 C.F.R. § 930.50(a) should be modified to include sales of foreign produced tart cherry products as a matter of policy, as follows:

> Although the CIAB cannot provide a single compelling reason for not including sales of foreign produced tart cherry products in the Optimum Supply Formula, the CIAB simply refuses to include them. This results in foreign producers of tart cherry products gaining unrestricted access to the domestic tart cherry marketplace while placing high levels of restrictions upon domestic producers of tart cherry products.

Burnette's Appeal Br. at 14.

A proceeding under 7 U.S.C. § 608c(15)(A) is not a forum in which to consider questions of policy, desirability, or effectiveness of order provisions[36] or to introduce evidence relating to the wisdom of order provisions or purporting to show that the petitioner has been damaged or disadvantaged by activities undertaken in accordance with an order.[37] Therefore, I reject Burnette's contention that the ALJ's conclusion that imported tart cherry products are not required to be included in the optimum supply formula, is error.

The Administrator's Appeal Petition

The Administrator raises five issues in the Administrator's Appeal Brief. First, the Administrator contends the ALJ erroneously concluded Tart Cherry Order volume restrictions, as applied to canners of tart cherries, are arbitrary and capricious and, consequently, unlawful (Administrator's Appeal Br. ¶ IA at 9-12).

The ALJ ordered modification of the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.[38] The ALJ found that requiring canners to meet volume restrictions is arbitrary and capricious and, consequently, unlawful, as follows:

> B. It is <u>fiction</u> to state that tart cherries processed into metal cans can be stored and carried over from crop year to crop year. [They **cannot**; the canned tart cherries need to reach the consumer promptly and cannot be maintained in the processor's inventory from crop year to crop year; the "best before" and "best by" date is roughly one year

[36] *See supra* note 23.
[37] Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); Belridge Packing Corp., 48 Agric. Dec. 16, 46 (U.S.D.A. 1989), *aff'd sub nom.* Farmers Alliance for Improved Regulation (FAIR) v. Madigan, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991).
[38] ALJ's Decision and Order ¶ 40 at 22.

> from harvest.] It would be arbitrary and capricious, and consequently not in accordance with law, to persist in that fiction.

ALJ's Decision and Order ¶ 1B at 2.

The record establishes that the Agricultural Marketing Service and the Cherry Industry Administrative Board have considered and rejected the exemption of canners from volume restrictions and that the Agricultural Marketing Service and the Cherry Industry Administrative Board have a rational basis for rejecting the exemption.

On March 17, 2010, the Agricultural Marketing Service published a proposed rule to establish free and restricted percentages of tart cherries for the 2009-2010 crop year.[39] The Agricultural Marketing Service received two comments from persons representing processors of canned tart cherry products. The Agricultural Marketing Service set forth its basis for rejecting an exemption from volume restrictions for canned tart cherry products, as follows:

> Two comments were received during the comment period in response to the proposal. The commenters, both representing processors of canned tart cherry products, opposed the increased volume regulation from the preliminary percentages to the final percentages.
> . . . .
> In response to the commenters, the tart cherry marketing order regulations do not apply to handlers according to the type of cherry products they pack. The order applies to the industry as a whole, regardless of which market segment individual handlers are involved in. The reserve formula under the order is designed to ensure that the aggregate market needs can be met with free percentage cherries and does not differentiate between product types.

75 Fed. Reg. 29,651-52 (May 27, 2010).

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[39] 75 Fed. Reg. 12,702 (Mar. 17, 2010).

In a letter to the Agricultural Marketing Service, dated June 28, 2011, Burnette requested that the Agricultural Marketing Service either suspend the Tart Cherry Order or exempt the canned segment of the tart cherry industry from the Tart Cherry Order (RX 3). The Agricultural Marketing Service responded stating it would consider a Cherry Industry Administrative Board recommendation to exempt canned tart cherries from the Tart Cherry Order and a measure designed to exempt canners would be presented at the September 15, 2011, Cherry Industry Administrative Board meeting in Grand Rapids, Michigan (RX 4 at 2). Mr. Thomas Facer, chairman of the Cherry Industry Administrative Board, testified that, on July 12, 2011, he had appointed an ad hoc committee to review all aspects of the Tart Cherry Order (Tr. at 1194). Market segmentation was one of the issues considered by the ad hoc committee (Tr. at 1200-01).[40] At the September 15, 2011, Cherry Industry Administrative Board meeting in Grand Rapids, Michigan, Mr. Ray Rowley, a Cherry Industry Administrative Board member and the chairman of the ad hoc committee to review the Tart Cherry Order, noted that the exemption of canned tart cherries from the Tart Cherry Order had been considered by the ad hoc committee, but that the exemption could not withstand the scrutiny or challenges presented to the ad hoc committee (PX 3 at 9). Mr. Roy Hackert, a Cherry Industry Administrative Board member and a member of the ad hoc committee, testified that the ad hoc committee thoroughly considered the issue of segmenting the canned part of the tart cherry industry and had developed a plan on segmentation, but, ultimately, the ad hoc committee rejected segmentation because segmentation would be difficult to administer and segmentation would be unlikely to be approved by the requisite percentage of industry members in the referendum which would be required to implement segmentation (Tr. at 254-57). Mr. Facer testified that segmentation was rejected because segmentation could only be implemented if the Tart Cherry Order were amended pursuant to a rulemaking proceeding and the Tart Cherry Order could be easily circumvented if segmentation were to be implemented (Tr. at 1200-01).

Market segmentation is an issue that is appropriately considered in the

[40] The term "market segmentation" refers to the disparate treatment of various segments of the tart cherry industry under the Tart Cherry Order, including segmentation of that part of the tart cherry industry engaged in canning and exemption of that part of the tart cherry industry from volume restrictions.

context of a formal rulemaking proceeding. The Tart Cherry Order, which is presumed lawful, must be judged on the evidence contained in the formal rulemaking record on which the Secretary of Agriculture based the Tart Cherry Order. If circumstances have changed so that the Tart Cherry Order no longer produces equitable results, the remedy is through an amendatory or termination process—not through a proceeding conducted pursuant to 7 U.S.C. § 608c(15)(A).[41] Burnette cannot in this proceeding challenge the policy, desirability, or the effectiveness of the Tart Cherry Order or even introduce evidence relating to the wisdom of the program or purporting to show that Burnette has been damaged or disadvantaged by the lack of an exemption from volume restrictions for canned tart cherry products.[42] The evidence contained in the formal rulemaking record supports the determination that the Tart Cherry Order should apply to all handlers of tart cherries, including canners. Therefore, I agree with the Administrator's contention that the ALJ's conclusion that the Tart Cherry Order volume restrictions, as applied to canners of tart cherries, are arbitrary and capricious and, consequently, unlawful, is error. Accordingly, I do not adopt the ALJ's Order modifying the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.

Second, the Administrator contends the ALJ erroneously gave credence to evidence relating to the shelf life of canned tart cherries (Administrator's Appeal Brief ¶ IB at 12-14).

Burnette alleges canned tart cherries have a shorter shelf life than frozen tart cherries making compliance with the Tart Cherry Order volume restrictions more difficult for the canned tart cherry segment of the industry than the frozen tart cherry segment of the industry:

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[41] Sequoia Orange Co., Inc., 41 Agric. Dec. 1511, 1522 (U.S.D.A. 1982) (Order Transferring Case), No. 82-2510 (D.D.C. June 14, 1983), *aff'd*, No. CV F 83-269 (E.D. Cal. Dec. 21, 1983). Furthermore, courts have noted that marketing orders are not required to be completely equitable and that an order may cause some resultant damage to a handler without destroying the validity of the order. *See* Lamers Dairy, Inc., 60 Agric. Dec. 406, 439 (U.S.D.A. 2001), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005), citing United States v. Mills, 315 F.2d 828 (4th Cir. 1963).

[42] *See supra* note 37.

> Pursuant to the Order the Cherry Industry Administrative Board ("CIAB") is charged with administering the amount of tart cherries available in the market through a formula prescribed by the provisions of the Order. Depending on the factors used in the formula the CIAB can impose restrictions on handlers, such as Burnette, impeding their ability to sell what they produce. Burnette is one of the few handlers of tart cherries that receives tart cherries directly from its growers and immediately converts those cherries into finished canned products, which have limited shelf life. . . . . Due to restrictions that can be placed upon Burnette's inventory (inventory that is finished and available for sale to retailers), Burnette is forced to purchase frozen tart cherries and/or "diversion credits" from suppliers that dominate the CIAB in order to comply with restrictions imposed by the CIAB. Burnette is often not able to use its own inventories for reserve requirements due to the limited shelf life of its finished canned inventory and the need to supply its customers on a just in time basis.

Pet. ¶ III 3 at 2. Burnette introduced evidence in support of its allegation that the shelf life of canned tart cherry products makes compliance with volume restrictions more difficult for the canned tart cherry segment of the industry than for the frozen tart cherry segment of the industry (Tr. at 1041-47). However, even if I were to find that compliance with volume restrictions is more difficult for the canned tart cherry segment of the industry than the frozen tart cherry segment of the industry, I would not conclude that the disparate burden of the volume restrictions renders application of the volume restrictions to the canned tart cherry segment of the industry unlawful.[43] The application of the Tart Cherry Order volume restrictions to the canned tart cherry segment of the industry is a policy consideration for the Secretary of Agriculture to be undertaken in the context of a formal rulemaking proceeding. Therefore, I find evidence

[43] Lamers Dairy, Inc., 60 Agric. Dec. 406, 426 (U.S.D.A. 2001) (a petitioner cannot, in a proceeding under 7 U.S.C. § 608c(15)(A), introduce evidence purporting to show that the petitioner has been damaged or disadvantaged by activities undertaken in accordance with the order), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005).

regarding the shelf life of canned tart cherry products compared to the shelf life of frozen tart cherry products, irrelevant; I do not adopt the ALJ's findings regarding the shelf life of tart cherry products; and I do not adopt the ALJ's Order exempting canned tart cherry products from volume restrictions.

Third, the Administrator contends the ALJ erroneously rejected alternatives to inventory reserves which can be used by handlers to meet Tart Cherry Order volume restrictions (Administrator's Appeal Brief ¶ IC at 14-15).

If the Cherry Industry Administrative Board establishes restricted percentages, handlers are required to set aside a portion of their tart cherry production. The Tart Cherry Order provides numerous methods by which a handler can comply with volume restrictions. These methods include storing product in inventory reserves, redeeming grower diversion certificates, destroying product, donating product to charitable organizations, donating product for new market development or market expansion, and exporting product to countries other than Canada and Mexico.[44] The form of cherries (frozen, canned, dried, or concentrated juice) a handler places in reserve is at the option of the handler.[45]

The ALJ found that requiring a canner of tart cherries to use alternatives to inventory is confiscatory, as follows:

> 22. Frozen tart cherries keep well (at least three years and up to four or five years). The same cannot be said of tart cherries processed into metal cans. Requiring Burnette or any other processor to hold tart cherries in cans off the market until close to the "best by" date (one year after canning) would be the equivalent of confiscation. It would be equally confiscatory to require a canner to meet the restriction requirements by using the alternatives to inventory.

ALJ's Decision and Order ¶ 22 at 15 (footnote omitted). Based, in part, on the finding that alternatives to inventory reserves, by which a handler

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[44] 7 C.F.R. § 930.159.
[45] 7 C.F.R. § 930.55(b).

may comply with the volume restrictions, are confiscatory, the ALJ ordered modification of the Tart Cherry Order to exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and promptly processed into metal cans with no processing other than canning.[46]

The provision of alternate methods by which to comply with volume restrictions is a policy consideration for the Secretary of Agriculture to be undertaken in the context of a formal rulemaking proceeding. The alternative methods by which a handler may comply with volume restrictions are not rendered unlawful merely because Burnette finds all of the alternatives burdensome. Therefore, I do not adopt the ALJ's conclusion that the alternative methods of complying with volume restrictions are unlawful and I do not adopt the ALJ's Order exempting canned tart cherry products from volume restrictions.

Fourth, the Administrator contends the ALJ erroneously ordered modification of the Tart Cherry Order to require all exempt-from-restriction-tart-cherry-production subtracted from supply for the purpose of calculating restriction percentages (Administrator's Appeal Br. ¶ II at 15-19).

The ALJ concluded that requiring handlers, who are not exempt from volume restrictions, to bear greater volume restrictions by being required to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt, is arbitrary and capricious and, consequently, not in accordance with law.[47] Based on this conclusion, the ALJ ordered the following modification to the optimum supply formula:

Order

> . . . .
> 41. Beginning with the **2014 Tart Cherry Crop** [July 1, 2014 - June 30, 2015 Crop Year] **exempt**-from-restriction-tart-cherry-production . . . must be subtracted from supply for purposes of volume control,

[46] ALJ's Decision and Order ¶ 40 at 22.
[47] ALJ's Decision and Order ¶ 1A at 1-2.

> including using the Optimum Supply Formula and calculating the restriction percentages that the **not**-exempt-from-restriction are required to comply with. That additional mathematical step must be employed.

ALJ's Decision and Order ¶ 41 at 22.

While Burnette seeks revisions to the formula for determining volume restrictions set forth in 7 C.F.R. § 930.50,[48] Burnette did not request the modification ordered by the ALJ. Moreover, the ALJ sets forth no basis for the ALJ's conclusion that requiring handlers, who are not exempt from volume restrictions, to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt, is arbitrary and capricious.

In contrast, the optimum supply formula in the Tart Cherry Order was devised after the Agricultural Marketing Service considered evidence presented during the rulemaking proceeding which resulted in the promulgation of the Tart Cherry Order. The proponents of the Tart Cherry Order provided sufficient evidence for the Secretary of Agriculture to conclude that the volume restrictions would result in a supply management program which would compensate for the erratic natural production cycles of tart cherries and which should provide the market with a more stable supply of tart cherries.[49] The Tart Cherry Order, which is presumed lawful, must be judged on the evidence contained in the formal rulemaking record on which the Secretary of Agriculture based the Tart Cherry Order. If circumstances have changed so that the Tart Cherry Order no longer produces equitable results, the remedy is through an amendatory or termination process—not through a proceeding conducted pursuant to 7 U.S.C. § 608c(15)(A).[50] Accordingly, I do not adopt the ALJ's Order modifying the optimum supply formula.

Fifth, the Administrator contends the ALJ erroneously exempted all tart cherry canners from volume restrictions. The Administrator asserts, as Burnette was the only petitioner in this proceeding, any order issued by the ALJ should have been limited to Burnette (Administrator's Appeal Br.

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[48] Pet. ¶ V F at 11.
[49] 60 Fed. Reg. 61,310 (Nov. 29, 1995).
[50] *See supra* note 41.

¶ III at 19-20).

As I deny all relief requested by Burnette and dismiss Burnette's Petition with prejudice, I find the issue of the scope of the ALJ's exemption from volume restrictions, moot.

Findings of Fact

1. Burnette is a Michigan corporation with a principal place of business in Elk Rapids, Michigan.

2. Burnette produces tart cherries, buys tart cherries from other producers, and processes tart cherries.

3. Burnette processes tart cherries into finished products in metal cans.

4. Burnette is a handler subject to the Tart Cherry Order.

5. CherrCo, Inc. is a federated Capper-Volstead cooperative.

6. CherrCo, Inc. receives consigned tart cherries from its member-cooperatives.

7. CherrCo, Inc. does not direct where consigned tart cherries are sold.

8. Multiple members of the Cherry Industry Administrative Board are also members of cooperatives that are members of CherrCo, Inc.

9. Imported tart cherry products are not included in the optimum supply formula in the Tart Cherry Order.

10. The Tart Cherry Order does not exempt from volume restrictions tart cherries delivered from being harvested directly to a canner and processed into metal cans.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

AGRICULTURAL MARKETING AGREEMENT ACT

2. CherrCo, Inc. is not a "sales constituency" as that term is defined in 7 C.F.R. § 930.16.

3. The membership of the Cherry Industry Administrative Board complies with 7 C.F.R. § 930.20(g).

4. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to include imported tart cherry products in the optimum supply formula in the Tart Cherry Order.

5. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to exempt from volume restrictions in the Tart Cherry Order tart cherries delivered from harvest directly to a canner and processed into metal cans.

6. The Secretary of Agriculture is not required by the AMAA, the Tart Cherry Order, or any other law to modify the optimum supply formula in the Tart Cherry Order so that handlers, who are not exempt from volume restrictions, are not required to absorb the share of volume restriction that would have been the responsibility of other handlers were those other handlers not exempt from volume restrictions.

For the foregoing reasons, the following Order is issued.

ORDER

1. The relief requested by Burnette in its Petition, filed August 3, 2011, is denied.

2. Burnette's Petition, filed August 3, 2011, is dismissed with prejudice. This Order shall become effective upon service on Burnette.

RIGHT TO JUDICIAL REVIEW

Burnette has the right to obtain judicial review of this Order in any district court of the United States in which district Burnette is an inhabitant or has its principal place of business. A bill in equity for the purpose of review of this Order must be filed within twenty (20) days from the date of entry of this Order. Service of process in any such proceeding may be

had upon the Secretary of Agriculture by delivering a copy of the bill of complaint to the Secretary of Agriculture.[51] The date of entry of this Order is June 19, 2015.

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ANIMAL WELFARE ACT

[51] 7 U.S.C. § 608c(15)(B).

COURT DECISIONS

KOLLMAN v. VILSACK.
No. 8:14-CV-1123-T-23TGW.
Court Decision.
Signed April 7, 2015.

AWA – Administrative procedure – Exhibitor – Exhibit, definition of – Hearing, opportunity for – License, application for – License, revocation of – License, suspension of – Revoke, definition of.

[Cite as: Not Reported in F. Supp.3d, 2015 WL 1538149 (M.D. Fla. 2015)].

United States District Court
M.D. Florida, Tampa Division

The Court held that the Animal Welfare Act (AWA) entitles the Department to refuse to issue a license to a person whose license was previously revoked. The Court also ruled that Complainant was not entitled to an evidentiary hearing prior to revocation because Complainant had waived his opportunity for hearing by failing to respond to the allegations against him. The Court granted the Department's motion to dismiss "Count I" of the complaint for failure to state a claim, ultimately ruling that the Department acted within its authority when it promulgated a regulation that prohibits a person whose license was revoked from obtaining a license upon re-application.

ORDER OF THE COURT

STEVEN D. MERRYDAY, DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Lancelot Kollman is an exotic-animal trainer who held an exhibitor's license under the Animal Welfare Act (AWA). Thomas J. Vilsack, Secretary of the United States Department of Agriculture, and Chester A. Gipson, Deputy Administrator of Animal Care for the Animal and Plant Health Inspection Service, (collectively, the Department) enforce the AWA, a legislative attempt to advance the humane treatment of animals on exhibit. Under the AWA and regulations promulgated by the Department, an exhibitor of lions must have a license, which the Department can revoke if the exhibitor violates the AWA or the regulations. After the death of two lions and Kollman's failure to contest

charges against him, the Department revoked Kollman's license to exhibit lions. *Kollman Ramos v. U.S. Dep't of Agr.,* 322 Fed. Appx. 814, 818 (11th Cir.2009) (describing the sequence of events in detail and upholding the revocation after Kollman's default). Relying on a regulation prescribing the consequences of revocation, the Department denied Kollman's application for another license.

Kollman sues for a declaration that, "notwithstanding his earlier license revocation, [he] is entitled to apply for and obtain a new exhibitor's license" and that, even without an exhibitor's license, he can "present" animals as an employee of a licensed exhibitor. (Doc. 22 at 12, 15) The Department moves (Doc. 26) to dismiss the complaint for failure to state a claim.

I. Count I

Kollman alleges that the Department lacks the authority to "permanently revoke licenses without the opportunity for reinstatement." (Doc. 22 ¶ 44) Specifically, Count I asserts (1) that, despite the revocation of his license, Kollman may apply for and obtain a new license and (2) that Kollman is entitled to a hearing to present evidence supporting his license application.

1. Revocation and re-application

Section 2149 of the AWA states:

> **(a) Temporary license suspension; notice and hearing; revocation**
>
> If the Secretary has reason to believe that any person licensed as a[n] ... exhibitor ... has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

The AWA fails to define "revoke" or to specify otherwise the consequence

of a revocation. However, the Department enforces Section 2149 through regulations such as 9 C.F.R. § 2.10(b), which states, "Any person whose license has been revoked shall not be licensed in his or her own name or in any other manner...." Similarly, 9 C.F.R. § 2.11(a)(3) states, "A license will not be issued to any applicant who ... has had a license revoked...." Although the Department's regulations existed when the Department revoked his license, Kollman argues that he is not barred forever from obtaining a new license and that the Department impermissibly interprets "revoke."

The parties agree that *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), governs judicial review of an agency's construction of a statute within the agency's jurisdiction. Under *Chevron,* if "Congress has directly spoken to the precise question at issue" and "[i]f the intent of Congress is clear," the construction of the statute necessarily incorporates Congress's expression. *Chevron,* 467 U.S. at 842. However, if the statute is silent or ambiguous, the judicial interpretation of the statute defers to an administrative interpretation that is "based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. Additionally, the Supreme Court has "recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.,* 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

By failing to define "revoke," Section 2149 implicitly leaves a "gap for the agency to fill." *Chevron,* 467 U.S. at 843. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron,* 467 U.S. at 844. Further, Section 2151 of the AWA authorizes the Secretary to "promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter." Thus, the AWA's delegation of authority merits *Chevron* deference.

Kollman argues, "Congress expressly addressed revocation and suspension ... in section 2149, and nowhere in the statute did it authorize permanent revocation." (Doc. 22 ¶ 45) For contrast, Kollman cites Section 2158(c)(3) (a statute governing the protection of pets), which states, "Any

dealer who violates this section three or more times shall have such dealer[']s license permanently revoked." Kollman argues that Section 2158(c)(3)'s use of "permanently revoke" confirms that "Congress clearly knew how to spell out the circumstances when the agency could permanently bar a licensee." (Doc. 22 ¶ 47) However, although the wording of one statute might aid in the interpretation of another statute, "drafters ... often use different words to denote the same concept." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012).

As the Department explains, Section 2149 (the statute at issue) establishes a "three-tier system of penalties," which range from a suspension not exceeding twenty-one days to, after notice and the opportunity for a hearing, a longer suspension and finally to a revocation. (Doc. 26 at 11) "For the agency to decide that someone who merited the most serious of the three tiers of punishment for licensees—revocation—should not be able to apply for a license in the future is consistent with the goal of promoting the humane treatment of animals." (Doc. 26 at 11)

Although the AWA fails to specify the consequence of a suspension, the Department construes "suspend" to mean that a person cannot apply for and obtain a new license during a suspension. *See* 9 C.F.R. § 2.11(a)(3) (stating that a "license will not be issued to any applicant ... whose license is suspended"). Similarly, although the AWA fails to specify the consequence of a revocation, the Department construes "revoke" to mean not only a permanent revocation but a prohibition against applying for another license. Accordingly, the Department offers a "reasonable interpretation" of Section 2149, and, therefore, the Department's interpretation is based on a "permissible construction of the statute."

However, even assuming that the Department impermissibly interprets Section 2149, a separate section—Section 2133—authorizes the Department's refusal to issue a license to a person whose license the Department revoked. Section 2133 (the statute governing the licensing of exhibitors) states, "The Secretary shall issue licenses to ... exhibitors upon application therefor in such form and manner as he may prescribe...." Thus, Section 2133 grants to the Department the authority to prescribe the requirements of a license. The Department validly exercised this authority by promulgating 9 C.F.R. § 2.10(b) ("Any person whose license has been

revoked shall not be licensed in his or her own name or in any other manner ....") and 9 C.F.R. § 2.11(a)(3) ("A license will not be issued to any applicant who ... has had a license revoked....").

2. Evidentiary hearing

Kollman asserts entitlement to a hearing under 9 C.F.R. § 2.11(b), which states, "An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for a license should not be denied." However, rather than entitling an applicant to a hearing, 9 C.F.R. § 2.11(b) permits an applicant to "request" a hearing. Thus, the Department complied with 9 C.F.R. § 2.11(b) by permitting Kollman to request a hearing.

Also, Kollman asserts that "a hearing must be afforded before an individual can be denied the right to practice his or her profession" because "the right to practice one's chosen profession is a liberty interest under the due process clause." (Doc. 22 ¶ 41) However, Kollman overlooks Section 2149, which requires "notice and an opportunity for hearing" before the revocation of a license. Complying with Section 2149, the Department afforded Kollman an opportunity for a hearing before revoking his license, but as *Kollman Ramos v. United States Department of Agriculture,* 322 Fed. Appx. at 821, determines, Kollman waived the opportunity by failing to respond to the allegations against him. After a "fact intensive" review of the "overall fairness of the proceedings," *Kollman Ramos,* 322 Fed. Appx. at 824, rejects Kollman's due process argument and holds that, "[T]he Judicial Officer's Decision and Order [revoking Kollman's license] did not violate the principles of fundamental fairness embodied in the Due Process Clause of the Fifth Amendment to the United States Constitution...."

Further, even if Kollman received a hearing to offer evidence in support of his application for a new license, the Department's regulations, including 9 C.F.R. §§ 2.10(b) and 2.11(a)(3), require the application's denial. Kollman has no right to—and the Department is not obligated to grant—a futile and purposeless hearing.

II. <u>Count II</u>

Count II demands a declaration that as an employee of a licensed exhibitor Kollman can "present" an animal. (Doc. 22 at 15) The Department moves (Doc. 26) to dismiss and cites 9 C.F.R. § 2.10(c), which states that a person whose license the Department has revoked may not "exhibit" an animal. Because neither the AWA nor the regulations define "exhibit," the Department argues that the term's common meaning* applies. Kollman responds that the correct definition of "exhibit" should accord with the definition of "exhibitor," a term defined by both the AWA and the regulations. The Department "do[es] not contend that [Kollman] is acting as an exhibitor." (Doc. 26 at 15) Kollman argues that, because he is not an "exhibitor," he is not "exhibiting" and that therefore the Department's refusal to allow him to "present" an animal as an employee of a licensed exhibitor is "arbitrary and capricious and violates the AWA and [the Department's] own regulations and practices." (Doc. 22 ¶ 62) Count II states a claim for a declaratory judgment.

CONCLUSION

The Department's motion (Doc. 26) to dismiss Count I is **GRANTED,** and the Department's motion (Doc. 26) to dismiss Count II is **DENIED.** No later than APRIL 17, 2015, Kollman may amend Count I.

ORDERED.

ANIMAL LEGAL DEFENSE FUND v. USDA.
No. 14-12260.
Court Decision.
Decided June 15, 2015.

AWA – Administrative procedure – *Chevron* deference – Exhibitor – Legislative history – License, issuance of – License, renewal of – License, suspension of – Licensing regulations – Proceedings, institution of.

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* According to the *American Heritage Dictionary* (5th ed.2014), "exhibit" means "to present for others to see."

ANIMAL WELFARE ACT

[Cite as: 789 F.3d 1206 (11th Cir. 2015)].

United States Court of Appeals, Eleventh Circuit.

The Court affirmed the district court's order granting summary judgment to the Department and its ruling that the Department's license-renewal process "was a permissible construction of" the Animal Welfare Act (AWA). The Court found that Congress had not directly spoken as to whether the AWA prohibits the Department from renewing an AWA license on the anniversary date of the license where the Department knows that the exhibitor has been noncompliant with animal welfare standards. Ultimately, the Court held that AWA licensing regulations are entitled to *Chevron* deference; therefore, the Department did not act arbitrarily or capriciously in renewing Seaquarium's license.

OPINION OF THE COURT

THE HONORABLE SUSAN HARRELL BLACK DELIVERED THE OPINION OF THE COURT.

The Animal Legal Defense Fund, Orca Network, People for the Ethical Treatment of Animals, Inc., Howard Garrett, and Karen Munro (collectively, ALDF)[1] appeal the district court's grant of summary judgment in favor of the United States Department of Agriculture; Tom Vilsack, in his official capacity as Secretary of the United States Department of Agriculture; and Elizabeth Goldentyer, in her official capacity as Eastern Regional Director of the United States Department of Agriculture Animal and Plant Health Inspection Service (collectively, USDA). ALDF argues the district court erred in ruling USDA's decision to renew Marine Exhibition Corporation d/b/a Miami Seaquarium's (Seaquarium) license did not violate the Animal Welfare Act (AWA), 7 U.S.C. §§ 2131–59. According to ALDF, USDA may not renew a license when USDA knows an exhibitor is noncompliant with any animal welfare standards on the anniversary of the day USDA originally issued the

[1] Pursuant to Federal Rule of Appellate Procedure 42(b), Appellants moved to dismiss the appeal as to Shelby Proie and Patricia Sykes, on the basis that Proie's current employment prohibits her from being involved in the litigation and Sykes is now deceased. This Court granted the motion to dismiss the appeal without prejudice as to Proie and dismissed the appeal of Sykes as moot. Proie and Sykes are therefore no longer parties to this appeal.

license.[2]

Congress has prescribed what an exhibitor must do to obtain *issuance* of a license in the first instance, but Congress has not spoken precisely to the question of license *renewal* under the AWA. USDA in turn has adopted comprehensive renewal regulations. USDA's renewal scheme requires Seaquarium to submit a form summarily certifying its regulatory compliance, a fee, and an annual report setting forth the number of exhibited animals. No annual inspection occurs. Given the thousands of exhibitors across the country and its limited resources, USDA conducts license renewal through a purely administrative procedure.

USDA has adopted a different mechanism to achieve substantive compliance with animal welfare standards. The USDA regulations provide for random, unannounced inspections to verify substantive compliance with the AWA. When violations are discovered, either through inspections or third-party complaints, the USDA can charge Seaquarium and seek to suspend or revoke its license after requisite due process. USDA must provide notice to Seaquarium by filing a complaint before an administrative law judge (ALJ) who conducts a hearing in accordance with detailed rules of administrative practice. The ALJ's decision is then subject to judicial review exclusively in the United States Court of Appeals.

USDA's licensing regulations constitute a reasonable policy choice balancing the conflicting congressional aims of due process and animal welfare, and the AWA licensing scheme is entitled to deference by this court. We therefore affirm. As explained below, assuming Seaquarium violated a substantive AWA standard, the remedy in this case lies not in

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[2] There is some confusion arising from USDA's characterization of ALDF's argument. USDA believes ALDF has argued the license renewal scheme is unlawful "because the regulations do not require a demonstration of compliance with the AWA prior to renewal." (USDA Response Brief at 2.) In its reply brief, though, ALDF clarifies that it "make[s] no such argument," and does not seek annual inspections of exhibitor facilities. (ALDF Reply Brief at 1.) Rather, ALDF "challenge[s] the USDA's specific decision to renew the license of Seaquarium despite evidence that the facility is in violation of several Welfare Act standards." (*Id.*) (emphasis removed). For the purposes of this appeal, we assume, without deciding, that USDA renewed the license despite knowing there was evidence Seaquarium was violating several AWA standards.

the administrative license renewal scheme, but in USDA's power to initiate an enforcement proceeding. USDA has the discretionary enforcement authority to revoke a license due to noncompliance. Only Congress, not this Court, possesses the power to limit the agency's discretion and demand annual, substantive compliance with animal welfare standards.

I. BACKGROUND[3]

A. Lolita

Lolita is a 20–feet long, 7000 pound *Orcinus orca*[4] held in captivity at Seaquarium. In 1970, Ted Griffin, the first person to swim with an orca in a public exhibition, captured Lolita in Whidbey Island's Penn Cove, off the coast of Washington State. Lolita was approximately three to six years old and a member of the Southern Resident L Pod. Seaquarium purchased Lolita, and she has lived there since September 24, 1970. Lolita performs each day in an event called the "Killer Whale and Dolphin Show."

Lolita lives in a tank which is surrounded by stadium seating. The stadium covering leaves Lolita exposed to ultraviolet radiation as she floats along the water's surface. As sunscreen, Seaquarium applies a black-colored zinc oxide on Lolita's skin. The effect of this sunscreen on Lolita's physiology is unknown. ALDF alleges Seaquarium's failure to provide Lolita with adequate sun cover violates 9 C.F.R. § 3.103(b)'s requirement to afford adequate protection from the weather or direct sunlight to marine animals kept outdoors.

Lolita's tank is oblong-shaped with a 5 feet 2 inches wide, crescent-shaped concrete platform that extends from the bottom of the tank through the surface of the water. Lolita's trainers stand on this platform during her performances. Her tank measures 80 feet by 60 feet. The concrete platform

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[3] We recount the facts in the light most favorable to USDA.

[4] The *Orcinus orca* is colloquially known by the misnomer "killer whale." The creature is not actually a whale; rather, it is the world's largest member of the dolphin family called Delphinidae. Both whales and dolphins are members of an entirely aquatic group of mammals known as cetaceans. For the sake of scientific accuracy, we refer to Lolita as an orca.

leaves an unobstructed circular pool of 80 feet by 35 feet. ALDF alleges Lolita's tank is smaller than the 48 feet minimum horizontal standard permitted by agency regulation. *See id.* § 3.104(b) (providing cetaceans in captivity must be given a pool of water with a minimum horizontal dimension of at least "two times the average adult length" of the species).

Orcas are primarily social in the wild and travel in large groups. Lolita has not interacted with another orca since Hugo, who was also captured off the coast of Washington State, died in March 1980. Lolita instead shares her tank with Pacific white-sided dolphins. ALDF alleges these dolphins are not "biologically related" to her, as prescribed by 9 C.F.R. § 3.109.

B. Renewal of Seaquarium's License

Seaquarium received an AWA license from USDA. Each April since the issuance of the license, USDA has renewed Seaquarium's license before its one-year expiration date. On February 16, 2012, before the expiration of Seaquarium's license in April 2012, ALDF sent a letter to USDA alleging Seaquarium exhibited Lolita in violation of 9 C.F.R. §§ 3.103(b), 3.104(b), and 3.109. ALDF stated Lolita's living conditions were inhumane and the renewal of Seaquarium's license would be unlawful. In a March 28, 2012 letter, Goldentyer responded to ALDF's letter, stating USDA intended to renew Seaquarium's exhibitor license because it found Seaquarium was in "compliance with the regulations and standards, and none of the other criteria for license denial under Section 2.11 or 2.12 are applicable." USDA renewed Seaquarium's license on April 21, 2012.

C. License Renewal Regulations

The AWA prohibits exhibitors[5] from exhibiting any animals unless they "have obtained a license from the Secretary and such license shall not have been suspended or revoked." 7 U.S.C. § 2134. "[N]o such license shall be issued" until the exhibitor "shall have demonstrated that his facilities comply with the standards promulgated by the Secretary." *Id.* § 2133. In addition to this statutory command, the AWA vests USDA with the authority to "promulgate such rules, regulations, and orders as he may

[5] The AWA defines an "exhibitor" as "any person ... 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." 7 U.S.C. § 2132(h).

deem necessary in order effectuate the purposes" of the statute. 7 U.S.C. § 2151. Pursuant to this section, USDA has adopted comprehensive renewal regulations that combine purely administrative requirements, random inspections, and discretionary enforcement proceedings.

On or before the expiration date of his or her one-year license, an exhibitor must submit a completed application form to the appropriate USDA regional office fulfilling three, purely administrative criteria. *See* 9 C.F.R. § 2.1(d). First, the exhibitor certifies by signing the application form that, to the best of her knowledge or belief, she is compliant and will continue to comply with all AWA animal wildlife standards. *Id.* § 2.2(b). Second, the exhibitor pays an annual fee calculated according to USDA's fee schedule that varies according to the number of animals owned, held, or exhibited. *Id.* § 2.6. Third, the exhibitor submits an annual report detailing the number of animals owned, held, or exhibited. *Id.* § 2.7(d). So long as an exhibitor meets these three criteria, even if her facility fails to comply with animal wildlife standards on the license expiration date, USDA must grant her a renewal. *See id.* § 2.2(b) (stating "[USDA] will issue a license" after applicant fulfills administrative requirements). Otherwise, the license automatically terminates due to expiration. *Id.* § 2.5(b).

Unlike the purely administrative procedure for renewing a license, USDA's mechanism for suspending or terminating licenses due to animal welfare violations depends on random inspections and enforcement proceedings. Each applicant for renewal is obligated to make her "animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection ... to ascertain the applicant's compliance with the standards and regulations." *Id.* § 2.3(a). USDA's administrative renewal scheme facilitates these inspections by requiring a licensee to "promptly notify [USDA] by certified mail of any change in the name, address, management, or substantial control or ownership of his business or operation, or of any additional sites, within 10 days of any change." *Id.* § 2.8. In addition to random inspections, any interested person may submit information to USDA regarding alleged violations by a licensee. 7 C.F.R. § 1.133(a)(1); *see also* 9 C.F.R. § 4.1 (applying USDA's Uniform Rules of Practice for adjudicatory proceedings to section 19 of the AWA (codified at 7 U.S.C. § 2149)). In response, USDA can choose to investigate the submission if, in the opinion of the agency, such an

investigation is "justified by the facts." 7 C.F.R. § 1.133(a)(3).[6]

Under the AWA's supplemental rules of procedure, USDA may suspend a license temporarily for 21 days upon written notification before an opportunity for notice and hearing if USDA has reason to believe a licensee has violated or is violating the AWA. 9 C.F.R. § 4.10. If, on the basis of inspections or the receipt of third-party information, USDA chooses to suspend a license for more than 21 days, impose a civil penalty, or terminate a license, USDA must afford notice and a hearing in an enforcement proceeding. *Id.* § 2.12 (stating "license may be terminated during the license renewal process ... after a hearing in accordance with the applicable rules of practice"). An interested person who submits a third-party complaint to the agency "shall not be a party to any proceeding which may be instituted as a result thereof." 7 C.F.R. § 1.133(a)(4).

USDA initiates the enforcement proceeding by filing a complaint with the USDA Hearing Clerk, *id.* § 1.133(b)(1), who assigns the case to an ALJ that conducts the proceeding according to formal rules of evidence and procedure, *see id.* § 1.133–51. Unless a licensee subject to an ALJ's adverse decision appeals to a Judicial Officer appointed by the Secretary of Agriculture, that decision becomes a final order. *Id.* § 1.145(i). Finally, the licensee may appeal an order that is final for the purposes of judicial review to the United States Court of Appeals of the circuit in which she resides or has her principal office, or in the District of Columbia Circuit. 7 U.S.C. § 2149(c); 28 U.S.C. § 2343.

D. ALDF's Complaint

On August 22, 2012, ALDF filed a complaint against USDA for declaratory and injunctive relief in the United States District Court for the Northern District of California. The complaint alleged Seaquarium houses Lolita in conditions that violate the AWA's standards for granting a license pursuant to 7 U.S.C. §§ 2133–34. ALDF alleged USDA acted unlawfully by (1) renewing Seaquarium's license in April 2012 and (2) routinely renewing Seaquarium's AWA license each year. Pursuant to 5 U.S.C. § 706(2)(A), (C) of the Administrative Procedure Act (APA), ALDF

[6] It is during this time period, when USDA discovers evidence of AWA violations, that USDA undertakes the cooperative enforcement measures described *infra* at Section III(*B*)(*2*) (*b*).

requested the district court to set aside the USDA's April 2012 decision to renew Seaquarium's license, award reasonable attorneys' fees and costs, and grant any further relief deemed just and proper. The Northern District of California granted Seaquarium's motion to intervene and USDA's 28 U.S.C. § 1404(a) motion to transfer the case to the Southern District of Florida.

E. Motion for Summary Judgment

USDA moved for summary judgment. USDA argued ALDF confused the *issuance* of a license with the annual *renewal* of a license. While 7 U.S.C. § 2133 requires a demonstration of compliance with the Secretary's standards before "such license shall be issued," USDA asserted the AWA is silent as to any requirements for renewal of a license already issued. Since the AWA did not explicitly address renewal, USDA promulgated administrative renewal regulations to fill this statutory gap. USDA argued these regulations are a permissible construction of the AWA.

In response, ALDF asserted the AWA's animal welfare compliance requirement unambiguously applies to initial licenses *and* license renewals; therefore, USDA violated § 2133 when it renewed the license despite Seaquarium's alleged failure to comply with applicable AWA standards. Further, USDA's distinction between an issuance and a renewal was simply a *post hoc* litigation strategy not entitled to deference. ALDF also claimed USDA's interpretation was an unreasonable construction of the statute because it would render the entire licensing scheme "virtually meaningless." Exhibitors like Seaquarium could keep receiving licenses even if USDA knows they are blatantly violating AWA standards.

F. District Court Order

The district court granted summary judgment to USDA. The district court did not request or examine the administrative record because the material facts were not in dispute and the only contested issue was a pure question of law. Applying the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the district court ruled Congress had not spoken to the precise question of license renewal under the AWA because the text and legislative history were silent as to the requirements and procedure for

renewal. Accordingly, USDA was free to implement its own administrative renewal scheme.

Under *Chevron* Step Two, the district court concluded USDA's renewal process was a permissible construction of the statute. USDA had adopted a purely administrative renewal scheme requiring a licensee to submit a certification of regulatory compliance, payment of an annual fee, and submission of an annual report detailing the number of animals owned, held, or exhibited during the prior year. This administrative scheme was coupled with a random, unannounced inspection program that, according to USDA, secured AWA compliance more efficiently than an annual inspection program. Accordingly, the district court held USDA's decision to renew Seaquarium's license despite alleged noncompliance with animal welfare standards did not violate 7 U.S.C. § 2133. ALDF filed a timely notice of appeal.

II. STANDARD OF REVIEW

"We review questions of subject matter jurisdiction de novo." *Yunker v. Allianceone Receivables Mgmt., Inc.,* 701 F.3d 369, 372 n. 2 (11th Cir.2012) (italics omitted). "We review a summary judgment ruling de novo, applying the same legal standards used by the district court." *See Johnson v. Bd. of Regents of Univ. of Ga.,* 263 F.3d 1234, 1242 (11th Cir.2001). In conducting this examination, we view the materials presented and all factual inferences in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Summary judgment is appropriate where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

III. DISCUSSION

A. Judicial Reviewability

Before discussing the merits of the district court's summary judgment motion, we address a threshold issue regarding this Court's subject matter jurisdiction over the present controversy. *See Scarfo v. Ginsberg,* 175 F.3d 957, 960 (11th Cir.1999) ("[P]arties cannot waive subject matter jurisdiction, and we may consider subject matter jurisdiction claims at any

time during litigation.”).

ALDF brings this suit for judicial review of USDA’s agency action pursuant to 5 U.S.C. § 702. Section 702 provides that any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.* This provision is inapplicable, however, to the extent “agency action is committed to agency discretion by law.” *Id.* § 701(a)(2). Whether an agency action is reviewable under § 701(a)(2) is a matter of subject matter jurisdiction. *See Lenis v. U.S. Attorney Gen.,* 525 F.3d 1291, 1293–94 (11th Cir.2008); *but see Sierra Club v. Jackson,* 648 F.3d 848, 853–54 (D.C.Cir.2011) (holding agency decisions excluded from judicial review by § 701(a)(2) are not justiciable because relief cannot be granted, but courts still retain subject matter jurisdiction over such controversies).

The Supreme Court has held § 701(a)(2) precludes APA review whenever the statute under which the agency acts “is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion”—that is, where a court would have “no law to apply.” *Heckler v. Chaney,* 470 U.S. 821, 830–31, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985) (internal quotation marks omitted). Due to the general unsuitability for judicial review of agency decisions to refuse enforcement, a presumption arises that such decisions are committed to agency discretion by law and thus unreviewable. *Id.* at 832, 105 S.Ct. at 1656 (holding “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)”); *see also Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.,* 677 F.3d 1073, 1084 (11th Cir.2012) (same).

The presumption of unreviewability does not apply to this case. ALDF does not seek an injunction requiring USDA to initiate enforcement proceedings against Seaquarium.[7] Instead, ALDF seeks a judicial order setting aside USDA’s affirmative decision to renew Seaquarium’s license in April 2012. This case is about an “affirmative act of approval under a statute,” *Heckler,* 470 U.S. at 831, 105 S.Ct. at 1655, in particular,

[7] Both parties acknowledge that if ALDF sought an injunction requiring the agency to initiate an enforcement proceeding against Seaquarium, this Court would lack subject matter jurisdiction.

USDA's affirmative decision to renew Seaquarium's license in April 2012. *See id.* at 832, 105 S.Ct. at 1656 (stating an agency's refusal to act "does not infringe upon areas that courts often are called upon to protect," as opposed to affirmative agency action that "itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner").

USDA's decision was not committed to agency discretion by law so as to render it unreviewable. The AWA provides "meaningful standard[s]" against which to judge USDA's exercise of discretion. *See id.* at 821, 105 S.Ct. at 1655 We accordingly hold USDA's renewal of Seaquarium's April 2012 license is a final agency action subject to judicial review under § 706(2).

B. AWA Requirements for License Renewal

To determine whether USDA's decision to renew Seaquarium's license in April 2012 must be set aside as unlawful under 5 U.S.C. § 706(2), we evaluate the merits of USDA's interpretation of the AWA's licensing requirements. In doing so, we apply the two-step framework formulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under *Chevron,* we afford deference to certain agency interpretations because "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Id.* at 843–44, 104 S.Ct. at 2782. Unlike courts, who "are not experts in the field, and are not part of either political branch of the Government," agencies possess invaluable technical expertise and, by virtue of their accountability to the President, are a proper forum to make policy choices based on unresolved "competing interests." *Id.* at 865–66, 104 S.Ct. at 2793.

1. Chevron Step One

When reviewing an agency's construction of a statute it administers, we first decide whether Congress has directly spoken to the question at issue. *Id.* at 842, 104 S.Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct.

at 2781.

To decide if the intent of Congress is clear, we employ traditional tools of statutory construction. *See id.* at 843 n. 9, 104 S.Ct. at 2781 n. 9. These include "examination of the text of the statute, its structure, and its stated purpose." *Miami—Dade Cnty. v. EPA,* 529 F.3d 1049, 1063 (11th Cir.2008). "As with any question of statutory interpretation, we begin by examining the text of the statute to determine whether its meaning is clear." *Harry v. Marchant,* 291 F.3d 767, 770 (11th Cir.2002) (en banc). This is because "we presume that Congress said what it meant and meant what it said." *Id.* (quotation omitted).

a. Statutory language

The precise question before us is whether USDA may renew a license even if it knows an exhibitor is not compliant with AWA standards governing "the humane handling, care, treatment, and transportation of animals," 7 U.S.C. § 2143(a)(1), on the anniversary of the date USDA originally issued the license. For example, if USDA issues a license on January 1, 2010, and USDA knows an exhibitor is violating an AWA standard when the clock strikes 12:01 am on January 1, 2011, may USDA still renew the license? To answer whether Congress has directly spoken to this question, we turn to the plain language of 7 U.S.C. § 2133, which provides:

> The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided,* That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title....

The parties dispute whether the word "issue" unambiguously encompasses the word "renew."

"Issue" is not defined in the AWA. In the absence of a statutory definition, "we look to the common usage of words for their meaning." *Consol. Bank,*

N.A., Hialeah, Fla. v. U.S. Dep't of Treasury, Office of Comptroller of Currency, 118 F.3d 1461, 1464 (11th Cir.1997). "Issue" is defined, in the sense linguistically relevant to the circumstances here, as "to come out, go out," "to proceed or come forth from a usually specified source," or "to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1201 (3d ed.1976).[8]

The word "renew" is also not defined in the AWA, nor does it even appear anywhere in the statute. "Renew" means "to make new again," "to restore to fullness or sufficiency," or "to grant or obtain an extension of." *Id.* at 1922.

Comparing these two definitions, we conclude the plain meaning of "issue" does not necessarily include "renew." Rather than make a license "come out" or "go out," one could "restore to fullness" a license that has already "come out" or "gone out." In fact, that is precisely the type of licensing regime USDA has established under the AWA. USDA makes a license "go out" once an applicant has met the requirements for an issuance. After USDA makes the license go out, it remains "valid and effective" unless the licensee fails to comply with the administrative renewal process. *See* 9 C.F.R. § 2.5(a) (stating a "license issued under this part shall be valid and effective" unless "revoked or suspended pursuant to section 19 of the Act"). No license is given out during the renewal process; instead, the exhibitor maintains the same license number. Based on our analysis of § 2133 standing alone, we cannot conclude Congress has spoken to the precise question at issue.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997). "In

[8] We have chosen to use a 1976 dictionary because it is more contemporaneous to the 1966 enactment of the AWA than a modern edition. *See Taniguchi v. Kan Pac. Saipan, Ltd.,* —— U.S. ——, 132 S.Ct. 1997, 2003 n. 2, 182 L.Ed.2d 903 (2012) (using "contemporaneous dictionaries" to elucidate meaning of statutory term).

expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113, 122, 12 L.Ed. 1009 (1850). Examination of the whole AWA statute strengthens USDA's argument that Congress did not unambiguously require compliance with animal welfare standards on the date of license renewal.

In particular, Congress's enactment of the AWA's § 2149 enforcement provision severely undermines the assertion Congress conditioned license renewal on an exhibitor's compliance with AWA standards on the anniversary of the date USDA originally issued the license. The heading of § 2149 is "Violations by licensees." *See Almendarez–Torres v. United States,* 523 U.S. 224, 234, 118 S.Ct. 1219, 1226, 140 L.Ed.2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). As the heading suggests, § 2149 spells out the adjudicative process for punishing a licensee, *i.e.,* one who already holds a license, *see* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1304 (3d ed.1976) (defining licensee as "a licensed person"). Section 2149(a) says:

> If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

Subsection (c) authorizes judicial review of final USDA enforcement orders exclusively in the United States Courts of Appeals.

If § 2133 mandated the revocation of a license whenever USDA thinks the exhibitor has failed to demonstrate compliance on an anniversary date, the

due process protections afforded to licensees in § 2149 would be mere surplusage. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698, 115 S.Ct. 2407, 2413, 132 L.Ed.2d 597 (1995) ("A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation."). To revoke a license, USDA would not need to bring an enforcement proceeding against a licensee; the agency could patiently bide its time until the license anniversary rolled around, then immediately revoke the license for failure to demonstrate compliance. The exhibitor would have no right to a hearing, nor would she have a right to appeal the denial of her renewal application. In light of the protracted time often necessary to litigate a final agency decision through an appeal, USDA would have no reason to initiate any enforcement proceedings against licensees. Surely Congress did not enact § 2149 to lull licensees into relying on due process protections that do not actually exist.

Moving beyond the AWA itself, a survey of § 2133's relationship to the whole United States Code shows issuing a license is not unambiguously the same as renewing one. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528, 109 S.Ct. 1981, 1994, 104 L.Ed.2d 557 (1989) (Scalia, J., concurring) (remarking a statute should be understood in a manner "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind"). Whereas Congress did not explicitly address renewal in the AWA, Congress has demonstrated an ability to address renewal when it intends to do so. *See, e.g.*, 7 U.S.C. § 85 (stating Secretary "may refuse to renew ... any license"); 12 U.S.C. § 5105(a) (discussing "minimum standards for license renewal"); 16 U.S.C. § 808 (setting forth detailed renewal process); 46 U.S.C. § 7106(a) (stating "license issued" may be "renewed for additional 5–year periods"); 47 U.S.C. § 1421(b)(2) (describing "renewal" of "initial license").

"Where Congress knows how to say something but chooses not to, its silence is controlling." *In re Haas*, 48 F.3d 1153, 1156 (11th Cir.1995), *abrogated on other grounds by In re Griffith*, 206 F.3d 1389 (11th Cir.2000). Congress could have unequivocally conditioned license renewal upon demonstrated compliance with AWA standards on the anniversary of license issuance, but chose instead to limit § 2133's language to issuance alone. On this question, "more important than what

Congress said" in § 2133 "is what Congress left unsaid." *See Gonzalez v. Reno,* 212 F.3d 1338, 1348 (11th Cir.2000). Since the AWA does not mandate a renewal procedure at all, much less prescribe the "particulars of that procedure," *id.*, Congress has conferred USDA the discretion to implement an administrative renewal scheme for AWA licenses.

In sum, the plain language of the statute shows Congress has not directly spoken to whether USDA can renew a license despite knowing that an exhibitor is noncompliant with animal welfare standards on the anniversary of the day USDA originally issued the license. The terms "issue" and "renew" have distinct meanings; § 2149's due process protections would be meaningless if we adopted ALDF's interpretation; and Congress's silence regarding renewal is controlling.

b. Legislative history

When, as here, the words of Congress are clear, "we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language." *Harris v. Garner,* 216 F.3d 970, 976 (11th Cir.2000) (en banc). We nonetheless examine the AWA's legislative history because it is consistent with our conclusion that Congress has not spoken directly to the question of license renewal. *See id.* at 977 (discussing legislative history consistent with plain meaning); *United States v. Fields,* 500 F.3d 1327, 1330 (11th Cir.2007) ("[W]e look to the legislative history of the statute to determine whether Congress provided any guidance concerning its intent."). Like the statutory language itself, the most striking feature of the AWA's legislative history is its almost total silence regarding renewal.

As with the current statute, none of the prior versions of the AWA mention license renewal. Congress enacted the AWA in 1966. *See* Laboratory Animal Welfare Act, PUB.L. NO. 89–544, 80 STAT. 350 (1966). Section 3 stated the "Secretary shall issue licenses to dealers upon application therefor in such form and manner as he may prescribe," provided that "no such license shall be issued until the dealer shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 13 of this Act." *Id.* § 3, 80 Stat. at 351. Also like the current version of the AWA, Congress authorized USDA to suspend a license through enforcement proceedings safeguarded by notice, hearing,

and appeal. *Id.* § 19, 80 Stat. at 352. The word renewal is conspicuously absent, and the topic is omitted from the bill's congressional reports. *See generally* H.R. REP. NO. 89–1848 (1966), 1966 U.S.C.C.A.N. 2649 (Conf.Rep.); S. REP. NO. 89–1281 (1966), 1966 U.S.C.C.A.N. 2635.

Subsequent amendments never discussed license renewal or fundamentally altered the scheme for revoking licenses. *See* Animal Welfare Act of 1970, PUB.L. NO. 91–579, 80 STAT. 1560; Animal Welfare Act Amendments of 1976, PUB.L. NO. 94–279, 90 STAT. 417; Food Security Act of 1985, PUB.L. NO. 99–198, §§ 1751–59, 99 STAT. 1354, 1645–50; Food, Agriculture, Conservation, and Trade Act of 1990, PUB.L. NO. 101–624, § 2503, 104 STAT. 3359, 4066–68; Farm Security and Rural Investments Acts of 2002, PUB.L. NO. 107–171, §§ 10301–05, 116 STAT. 134, 491–94. In sum, Congress has never squarely addressed the precise question at issue.

The parties' and our independent research have revealed only two exceptions to this legislative silence. The first exception appears in H.R. 3556, 87th Cong. § 10–11 (as reported by S. Comm. on Interstate and Foreign Commerce, Sept. 28–29, 1962), an unenacted bill sponsored by Rep. Morgan M. Moulder of Missouri in 1962. This unenacted bill would have required persons conducting animal research to obtain a "letter of qualification," *id.* § 10, similar to a "license" under the current statute. Interestingly, the letter would be "valid for no more than one year," but would "be renewed by the Commissioner if renewal is requested, subject to the requirements for an original letter of qualification." *Id.* § 11. Thus, Rep. Moulder's bill contemplated a renewal procedure as to individual letters of qualification conditioned upon annual compliance. By contrast, with regard to the "certificate of compliance" issued to the laboratory itself, the bill established no separate compliance requirement for renewal. *Id.* § 7–9, 12. Section 15 instead established a method for suspending or revoking a certificate of compliance through notice via mail and publication in the Federal Register. *Id.* § 15.

Considered alone, the bill's text lends credence to USDA's argument that Congress considered whether to condition license renewal upon annual compliance with animal welfare standards but declined to do so when enacting the AWA. Under these particular circumstances, however, we decline to infer any such conclusion when (1) neither the bill nor a

subsequent version were enacted into law, (2) the bill was proposed in the 87th rather than 89th Congress, (3) and Rep. Moulder did not hold office after the 87th Congress, *see MOULDER, Morgan Moore*, BIOGRAPHIC DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=M001045 (last visited March 28, 2015). The connection between Rep. Moulder's bill introduced in subcommittee and the AWA's passage in 1966 is simply too attenuated to divine Congress's intent.

The second exception to the legislative silence regarding AWA license renewal appears in Rep. George E. Brown, Jr. of California's remarks inserted into the Congressional Record on June 13, 1995. *See* 141 CONG. REC. E1239–40 (1995) (statement of Rep. George E. Brown, Jr.). According to Rep. Brown, who was "intimately involved in the 1985 amendments to the Animal Welfare Act,"

> It was clearly the intent of Congress that facilities should come into compliance before being issued the initial registrations, and that license renewals should be withheld where licenses have been suspended or revoked or in instances where facilities are not in compliance with the provisions of the act.

Id. ALDF argues Rep. Brown's statement shows Congress unambiguously intended to withhold any license—whether an issuance or renewal—from an out-of-compliance applicant.

Rep. Brown's statement lacks persuasive force. Though the Congressman may have assisted in crafting the 1985 amendments to the AWA, those amendments made no alterations to the AWA's licensing provisions. Furthermore, Congress passed the 1985 amendments 19 years after 1966—the year Congress enacted the AWA language relevant to this appeal. Rep. Brown's opinion provides negligible insight into Congress's intent. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722, 60 L.Ed.2d 208 (1979) ("The remarks of a single legislator ... are not controlling in analyzing legislative history.").

In addition to legislative silence, USDA's regulatory actions since the AWA's passage in 1966, combined with Congress's inaction, further

suggest Congress has not spoken directly to the precise question under consideration. "Ordinarily, and quite appropriately, courts are slow to attribute significance" to legislative acquiescence. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600, 103 S.Ct. 2017, 2032, 76 L.Ed.2d 157 (1983). Here, however, one can draw an inference of ambiguity, however minimal, from Congress's inaction.

USDA has drawn a lengthy and unerring distinction between AWA license issuance versus renewal. USDA promulgated its first regulations interpreting the AWA on February 24, 1967. *See* Laboratory Animal Welfare, 32 Fed.Reg. 3270 (Feb. 24, 1967). Section 2.4 was titled "Issuance of licenses," and USDA could not "issue[ ]" a license absent a prior demonstration of compliance. *Id.* at 3271. By contrast, § 2.8 was titled "Renewal and termination." *Id.* In order to renew a license and avoid automatic termination, a licensee had to fulfill two purely administrative annual requirements: (1) file a form documenting specified dollar receipts and (2) pay a renewal fee. *Id.*

The significance of the contrast between § 2.4 (issuance) and § 2.8 (renewal) is highlighted by § 2.5, titled "Duration of license." *Id.* Section 2.5 laid out three, independent methods by which a license may be terminated. *Id.* First, under subsection (a), a license could be "revoked or suspended" for failure to comply with AWA standards after notice, hearing, and appeal. *Id.* Second, under subsection (b), a license could be "automatically terminated" pursuant to § 2.8, which governs renewal. *Id.* Third, under subsection (c), a license could be "voluntarily terminated" upon the licensee's request. *Id.* It has thus been clear since 1967 that USDA regulations do not authorize automatic termination for failure to comply with animal welfare standards. Automatic termination occurs only if a licensee fails to meet its purely administrative obligations.

Subsequent versions of the regulations have maintained this distinction. *See, e.g.*, Animal Welfare, 54 Fed.Reg. 36123–01 (Aug. 31, 1989); Animal Welfare, Licensing and Records, 60 Fed.Reg. 13893–01 (Mar. 15, 1995); Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed.Reg. 42089–01 (July 14, 2004). Despite this nearly half-century old interpretation, the legislative history does not disclose any serious attempt to overturn USDA's 1967 rulemaking. Congress's legislative acquiescence adds weight to USDA's proposition that 7 U.S.C. § 2133 is

ambiguous as to license renewal.

After applying the traditional canons of statutory interpretation to both the relevant text and legislative history, we find Congress has not spoken directly to whether the AWA prohibits USDA from renewing a license when USDA knows an exhibitor has failed to comply with the standards governing the humane handling, care, treatment and transportation of animals on the anniversary date of his or her license. Accordingly, we proceed to Chevron Step Two.

2. Chevron Step Two

Under Chevron Step Two, the question for this Court is "whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843, 104 S.Ct. at 2782. Because Congress has expressly delegated authority to USDA to elucidate the meaning of 7 U.S.C. § 2133 through regulation, those regulations "are given controlling weight unless arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44, 104 S.Ct. at 2782. If USDA's construction of the statute is reasonable in light of the policies committed to its care by the AWA, this Court may not substitute its own construction of the statutory provision. *Id.* at 845, 104 S.Ct. at 2783. Our duty is to decide whether USDA's construction is a reasonable one in light of the statutory scheme. *Id.*

a. Post hoc rationalization

We initially address ALDF's assertion that USDA's license renewal scheme is not entitled to *Chevron* deference because USDA's view is merely a litigation position and not a reasoned interpretation of the AWA. "An after-the-fact rationalization of agency action—an explanation developed for the sole purpose of defending in court the agency's acts"—is not entitled to deference. *Gonzalez,* 212 F.3d at 1350; *see also Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action."). ALDF raises two reasons why USDA's interpretation is merely a post hoc rationalization. We address each in turn.

First, ALDF argues Goldentyer's March 28, 2012 letter demonstrates

USDA, prior to this litigation, considered demonstrated compliance a statutory prerequisite for AWA license renewal.[9] The letter says USDA intended to renew Seaquarium's exhibitor license because it found Seaquarium was in "compliance with the regulations and standards, and none of the other criteria for license denial under Section 2.11 or 2.12 are applicable." Contrary to ALDF's protestations, the letter does not prove USDA's interpretation of 7 U.S.C. § 2133 is a post hoc litigation position.[10]

As discussed above, USDA first articulated its license renewal policy not during this litigation, but in 1967. *See* Laboratory Animal Welfare, 32 Fed.Reg. 3720, 3721, §§ 2.4–2.5 (Feb. 24, 1967) (setting independent

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[9] Though ALDF mentioned Goldentyer's letter in its complaint and briefing before the district court, ALDF never submitted the letter itself into this Court's record. ALDF filed a motion with this Court to supplement the record with the letter from Goldentyer. ALDF asks us to admit the letter pursuant to Federal Rule of Appellate Procedure 10(e)(2) or, in the alternative, this Court's equitable powers.

We deny the motion to supplement pursuant to Rule 10(e)(2). The Rule states "[i]f anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected" by the court of appeals. Supplementation under Rule 10(e)(2) is not warranted because the parties never presented the letter to the district court, nor did they inadvertently omit the letter from the record. *See Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir.1986) ("Because the information in the affidavits was not before the district court in any form, and because neither of the parties relied on the evidence at an earlier point in the proceedings, Fed. R.App. P. 10(e) is inapplicable....").

We also decline to admit the letter pursuant to our equitable powers because its admission would not establish beyond any doubt the proper resolution of the pending issues. *See CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir.2000) ("A primary factor which we consider in deciding a motion to supplement the record is whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issues."). With regard to the post hoc litigation argument explained *infra*, this letter alone does not outweigh the USDA's statutory interpretation embodied in notice-and-comment rulemaking for nearly fifty years. With regard to the administrative record issue explained *infra* in footnote 13, the district court did not err in disregarding the administrative record because examining the record would have been pointless. Supplementing the record with the letter would thus not substantially aid the resolution of the issues on appeal.

[10] Although we deny the motion to supplement the record, we still take notice and consider those portions of the letter quoted in ALDF's complaint. Again, we assume, without deciding, that USDA renewed the license despite knowing there was evidence Seaquarium was violating several AWA standards. *See supra* footnote 2.

requirements for license issuance versus renewal). While Goldentyer's letter "may not harmonize perfectly" with earlier USDA interpretations, *Gonzalez,* 212 F.3d at 1350, this is not a case where the agency's position is "wholly unsupported by regulations, rulings, or administrative practice," *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 212, 109 S.Ct. 468, 473–74, 102 L.Ed.2d 493 (1988). Put another way, one paragraph, from one letter, from one regional administrator, does not outweigh an agency's statutory interpretation embodied in notice-and-comment rulemaking for nearly fifty years.

Second, ALDF contends USDA's interpretation is inconsistent with its own regulations. ALDF trains its attention on two regulations: 9 C.F.R. § 2.1(c)(2) and § 2.3(a).

Under § 2.1(c)(2), a license will be issued when the "applicant has paid the application fee of $10 and the annual license fee indicated in § 2.6 to the appropriate Animal Care regional office for an initial license, and, in the case of a license renewal, the annual license fee has been received by the appropriate Animal Care regional office on or before the expiration date of the license." ALDF argues the regulation says a "license renewal" is "issued," thus contradicting USDA's interpretation that "issue" in 7 U.S.C. § 2133 does not apply to renewal.

The other allegedly inconsistent regulation is § 2.3(a). According to § 2.3(a), "[e]ach applicant" shall demonstrate his or her compliance with the AWA standards, and "[e]ach applicant for an initial license or license renewal" shall make itself available for inspection. ALDF argues this subsection establishes that renewal applicants, just like initial applicants, are required to comply with AWA standards before USDA makes any licensing decision.

ALDF reads too much significance into these two (and the USDA admits) poorly drafted regulatory subsections. Under well-established administrative law, courts defer to an agency's consistent interpretation of its own regulation, "which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945). Such deference is due particularly when the agency "has made a written interpretation of the regulation or has maintained a longstanding

policy on the subject." *McKee v. Sullivan*, 903 F.2d 1436, 1438 n. 3 (11th Cir.1990). The regulations issued in 1967 establish USDA has long adhered to the interpretation that issuance and renewal are separate processes, and compliance with AWA standards is not a prerequisite to renewal. *See* Laboratory Animal Welfare, 32 Fed.Reg. 3720 (Feb. 24, 1967) (differentiating between issuance and renewal of licenses). USDA is therefore entitled to significant deference in interpreting the meaning of §§ 2.1(c)(2) and 2.3(a) within the AWA regulatory framework.

As USDA explains, § 2.1(c)(2) is a payment timing provision; the regulation specifies the moment in time at which an applicant satisfies the licensing requirements after submitting his or her fee. Prior to 2004, § 2.1(c)(2) did not mention renewal and required the application fee to "clear [ ] normal banking procedures." *See* Animal Welfare, 54 Fed.Reg. 36123–01, 36148 (Aug. 31, 1989). Responding to comments from the public, in 2004 USDA eliminated the requirement for bank clearance and instead imposed a penalty for bounced checks. Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed.Reg. 42089–01, 42091 (July 14, 2004). To accomplish this objective, USDA added a new clause mentioning "license renewal" to clarify the bank clearance requirement no longer applied to either initial or renewal licenses. *See id.* Viewed this way, USDA's interpretation of § 2.1(c)(2) is reasonable. This is especially so when there is no indication in the rulemaking record USDA intended, through this minor amendment, to reverse its four-decade long policy of distinguishing between license issuance and renewal. *Cf. Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468, 121 S.Ct. 903, 909–10, 149 L.Ed.2d 1 (2001) (a lawmaking entity "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes").

Additionally, USDA proffers that § 2.3(a) does not condition license renewal on demonstrated compliance with AWA standards. Rather, § 2.3(a) affirms that initial and renewal applicants have an ongoing legal duty to maintain compliance and submit to random inspections. Violation of this duty can result in enforcement proceedings. We find this to be a plausible interpretation of § 2.3(a). Subsection (b), unlike subsection (a), applies only to initial applicants and requires a demonstration of compliance "before [USDA] will issue a license." USDA's credible interpretation of § 2.3(a) is supported by the rulemaking record. During its

1989 notice-and-comment rulemaking, USDA deleted the phrase "before a license will be issued" from a proposed 1987 rule to illuminate that renewal is not conditioned on prior demonstrated compliance. *See* Animal Welfare Regulations, 54 Fed.Reg. 10835–01, 10840 (proposed Mar. 15, 1989).

While USDA deserves no plaudits for its regulatory draftsmanship, the two regulatory subsections cited by ALDF fail to render USDA's license renewal interpretation "plainly erroneous or inconsistent," *Bowles,* 35 U.S. at 414, 65 S.Ct. at 1217. USDA's explanations of these provisions' intended meaning and relationship to the whole regulatory framework are imminently reasonable. These regulations thus do not render USDA's interpretation of 7 U.S.C. § 2133 a mere post hoc litigation position.

b. Reasonableness of agency interpretation

Having found USDA's interpretation of the AWA license renewal scheme is entitled to deference, we turn to whether that interpretation is reasonable under *Chevron* Step Two. We conclude USDA's interpretation—which does not condition renewal on compliance with animal welfare standards on the anniversary of the license issuance date—is a reasonable one. The USDA's renewal scheme is a sensible policy choice that balances the competing demands of due process and animal welfare.

USDA's administrative renewal process requires a licensee to submit an application fulfilling three requirements: (1) a certification "that, to the best of applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards," 9 C.F.R. § 2.2(b); (2) payment of an annual fee, *id.* § 2.6(c); and (3) submission of an annual report, *id.* § 2.7(d).[11] *See* Rules and Regulations, Department of Agriculture, Animal Welfare; Licensing and Records, 60 Fed.Reg. 13893–01, 13894 (Mar. 15, 1995) (creating three renewal requirements). Compliance with AWA standards is not a condition precedent for renewal. *Compare* 9 C.F.R. § 2.2(b)

[11] As an exhibitor, Seaquarium's annual reports must "set forth in his or her license renewal application and annual report the number of animals owned, held, or exhibited by him or her, including those which are leased, during the previous year or at the time he signs and dates the report, whichever is greater." 9 C.F.R. § 2.7(d).

(stating USDA "will renew" a license after fulfilling administrative requirements), *with id.* § 2.3(b) (stating applicant for "initial license" shall "demonstrate compliance with regulations and standards ... before [USDA] will issue a license"). After obtaining an initial license, licensees are subject to random inspections, *id.* § 2.3, and USDA may bring enforcement proceedings to suspend or revoke a license, *id.* § 2.5; 7 U.S.C. § 2149.

USDA's construction of the AWA's license renewal process was "a reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845, 104 S.Ct. at 2783. USDA's administrative renewal scheme furthers the AWA's competing goals of promoting animal welfare and affording due process to licensees. Purely administrative renewal keeps USDA's records up-to-date, and then allows the agency to protect animal welfare through random, unannounced inspections. Given its limited resources, USDA could not annually inspect the facilities of every zoo, aquarium or other exhibitor across the country,[12] or initiate license termination proceedings for every violation, no matter how minor. USDA has exercised its "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *See Massachusetts v. EPA*, 549 U.S. 497, 527, 127 S.Ct. 1438, 1459, 167 L.Ed.2d 248 (2007). At the same time, the exclusive use of enforcement proceedings to suspend or revoke licenses for noncompliance fosters Congress's intent to protect licensees from arbitrary agency action, as codified at 7 U.S.C. § 2149. USDA's interpretation restrains the agency from using the renewal process as a means to bypass licensees' right to notice, a hearing, and an appeal.

ALDF also claims the renewal process is unreasonable because, according to the agency's regulations, USDA is obligated to renew a license even if USDA knows the licensee is failing to comply with the AWA standards. USDA's "rubber-stamping" licensing scheme thus allegedly sanctions animal abuse in direct contravention of congressional intent.

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[12] As of 2004, USDA regulated over 2,500 exhibitors possessing AWA licenses. Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed.Reg. 42089–01, 42099 (July 14, 2004).

ALDF overlooks that, after granting a license renewal, USDA retains the authority under its regulations to suspend or revoke a license for noncompliance. Indeed, according to USDA's experience administering the AWA, revoking a license for a minor infraction does not always promote maximum animal welfare. Animal Welfare, Inspection, Licensing, and Procurement of Animals, 69 Fed.Reg. 42089–01, 42094 (July 14, 2004). Due to the threat of USDA enforcement and the imposition of sanctions less severe than revocation, exhibitors are incentivized to rectify violations within a short time window. *See id.* According to the USDA, this brand of cooperative enforcement "has been more effective than enforcement actions for each citation." *Id.* Since USDA issues numerous citations to exhibitors for minor violations that do not directly or immediately impact animal welfare, it is "unrealistic and counterproductive" to risk the stressful release or transfer or animals by making license renewal contingent on demonstrated compliance. *See id.*

The AWA licensing regulations embody a reasonable accommodation of the conflicting policy interests Congress has delegated to the USDA. The regulations are entitled to *Chevron* deference, and USDA therefore did not act arbitrarily or capriciously by renewing Seaquarium's license.[13]

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[13] ALDF raises one additional issue. ALDF argues the district court erred in failing to require production of the administrative record to determine whether USDA's decision to renew the April 2012 license was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). ALDF contends Goldentyer's letter shows USDA granted the April 2012 license renewal because it found Seaquarium's facilities complied with AWA standards. Assuming the agency was not required to ensure Seaquarium's compliance with AWA standards before renewing the license, USDA's finding that Seaquarium was in compliance should, ALDF urges, still be reviewed upon remand to the district court. Under the *Chenery* doctrine, "[w]hen an administrative decision is based on inadequate or improper grounds, a reviewing court may not presume that the [agency] would have made the same decision on other, valid grounds." *Am. Pub. Transit Ass'n v. Lewis,* 655 F.2d 1272, 1278 (D.C.Cir.1981); *see SEC v. Chenery Corp. (II),* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947); *SEC v. Chenery Corp. (I),* 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943).

There is no need to remand this case to the district court for additional fact finding because the agency's alleged error was harmless. An agency decision is harmless "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *U.S. Steel Corp. v. EPA,* 595 F.2d 207, 215 (5th Cir.1979) (quotation omitted) (binding authority because in *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981); *see* 5 U.S.C. § 706 (when reviewing agency action "due

IV. CONCLUSION

Administration of the AWA standards involves a subject matter that is "technical, complex, and dynamic." *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339, 122 S.Ct. 782, 789, 151 L.Ed.2d 794 (2002). Tasked by Congress to perform the difficult job of reconciling the inherently conflicting interests of due process and animal welfare, USDA has exercised its expertise to craft a reasonable license renewal scheme based on a permissible construction of the AWA. USDA has acted within the bounds of Congress's delegated authority.

As long as USDA refuses to initiate a discretionary enforcement proceeding, the remedy ALDF and Lolita's legion of supporters seek lies not in the federal courts, but in the halls of Congress. Our democratically elected leaders alone have the authority to limit USDA's license-renewal discretion in this matter and to demand annual, substantive compliance with animal welfare standards. While we are sensitive to the plight of Lolita and other animals exhibited across this country, we cannot say USDA violated the AWA by renewing Seaquarium's license through its purely administrative scheme. For the foregoing reasons, we must affirm the district court's grant of summary judgment to USDA.

AFFIRMED.

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account shall be taken of the rule of prejudicial error").

ALDF has conceded Seaquarium fulfilled the only three licensing renewal criteria required by law: (1) filing a certification of compliance, (2) paying a fee, (3) and submitting an annual report. Because there is no factual dispute about whether USDA correctly found Seaquarium satisfied all licensing requirements, the district court had no reason to examine the administrative record. Directing the district court to scrutinize the administrative record to evaluate whether USDA complied with a fictitious legal requirement would be the height of pointlessness. *Salt River Project Agric. Improvement & Power Dist. v. United States,* 762 F.2d 1053, 1060, n. 8 (D.C.Cir.1985) ("When it is clear that based on the valid findings the agency would have reached the same ultimate result, we do not improperly invade the administrative province by affirming.").

EQUAL ACCESS TO JUSTICE ACT

DEPARTMENTAL DECISIONS

In re: LE ANNE SMITH.
Docket No. 14-0020.
Decision and Order.
Filed January 2, 2015.

EAJA – Appealability – Application, time for filing – Excessive demand – Fees and expenses – Net worth – Special circumstances – Substantially justified.

Larry J. Thorson, Esq. for Applicant.
Colleen A. Carroll, Esq. for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

On December 6, 2013, Le Anne Smith instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [EAJA Rules of Practice] by filing an EAJA Application for Award of Attorney's Fees and Expenses for Le Anne Smith [EAJA Application]. Ms. Smith requests an award of $17,450 for attorney fees and $815 for other expenses which she incurred in connection with *Perry*, AWA Docket No. 05-0026, an adversary adjudication which the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], instituted against her under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act].[1]

On March 6, 2014, APHIS filed "Agency Answer to Application Filed by Le Anne Smith for Attorney's Fees and Expenses" [Answer] denying the allegations in Ms. Smith's EAJA Application and requesting denial of

[1] EAJA App. at 3.

Ms. Smith's EAJA Application.[2] On April 14, 2014, Ms. Smith filed a response to APHIS's Answer.[3]

On May 5, 2014, Administrative Law Judge Jill S. Clifton [ALJ] issued a Decision and Order Granting EAJA Fees [ALJ's Decision] awarding Ms. Smith $15,358.33 for attorney fees and $815 for other expenses which she incurred in connection with *Perry*, AWA Docket No. 05-0026.[4] On June 5, 2014, APHIS appealed the ALJ's Decision to the Judicial Officer.[5] On July 3, 2014, Ms. Smith filed a response to APHIS's Appeal Petition.[6] On July 8, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I issue this final decision awarding Ms. Smith $15,295.83 for attorney fees and $815 for other expenses that she incurred in connection with *Perry*, AWA Docket No. 05-0026.

DISCUSSION

The Equal Access to Justice Act requires an agency that conducts an adversary adjudication to award fees and other expenses to a prevailing party, other than the United States, as follows:

> **§ 504. Costs and fees of parties**
>
> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be

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[2] Answer ¶ IV at 25.
[3] Applicant's Resp. Br.
[4] ALJ's Decision ¶ 20 at 11.
[5] Agency's Pet. for Appeal of Decision and Order Granting EAJA Fees [Appeal Petition].
[6] Le Anne Smith's Br. in Support of Decision and Order Granting EAJA Fees.

> determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

The ALJ found Ms. Smith was a prevailing party in *Perry*, AWA Docket No. 05-0026, APHIS's position in the adversary adjudication was not substantially justified, and no special circumstances make an award to Ms. Smith unjust.[7] While APHIS concedes Ms. Smith was a prevailing party in *Perry*, AWA Docket No. 05-0026 (Appeal Pet. at 8, 14), APHIS raises eight issues on appeal and requests that I reverse the ALJ's Decision.

First, APHIS contends the ALJ erroneously concluded that Ms. Smith's EAJA Application was timely filed (Appeal Pet. at 7-13).

The Equal Access to Justice Act and the EAJA Rules of Practice provide that a party must submit an application for fees and other expenses to the agency from which the party seeks fees and other expenses within thirty (30) days after final disposition of the adversary adjudication.[8] The term "final disposition" is defined, as follows:

> **§ 1.193 Time for filing application.**
>
> . . . .
> (b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b).

The ALJ held Ms. Smith and APHIS would have had sixty (60) days after entry of the Judicial Officer's September 11, 2013 Order to seek

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[7] ALJ's Decision ¶¶ 2, 7, 10-14 at 2, 4-7.
[8] 5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a).

judicial review, as follows:

> 3. . . . . [T]heoretically the parties would have had 60 days to seek review of the Judicial Officer's Order in the U.S. Court of Appeals (60 days from the date of the Judicial Officer's Order, 7 U.S.C. § 2149). . . .
>
> 4. As a practical matter, the Judicial Officer spoke for the Secretary of Agriculture in his Order issued September 11, 2013, so APHIS would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. As a practical matter, Le Anne Smith won, so Le Anne Smith would not appeal the Judicial Officer's Order to the U.S. Court of Appeals. . . .

ALJ's Decision ¶¶ 3-4 at 2-3. Sixty days after September 11, 2013 is November 10, 2013; however, because November 10, 2013 was a Sunday and Monday, November 11, 2013 was a legal holiday, Ms. Smith was required to seek judicial review of *Perry*, No. 05-0026, 72 Agric. Dec. __ (U.S.D.A. Sept. 11, 2013) (Decision as to Le Anne Smith)[9] [hereinafter referred to as "*Perry*"], no later than Tuesday, November 12, 2013.[10] Therefore, the ALJ concluded Ms. Smith was required to file her EAJA Application no later than December 12, 2013, and Ms. Smith timely filed her EAJA Application on December 6, 2013.

APHIS, relying on 7 U.S.C. § 2149(c), contends Ms. Smith's December 6, 2013 EAJA Application was not timely filed (Appeal Pet. at 7-8).

The Animal Welfare Act provides that any dealer, exhibitor, research facility, intermediate handler, or operator of an auction sale aggrieved by a final order of the Secretary of Agriculture may seek judicial review, as follows:

> **§ 2149. Violations by licensees**

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[9] *Available at* http://nationalaglawcenter.org/wp-content/uploads//assets/decisions/091113.Perry_.DO_.AWA05-0026.pdf.

[10] See FED. R. APP. P. 26(a)(1).

. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Court of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

7 U.S.C. § 2149(c).

APHIS asserts Ms. Smith was not a dealer, exhibitor, research facility, intermediate handler, or operator of an auction sale aggrieved by *Perry* and had no right to seek judicial review of the Judicial Officer's September 11, 2013 Order. APHIS contends the Judicial Officer's decision disposing of the merits of the proceeding became final and unappealable on September 11, 2013; Ms. Smith was required to file her EAJA Application no later than October 11, 2013; and Ms. Smith's December 6, 2013 EAJA Application was not timely filed.

I conclude APHIS has confused appealability in the context of the Equal Access to Justice Act with the merits of an appeal of the agency disposition of the underlying adversary adjudication. Even when an appeal of an adversary adjudication giving rise to an Equal Access to Justice Act application is nonjusticiable, if the governing statute relevant to the underlying agency adjudication allows an appeal generally, the underlying order must be considered "appealable" for the purposes of an Equal Access to Justice Act proceeding. The thirty-day deadline for filing an Equal Access to Justice Act application does not expire until thirty (30) days after the time to appeal the underlying order has expired or the appeal has

concluded.[11] Because Ms. Smith could have potentially appealed *Perry* pursuant to 7 U.S.C. § 2149(c), the thirty-day deadline for filing her EAJA Application did not begin to run until sixty (60) days following the entry of the Judicial Officer's September 11, 2013 Order and Ms. Smith's December 6, 2013 EAJA Application was timely filed. Therefore, I reject APHIS's contention that the ALJ's conclusion that Ms. Smith's EAJA Application was timely filed, is error.

Second, APHIS contends the ALJ erroneously failed to reject Ms. Smith's EAJA Application based upon Ms. Smith's failure to identify the APHIS position that Ms. Smith alleges was not substantially justified, as required by 7 C.F.R. § 1.190(a) (Appeal Pet. at 14-15).

The EAJA Rules of Practice require that an applicant identify the United States Department of Agriculture position which the applicant alleges was not substantially justified or show that the United States Department of Agriculture demand was substantially in excess of, and was unreasonable when compared with, the decision in the underlying adversary adjudication, as follows:

> **§ 1.190 Contents of application.**
>
> (a) An application for an award of fees and expenses under EAJA shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:
>
> (1) Show that the applicant has prevailed and identify the position of the Department that the applicant alleges was not substantially justified and shall briefly state the basis for such allegation; or
>
> (2) Show that the demand by the Department in the proceeding was substantially in excess of, and was

[11] Adams v. SEC, 287 F.3d 183 (D.C. Cir. 2002).

> unreasonable when compared with, the decision in the proceeding.

7 C.F.R. § 1.190(a).

Ms. Smith identifies the APHIS position which she alleges was not substantially justified, as follows:

> 3. The position of the USDA was not substantially justified in bringing Le Anne Smith into this matter as is apparent by the total lack of evidence submitted by [APHIS] as to her involvement in any of the alleged violations set forth in the Government's Complaint.

EAJA App. ¶ 3 at 1-2. Ms. Smith's identification of the APHIS position which Ms. Smith alleges was not substantially justified is marked by perplexing brevity; however, Ms. Smith incorporates into the EAJA Application all of the arguments in *Perry*, AWA Docket No. 05-0026, as follows:

> 1. This Court is familiar with the relevant facts and proceedings. To the extent that facts, law, procedural developments, trial transcript, exhibits, arguments, or circumstances other than those specifically cited in this application may be relevant, Le Anne [Smith] incorporates these by reference and asks the Court to note the same.

EAJA App. ¶ 1 at 1.

Ms. Smith's arguments in *Perry*, AWA Docket No. 05-0026, identify the APHIS position which Ms. Smith alleges was not substantially justified and provide the basis for Ms. Smith's allegation. Therefore, I find Ms. Smith complied with 7 C.F.R. § 1.190(a) by incorporating the arguments presented in the underlying adversary adjudication into Ms. Smith's EAJA Application, and I reject APHIS's contention that the ALJ erroneously found Ms. Smith identified the APHIS position that Ms. Smith alleges was not substantially justified.

Third, APHIS contends its position in *Perry*, AWA Docket No. 05-0026, was substantially justified (Appeal Pet. 16-21).

The EAJA Rules of Practice provide that a prevailing party may receive an award, unless the position taken by the United States Department of Agriculture in the underlying adversary adjudication was substantially justified.[12] APHIS bears the burden of proving that its position in *Perry*, AWA Docket No. 05-0026, was substantially justified. In order to meet its burden of proof, APHIS must show that its position had a reasonable basis in both law and fact.[13] APHIS's failure to prevail in the underlying adversary adjudication does not create a presumption that APHIS's position was not substantially justified.[14]

In the underlying adversary adjudication, APHIS contended Ms. Smith was jointly responsible with Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc. [PWR], for violations of the Animal Welfare Act because Ms. Smith was a de facto partner in the business operated by Mr. Perry and PWR or a de facto principal of PWR and played a critical role in the operation of Mr. Perry and PWR's business.

I have long held that when people act together in the exhibition of

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[12] 7 C.F.R. § 1.185(a)(1).

[13] *See* Pierce v. Underwood, 487 U.S. 552, 565 (1988) (holding a substantially justified position is one that would satisfy a reasonable person and must have a reasonable basis in law and fact); Harmon v. United States, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, well founded in law and fact, and solid); Frey v. CFTC, 931 F.2d 1171, 1174 (7th Cir. 1991) (stating the standard for "substantial justification," within the meaning of the Equal Access to Justice Act, is one of simple reasonableness; to avoid an award of fees the agency must prove that the proceeding had a reasonable basis in law and fact); Derickson Co. v. NLRB, 774 F.2d 229, 232 (8th Cir. 1985) (holding the test of substantial justification is a practical one, namely, whether the agency's position was reasonable both in law and fact); Iowa Express Distribution, Inc. *v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.) (stating the test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

[14] Scarborough v. Principi, 541 U.S. 401, 415 (2004) (stating "substantially justified" is not to be read to raise a presumption that the government's position was not substantially justified simply because it lost the case); Harmon v. United States, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, even if it is not correct); S & H Riggers & Erectors, Inc. v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982) (stating the burden of showing substantial justification for a case the government lost is not insurmountable).

animals, they can be held jointly and severally liable for violations of the Animal Welfare Act and their relationship need not meet the requirements for a partnership or joint venture.[15] Therefore, I conclude APHIS's position in *Perry*, AWA Docket No. 05-0026, that Ms. Smith was jointly responsible with Mr. Perry and PWR for Animal Welfare Act violations had a reasonable basis in law.

However, in the underlying adversary adjudication, APHIS introduced almost no evidence that Ms. Smith jointly engaged in any animal exhibition. Ms. Smith, whom the ALJ found to be an extremely credible witness, testified extensively and provided an affidavit regarding her minimal connection with the business conducted by Mr. Perry and PWR. Ms. Smith's testimony and affidavit were corroborated by numerous witnesses, including APHIS employees called by APHIS. When I examine the record in the underlying adversary adjudication, I find APHIS did not have a reasonable basis in fact for its position regarding Ms. Smith. As APHIS failed to prove that it had a reasonable basis in fact for its position regarding Ms. Smith, I conclude APHIS's position in the underlying adversary adjudication was not substantially justified.

Fourth, APHIS contends the ALJ erroneously failed to address Ms. Smith's allegation of excessive demand (Appeal Pet. at 21). Ms. Smith alleges APHIS made an excessive and unreasonable demand in the underlying adversary adjudication.[16] The EAJA Rules of Practice provide that an adjudicative officer shall award fees and other expenses related to defending against an excessive demand.[17]

I agree with APHIS that the ALJ did not address Ms. Smith's allegation

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[15] White, 49 Agric. Dec. 123, 154 (U.S.D.A. 1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); Post, 47 Agric. Dec. 542, 547 (U.S.D.A. 1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf.* McCall, 52 Agric. Dec. 986, 998 (U.S.D.A. 1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

[16] EAJA App. ¶ 4 at 2.

[17] 7 C.F.R. § 1.185(b).

regarding APHIS's excessive and unreasonable demand. I find the ALJ's failure to address Ms. Smith's allegation harmless error because Ms. Smith did not request fees and other expenses related to defending against APHIS's purported excessive and unreasonable demand, and I decline to remand this proceeding to the ALJ to address Ms. Smith's allegation.

Fifth, APHIS contends the ALJ erroneously failed to find special circumstances that make an award to Ms. Smith unjust. APHIS asserts Larry J. Thorson, who represented Ms. Smith in *Perry*, AWA Docket No. 05-0026, also represented Mr. Perry and PWR in that proceeding, and Ms. Smith's EAJA Application does not distinguish between the legal services performed on her behalf and the legal services performed on behalf of Mr. Perry and PWR. APHIS contends Ms. Smith's inability to identify the attorney fees and expenses specifically attributable to her defense in *Perry*, AWA Docket No. 05-0026, constitutes a special circumstance which makes an award of attorney fees and other expenses to Ms. Smith unjust (Appeal Pet. at 22-24).

In the underlying adversary adjudication, APHIS contended Ms. Smith was jointly responsible with Mr. Perry and PWR for violations of the Animal Welfare Act because Ms. Smith was a de facto partner in the business operated by Mr. Perry and PWR or a de facto principal of PWR and played a critical role in the operation of Mr. Perry and PWR's business. Ms. Smith alleges, and I find, based upon my review of the record in *Perry*, AWA Docket No. 05-0026, that Ms. Smith was required to defend herself throughout the entire proceeding.[18]

Similarly, Mr. Thorson describes Ms. Smith's involvement in the proceeding as coextensive with the involvement of Mr. Perry and PWR, and Mr. Thorson asserts he attributed one-third of the bill for attorney fees and other expenses for the defense of *Perry*, AWA Docket No. 05-0026, to Ms. Smith "because there were three defendants and this was the most sensible way to allocate the time spent on the defense" of *Perry*, AWA Docket No. 05-0026.[19]

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[18] EAJA App. ¶ 9 at 3.

[19] Aff. of Larry J. Thorson in Support of EAJA App. by Le Anne Smith at 2, dated December 5, 2013.

Based upon my review of the record in *Perry*, AWA Docket No. 05-0026, I reject APHIS's contention that Ms. Smith's inability to identify the attorney fees and expenses specifically attributable to her defense in *Perry*, AWA Docket No. 05-0026, constitutes a special circumstance which makes an award of attorney fees and other expenses to Ms. Smith unjust, and I reject APHIS's contention that the ALJ's failure to find special circumstances that make an award to Ms. Smith unjust is error.

Sixth, APHIS contends the ALJ erroneously failed to reject Ms. Smith's EAJA Application because Ms. Smith failed to provide a net worth exhibit, as required by 7 C.F.R. § 1.191(a) (Appeal Pet. at 24-32).

The EAJA Rules of Practice require that an applicant for fees and expenses provide an exhibit showing the net worth of the applicant, as follows:

> **§ 1.191 Net worth exhibit.**
>
> (a) An applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1.184 of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

7 C.F.R. § 1.191(a).

The EAJA Application states Ms. Smith's net worth was less than $100,000 at the time APHIS initiated and litigated *Perry*, AWA Docket No. 05-0026.[20] In support of this allegation, Ms. Smith submitted an affidavit in which Ms. Smith attests that, at the time APHIS initiated and

[20] EAJA App. ¶ 6 at 2.

litigated the underlying adversary adjudication, her net worth was under $100,000 and she had no income because she is a full-time housewife taking care of her children.[21]

The ALJ could have required Ms. Smith to file additional information to determine her eligibility for an Equal Access to Justice Act award. Instead, the ALJ found Ms. Smith's affidavit sufficient to determine her eligibility for an Equal Access to Justice Act award, as follows:

> 15. Le Anne Smith's net worth did not exceed two million dollars at the time of the adjudication. Evidence during the hearing proved this; Le Anne Smith's EAJA application, including her Affidavit executed December 5, 2013, further confirms this.

ALJ's Decision ¶ 15 at 7.

Based upon the ALJ's finding and Ms. Smith's uncontroverted affidavit, I decline to remand this proceeding to the ALJ to require Ms. Smith to file additional information regarding her net worth. Moreover, I find no basis on which to disturb the ALJ's determination that, at the time APHIS initiated *Smith*, AWA Docket No. 05-0026, Ms. Smith's net worth did not exceed $2,000,000.

Seventh, APHIS contends the ALJ erroneously failed to reject Ms. Smith's EAJA Application because Ms. Smith's EAJA Application was not accompanied by full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c) (Appeal Pet. at 26).

The EAJA Rules of Practice require documentation of fees and expenses, as follows:

> **§ 1.192 Documentation of fees and expenses.**
>
> (a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test,

[21] Aff. of Le Anne Smith in Support of EAJA App. at 1, dated December 5, 2013.

> project, or similar matter, for which an award is sought.
>
> (b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing on behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.
>
> > (1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.
> >
> > (2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.
>
> (c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c). Ms. Smith attached to the EAJA Application full documentation of the fees and expenses for which Ms. Smith seeks an Equal Access to Justice Act award. The documentation states the actual time expended and the hourly rate at which Mr. Thorson computed attorney fees and describes the specific services performed by Mr. Thorson and the other expenses. In support of this documentation, Ms. Smith submitted Mr. Thorson's affidavit in which Mr. Thorson attests to the accuracy of the documentation of the fees and expenses and the hourly rate at which he computed attorney fees in *Perry*, AWA Docket No. 05-0026.[22] Therefore, I find Ms. Smith's EAJA Application was

[22] Aff. of Larry J. Thorson in Support of EAJA App. by Le Anne Smith, dated December 5, 2013.

accompanied by full documentation of fees and expenses attributable to Ms. Smith's defense of the underlying adversary adjudication, as required by 7 C.F.R. § 1.192(a)-(c).

Eighth, APHIS contends the ALJ awarded Ms. Smith attorney fees at the rate of $150 an hour, which exceeds the maximum hourly rate that can be awarded in this proceeding (Appeal Pet. at 34).

The ALJ awarded Ms. Smith attorney fees at the rates of $125 and $150 per hour, as follows:

> 16. The $125.00 per hour maximum attorney fee under EAJA applies until March 3, 2011. The $150.00 per hour maximum attorney fee under EAJA applies beginning March 3, 2011. 7 C.F.R. § 1.186. . . .

ALJ's Decision ¶ 16 at 7. The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed $150 per hour, as follows:

> **§ 1.186 Allowable fees and expenses.**
>
> . . . .
> (b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed $150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b) (2014). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of $150 became effective March 3, 2011.[23] The final rule explicitly states the maximum hourly

[23] 76 Fed. Reg. 11,667 (Mar. 3, 2011).

attorney fees rate of $150 only applies to proceedings initiated on and after the effective date of the final rule, as follows:

> SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from $125.00 to $150.00 for covered proceedings initiated on and after the effective date of this final rule.
>
> DATES: This final rule is effective March 3, 2011.
>
> . . . .
>
> SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from $125.00 to $150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

APHIS initiated the adversary adjudication for which Ms. Smith seeks attorney fees and other expenses, on July 14, 2005.[24] Therefore, the maximum hourly attorney fees rate of $150 set forth in 7 C.F.R. § 1.186(b) (2014) is not applicable to this proceeding, and I find the ALJ erroneously awarded attorney fees at the rate of $150 an hour. Instead, I find the maximum hourly attorney fees rate of $125 is applicable to this proceeding.[25]

Ms. Smith seeks an award of $17,450 for attorney fees based on the $150 per hour rate for attorney services and $815 for other expenses.[26] Ms. Smith based her request for $17,450 for attorney fees upon 349 total

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[24] Perry, No. 05-0026, 72 Agric. Dec. __, slip op. at 1 (U.S.D.A. Sept. 11, 2013) (Decision as to Le Anne Smith), *available at* http://nationalaglawcenter.org/wp-content/uploads//assets/decisions/091113.Perry_.DO_.AWA05-0026.pdf.

[25] 7 C.F.R. § 1.186(b) (2006).

[26] EAJA App. ¶¶ 7-8 at 2-3.

hours of attorney services, with one-third of the total number of hours of attorney services attributable to Ms. Smith's defense of *Perry*, AWA Docket No. 05-0026. However, the ALJ noted that the total number of hours of attorney services for the defense of *Perry*, AWA 05-0026, is 369 hours, one-third of which (123 hours) the ALJ allocated to Ms. Smith.[27] The ALJ also found that communication with legislators is not recoverable,[28] and Mr. Thorson provided 1.9 hours of attorney services related to communications with legislators.

Accordingly, I award Ms. Smith $15,295.83 for attorney fees[29] and $815 for other expenses for a total of $16,110.83 incurred by Ms. Smith in connection with *Perry*, AWA Docket No. 05-0026.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. Ms. Smith is an individual whose address is in Iowa.

3. On July 14, 2005, APHIS instituted an adversary adjudication, *Perry*, AWA Docket No. 05-0026, against Ms. Smith.[30]

4. At the time APHIS initiated *Perry*, AWA Docket No. 05-0026, Ms. Smith had a net worth of less than $100,000.

5. *Perry* became final and unappealable on November 12, 2013.

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[27] ALJ's Decision ¶ 19 at 9.

[28] *See* Dallas Irrigation Dist. v. United States, 91 Fed. Cl. 689, 706 (2010) (holding fees associated with correspondence with legislators and the media are not recoverable under the Equal Access to Justice Act); Hillensbeck v. United States, 74 Fed. Cl. 477, 482 (2006) (holding fees associated with lobbying Congress are not recoverable under the Equal Access to Justice Act).

[29] This award is based upon 123 hours of attorney services attributable to Ms. Smith's defense of *Perry*, AWA Docket No. 05-0026, at an hourly attorney fees rate of $125 for each hour ($15,375) minus one-third of the amount attributable to attorney services related to communications with legislators ($79.17).

[30] Perry, No. 05-0026, 72 Agric. Dec. __, slip op. at 1 (U.S.D.A. Sept. 11, 2013) (Decision as to Le Anne Smith), *available at* http://nationalaglawcenter.org/wpcontent/uploads//assets/decisions/091113.Perry_.DO_.AWA05-0026.pdf.

EQUAL ACCESS TO JUSTICE ACT

6. Ms. Smith's EAJA Application, which was filed on December 6, 2013, twenty-four (24) days after *Perry* became final and unappealable, was timely filed.

7. Ms. Smith was a prevailing party *Perry*.

8. APHIS's position regarding Ms. Smith in *Perry*, AWA Docket No. 05-0026, was not substantially justified.

9. No special circumstances make the award of fees or other expenses to Ms. Smith unjust.

10. Ms. Smith meets all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act and the EAJA Rules of Practice.

11. Ms. Smith incurred attorney fees and other expenses in connection with *Perry*, AWA Docket No. 05-0026, to which she is entitled to an award under the Equal Access to Justice Act and the EAJA Rules of Practice totaling $16,110.83.

For the foregoing reasons, the following Order is issued.

ORDER

Ms. Smith is awarded $16,110.83 for attorney fees and other expenses which Ms. Smith incurred in connection with *In re Craig A. Perry*, AWA Docket No. 05-0026.[1]

RIGHT TO SEEK JUDICIAL REVIEW

Ms. Smith has the right to seek judicial review of this Decision and Order in the courts of the United States having jurisdiction to review the merits of *Perry*.[2] Ms. Smith must seek judicial review within thirty (30) days after the determination of the award of attorney fees and other

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[1] The process by which Ms. Smith may obtain payment of the award in this Order is set forth in 7 C.F.R. § 1.203.

[2] 5 U.S.C. § 504(c)(2); 7 C.F.R. § 1.202.

expenses in this Decision and Order.[3]

The date of the determination of the award of attorney fees and other expenses in this Decision and Order is January 2, 2015.

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In re: JENNIFER CAUDILL, an individual, a/k/a JENNIFER WALKER and JENNIFER HERRIOTT WALKER.
Docket No. 13-0186.
Decision and Order.
Filed February 23, 2015.

EAJA – Adversary adjudication – Allowable fees and expenses – Eligibility – Final disposition.

Colleen A. Carroll, Esq. for Complainant.
William J. Cook, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

On February 28, 2013, Jennifer Caudill instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [EAJA Rules of Practice] by filing "Respondent, Jennifer Caudill a/k/a Jennifer Walker a/k/a Jennifer Herriott Walker's Verified Application for Attorney's Fees and Other Expenses" [EAJA Application]. Ms. Caudill requests an award of $18,090 for attorney fees and $2,648.55 for other expenses which she incurred in connection with *Caudill*, No. 10-0416, an adjudication which the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], instituted against Ms. Caudill under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act]

[3] 5 U.S.C. § 504(c)(2). *See also* Holzbau v. United States, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination, not from the date the party receives a copy of the determination); Sonicraft, Inc. v. NLRB, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).

and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133).[4]

On March 29, 2013, APHIS filed Agency Motion to Strike Application or Request to Stay Proceedings stating no final unappealable disposition of *Caudill*, No. 10-0416, has been issued.[5] Subsequent to APHIS filing its Agency Motion to Strike Application or Request to Stay Proceedings, I issued a final agency decision dismissing *Caudill*, No. 10-0416, as moot.[6]

On September 12, 2014, former Chief Administrative Law Judge Peter M. Davenport[7] [Chief ALJ] issued a Decision and Order [Initial EAJA Decision] awarding Ms. Caudill $18,090 for attorney fees and $2,648.55 for other expenses which Ms. Caudill incurred in connection with *Caudill*, No. 10-0416.[8] On November 3, 2014, APHIS appealed the Chief ALJ's Initial EAJA Decision to the Judicial Officer.[9] On December 8, 2014, Ms. Caudill filed a response to APHIS's Appeal Petition.[10] On December 10, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I issue this final decision denying Ms. Caudill's request for attorney fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416.

DISCUSSION

The Equal Access to Justice Act requires an agency that conducts an adversary adjudication to award fees and other expenses to a prevailing party, other than the United States, as follows:

§ 504. Costs and fees of parties

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[4] EAJA App. ¶ 3 at 1.

[5] Agency Mot. to Strike App. or Request to Stay Proceedings at 2.

[6] Caudill, 73 Agric. Dec. 241 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

[7] Former Chief Administrative Law Judge Peter M. Davenport retired on January 3, 2015.

[8] Chief ALJ's Initial EAJA Decision at 9.

[9] Agency Pet. for Appeal of Initial Decision Awarding Fees and Costs and Supporting Br. [Appeal Petition].

[10] Jennifer Caudill a/k/a Jennifer Walker a/k/a Jennifer Herriott Walker's Resp. to Br. [Response to Appeal Petition].

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

The Chief ALJ found Ms. Caudill was a prevailing party in *Caudill*, No. 10-0416; APHIS's position in *Caudill*, No. 10-0416, was not substantially justified; and no special circumstances make an award to Ms. Caudill unjust.[11] APHIS raises nine issues on appeal and requests that I reverse the Chief ALJ's Initial EAJA Decision.

First, APHIS asserts *Caudill*, No. 10-0416, was not an "adversary adjudication" under the Equal Access to Justice Act or a "covered" proceeding under the EAJA Rules of Practice (Appeal Pet. ¶ IA at 9-15). The Equal Access to Justice Act defines the term "adversary adjudication," as follows:

> **§ 504. Costs and fees of parties**
>
> . . . .
>
> (b)(1) For purposes of this section—
>
> . . . .
>
> (C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting

[11] Chief ALJ's Initial EAJA Decision at 6-9.

> or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993[.]

5 U.S.C. § 504(b)(1)(C). APHIS contends *Caudill*, No. 10-0416, was not an "adversary adjudication" conducted under 5 U.S.C. § 554;[12] Ms. Caudill contends *Caudill*, No. 10-0416, was an "adversary adjudication" conducted under 5 U.S.C. § 554.[13] Neither APHIS nor Ms. Caudill contends that *Caudill*, No. 10-0416, was an "adversary adjudication" as that term is defined in 5 U.S.C. § 504(b)(1)(C)(ii), (iii), or (iv).

The Administrative Procedure Act provides that 5 U.S.C. § 554 applies, as follows:

> **§ 554. Adjudications**
>
> (a) This section applies, according to the provisions thereof in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . .

5 U.S.C. § 554(a). APHIS instituted *Caudill*, No. 10-0416, pursuant to 7 U.S.C. § 2133, seeking termination of Ms. Caudill's Animal Welfare Act license.[14] While Animal Welfare Act license termination proceedings have been determined on the record after an agency hearing,[15]

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[12] Appeal Pet. ¶ IA at 12.

[13] Resp. to Appeal Pet. at 2-3.

[14] The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application therefore in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133). The power to require and to issue licenses under 7 U.S.C. § 2133 includes the power to terminate licenses and to disqualify persons from becoming licensed. Greenly, 72 Agric. Dec. 586, 589 (U.S.D.A. 2013); Vanishing Species Wildlife, Inc., 69 Agric. Dec. 1068, 1070 (U.S.D.A. 2010); Animals of Mont., Inc., 68 Agric. Dec. 92, 94 (2009); Amarillo Wildlife Refuge, Inc., 68 Agric. Dec. 77, 81 (U.S.D.A. 2009); Vigne, 67 Agric. Dec. 1060, 1062 (U.S.D.A. 2008); Bradshaw, 50 Agric. Dec. 499, 507 (U.S.D.A. 1991).

[15] *See* 9 C.F.R. § 2.12 providing that an Animal Welfare Act license may be terminated after a hearing in accordance with the Rules of Practice Governing Formal Adjudicatory

7 U.S.C. § 2133 does not require that Animal Welfare Act license termination proceedings be determined on the record after opportunity for an agency hearing. Therefore, I conclude *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act. Consequently, Ms. Caudill is not entitled to an award of fees and expenses which she incurred in connection with *Caudill*, No. 10-0416.

Moreover, the only proceedings that are "covered" proceedings under the EAJA Rules of Practice are "adversary adjudications," as that term is defined in the Equal Access to Justice Act.[16] As *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act, it was not a "covered" proceeding under the EAJA Rules of Practice.

Second, APHIS contends the Chief ALJ erroneously concluded Ms. Caudill was a "prevailing party" in *Caudill*, No. 10-0416 (Appeal Pet. ¶ IB at 15-20).

On September 7, 2010, APHIS instituted *Caudill*, No. 10-0416, seeking an order terminating Ms. Caudill's Animal Welfare Act license based upon Ms. Caudill's alleged unfitness to hold an Animal Welfare Act license. Ms. Caudill denied APHIS's allegations and opposed termination of her Animal Welfare Act license. On February 1, 2013, the Chief ALJ issued an initial decision in *Caudill*, No. 10-0416, in which he reversed APHIS's determination that Ms. Caudill was unfit to hold an Animal Welfare Act license and dismissed *Caudill*, No. 10-0416. The Chief ALJ's initial decision in *Caudill*, No. 10-0416, did not become final and effective as both APHIS and Ms. Caudill timely appealed the Chief ALJ's initial decision to the Judicial Officer. Prior to the Judicial Officer's issuance of a final agency decision in *Caudill*, No. 10-0416, Ms. Caudill failed to pay an annual Animal Welfare Act license renewal fee, as required by 9 C.F.R. § 2.6, and, on October 16, 2013, Ms. Caudill's Animal Welfare Act license automatically terminated, pursuant to 9 C.F.R. § 2.5(a)(4).

On April 29, 2014, APHIS moved to dismiss *Caudill*, No. 10-0416, as

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

[16] 7 C.F.R. § 1.183(a).

moot, based upon the automatic termination of Ms. Caudill's Animal Welfare Act license. Ms. Caudill failed to file a response to APHIS's motion, and on May 16, 2014, I dismissed *Caudill*, No. 10-0416, as moot stating, as follows:

> Based upon the record before me, I find the automatic termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.5, renders moot the instant proceeding in which the Administrator seeks termination of Animal Welfare Act license number 58-C-0947, pursuant to 9 C.F.R. § 2.12.

Caudill, 73 Agric. Dec. 241, 244 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

The Chief ALJ concluded that Ms. Caudill was the prevailing party in *Caudill*, No. 10-0416, because, although Ms. Caudill's Animal Welfare Act license was terminated, the termination was not related to her fitness to hold an Animal Welfare Act license.[17]

A "prevailing party" is one in whose favor a judgment is rendered.[18] While *Caudill*, No. 10-0416, 73 Agric. Dec. 241 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), contains no finding that Ms. Caudill was unfit to hold an Animal Welfare Act license, it contains no judgment rendered in favor of Ms. Caudill. Instead, the specific outcome sought by APHIS in *Caudill*, No. 10-0416, and opposed by Ms. Caudill, was obtained due to Ms. Caudill's failure to pay an annual Animal Welfare Act license renewal fee, rendering the Animal Welfare Act license termination proceeding moot. Therefore, I conclude the Chief ALJ's conclusion that Ms. Caudill was a prevailing party in *Caudill*, No. 10-0416, is error.

Third, APHIS asserts the Chief ALJ's February 1, 2013, initial decision

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[17] Chief ALJ's Initial EAJA Decision at 6-7.

[18] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598, 602-05 (2001); Jeroski v. Federal Mine Safety and Health Review Comm'n, 697 F.3d 651 (7th Cir. 2012); Citizens for Better Forestry v. U.S. Dep't of Agric., 567 F.3d 1128, 1131 (9th Cir. 2009).

in *Caudill*, No. 10-0416, was not a final disposition of *Caudill*, No. 10-0416, and the Chief ALJ erroneously awarded fees and expenses under the Equal Access to Justice Act to Ms. Caudill based upon the Chief ALJ's initial decision in *Caudill*, No. 10-0416 (Appeal Pet. ¶¶ IC-ID at 21-23).

Caudill, No. 10-0416, was conducted in accordance with the Rules of Practice, which provide that an administrative law judge's decision shall become final and effective unless a party appeals the administrative law judge's decision to the Judicial Officer, as follows:

> **§ 1.142 Post-hearing procedure.**
>
> . . . .
> (c) *Judge's decision.*
> . . . .
> (4) The Judge's decision shall become final and effective without further proceedings 35 days after issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however*, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4). On February 1, 2013, the Chief ALJ issued an initial decision in *Caudill*, No. 10-0416. APHIS and Ms. Caudill timely appealed the Chief ALJ's initial decision to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a); therefore, the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, did not become final and effective.

The EAJA Rules of Practice define the term "final disposition," as follows:

> **§ 1.193 Time for filing application.**
> . . . .
> (b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of

> the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b). As the Chief ALJ's February 1, 2013, initial decision in *Caudill*, No. 10-0416, did not dispose of the merits of the proceeding, did not constitute a complete resolution of *Caudill*, No. 10-0416, and was appealable within the United States Department of Agriculture, I conclude the Chief ALJ's February 1, 2013 initial decision in *Caudill*, No. 10-0416, was not a final disposition of *Caudill*, No. 10-0416, and the Chief ALJ's award of fees and expenses under the Equal Access to Justice Act to Ms. Caudill based upon the Chief ALJ's February 1, 2013 initial decision in *Caudill*, No. 10-0416, was error.

Fourth, APHIS contends the Chief ALJ failed to issue a timely ruling on the Agency Motion to Strike Application or Request to Stay Proceedings (Appeal Pet. ¶ IE.1. at 23-24).

On March 29, 2013, APHIS filed Agency Motion to Strike Application or Request to Stay Proceedings requesting that the Chief ALJ either strike Ms. Caudill's EAJA Application as premature or stay this Equal Access to Justice Act proceeding pending final disposition of *Caudill*, No. 10-0416. On September 12, 2014, the Chief ALJ denied APHIS's motion to strike Ms. Caudill's EAJA Application[19] and stated he had stayed consideration of Ms. Caudill's EAJA Application pending final disposition of *Caudill*, No. 10-0416, as follows:

> As an appeal was taken in the license termination case, the stay of the application for attorney's fees and costs required by section 1.193(c) took effect. 7 C.F.R. § 1.193(c). As a final determination has now been made, this matter is again before me for consideration of the application for attorney fees in the amount of $18,090.00, which has been submitted in this action by [sic] for services provided by William J. Cook, Esquire, as Caudill's attorney, and for the further sum of $2,648.55

[19] Chief ALJ's Initial EAJA Decision at 5.

> for costs and expenses incurred.

Chief ALJ's Initial EAJA Decision at 4. While I find the one (1) year, five (5) month, and fourteen (14) day period between APHIS's March 29, 2013 filing and the Chief ALJ's September 12, 2014 ruling, inordinate, I do not find the Chief ALJ was required by the EAJA Rules of Practice to rule on APHIS's March 29, 2013, filing within a specified time. Therefore, I reject APHIS's contention that the Chief ALJ's September 12, 2014, ruling on the Agency Motion to Strike Application or Request to Stay Proceedings was not timely.

Fifth, APHIS asserts the Chief ALJ's Initial EAJA Decision contains unwarranted criticism of APHIS's filing the Agency Motion to Strike Application or Request to Stay Proceedings (Appeal Pet. ¶ IE.2. at 25-29).

The Chief ALJ observed that certain attorneys employed by the United States Department of Agriculture, Office of the General Counsel, routinely respond to Equal Access to Justice Act applications, as follows:

> [A]s apparently is routine practice by certain attorneys in the Department's Office of General Counsel, rather than filing an answer, on March 29, 2013, [APHIS] moved to strike [Ms. Caudill's EAJA Application] as being premature, or in the alternative, requested stay of the proceedings.

Chief ALJ's Initial EAJA Decision at 4. While I find the Chief ALJ's observation regarding the routine practice by certain attorneys irrelevant to the disposition of this proceeding, I do not find the Chief ALJ's observation constitutes criticism of APHIS's filing the Agency Motion to Strike Application or Request to Stay Proceedings, as APHIS contends.

Sixth, APHIS contends the Chief ALJ erroneously failed to afford APHIS an opportunity to file an answer to Ms. Caudill's EAJA Application (Appeal Pet. ¶ IE.3. at 29).

The EAJA Rules of Practice provide that agency counsel may file an answer to an Equal Access to Justice Act application within thirty

(30) days after service of the application.[20] The EAJA Rules of Practice are binding on administrative law judges;[21] therefore, the Chief ALJ was required to allow APHIS's counsel to file an answer to Ms. Caudill's EAJA Application during the thirty (30) day period after the Hearing Clerk served APHIS with Ms. Caudill's EAJA Application. I find nothing in the record supporting APHIS's contention that the Chief ALJ denied APHIS the opportunity to file an answer to Ms. Caudill's EAJA Application in violation of 7 C.F.R. § 1.195(a). To the contrary, the record reveals that on March 29, 2013, APHIS filed a timely answer denying the allegations in Ms. Caudill's EAJA Application.[22] Therefore, I reject APHIS's contention that the Chief ALJ erroneously failed to afford APHIS an opportunity to file an answer to Ms. Caudill's EAJA Application.

Seventh, APHIS contends the Chief ALJ erroneously failed to rule on APHIS's request to conduct further proceedings before issuing the Chief ALJ's Initial EAJA Decision (Appeal Pet. ¶ IE.3. at 29).

The EAJA Rules of Practice provide that an administrative law judge may order "further proceedings," as follows:

> **§ 1.199 Further proceedings.**
>
> (a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral

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[20] 7 C.F.R. § 1.195(a).

[21] *Cf.*, Reinhart, 59 Agric. Dec. 721, 740-41 (U.S.D.A. 2000) (stating the Rules of Practice are binding on administrative law judges), *aff'd per curiam*, 39 F. App'x 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 538 U.S. 979 (2003).

[22] Agency Mot. to Strike App. or Request to Stay Proceedings at 2 n.3. In light of APHIS's answer denying the allegations in Ms. Caudill's EAJA Application, I find the Chief ALJ's statement that APHIS filed a motion to strike or, in the alternative, a request for a stay of proceedings "rather than filing an answer" (Chief ALJ's Initial EAJA Decision at 4), perplexing. Based upon the current status of this proceeding, I decline to remand the proceeding to the Office of the Administrative Law Judges to provide an administrative law judge the opportunity to consider APHIS's answer which the Chief ALJ may have overlooked.

> argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
> (b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

7 C.F.R. § 1.199(a)-(b).

On March 29, 2013, APHIS requested that the Chief ALJ order further proceedings pursuant to 7 C.F.R. § 1.199(a).[23] I find nothing in the record indicating that the Chief ALJ ruled on APHIS's March 29, 2013, request for further proceedings. Nonetheless, I decline to remand this proceeding to the Office of the Administrative Law Judges for a ruling on APHIS's March 29, 2013, request. Instead, I find the Chief ALJ's failure to rule on APHIS's March 29, 2013, request for further proceedings and the Chief ALJ's issuance of the Initial EAJA Decision without further proceedings, pursuant to 7 C.F.R. § 1.199(a), operate as an implicit denial of APHIS's request that the Chief ALJ order further proceedings.[24]

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[23] Agency Mot. to Strike App. or Request to Stay Proceedings at 2 n.3.

[24] *See* Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than 3 years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to

Moreover, I agree with the Chief ALJ's implicit denial of APHIS's request for further proceedings as APHIS failed to identify specifically the information sought or the disputed issues and failed to explain specifically why the additional proceedings were necessary to resolve the issues, as required by 7 C.F.R. § 1.199(b).

Eighth, APHIS contends the Chief ALJ awarded Ms. Caudill attorney fees at the rate of $150 an hour, which exceeds the maximum hourly rate that can be awarded in this Equal Access to Justice Act proceeding (Appeal Pet. ¶ IF at 29-33).

The Chief ALJ awarded Ms. Caudill attorney fees at the rate $150 per hour.[25] The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed $150 per hour, as follows:

> **§ 1.186 Allowable fees and expenses.**
>
> . . . .
> (b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed $150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b) (2014). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of $150 became effective

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act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Greenly, No. 11-0073, 72 Agric. Dec. , 586, 596 (U.S.D.A. 2013) (stating the administrative law judge's issuance of an initial decision and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, No. 13-2882 (8th Cir. Aug. 22, 2014).

[25] Chief ALJ's Initial EAJA Decision at 9.

March 3, 2011.[26] The final rule explicitly states the maximum hourly attorney fees rate of $150 only applies to proceedings initiated on and after the effective date of the final rule, as follows:

> SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from $125.00 to $150.00 for covered proceedings initiated on and after the effective date of this final rule.
>
> DATES: This final rule is effective March 3, 2011.
> . . . .
> SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from $125.00 to $150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

APHIS initiated the adjudication for which Ms.Caudill seeks attorney fees and other expenses, on September 7, 2010.[27] Therefore, the maximum hourly attorney fees rate of $150 set forth in 7 C.F.R. § 1.186(b) (2014) is not applicable to this proceeding, and I find the Chief ALJ erroneously awarded attorney fees at the rate of $150 an hour. Instead, I find the maximum hourly attorney fees rate of $125 is applicable to this proceeding.[28]

Ms. Caudill concedes that the $125 per hour rate for attorney services is applicable to this Equal Access to Justice Act proceeding and, based upon this rate, Ms. Caudill now seeks an award of $15,075 for attorney

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[26] 76 Fed. Reg. 11,667 (Mar. 3, 2011).
[27] Caudill, 73 Agric. Dec. 241, 244 (U.S.D.A. 2014) (Ruling Granting Pet. To Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).
[28] 7 C.F.R. § 1.186(b) (2010).

fees instead of the $18,090 which she sought in her EAJA Application.[29] However, based on my findings that *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act, and that Ms. Caudill was not a prevailing party in *Caudill*, 73 Agric. Dec. 241, 244 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), I conclude Ms. Caudill is not entitled to an award of any attorney fees or other expenses under the Equal Access to Justice Act.

Ninth, APHIS contends the Chief ALJ erroneously awarded attorney fees for 1.7 hours of work that, on the face of Ms. Caudill's EAJA Application, appears not to have been performed for Ms. Caudill, but rather for Mr. Kalmanson, and the Chief ALJ erroneously awarded attorney fees for 2.7 hours of work related to a Freedom of Information Act request that appears to be unrelated to *Caudill*, No. 10-0416 (Appeal Pet. ¶ IF at 32-33).

Ms. Caudill attached to her EAJA Application full documentation of the fees and expenses for which Ms. Caudill seeks an Equal Access to Justice Act award. The documentation states the actual time expended and the hourly rate at which William J. Cook, Ms. Caudill's attorney in *Caudill*, No. 10-0416, computed attorney fees and describes the specific services performed by Mr. Cook and the other expenses. In support of this documentation, Ms. Caudill submitted Mr. Cook's declaration in which Mr. Cook, under penalty of perjury, swears to the accuracy of the documentation of the fees and expenses and the hourly rate at which he computed attorney fees in *Caudill*, No. 10-0416.[30] Mr. Cook explains the entries that APHIS contends appear to relate to Mr. Kalmanson, rather than to Ms. Caudill, as follows:

> 3. My firm has served as counsel for Ms. Caudill in this case since its inception. During this time, I have expended 120.6 hours for legal services for Ms. Caudill. Attached as Exhibit "B" is a listing of the time I spent on this matter. I also represented Respondent, Mitchel Kalmanson, and I have deleted any time entries devoted exclusively to Mr. Kalmanson's portion of the case.

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[29] Resp. to Appeal Pet. ¶ III at 4.

[30] Decl. of William J. Cook, dated February 27, 2013 (EAJA App. Ex. 2).

> Thus, the hours claimed represent time spent only on Ms. Caudill's defense or time spent jointly on both respondents' defense. Most of the time, however, was spent on Ms. Caudill's case, as the allegations against her were more detailed and extensive than the allegations against Mr. Kalmanson.

EAJA Application Ex. 2 ¶ 3 at 1-2. Moreover, I find Mr. Cook's April 27, 2011, entry in the Statement of Attorney's Time establishes that the 2.7 hours of work related to a Freedom of Information Act request is related to *Caudill*, No. 10-0416.[31]

Therefore, I reject APHIS's contention that the Chief ALJ erroneously awarded attorney fees for 1.7 hours of work that was not performed for Ms. Caudill, but rather for Mr. Kalmanson, and APHIS's contention that the Chief ALJ erroneously awarded attorney fees for 2.7 hours of work related to a Freedom of Information Act request that was unrelated to *Caudill*, No. 10-0416. However, based on my findings that *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act, and that Ms. Caudill was not a prevailing party in *Caudill*, 73 Agric. Dec. 241, 244 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding), I conclude Ms. Caudill is not entitled to an award of any attorney fees or other expenses under the Equal Access to Justice Act.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. Ms. Caudill is an individual whose address is in Florida.

3. On September 7, 2010, pursuant to 7 U.S.C. § 2133, APHIS instituted an adjudication, *Caudill*, No. 10-0416, against Ms. Caudill seeking termination of Ms. Caudill's Animal Welfare Act license.[32]

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[31] EAJA App. Ex. B at 2.

[32] Caudill, 73 Agric. Dec. 241, 243 (U.S.D.A. 2014) (Ruling Granting Pet. To Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).

4. Ms. Caudill failed to pay timely an annual Animal Welfare Act license renewal fee, and on October 16, 2013, pursuant to 9 C.F.R. § 2.5, Ms. Caudill's Animal Welfare Act license automatically terminated.[33]

5. On May 16, 2014, the Judicial Officer dismissed *Caudill*, No. 10-0416, as moot.[34]

6. *Caudill*, No. 10-0416, was not an "adversary adjudication," as that term is defined in the Equal Access to Justice Act (5 U.S.C. § 504(b)(1)(C)).

7. *Caudill*, No. 10-0416, was not a "covered" proceeding under the EAJA Rules of Practice (7 C.F.R. § 1.183).

8. Ms. Caudill was not a prevailing party in *Caudill* No. 10-0416.

9. Ms. Caudill does not meet the conditions of eligibility for an award of fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416.

For the foregoing reasons, the following Order is issued.

ORDER

Ms. Caudill's February 28, 2013, request for an award of attorney fees and other expenses which she incurred in connection with *Caudill*, No. 10-0416, is denied.

RIGHT TO SEEK JUDICIAL REVIEW

Ms. Caudill has the right to seek judicial review of this Decision and Order in the courts of the United States having jurisdiction to review the merits of *Caudill*, No. 10-0416, 73 Agric. Dec. 241 (U.S.D.A. 2014) (Ruling Granting Pet. to Reopen and Ruling Granting Request to Issue an Order Dismissing the Proceeding).[35] Ms. Caudill must seek judicial review within thirty (30) days after the determination of the award of

[33] *Id.* at 244.
[34] *Id.* at 245.
[35] 5 U.S.C. § 504(c)(2); 7 C.F.R. § 1.202.

attorney fees and other expenses in this Decision and Order.[36] The date of the determination of the award of attorney fees and other expenses in this Decision and Order is February 23, 2015.

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[36] 5 U.S.C. § 504(c)(2); *see also* Holzbau v. United States, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination, not from the date the party receives a copy of the determination); Sonicraft, Inc. v. NLRB, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).

HORSE PROTECTION ACT

DEPARTMENTAL DECISIONS

In re: JUSTIN JENNE.
Docket No. 13-0308.
Decision and Order.
Filed April 13, 2015.

HPA – Civil penalty – Sanctions – Sore – Disqualification.

Thomas Bolick, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

On August 2, 2013, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], initiated this administrative disciplinary proceeding against Justin Jenne by filing a Complaint. The Administrator alleges: (1) Mr. Jenne, at all times material to this proceeding, was the owner of a horse known as "Led Zeppelin";[1] and (2) on or about August 27, 2012, Mr. Jenne entered and allowed the entry of Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act].[2]

On September 6, 2013, Mr. Jenne filed an answer in which Mr. Jenne: (1) admitted he was the owner of Led Zeppelin;[3] (2) admitted that, on or about August 27, 2012, he entered and allowed the entry of Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee

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[1] Compl. ¶ I(1) at 1.
[2] Compl. ¶ II(1) at 1.
[3] Answer of Justin R. Jenne ¶ I(1) at 1.

Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin;[4] and (3) denied that Led Zeppelin was sore when he entered and allowed the entry of Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee.[5]

Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing on March 11, 2014, by an audio-visual connection between Washington, DC, and Nashville, Tennessee.[6] Thomas Neil Bolick, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Jenne appeared pro se.[7] Three witnesses testified, and seven exhibits were identified and received into evidence at the March 11, 2014, hearing.[8]

On July 29, 2014, the ALJ issued a Decision and Order: (1) concluding Mr. Jenne entered Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in willful violation of the Horse Protection Act; (2) assessing Mr. Jenne a $2,200 civil penalty; and (3) disqualifying Mr. Jenne for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[9]

On September 8, 2014, Mr. Jenne filed a timely appeal of the ALJ's Decision and Order,[10] along with a petition to reopen the hearing to take additional evidence.[11] On October 30, 2014, the Administrator filed

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[4] Answer of Justin R. Jenne ¶ II(1) at 1.
[5] Answer of Justin R. Jenne ¶ II(1) at 1.
[6] References to the transcript of the March 11, 2014, hearing are designated as "Tr." and the page number.
[7] Prior to the March 11, 2014, hearing, Dudley W. Taylor, Taylor & Knight, Knoxville, Tennessee, represented Mr. Jenne, but, in a conference call with the ALJ and Mr. Bolick on March 6, 2014, Mr. Taylor withdrew his representation of Mr. Jenne.
[8] The exhibits received in evidence are designated as "CX" and the exhibit number.
[9] ALJ's Decision and Order at 10-12.
[10] Appeal to Judicial Officer [Appeal Petition].
[11] Pet. to Re-Open Hr'g for Submission of Additional Evidence [Petition to Reopen

Complainant's response to Mr. Jenne's Appeal Petition and Mr. Jenne's Petition to Reopen Hearing.[12]

On November 7, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record that was before the ALJ, I agree with the ALJ's Decision and Order.

DECISION

Pertinent Statutory Provisions

Congress enacted the Horse Protection Act to end the cruel practice of deliberately soring Tennessee Walking Horses for the purpose of altering their natural gait and improving their performance at horse shows. When a horse's front feet are deliberately made sore, usually by using chains or chemicals, "the intense pain which the horse suffers when placing his forefeet on the ground causes him to lift them up quickly and thrust them forward, reproducing exactly" the distinctive high-stepping gait that spectators and show judges look for in a champion Tennessee Walking Horse. H.R. Rep. No. 91-1597, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.

Congress's reasons for prohibiting soring were twofold. First, soring inflicts great pain on the animals. Second, trainers who sore horses gain an unfair competitive advantage over trainers who rely on skill and patience. In 1976, Congress significantly strengthened the Horse Protection Act by amending it to make clear that intent to sore the horse is not a necessary element of a violation.[13] *See Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

The Horse Protection Act defines the term "sore," as follows:

§ 1821. Definitions

Hearing].

[12] Complainant's Resp. to Resp't's Appeal to Judicial Officer and Pet. to Re-open Hr'g for Submission of Additional Evidence [Complainant's Response to Appeal Petition].

[13] The Horse Protection Act also provides for criminal penalties for "knowingly" violating the Horse Protection Act (15 U.S.C. § 1825(a)). This provision of the Horse Protection Act is not at issue in this proceeding.

> As used in this chapter unless the context otherwise requires:
>
> . . . .
>
> (3) The term "sore" when used to describe a horse means that—
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving . . . .

15 U.S.C. § 1821(3).

The Horse Protection Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore, as follows:

> **§ 1825. Violations and penalties**
>
> . . . .
>
> **(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**
>
> . . . .
>
> (5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

15 U.S.C. § 1825(d)(5).

The Horse Protection Act prohibits certain conduct, including:

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
> . . . .
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.15 U.S.C. § 1824(2).

Violators of the Horse Protection Act are subject to civil and criminal sanctions. Civil sanctions include both civil penalties (15 U.S.C. § 1825(b)(1)) and disqualification for a specified period from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction" (15 U.S.C. § 1825(c)). The maximum civil penalty for each violation is $2,200 (15 U.S.C. § 1825(b)(1)).[14] In making the determination concerning the amount of the monetary penalty, the Secretary of Agriculture must "take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." 15 U.S.C. § 1825(b)(1).

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[14] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824. The maximum civil penalty for violations of the Horse Protection Act occurring after May 7, 2010, is $2,200 (7 C.F.R. § 3.91(b)(2)(viii)).

As to disqualification, the Horse Protection Act further provides, as follows:

> **§ 1825. Violations and penalties**
>
> . . . .
> (c) **Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**
>
> In addition to any . . . civil penalty authorized under this section, any person . . . who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.
>
> 15 U.S.C. § 1825(c).

Mr. Jenne Failed to Rebut the Statutory Presumption That Led Zeppelin Was Sore

On August 27, 2012, Mr. Jenne, who, at all times material to this proceeding, was the owner and trainer of Led Zeppelin, presented Led Zeppelin, as entry number 542, class number 110A, to a Designated Qualified Person [DQP][15] for inspection at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (Answer of Justin R. Jenne ¶¶ I(1) at 1, II(1) at 1, III(3) at 2; Tr. at 131;

[15] A DQP is a person meeting the requirements of 9 C.F.R. § 11.7 who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the United States Department of Agriculture and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purpose of enforcing the Horse Protection Act. *See* 9 C.F.R. § 11.1.

CX 1B, CX 4B-CX 5B). The DQP did not find that Led Zeppelin was sore (Answer of Justin R. Jenne ¶ III(3) at 2; Tr. at 153-54, 159-60); however, Bart Sutherland, DVM, a United States Department of Agriculture veterinary medical officer, conducted a pre-show examination of Led Zeppelin after the DQP's examination and found that Led Zeppelin reacted consistently to blanching his thumb along the horse's feet (Tr. at 120-21).[16] Dr. Sutherland described his inspection of Led Zeppelin, as follows:

> I noticed no gait deficits as the horse was being led to demonstrate its gait. I approached the horse and began my inspection. I began by inspecting the left pastern. I palpated the posterior pastern area and the horse made repeated and consistent pain withdrawal responses. The withdrawal locations on the pastern were the lateral posterior portions of the pastern. These reactions were both consistent in location and repeatable.
>
> Next I examined the right pastern. I palpated the anterior pastern area and the horse made repeated and consistent

[16] Routinely, DQP examinations are found to be less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to DQP examinations than to United States Department of Agriculture examinations. Oppenheimer, 54 Agric. 221, 269 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); Sparkman (Decision as to Sparkman and McCook), 50 Agric. Dec. 602, 610 (U.S.D.A. 1991); Edwards, 49 Agric. Dec. 188, 200 (U.S.D.A. 1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992). Mr. Jenne did not call the DQP who examined Led Zeppelin as a witness or introduce any report of the results of the DQP's examination of Led Zeppelin. On the other hand, the Administrator called Dr. Sutherland as a witness. Dr. Sutherland testified extensively regarding his examination of Led Zeppelin and his finding that Led Zeppelin was bilaterally sore (Tr. at 113-44, 156-82). In addition, the Administrator introduced Dr. Sutherland's affidavit which Dr. Sutherland prepared shortly after his examination of Led Zeppelin and which describes Dr. Sutherland's examination of Led Zeppelin and the basis for his finding that Led Zeppelin was bilaterally sore (CX 2B). Further still, the Administrator introduced Dr. Sutherland's written report documenting his finding that Led Zeppelin was bilaterally sore (CX 1B). A review of the record does not lead me to believe that I should deviate from my usual practice of according less credence to the DQP examination and findings than to the United States Department of Agriculture examination and findings in this proceeding. I accord Dr. Sutherland's examination of and findings regarding Led Zeppelin more credence than the DQP's examination of and findings regarding Led Zeppelin.

> pain withdrawal responses. The withdrawal locations on the pastern were the lateral to medial anterior portions of the pastern. These reactions were both consistent and repeatable.
>
> I found the horse to be bilaterally sore.

CX 2B. Dr. Sutherland stated that, in his professional opinion, Led Zeppelin was sored using chemical and/or action devices (CX 2B).

Pursuant to 15 U.S.C. § 1825(d), Led Zeppelin must be presumed to be sore based upon Dr. Sutherland's finding that Led Zeppelin manifested abnormal sensitivity in both of his forelimbs. Once the statutory presumption is established, the burden of persuasion shifts to the respondent to provide proof that the horse was not sore or that soreness was due to natural causes.

Mr. Jenne contends on appeal that the results of an examination of Led Zeppelin by his veterinarian, Richard Wilhelm, DVM, on August 27, 2012, rebuts the statutory presumption that Led Zeppelin was sore (Appeal Pet. ¶ 4 at 2). Mr. Jenne did not call Dr. Wilhelm as a witness, but testified that Dr. Wilhelm recorded the results of his examination of Led Zeppelin. Mr. Jenne did not have a copy of Dr. Wilhelm's report of his examination of Led Zeppelin to offer into evidence at the March 11, 2014, hearing, but, instead, stated he would have Mr. Taylor, Mr. Jenne's former attorney, forward Dr. Wilhelm's report to the ALJ (Tr. at 150- 51). The ALJ informed Mr. Jenne that she would hold the record open until May 16, 2014, to receive Dr. Wilhelm's report of his examination of Led Zeppelin (Tr. at 186-87); however, Mr. Jenne failed to provide the ALJ with Dr. Wilhelm's written report prior to the close of the record on May 16, 2014.[17]

On September 8, 2014, Mr. Jenne filed a Petition to Reopen Hearing, attached to which is an Affidavit of Richard Wilhelm, dated September 5, 2014, in which Dr. Wilhelm states he examined Led Zeppelin on August 27, 2012, he found no evidence that Led Zeppelin was sore, and a true and correct copy of the report of his August 27, 2012, examination of

[17] ALJ's Decision and Order at 2 n.3.

Led Zeppelin is attached to the affidavit. On April 10, 2015, I denied Mr. Jenne's Petition to Reopen Hearing as evidence of Dr. Wilhelm's August 27, 2012, examination of Led Zeppelin could have been adduced at the March 11, 2014, hearing or at anytime prior to the close of the record on May 16, 2014. Moreover, I note Dr. Wilhelm's written report of his August 27, 2012, examination of Led Zeppelin is not attached to the Affidavit of Richard Wilhelm, as stated in that affidavit. Therefore, I reject Mr. Jenne's contention that he presented sufficient evidence to rebut the presumption that Led Zeppelin was sore, and I find Mr. Jenne entered and allowed the entry of Led Zeppelin as entry number 542, class number 110A, on August 27, 2012, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in violation of 15 U.S.C. §§ 1824(2)(B) and 1824(2)(D).

Sanction

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than $2,000 for each violation of 15 U.S.C. § 1824. However, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(viii)). The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than one year for a first violation of the Horse Protection Act and not less than five years for any subsequent violation of the Horse Protection Act (15 U.S.C. § 1825(c)).

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. The Administrator recommends that I assess Mr. Jenne a $2,200 civil penalty (Complainant's Resp. to Appeal Pet. at 4-9).

The extent and gravity of Mr. Jenne's violations of the Horse Protection Act are great. A United States Department of Agriculture veterinary medical officer found Led Zeppelin sore. Dr. Sutherland found palpation of Led Zeppelin's front forelimbs elicited consistent, repeatable pain responses. Mr. Jenne contends on appeal that he is unable to pay the $2,200 civil penalty assessed by the ALJ, but admits that he failed to present any argument or evidence in mitigation of the civil penalty at the March 11, 2014, hearing (Appeal Pet. ¶ 5 at 2).

I agree with Mr. Jenne that he failed to present any evidence of his inability to pay a civil penalty at the March 11, 2014, hearing. I have consistently held that "the burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty or inability to continue to conduct business if the civil penalty is assessed."[18]

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[18] Clark, 59 Agric. Dec. 701, 710 (U.S.D.A. 2000) (Decision as to Coleman); Stepp, 57 Agric. Dec. 297, 318 (U.S.D.A. 1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (U.S.D.A. 1999); Oppenheimer, 54 Agric. Dec. 221, 321 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer); Armstrong, 53 Agric. Dec. 1301, 1324 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, 53 Agric. Dec. 322, 346 (U.S.D.A. 1994).

On September 8, 2014, Mr. Jenne filed a Petition to Reopen Hearing, attached to which is an Affidavit of Justin R. Jenne, dated September 5, 2014, and supporting attachments, in which Mr. Jenne asserts he is unable to pay a civil penalty. On April 10, 2015, I denied Mr. Jenne's Petition to Reopen Hearing as evidence of Mr. Jenne's inability to pay a civil penalty could have been adduced at the March 11, 2014, hearing. As Mr. Jenne failed to present evidence indicating an inability to pay the civil penalty, I reject Mr. Jenne's contention that he is not able to pay a $2,200 civil penalty.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.[19] Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed, I do not find a maximum penalty in this case to be inappropriate. The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, requests a maximum civil penalty; therefore, I assess Mr. Jenne the $2,200 civil penalty recommended by the Administrator.

The Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish the purpose of the Horse Protection Act is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse

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[19] Back, 69 Agric. Dec. 448, 463 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1504 (U.S.D.A. 2005) (Decision as to Christopher Jerome Zahnd), *aff'd sub nom.* Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1475 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 490 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., 61 Agric. Dec. 173, 208 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.[20]

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act and I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.[21]

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not

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[20] *See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

[21] Back, 69 Agric. Dec. 448, 464 (U.S.D.A. 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005) (Decision as to Christopher Jerome Zahnd), *aff'd sub nom.* Zahnd v. Sec'y of Agric., 479 F.3d 767 (11th Cir. 2007); Turner, 64 Agric. Dec. 1456, 1476 (U.S.D.A. 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, 64 Agric. Dec. 436, 492 (U.S.D.A. 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., 61 Agric. Dec. 173, 209 (U.S.D.A. 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Mr. Jenne's violations of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

Findings of Fact

1. Mr. Jenne is a resident of Tennessee.

2. At all times material to this proceeding, Mr. Jenne was the trainer of Led Zeppelin.

3. At all times material to this proceeding, Mr. Jenne was the owner of Led Zeppelin.

4. On August 27, 2012, Mr. Jenne entered Led Zeppelin as entry number 542, class number 110A, in the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin.

5. On August 27, 2012, Mr. Jenne allowed the entry of Led Zeppelin as entry number 542, class number 110A, in the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin.

6. Dr. Sutherland, a United States Department of Agriculture veterinary medical officer, inspected horses participating in the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in August and September 2012, for compliance with the Horse Protection Act.

7. On August 27, 2012, Mr. Jenne's employee, Roberto Ricardo, presented Led Zeppelin for inspection at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee.

8. On August 27, 2012, Dr. Sutherland conducted a pre-show

examination of Led Zeppelin.

9. Based upon his August 27, 2012, examination of Led Zeppelin, Dr. Sutherland concluded that Led Zeppelin was "sore" within the meaning of the Horse Protection Act.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On the basis of the evidence in the record, I conclude Led Zeppelin was "sore," as that term is defined in the Horse Protection Act, when entered on August 27, 2012, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee.

3. On August 27, 2012, Mr. Jenne entered Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in violation of 15 U.S.C. § 1824(2)(B).

4. On August 27, 2012, Mr. Jenne allowed the entry of Led Zeppelin as entry number 542, class number 110A, at the 74th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, for the purpose of showing or exhibiting Led Zeppelin while Led Zeppelin was sore, in violation of 15 U.S.C. § 1824(2)(D).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Jenne is assessed a $2,200 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:

Mr. Thomas Bolick
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety Division

1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Mr. Jenne's payment of the civil penalty shall be forwarded to, and received by, Mr. Bolick within six months after service of this Order on Mr. Jenne. Mr. Jenne shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 13-0308.

2. Mr. Jenne is disqualified for a period of one year from showing, exhibiting, or entering any horse, directly or indirectly, through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction. The disqualification of Mr. Jenne shall become effective on the 60th day after service of this Order on Mr. Jenne.

RIGHT TO JUDICIAL REVIEW

Mr. Jenne has the right to obtain review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Jenne resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Jenne must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[22] The date of the Order in this Decision and Order is April 13, 2015.

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[22] 15 U.S.C. § 1825(b)(2), (c).

In re: RANDALL JONES.
Docket No. 13-0053.
Decision and Order.
Filed June 29, 2015.

HPA – Administrative procedure – Answer, failure to file timely – Default – Service.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision by Janice K. Bullard, Administrative Law Judge.
Final Decision and Order by William G. Jenson, Judicial Officer.

DECISION AND ORDER

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on October 23, 2012. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges, on May 29, 2010, Randall Jones, in violation of 15 U.S.C. § 1824(2)(A) and § 1824(2)(D), exhibited and allowed the exhibition of a horse known as "Jammin The Blues" as entry number 336, in class number 47, at the 40th Annual Spring Fun Show, in Shelbyville, Tennessee, while the horse was sore by virtue of being scarred, as defined in 9 C.F.R. § 11.3.[1]

On October 25, 2012, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, sent Mr. Jones the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated October 25, 2012. The United States

[1] Compl. ¶ IIB at 2.

Postal Service returned the October 25, 2012, mailing to the Hearing Clerk marked "unclaimed."[2] On December 18, 2012, in accordance with 7 C.F.R. § 1.147(c)(1), the Hearing Clerk, by ordinary mail, served Mr. Jones with the Complaint, the Rules of Practice, and the Hearing Clerk's October 25, 2012, service letter.[3] Mr. Jones failed to file an answer to the Complaint within 20 days after the Hearing Clerk served Mr. Jones with the Complaint, as required by 7 C.F.R. § 1.136(a).

On March 7, 2014, Administrative Law Judge Janice K. Bullard [ALJ] filed an Order to Show Cause Why Default Should Not Be Entered [Order to Show Cause] in which the ALJ provided Mr. Jones and the Administrator 20 days to show cause why an order of default should not be entered in favor of the Administrator due to Mr. Jones' failure to file an answer. On March 10, 2014, the Hearing Clerk sent the ALJ's Order to Show Cause to Mr. Jones.[4] On March 10, 2014, in response to the ALJ's Order to Show Cause, the Administrator filed a Motion for Adoption of Proposed Decision and Order [Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [Proposed Default Decision]. On March 13, 2014, the Hearing Clerk served Mr. Jones with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and the Hearing Clerk's service letter dated March 10, 2014.[5] On March 27, 2014, Mr. Jones filed a letter in response to the Administrator's Motion for Default Decision, which response states in its entirety, as follows:

> 03-14-2014
>
> Janice K. Bullard
> Administrative Law Judge
>
> Re: Docket No. 13-0053

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[2] United States Postal Service Product & Tracking Information for article number 7005 1160 0002 7836 2208.

[3] Mem. to the File, dated December 18, 2012, signed by Carla M. Andrews for L. Eugene Whitfield, Hearing Clerk.

[4] Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form stating the Hearing Clerk sent the ALJ's Order to Show Cause to Mr. Jones by regular mail, on March 10, 2014.

[5] United States Postal Service Domestic Return Receipt for article number 7003 1010 0001 7367 4398.

> Dear Hearing Clerk:
>
> I have not received any info concerning this issue and have no knowledge of any deliveries to my address. Please forward any info concerning issue at hand and I will respond in a timely manner.
>
> /s/
> Randall Jones

Letter from Randall Jones to the Hearing Clerk, dated March 14, 2014.

On April 9, 2014, in accordance with 7 C.F.R. § 1.139, the ALJ filed a Decision Without Hearing by Entry of Default Against Respondent [Default Decision]: (1) concluding Mr. Jones violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Jones a $4,400 civil penalty; and (3) disqualifying Mr. Jones for four years from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[6]

On May 29, 2015, Mr. Jones appealed the ALJ's Default Decision to the Judicial Officer. The Administrator failed to file a timely response to Mr. Jones' appeal petition, and on June 23, 2015, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I adopt, with minor changes, the ALJ's Default Decision as the final agency decision.

DECISION

Statement of the Case

Mr. Jones failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. §

[6] ALJ's Default Decision at 4-5.

1.136(c)) provide the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint that relate to Mr. Jones are adopted as findings of fact.[7] I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Jones is an individual whose mailing address is in the State of North Carolina.

2. On December 18, 2012, the Hearing Clerk served Mr. Jones at the address acknowledged by Mr. Jones to be his address with the Complaint alleging Mr. Jones violated the Horse Protection Act.[8]

3. Mr. Jones did not file an answer in response to the Complaint.

4. On March 7, 2014, the ALJ filed an Order to Show Cause why an order of default should not be entered in favor of the Administrator due to Mr. Jones's failure to file an answer.

5. On March 10, 2014, the Hearing Clerk served Mr. Jones at the address acknowledged by Mr. Jones to be his address with the ALJ's Order to Show Cause.[9]

6. Mr. Jones did not file a response to the ALJ's Order to Show Cause.

7. On March 10, 2014, the Administrator filed a Motion for Default Decision and a Proposed Default Decision.

8. On March 13, 2014, the Hearing Clerk served Mr. Jones at the address acknowledged by Mr. Jones to be his address with the Administrator's

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[7] The Complaint contains allegations related to Jeanette Baucom, as well as allegations that relate to Mr. Jones. The allegations that relate solely to Ms. Baucom are not relevant to this Decision and Order.

[8] *See supra* note 3.

[9] *See supra* note 4.

Motion for Default Decision and the Administrator's Proposed Default Decision.[10]

9. On March 27, 2014, Mr. Jones filed a letter in response to the Administrator's Motion for Default Decision. Mr. Jones's March 27, 2014 filing does not address the Administrator's Motion for Default Decision or the allegations in the Complaint.

10. At all times material to this proceeding, Mr. Jones was the owner of a horse known as "Jammin The Blues."

11. On May 29, 2010, Mr. Jones exhibited and allowed the exhibition of a horse known as "Jammin The Blues" as entry number 336, in class number 47, at the 40th Annual Spring Fun Show in Shelbyville, Tennessee, while the horse was sore by virtue of being scarred.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. By reason of the findings of fact, Mr. Jones has violated the Horse Protection Act (15 U.S.C. § 1824(2)(A), (2)(D)).

3. The Order in this Decision and Order is authorized by the Horse Protection Act and justified under the circumstances described in this Decision and Order.

Mr. Jones's Appeal Petition

Mr. Jones raises two issues in his letter, dated May 19, 2015, which serves as his appeal petition. First, Mr. Jones contends he did not receive any notification of this proceeding until February 2014 and he diligently responded to all filings of which he was aware (Appeal Pet. ¶¶ 1-4).

The Rules of Practice provide for service of a complaint on a party other than the Secretary of Agriculture, as follows:

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[10] *See supra* note 5.

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
> (c) *Service on party other than the Secretary*. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1). The record establishes that, on October 25, 2012, the Hearing Clerk mailed the Complaint to Mr. Jones by certified mail.[11] The United States Postal Service returned the Complaint to the Hearing Clerk marked "unclaimed."[12] On December 18, 2012, the Hearing Clerk remailed the Complaint to Mr. Jones by ordinary mail using the same address as the Hearing Clerk used when mailing the Complaint by certified mail.[13] Therefore, I conclude that, on December 18, 2012, the Hearing Clerk served Mr. Jones with the Complaint in accordance with 7 C.F.R. § 1.147(c)(1).

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314

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[11] *See supra* note 3.
[12] *See supra* note 2.
[13] *See supra* note 3.

(1950).[14] As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law.

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982), the court held:

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[14] *See also* Trimble v. United States Dep't of Agric., 87 F. App'x 456, 2003 WL 23095662 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); DePiero v. City of Macedonia, 180 F.3d 770, 788-89 (6th Cir. 1999) (holding service of a summons at the plaintiff's last known address is sufficient where the plaintiff is not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect the plaintiff would not actually receive the notice mailed to his last known address), *cert. denied*, 528 U.S. 1105 (2000); Weigner v. City of New York, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); NLRB v. Clark, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (footnote omitted).

Even if I were to find that Mr. Jones did not receive actual notice of this proceeding until February 2014, as he asserts, I would conclude Mr. Jones was properly served with the Complaint on December 18, 2012. The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service*. Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding.
>
> . . . .
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon

> such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Mr. Jones of the consequences of failing to file a timely answer, as follows:

> The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2.

Mr. Jones's answer was due no later than twenty (20) days after the

Hearing Clerk served Mr. Jones with the Complaint,[15] namely, January 7, 2013. Mr. Jones filed his first document in this proceeding on March 27, 2014, one (1) year, two (2) months, and twenty (20) days after Mr. Jones's answer was due. Moreover, Mr. Jones's March 27, 2014 filing does not respond to the allegations in the Complaint. Therefore, in accordance with the Rules of Practice, Mr. Jones is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived opportunity for hearing.

Second, Mr. Jones asserts he has no legal training and may not clearly understand the procedures applicable to this proceeding (Appeal Pet. ¶ 5). On December 18, 2012, the Hearing Clerk served Mr. Jones with the Rules of Practice, which set forth the procedures applicable to this proceeding.[16] Mr. Jones fails to identify any provision in the Rules of Practice which he does not understand. I find Mr. Jones's possible lack of understanding of the procedures applicable to this proceeding, and Mr. Jones's lack of legal training are not excuses for Mr. Jones's failure to file a timely answer or bases for setting aside the ALJ's Default Decision.[17]

For the foregoing reasons, the following Order is issued.

ORDER

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[15] 7 C.F.R. § 1.136(a).

[16] *See supra* note 3.

[17] Arends, 70 Agric. Dec. 839, 857 (U.S.D.A. 2011) (stating pro se status is not relevant to whether a party filed a timely answer or whether a motion for default decision should be granted); Vigne, 68 Agric. Dec. 362, 364 (U.S.D.A. 2009) (Order Den. Pet. To Reconsider) (stating the Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel; Ms. Vigne's status as a pro se litigant is not a basis on which to set aside her waiver of the right to an oral hearing); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1283, 1286 (U.S.D.A. 2007) (Order Den. Pet. For Reh'g as to Lancelot Kollman Ramos) (holding the respondent's status as a pro se litigant is not a basis on which to grant his petition for rehearing or set aside the default decision); Knapp, 64 Agric. Dec. 253, 299 (U.S.D.A. 2005) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file a timely answer to the complaint); Noell, 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000); Byard, 56 Agric. Dec. 1543, 1559 (U.S.D.A. 1997) (Decision as to Dean Byard) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

1. Mr. Jones is assessed a $4,400 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:

Buren W. Kidd
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Mr. Jones's civil penalty payment shall be forwarded to, and received by, Mr. Kidd within sixty (60) days after service of this Order on Mr. Jones. Mr. Jones shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 13-0053.

2. Mr. Jones is disqualified for four (4) uninterrupted years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. The disqualification of Mr. Jones shall become effective on the 60th day after service of this Order on Mr. Jones.

RIGHT TO JUDICIAL REVIEW

Mr. Jones has the right to obtain judicial review of this Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Jones must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the

Secretary of Agriculture.[18] The date of this Order is June 29, 2015.

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[18] 15 U.S.C. § 1825(b)(2), (c).

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

In re: DEER FOREST EXOTIC ANIMAL SANCTUARY, LLC.
Docket No. D-14-0164.
Order of Dismissal.
Filed January 1, 2015.

In re: LEE MARVIN GREENLY, an individual; SANDY GREENLY, an individual; CRYSTAL GREENLY, an individual; and MINNESOTA WILDLIFE CONNECTION, INC., a Minnesota corporation.
Docket No. 11-0072.
Miscellaneous Order.
Filed February 10, 2015.

AWA – Administrative procedure – Stay.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondents.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER LIFTNIG STAY ORDER AS TO LEE MARVIN GREENLY AND MINNESOTA WILDLIFE CONNECTION, INC.

I issued *Greenly*, 72 Agric. Dec. 603, No. 11-0072, 2013 WL 8213615 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.): (1) ordering Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., to cease and desist from violations of Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [the Animal Welfare Act] and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; (2) revoking Mr. Greenly's Animal Welfare Act license; and (3) assessing Mr. Greenly and Minnesota Wildlife Connection, Inc., jointly and severally, a $11,725 civil penalty.

On August 27, 2013, Mr. Greenly and Minnesota Wildlife Connection, Inc. filed a "Motion for Stay of Order Pending Judicial Review" [Motion for Stay] seeking a stay of the Order in *Greenly*, 72 Agric. Dec. 603, No. 11-0072, 2013 WL 8213615 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), pending the outcome of proceedings for judicial review. On September 19, 2013, I granted Mr. Greenly and Minnesota Wildlife Connection, Inc.'s Motion for Stay.[1]

On November 24, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed Complainant's Motion to Lift Stay Order stating proceedings for judicial review are concluded and requesting that I lift the September 19, 2013 Stay Order as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. Neither Mr. Greenly nor Minnesota Wildlife Connection, Inc. filed a response to Complainant's Motion to Lift Stay Order.

As proceedings for judicial review have concluded, the September 19, 2013 Stay Order as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. is lifted and the Order in *Greenly*, 72 Agric. Dec. 603, No. 11-0072, 2013 WL 8213615 (U.S.D.A. 2013) (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), is effective as follows.

ORDER

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[1] Greenly, 72 Agric. Dec. 764, No. 11-0072, 2013 WL 8213623 (U.S.D.A. 2013) (Stay Order as to Lee Marvin Greenly and Minnesota Wildlife Connection).

1. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., their 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:

a. failing to handle animals as carefully as possible in a manner that does not cause trauma or physical harm;

b. failing to handle animals, during public exhibition, so there is minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public;

c. failing to construct housing facilities so that the housing facilities are structurally sound;

d. failing to maintain housing facilities in good repair;

e. failing to enclose outdoor housing facilities for animals with adequate perimeter fences;

f. failing to store food in a manner that adequately protects the food from contamination;

g. failing to make, keep, and maintain adequate records of the acquisition and disposition of animals; and

h. failing to allow Animal and Plant Health Inspection Service officials to inspect their facilities, property, animals, and records, during normal business hours.

Paragraph one of this Order shall become effective upon service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.

2. Mr. Greenly's Animal Welfare Act license (Animal Welfare Act license number 41-C-0122) is revoked. Paragraph two of this Order shall become effective 60 days after service of this Order on Lee Marvin

Greenly.

3. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. are assessed, jointly and severally, a $11,725 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Lee Marvin Greenly and Minnesota Wildlife Connection, Inc. Lee Marvin Greenly and Minnesota Wildlife Connection, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 11-0072.

In re: LEE MARVIN GREENLY.
Docket No. 11-0073.
Decision and Order.
Filed February 10, 2015.

AWA – Administrative procedure – Stay.

Colleen A. Carroll, Esq. for Complainant.
Larry Perry, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER LIFTING STAY ORDER

I issued *Greenly*, 72 Agric. Dec. 586, No. 11-0073, 2013 WL 8213613 (U.S.D.A. 2013), terminating Animal Welfare Act license number 41-C-0122 and disqualifying Lee Marvin Greenly for two years from

becoming licensed under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act].

On August 27, 2013, Mr. Greenly filed "Motion for Stay of Order Pending Judicial Review" [Motion for Stay] seeking a stay of the Order in *Greenly*, 72 Agric. Dec. 586, 2013 WL 8213613 (U.S.D.A. 2013), pending the outcome of proceedings for judicial review. On September 17, 2013, I granted Mr. Greenly's Motion for Stay.[1]

On November 24, 2014, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, filed Complainant's Motion to Lift Stay Order stating proceedings for judicial review are concluded and requesting that I lift the September 17, 2013 Stay Order. Mr. Greenly has not filed a response to Complainant's Motion to Lift Stay Order.

As proceedings for judicial review have concluded, the September 17, 2013 Stay Order is lifted and the Order in *Greenly*, 72 Agric. Dec. 586, 2013 WL 8213613 (U.S.D.A. 2013), is effective, as follows.

ORDER

1. Animal Welfare Act license number 41-C-0122 is terminated.

2. Mr. Greenly, his agents and assigns, and any business entity for which Mr. Greenly is an officer, agent, or representative or otherwise holds a substantial business interest, are disqualified for two years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Mr. Greenly.

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[1] Greenly, 72 Agric. Dec. 763, No. 11-0073, 2013 WL 8213622 (U.S.D.A. 2013) (Stay Order).

MISCELLANEOUS ORDERS & DISMISSALS

FEDERAL MEAT INSPECTION ACT

In re: PAUL ROSBERG AND KELLY ROSBERG, d/b/a NEBRASKA'S FINEST MEATS.
Docket Nos. 12-0182; 12-0183.
Miscellaneous Order.
Filed January 2, 2015.

FMIA – Administrative procedure – Extension of time.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING RESPONDENTS' MOTION FOR EXTENSION OF TIME

PROCEDURAL HISTORY

On December 2, 2014, Paul Rosberg and Kelly Rosberg [Respondents] filed a motion to extend the time for filing a response to *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal). On December 5, 2014, Alfred V. Almanza, Administrator, Food Safety and Inspection Service, United States Department of Agriculture [Administrator], filed Opposition to Respondents' Motion for Extension of Time. On December 31, 2014, Respondents filed a response to the Administrator's Opposition to Respondents' Motion for Extension of Time, and the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Respondents' December 2, 2014 Motion for an Extension of Time.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer within 10 days after the date of service of the decision upon the

[1] 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) [Rules of Practice].

party filing the petition, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . . .
> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

I find Respondents' December 2, 2014, motion to extend the time for filing a response to *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal), constitutes a motion to extend the time for filing Respondents' petition for reconsideration of *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal).

The Hearing Clerk served Respondents with *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal), on November 12, 2014,[2] and Respondents were required to file a petition for reconsideration of the November 7, 2014, Order Denying Late Appeal no later than November 24, 2014.[3] As Respondents filed the request to extend the time

[2] Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form, relating to the November 12, 2014, distribution of the Judicial Officer's Order Denying Late Appeal filed in FMIA Docket Nos. 12-0182 and 12-0183.

[3] Ten days after the date the Hearing Clerk served Respondents with the November 7, 2014, Order Denying Late Appeal was Saturday, November 22, 2014. The Rules of Practice provide, when the time for filing a document or paper expires on a Saturday, the

for filing a petition for reconsideration after Respondents' petition for reconsideration was required to be filed, Respondents' request for an extension of time to file a petition for reconsideration of *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal), is denied.

For the foregoing reasons, the following Ruling is issued.

RULING

Respondents' December 2, 2014, motion for an extension of time to file a petition for reconsideration of *Rosberg*, 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal), is denied.

In re: PAUL ROSBERG AND KELLY ROSBERG, d/b/a NEBRASKA'S FINEST MEATS.
Docket Nos. 12-0182; 12-0183.
Miscellaneous Order.
Filed February 3, 2015.

FMIA – Administrative procedure.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING RESPONDENTS' MOTION FOR EXTENSION OF TIME TO FILE AN APPEAL PETITION

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time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h). The next business day after Saturday, November 22, 2014 was Monday, November 24, 2014.

PROCEDURAL HISTORY

On January 29, 2015, Paul Rosberg and Kelly Rosberg [Respondents] filed a motion to extend the time for filing a second appeal of Administrative Law Judge Janice K. Bullard's[1] July 29, 2014 Decision and Order Dismissing Case as Moot [Decision].[2] Respondents contend the time for filing a second appeal petition should be extended for "excusable neglect," as authorized by Federal Rule of Criminal Procedure 45(b)(1)(B).

The Federal Rules of Criminal Procedure are applicable to criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.[3] The Federal Rules of Criminal Procedure are not applicable to this disciplinary administrative proceeding.[4] Instead, the rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service,[5] and, unlike the Federal Rules of Criminal Procedure, the Rules of Practice contain no provision for an extension of time after time expires based upon excusable neglect.

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[1] Effective January 4, 2015, Administrative Law Judge Janice K. Bullard [Chief ALJ] was appointed Acting Chief Administrative Law Judge.

[2] Respondents previously appealed the Chief ALJ's Decision. I denied Respondents' September 23, 2014 appeal petition because Respondents filed their appeal petition after the time for filing an appeal petition had expired. Rosberg,. 73 Agric. Dec. 562 (U.S.D.A. 2014) (Order Den. Late Appeal).

[3] FED. R. CRIM. P. 1(a)(1).

[4] Morrow v. Dep't of Agric., 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (U.S.D.A. 1995) (stating the Federal Rules of Criminal Procedure do not apply to administrative hearings); Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (same).

[5] 7 C.F.R. § 1.145(a).

The Hearing Clerk served Respondents with the Chief ALJ's Decision on August 18, 2014;[6] therefore, Respondents were required to file their appeal petition with the Hearing Clerk no later than September 17, 2014. As Respondents filed their January 29, 2015, request to extend the time for filing a second appeal petition after Respondents' time for filing an appeal petition had expired, Respondents' request for an extension of time to file a second appeal of the Chief ALJ's July 29, 2014, Decision, must be denied.

For the foregoing reasons, the following Ruling is issued.

RULING

Respondents' January 29, 2015 motion for an extension of time to appeal the Chief ALJ's July 29, 2014 Decision, is denied.

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In re: PAUL ROSBERG & NEBRASKA'S FINEST MEATS, LLC.
Docket Nos. 14-0094; 14-0095.
Miscellaneous Order.
Filed February 3, 2015.

FMIA – Extension of time – Federal Rules of Criminal Procedure – Rules of Practice.

Lisa Jabaily, Esq. for Complainant.
Respondents, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

RULING DENYING RESPONDENTS' MOTION FOR EXTENSION OF TIME TO FILE AN APPEAL PETITION

PROCEDURAL HISTORY

On January 29, 2015, Paul Rosberg and Nebraska's Finest Meats, L.L.C. [Respondents] filed a motion to extend the time for filing a second

[6] United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 4177.

appeal of Administrative Law Judge Janice K. Bullard's[1] June 19, 2014 Decision and Order on the Record [Decision].[2] Respondents contend the time for filing a second appeal petition should be extended for "excusable neglect," as authorized by Federal Rule of Criminal Procedure 45(b)(1)(B).

The Federal Rules of Criminal Procedure are applicable to criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.[3] The Federal Rules of Criminal Procedure are not applicable to this disciplinary administrative proceeding.[4] Instead, the rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service,[5] and, unlike the Federal Rules of Criminal Procedure, the Rules of Practice contain no provision for an extension of time after time expires based upon excusable neglect.

The Hearing Clerk served Respondents with the Chief ALJ's Decision on June 23, 2014;[6] therefore, Respondents were required to file their appeal petition with the Hearing Clerk no later than July 23, 2014. As Respondents filed their January 29, 2015 request to extend the time for

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[1] Effective January 4, 2015, Administrative Law Judge Janice K. Bullard [Chief ALJ] was appointed Acting Chief Administrative Law Judge.

[2] Respondents previously appealed the Chief ALJ's Decision. I denied Respondents' July 29, 2014 appeal petition because Respondents filed their appeal petition after the time for filing an appeal petition had expired. Rosberg, 73 Agric. Dec. 551, 2014 WL 7405834 (U.S.D.A.b2014) (Order Den. Late Appeal).

[3] FED. R. CRIM. P. 1(a)(1).

[4] Morrow v. Department of Agric., 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (U.S.D.A. 1995) (stating the Federal Rules of Criminal Procedure do not apply to administrative hearings); Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (same).

[5] 7 C.F.R. § 1.145(a).

[6] United States Postal Service Product & Tracking Information for article number 7003 1010 0001 7367 4916.

filing a second appeal petition after Respondents' time for filing an appeal petition had expired, Respondents' request for an extension of time to file a second appeal of the Chief ALJ's June 19, 2014 Decision, must be denied.

For the foregoing reasons, the following Ruling is issued.

RULING

Respondents' January 29, 2015 motion for an extension of time to appeal the Chief ALJ's June 19, 2014 Decision, is denied.

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HORSE PROTECTION ACT

In re: JUSTIN JENNE.
Docket No. 13-0308.
Miscellaneous Order.
Filed April 10, 2015.

HPA – Administrative procedure – Petition to reopen hearing.

Thomas Bolick, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Order entered by William G. Jenson, Judicial Officer.

ORDER DENYING PETITION TO REOPEN HEARING

On March 11, 2014, Administrative Law Judge Janice K. Bullard [ALJ] conducted a hearing in this proceeding.[1] Thomas Neil Bolick, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator]. Justin Jenne appeared pro se.[2] On July 29, 2014, the ALJ issued a Decision and Order.

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[1] References to the transcript of the March 11, 2014 hearing are designated as "Tr." and the page number.

[2] Prior to the March 11, 2014, hearing, Dudley W. Taylor, Taylor & Knight, Knoxville, Tennessee, represented Mr. Jenne, but, in a March 6, 2014 conference call with the ALJ and Mr. Bolick, Mr. Taylor withdrew his representation of Mr. Jenne.

On September 8, 2014, Mr. Jenne filed an Appeal to Judicial Officer [Appeal Petition] and concurrently filed a Petition to Re-open Hearing for Submission of Additional Evidence [Petition to Reopen Hearing] requesting that the ALJ consider additional evidence that Mr. Jenne failed to adduce at the March 11, 2014 hearing. On October 30, 2014, the Administrator filed a response opposing Mr. Jenne's Petition to Reopen Hearing.[3] On November 7, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Mr. Jenne's Petition to Reopen Hearing.

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice], which are applicable to this proceeding, apportion jurisdiction to rule on a petition to reopen a hearing and set forth the requirements for a petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite—*
>
> (1) *Filing; service; ruling.* . . . . Any such petition filed prior to the filing or an appeal of the Judge's decision pursuant to § 1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.
>
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that

[3] Complainant's Resp. to Resp't's Appeal to Judicial Officer & Pet. to Re-Open Hr'g for Submission of Additional Evid.

> such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(1)-(2).

Mr. Jenne concurrently filed the Appeal Petition and the Petition to Reopen Hearing; therefore, pursuant to 7 C.F.R. § 1.146(a)(1), jurisdiction to rule on Mr. Jenne's Petition to Reopen Hearing lies with the Judicial Officer.

Mr. Jenne attached to the Petition to Reopen Hearing the evidence he seeks to introduce and describes the purpose of the evidence to be introduced. Specifically, Mr. Jenne seeks to reopen the hearing to introduce: (1) Affidavit of Richard Wilhelm, dated September 5, 2014, in which Dr. Wilhelm describes the results of his August 27, 2012 examination of a horse known as "Led Zeppelin," the horse which is the subject of this proceeding; and (2) Affidavit of Justin R. Jenne, dated September 5, 2014, and supporting attachments, in which Mr. Jenne asserts, prior to the institution of this proceeding and *Jenne*, No. 13-0080, he had never been accused by the United States Department of Agriculture of violating the Horse Protection Act and he is unable to pay a civil penalty. Mr. Jenne offers the following as the reasons for his failure to adduce the evidence in question at the March 11, 2014, hearing:

> 2. Judge Bullard noted in her Decision that she held the record open for receipt of report of examination by Respondent's veterinarian, but that report was not submitted. The Respondent, who was not represented by counsel, was not aware of that fact until it was recently pointed out to Respondent by an attorney.

Pet. to Reopen Hr'g ¶ 2 at 1.

Evidence of the results of Dr. Wilhelm's August 27, 2012 examination of Led Zeppelin; evidence that Mr. Jenne had not been accused by the United States Department of Agriculture of violating the Horse Protection Act prior to the institution of this proceeding and *Jenne*, No. 13-0080; and evidence of Mr. Jenne's inability to pay a civil penalty could have been

adduced at the March 11, 2014, hearing. Moreover, the ALJ held the record open until May 16, 2014, for receipt of Dr. Wilhelm's report of his August 27, 2012 examination of Led Zeppelin (Tr. at 186-87), and Dr. Wilhelm's report could have been adduced prior to May 16, 2014.

The Rules of Practice do not distinguish between persons who appear pro se and persons who are represented by counsel,[4] and Mr. Jenne's status as a pro se litigant is not a good reason for his failure to adduce available evidence at the March 11, 2014, hearing.[5] Moreover, Mr. Jenne was present when the ALJ explicitly stated the record would remain open until May 16, 2014, for receipt of Dr. Wilhelm's report regarding his August 27, 2012, examination of Led Zeppelin (Tr. at 186-87), and the record reveals no basis for Mr. Jenne's lack of awareness that the ALJ held the record open for receipt of Dr. Wilhelm's report.

Under these circumstances, I decline to reopen the hearing in this proceeding to receive in evidence the September 5, 2014 Affidavit of Richard Wilhelm or the September 5, 2014 Affidavit of Justin R. Jenne.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Jenne's Petition to Reopen Hearing, filed September 8, 2014, is

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[4] Vigne, 68 Agric. Dec. 362, 364 (U.S.D.A. 2009) (Order Den. Pet. to Reconsider); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1283, 1286 (U.S.D.A. 2007) (Order Den. Pet. for Reh'g as to Lancelot Kollman Ramos); Knapp, 64 Agric. Dec. 253, 299 (U.S.D.A. 2005); Meyers, 58 Agric. Dec. 861, 865 (U.S.D.A. 1999) (Order Den. Pet. for Recons.).

[5] *Cf.* Vigne, 68 Agric. Dec. 362, 364 (U.S.D.A. 2009) (Order Den. Pet. to Reconsider) (holding the respondent's status as a pro se litigant is not a basis on which to set aside the respondent's waiver of the right to an oral hearing); Octagon Sequence of Eight, Inc., 66 Agric. Dec. 1283, 1286 (U.S.D.A. 2007) (Order Den. Pet. for Reh'g as to Lancelot Kollman Ramos) (holding the respondent's status as a pro se litigant is not a basis on which to grant the respondent's petition for rehearing or set aside the default decision); Noell, 58 Agric. Dec. 130, 146 (U.S.D.A. 1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom.* The Chimp Farm, Inc. v. U.S. Dep't of Agric., No. 00-10608-A (11th Cir. July 20, 2000); Byard, 56 Agric. Dec. 1543, 1559 (U.S.D.A. 1997) (Decision as to Byard) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

denied.

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In re: SHOW, INC.
Docket No. 14-0056.
Order of Dismissal.
Filed April 14, 2015.

In re: RANDALL JONES.
Docket No. 13-0053.
Miscellaneous Order.
Filed April 15, 2015.

HPA – Administrative procedure – Extension of time.

Buren W. Kidd, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER EXTENDING TIME FOR FILING MR. JONES'S APPEAL PETITION

On April 9, 2014, Administrative Law Judge Janice K. Bullard [ALJ] issued a Decision Without Hearing by Entry of Default Against Respondent [Default Decision]. The Hearing Clerk served Randall Jones with the ALJ's Default Decision on April 29, 2014,[1] and on May 19, 2014, Mr. Jones filed a letter indicating some confusion regarding the time within which he was required to appeal the ALJ's Default Decision to the Judicial Officer.[2]

In order to clarify the time within which Mr. Jones must file an appeal petition, I treat Mr. Jones's May 19, 2014, filing as a request for an extension of time to appeal the ALJ's Default Decision to the Judicial Officer. On April 15, 2015, Buren W. Kidd, counsel for Complainant, informed me by telephone that Complainant has no objection to my extending the time within which Mr. Jones may file an appeal petition; therefore, I extend the time for filing Mr. Jones's appeal petition to, and

[1] Mem. to the File, dated April 29, 2014, issued by Shawn C. Williams, Hearing Clerk.
[2] Specifically, Mr. Jones states in his May 19, 2014, filing: "Is a [sic] appeal necessary at this time?".

including, May 29, 2015.[3]

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ORGANIC FOODS PRODUCTION ACT

In re: BOB THOMAS, d/b/a MAGNUM LAND HOLDING.
Docket No. 14-0158.
Order of Dismissal.
Filed April 24, 2015.

In re: PAUL A. ROSBERG, d/b/a ROSBERG FARM.
Docket No. 12-0216.
Miscellaneous Order.
Filed June 9, 2015.

SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

In re: J.W. WILLIAMSON GINNERY, INC.
Docket No. 15-0010.
Miscellaneous Order.
Filed March 16, 2015.

In re: JOHNNY WILLIAMSON, a/k/a JOHN W. WILLIAMSON III.
Docket No. 15-0012.
Miscellaneous Order.
Filed March 16, 2015.

[3] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, Mr. Jones must ensure his appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, May 29, 2015.

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

ANIMAL WELFARE ACT

CASEY LUDWIG.
Docket No. 14-0132.
Default Decision and Order.
Filed January 23, 2015.

ORGANIC FOODS PRODUCTION ACT

EMMANUEL H. COBLENTZ.
Docket No. 15-0049.
Default Decision and Order.
Filed March 16, 2015.

PLANT PROTECTION ACT

JULIO ALVAREZ III.
Docket No. 15-0662.
Default Decision and Order.
Filed May 13, 2015.

CONSENT DECISIONS

ANIMAL HEALTH PROTECTION ACT

T. Kenneth Emery, LLC.
Docket No. 14-0148
Filed May 21, 2015.

ANIMAL WELFARE ACT

Deer Forest Amusements, Inc.
Docket No. 14-0135
Filed June 22, 2015.

Anthony L. Schachtele
Docket No. 15-0090
Filed May 13, 2015.

Rebecca Jo Schachtele
Docket No. 15-0091.
Filed May 13, 2015.

FEDERAL CROP INSURANCE ACT

Keith Wendell Hooks.
Docket No. 15-0025.
Filed June 30, 2015.

FEDERAL MEAT INSPECTION ACT

Lemay and Sons Beef Co.
Docket No. 15-0066.
Filed February 6, 2015.

Richard Lemay.
Docket No. 15-0067.
Filed February 6, 2015.

CONSENT DECISIONS

Tri-Town Packing Corp.
Docket No. 14-0180.
Filed May 19, 2015.

DeHaven's Butchering and Country Market & Carl DeHaven.
Docket No. 15-0076.
Filed February 20, 2015.

HORSE PROTECTION ACT

Alvin Strickland.
Docket No. 13-0232.
Filed March 12, 2015.

Toni Strickland.
Docket No. 13-0233.
Filed March 12, 2015.

Kevin Gower.
Docket No. 15-0040.
Filed March 31, 2015.

Megan M. Baker.
Docket No. 13-0265.
Filed April 6, 2015.

Dennis Smith.
Docket No. 13-0364.
Filed April 29, 2015.

Dustin Smith.
Docket No. 15-0038.
Filed April 29, 2015.

David C. Polk, d/b/a David Polk Stables.
Docket No. 14-0121.
Filed May 5, 2015.

Andrew Simpson.
Docket No. 14-0110.
Filed May 8, 2015.

POULTRY PRODUCTS INSPECTION ACT

Tri-Town Packing Corp.
Docket No. 14-0180.
Filed May 19, 2015.

SOYBEAN PROMOTION, RESEARCH, AND CONSUMER INFORMATION ACT

Alton Phillips.
Docket No. 15-0011.
Filed February 13, 2015.

Carolina Soya, LLC.
Docket No. 15-0007.
Filed February 13, 2015.

Lynchburg Grain Company.
Docket No. 15-0008.
Filed February 13, 2015.

Carolina Eastern, Inc.
Docket No. 15-0009.
Filed February 13, 2015.