COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS

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February 12, 2010

Chester A. Gipson
Deputy Administrator, Animal Care
United States Department of Agriculture
Animal and Plant Health Inspection Service
4700 River Road
Riverdale, MD 20737

Re: The Unlicensed Private Possession of Wildlife

Dear Mr. Gibson:

Our Committee, Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York, writes to take issue with the position of the United States Department of Agriculture that it is powerless to rescue endangered and threatened wildlife from a person, despite the person's lack of a license, because such person is no longer engaged "in activities for which he would need to be licensed, such as selling, trading, exhibiting, transporting, or delivering" the wildlife for transport".

The position is set forth in a letter dated December 10, 2009 (a copy of which is enclosed herewith, and herein referred to as "Department's Letter"), responding to a concerned citizen's request for that Department to take possession of the Asian elephant, Queenie, from her trainer/owner, Wilbur Davenport, who allegedly "voluntarily surrendered his business AWA license".[1] USDA contends that any action on your part must await the resolution of Davenport's hearing.

After review of the applicable law, we believe that the Department's position violates the Endangered Species Act (ESA), [see 16 U.S.C. 1513-1540], specifically those provisions governing endangered and threatened wildlife and delegating to the Secretary of the Interior the authority to promulgate regulations defining and enforcing its provisions (50 CFR 17.1 *et seq.*). The ESA mandates Federal interagency cooperation under 16 U.S.C. 1536, and subdivision 2 of that section emphasizes the obligation of other Federal agencies to effectuate the conservation

[1] As your Department has acknowledged, two other Asian elephants in Davenport's possession, Tina and Jewel, were finally taken from him after extensive petitioning by animal welfare organizations, as well as individuals, and placed in the San Diego Zoo.

goals of the ESA when their duties overlap.[2] Consequently, it violates both the letter and the spirit of the ESA for the Department of Agriculture to claim that its APHIS inspectors are powerless to act simply because a trainer allegedly no longer exhibits the wildlife. Federal law mandates your Department's cooperation with the Department of the Interior. Since Queenie is of Asian origin, and therefore a member of an endangered species, even if bred in captivity[3], she can only be kept pursuant to a Captive Bred Wildlife (CBW) permit issued upon proper application to the Fish & Wildlife Service of Department of the Interior. 16 U.S.C. 1539 (a)(1)(A) and 50 CFR 17.21(g). But the purpose of the "taking" must be to "enhance the propagation or survival of the affected species." 50 CFR 17.21(g)(ii). In furtherance of this goal, the holder of the CBW permit may engage in the following activities:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping, or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry, needed to maintain captive populations that are self-sustaining, and that possess as much genetic vitality as possible;
(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive populations at the location from which the wildlife would be removed; and
(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.

See 50 CFR 17.3.

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[2] 16 U.S.C. 1536, entitled "Interagency Cooperation", specifically provides in subdivision one that "All other Federal agencies shall, in consultation with and with the assistance of the Secretary [of the Interior] utilize their authorities in furtherance of the purposes of this [ESA] Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act [16 U.S.C. 1533]. Subdivision two further provides as follows: Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action which is authorized, funded or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species…."

[3] 50 CFR 17.11 defines Asian elephants as members of an endangered species. This definition applies even if they were bred in captivity prior to the more restrictive amendments to the ESA (16 U.S.C. 1513 et. seq.). *See ASPCA et al. v. Ringling Bros*., 502 F. Supp. 2d 103, 108 (Dist. Ct. D.C. 2007), quoting *Stone v. INS*, 514 U.S. 386, 397 (1996): "When Congress acts to amend a statute, [the Court] presume[s] it intends its amendments to have real and substantial effect." In *ASPCA et. al.* v. *Ringling Bros., supra*, at 106-107, quoting 16 U. S. C. 1532 (19), the Court stated that "To 'take' an endangered species means to harass, harm, pursue, hurt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." By FWS regulation, "harass" further is clarified to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns…" 50 C.F.R. § 17.3. The term "harm" as used in Section 9(a)(1)(B) of the ESA means "an act which actually kills or injures wildlife..." When applied to "captive wildlife," only certain humane exceptions apply (*e.g.*, animal husbandry, breeding procedures, and veterinary care, which are inapplicable to the animal which is the subject of this bar association letter). Thus, the Court made clear that "take" is a term of art and concluded that it applies to captive bred endangered species. Further, 50 CFR 17 *et seq.*, which mandates a permit for the activities listed therein pertaining to endangered species, includes the term possession and also applies retroactively. There is no evidence that the unlicensed trainer either possessed a permit or, if he did, that it was suspended. In *ASPCA* v. *Ringling Bros*., *supra*, the Court refused to rule on the alleged violations of Captive Bred Wildlife permits, contending sole jurisdiction was with the Department of the Interior. In light of the statutory mandate of interagency cooperation, it would be hoped the Departments might make a joint effort in this area.

There is no evidence of which we are aware – and the Department Letter does not allege that such evidence exists - that Wilbur Davenport has ever applied for a CBW permit or that his private possession of Queenie satisfies the above-cited conditions required by Federal law for the issuance of such a CBW permit. All evidence in the public record is to the contrary. If this is in fact the case, we believe the legal position stated in the Department's Letter is incorrect and, therefore, the Department's refusal to take possession of Queenie is contrary to applicable law.

Further, there is Federal decisional authority that government agents may take possession of an animal to prevent or halt its neglect or abuse. *See United States v. Vurgess*, 2008 WL 43859830 S. D. Ga. 2008)(the "emergency exception" to the Fourth Amendment justified the warrantless seizure of malnourished dogs from defendant's real property; however, weapons, narcotics, and other evidence of illegal activities were suppressed inasmuch as no exception to the warrant requirement was ruled applicable these seizures). Such case law should be sufficient for the Department to act against the private possession of a wild animal by a currently unlicensed circus trainer who is the subject of a pending case against him for violations he committed while enjoying the privilege of a license[3]. Although the trainer surrendered his USDA exhibitor license before it could be officially suspended, he is charged by the USDA in a license revocation proceeding, which could also result in civil penalties, for failing to provide the required humane conditions for the elephants in his care.

In conclusion, we believe the Department has no basis in law for refusing to exercise the authority that it is granted by the applicable statute, regulations and case law to take possession of endangered and threatened wildlife in this and similar cases.

Sincerely,

Martha Golar

Martha Golar

Cc: Tom Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

General Counsel
The Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Room 3311-5
Washington, DC 20250

[3] The Department of Agriculture did take possession of two Asian elephants, Tina and Jewel, whom Davenport had been accused of abusing. As of this date, upon information and belief, Tina and Jewel are at the San Diego Zoo.

USDA

United States
Department of
Agriculture

Animal and
Plant Health
Inspection
Service

4700 River Road
Riverdale, MD
20737

DEC 10 2009

Dear Concerned Citizen:

Thank you for writing to the U.S. Department of Agriculture (USDA) concerning the welfare of Queenie (also known as "Boo"), an elephant that is owned and was previously exhibited by Mr. Wilbur Davenport doing business as Maximus 'Tons of Fun,' LLC.

We at USDA are deeply committed to using our Animal Welfare Act (AWA) authority to ensure that regulated animals receive care in accordance with the law. When we find that an animal is in a condition of unrelieved suffering, we will confiscate the animal and move it to another facility that will provide the animal care and treatment which meets the AWA requirements. Accordingly, on August 20, 2009, USDA officials, in conjunction with other Federal officials, confiscated Jewel from Mr. Davenport's facility in Leggett, Texas; another elephant, Tina, was relinquished by Mr. Davenport at that time. Both elephants are being housed together at the San Diego Zoo.

Because Mr. Davenport voluntarily surrendered his business' AWA license, we have no regulatory authority over Mr. Davenport's remaining elephant, Queenie, unless he engages in activities for which he would need to be licensed, such as selling, trading, exhibiting, transporting, or delivering Queenie for transport. Accordingly, we cannot confiscate Queenie nor can we require that Mr. Davenport relinquish her to our Agency or to a third party. Our authority to confiscate animals is limited to situations in which an animal, held by a regulated entity, is suffering and action is not taken to alleviate that condition.

Our Agency recently issued an AWA complaint against Mr. Davenport and his business, Maximus 'Tons of Fun,' LLC, that pertains to activities conducted when Mr. Davenport's business was licensed under the AWA. The complaint was delivered on October 21, 2009, and Mr. Davenport has responded by denying the allegations contained in the complaint. We continue to pursue this enforcement action and have filed a motion to schedule a hearing before an administrative law judge. If Mr. Davenport were to relinquish Queenie to Agency officials at any point during this process, we assure you that we would carefully consider an appropriate, AWA-compliant facility for placement.

To learn more about our Agency's AWA enforcement activities, we encourage you to visit our Web site at www.aphis.usda.gov and select "Animal Welfare" on the left side of the page. We hope this information is helpful.

Sincerely,

for Chester A. Gipson
Deputy Administrator
Animal Care