

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

Docket No. 12-0465

In re: DAVID DeMARCE and SHERRY CARNEY,

Petitioners.

Appearances:

Colleen Carroll, Esq. for Respondent

David DeMarce and Sherry Carney, Petitioners, pro se

Before:

Janice K. Bullard  
Administrative Law Judge

**DECISION AND ORDER**

The above captioned matter involves a petition for review of the denial of a license by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Respondent”), filed by David DeMarce and Sherry Carney (“Petitioners”). Petitioners contend that APHIS’ decision to deny them a license under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; “the Act”), was unfounded.

The instant decision<sup>1</sup> is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

I. ISSUES

1. Whether Respondent’s determination denying Petitioners a license under the Act should be upheld.

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<sup>1</sup>In this Decision & Order, the transcript of the hearing shall be referred to as “Tr. at [page number]. Petitioners’ evidence shall be denoted as “PX-[exhibit #]” and Respondents’ evidence shall be denoted as “RX-[exhibit number]”. Exhibits admitted to the record sua sponte shall be denoted as “ALJX-[exhibit number]”.

## II. STATEMENT OF THE CASE

### 1. Procedural History

On June 8, 2012, Petitioners filed a request for review of a determination issued on May 23, 2012, which denied their application for a license under the Act. On July 9, 2012, Respondent filed a response to the petition, maintaining that a hearing was not necessary, and proposing disposition of the matter by summary judgment. By Order issued July 13, 2012, I directed the Petitioners to show cause why a Decision should not be issued on the record and directed Respondent to file evidence. On July 24, 2012, Petitioners responded with their reasons for holding a hearing. Petitioners also filed a request for subpoena, to which Respondent objected. Respondent requested an extension of time to submit its documents, and I granted the motion by Order issued August 1, 2012.

On August 12, 2012, Respondent filed a motion for summary judgment, with supporting documentation. On September 5, 2012, Petitioners requested additional time to respond to the motion, which I granted by motion filed September 7, 2012. Petitioners requested additional time by motion filed September 27, 2012. On October 17, 2012, I issued an Order deferring ruling on Respondent's motion pending Petitioner's filings.

On December 12, 2013, Petitioners moved to withdraw from the appeal, but the pleadings were not clear, and I held a telephone conference with the parties. At the conference, Petitioners made it clear that they did not have too much evidence, but wanted the reasons for the license denial explained to them. A hearing date was set, but for reasons beyond the parties' control, was continued to August 13, 2013. The parties filed supplemental submissions, and convened on the scheduled date. The hearing commenced by audiovisual connection between Somerset, New Jersey, where I attended; Washington, DC; and Atlanta, Georgia.

At the hearing, I admitted to the record Respondent's exhibits, most of which were filed with the motion for summary judgment. I entered RX-1 through RX-25 to the record. I admitted all written submissions from Petitioners. Testimony was given by several witnesses for Respondent and Petitioners made statements under oath. I advised the parties that the written brief in support of summary judgment submitted by Respondent's counsel and Petitioners' statements would serve as closing argument. I closed the record, except for the entry of the transcript of the hearing, which has been received and is of record.

## **2. Statutory and Regulatory Authority**

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. Veg-Mix, Inc. v. United States Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10<sup>th</sup> Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10<sup>th</sup> Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving

party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10<sup>th</sup> Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Adler, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10<sup>th</sup> Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. § 2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service (“APHIS”), an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

Pursuant to 9 C.F.R. §2.11(a) A license shall not be issued to any applicant who:

(5) Is or would be operating in violation or circumvention of any federal, State or local laws; or (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department of other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §§2.11(a)(5) and (6).

### 3. Summary of the Evidence

#### A. Documentary Evidence

RX-1	Affidavit of Sam O’Neal
RX-1(a)	Copy of Georgia Statute O.C.G.A. § 27-5-4
RX-2	Sample Special Permit Unit (“SPU”) wild animal license application
RX-3	Information about and sample SPU license renewal forms
RX-4	SPU license for Sherry Carney d/b/a Fascinating Felines (“Carney”)
RX-5	SPU license for Carney
RX-6	SPU renewal application from Carney dated 3/28/2011
RX-7	Notice of deficiency from SPU to Carney
RX-8	Dempsey Inspection Report
RX-9	Notice of State License denial
RX-10	Decision and Order of State Administrative Law Judge
RX-11	Order of State Superior Court
RX-12	Request for Admissions and discovery
RX-13	Records from Carroll County Animal for Carney
RX-14	Duplicate copy of SPU license ending 3/31/2011
RX-15	SPU Application from David DeMarce
RX-16	Copy of APHIS AWA license (date indecipherable)
RX-17	Affidavit of Sherry Carney
RX-18	APHIS letter dated 8/27/2010 denying Carney renewal application
RX-19	Carney letter dated 9/13/2010 requesting reconsideration by APHIS
RX-20	APHIS letter dated 9/29/2010 denying reconsideration
RX-21	Carney application for AWA license dated 11/8/2010

- RX-22 APHIS denial dated 2/22/2011 and letter from Carney dated 4/7/2011
- RX-23 Responses to Request for Admissions and certificates of service
- RX-24 Declaration of Elizabeth Goldentyer
- RX-25 Decision of Georgia Court of Appeals
- RX-26 Copy of Docket Sheet
- PX-1 Letter denying application for an exhibitor's license, dated 5/ 23/2012

B. Testamentary Evidence

*Lieutenant Sam O'Neal* (Tr. at 22-75)

Lt. O'Neal works in the Law Enforcement Division of the State of Georgia's Department of Natural Resources ("DNR"). His primary duties are to investigate matters involving the state's resources, including wildlife. His duties include reviewing special licenses for people to breed or exhibit exotic animals, which he defined as animals that are not indigenous to Georgia. Individuals may possess such animals only after approval of a license application. Licensees are required to keep records of acquisition and disposition of animals, and inform the DNR of the addition or disposal of animals.

The DNR does not routinely inspect premises of licensees, but does conduct an inspection before licensing and when licensees seek to add a different species to their inventory of animals. However, when the Law Enforcement Division of the DNR assumed responsibility for special licenses in September, 2010, it decided to inspect all licensees. Petitioner Carney held a wild animal license at that time, and her facility was inspected by Corporal (now Sergeant) Rick Dempsey. Sgt. Dempsey reported that records were not complete and the facility did not meet standards for security. Two lynx, a caracal and a serval were present. There was no evidence of breeding, and there was evidence that the animals were at times kept in a residence,

and not in a secured enclosure. In cases where people hold licenses as breeders, the State would expect to see offspring in years following the issuance of the license.

Sgt. Dempsey consulted Lt. O'Neal and inspectors from USDA, and DNR concluded that a search warrant was warranted to see what other animals were on Ms. Carney's property. The search warrant was executed in November, 2011, and the four cats were present. All but one of the cats was male, and they were all housed in separate enclosures. The DNR investigators concluded that no breeding was taking place, and the cats were confiscated. In addition, Ms. Carney did not have a valid license because she did not have a valid AWA license from USDA. Ms. Carney was cited for having animals without a license, because her license had not been renewed. Another citation was issued for failing to secure animals properly. They were in a chain link enclosure without a lock securing a gate.

Lt. O'Neal explained that even if Respondent had a valid USDA license, her Georgia license had expired, and would not have been renewed, because she was obviously not breeding or exhibiting animals. There was no documentation or pictures of offspring, and nothing to show that offspring had been sold or otherwise transferred since Ms. Carney's license was issued in 1999. There was no documentation of exhibitions, or any evidence showing that Respondent had a business exhibiting the animals. Lt. O'Neal concluded that the cats were Ms. Carney's pets, which is against Georgia law.

Lt. O'Neal also testified that there were discrepancies in Ms. Carney's application for Georgia license renewal dated March 28, 2011, which listed that she had three lynx and a caracal. When the premises were inspected in July, 2012, two lynx, a caracal and a serval were on site. There was no record that Ms. Carney had notified the DNR that a lynx had died or that she had acquired a serval, though she admitted these facts to Sgt. Dempsey. Individuals with

licenses are required to notify the state within a reasonable time of the birth or acquisition of an additional animal, and also of the disposition of an animal by any means.

*Sergeant Rick Dempsey* (Tr. at 77-110)

Sgt. Dempsey was recently promoted from Corporal, which was his rank when he conducted his inspection of Petitioners' location. He conducted 37 inspections of licensees when the Law Enforcement Division took over the responsibility for wild animal licenses, including Ms. Carney's facility. Sgt. Dempsey and a wildlife technician visited Ms. Carney on July 28, 2011. He had no previous knowledge of her or Mr. DeMarce. When he arrived at Ms. Carney's facility, Sgt. Dempsey saw two lynx and a serval in an unlocked enclosure made of tall chain link fencing next to a garage. He saw a caracal on cement in an enclosure under a carport. Mr. DeMarce answered the door to Sgt. Dempsey's knock, and advised that Ms. Carney was at work. Sgt. Dempsey noted on an inspection report that the fence was not locked, and he made arrangements to meet with Ms. Carney on another day.

When he met with Ms. Carney, Sgt. Dempsey had with him a copy of her application for renewal that was due on March 31, 2011. It was dated March 28, 2011, but received by the DNR on April 22, 2011. The animals owned by Ms. Carney were listed on the application as two male and one female lynx and one male caracal. At his inspection, Sgt. Dempsey found two male lynx, one male caracal and a female serval. When he met with Ms. Carney, she told him that her female lynx had died, but did not say when. Ms. Carney said that she had obtained the serval from an individual in October, 2010. She did not have a current Georgia wild animal license or an APHIS AWA license, but she said that the APHIS license was pending.

Sgt. Dempsey consulted with the wildlife technician when he completed the inspection report he prepared, and both signed it. He was particularly concerned that he had found the animals' enclosure unsecure and accessible by anyone. He also was concerned that Ms. Carney had no

documentation about the lynx' death, or records of births, and had not reported ownership of the serval. He thought the serval did not look well, but Ms. Carney assured him that it liked to be alone.

Sgt. Dempsey reported his findings to Lt. O'Neal, and they decided to issue a search warrant to look for records and to seize the animals, as they had not been kept in a secure enclosure. Sgt. Dempsey was not concerned that Ms. Carney did not have a USDA license because he believed she had not met requirements for a Georgia license. He never did see records or documentation to support that Ms. Carney had exhibited or bred the animals. He did see photographs of the animals that appeared to be taken in Ms. Carney's residence, and she told him she considered them her "babies". He concluded from her statements that the cats were Ms. Carney's pets. The Georgia rules prohibit exotic animals from being in a residence.

Sgt. Dempsey was not aware that an employee of the DNR had advised Ms. Carney that her Georgia license renewal application was being held pending the results of the USDA application. In Sgt. Dempsey's opinion, the fact that the enclosure that held the cats was not locked made it an unsecure enclosure within the definition of the law. He recalled that Ms. Carney had told him that one of the cats had had kittens, which had died, but he could not say whether it was the lynx or the serval.

*Rhudy Ralph Ayers (Tr. at 114-137)*

Mr. Ayers had worked as an inspector for USDA for 37 years until his retirement in January, 2013. He routinely inspected Petitioners' facility and had never found problems with their care of animals. Ms. Carney did not have an exhibitor license, but he could not recall what class dealer license she held. His last inspection was conducted about one year before the Georgia inspection took place. He generally found the facility locked, and usually had to call Ms. Carney to let him in. He did not recall any complaints about Petitioners' facility. Mr. Ayers was not

familiar with Georgia's requirements for issuing state licenses. He had a good relationship with Georgia inspectors at one time, but the relationship had eroded sometime before he retired. No one from Georgia contacted him about Petitioners, and he was not aware if anyone else with USDA had been consulted by Georgia officials.

Mr. Ayers was aware of other facilities that held a Georgia license but no USDA license. He recalled talking with Ms. Carney about serval kittens dying or being bottle fed in another state, but he could not remember the conversation. He wrote an email to other USDA employees about the serval kittens, and Mr. Ayers confirmed that whatever he said at that time would have accurately reflected his understanding of the situation at that time. He had reported seeing a serval at Petitioner's facility on his last inspection, but no kittens. He never saw veterinary documentation of the birth of kittens. Mr. Ayers confirmed that lynx don't always breed well, particularly in cold weather.

Mr. Ayers explained that he conducted inspections by applicants for APHIS AWA licenses, and in his experience, if applicants passed the inspection, their applications were approved. He was not involved in making the decisions regarding approving licenses or license renewals. Mr. Ayers did not conduct an inspection in conjunction with the license application that APHIS had denied. He did not know why Petitioners' license application was denied, but was aware that they had applied for an exhibitor's license in 2010 or 2011.

*Elizabeth Goldentyer* (Tr. at 141-162: RX-15)

Dr. Goldentyer has been the Regional Director, Animal Care, Eastern Division for APHIS since 1997. RX-15. Dr. Goldentyer testified that Petitioners' April 26, 2012, application for an exhibitor's license was denied because Petitioners were not abiding by Georgia law and because Ms. Carney made false statements in the license renewal application she filed with the State of Georgia. Ms. Carney did not provide accurate information about the animals she owned. Dr.

Goldentyer was aware that the State had denied her state license in part because she did not have a USDA license. Dr. Goldentyer had been provided a transcript of a Georgia court proceeding in which Ms. Carney had admitted that she had failed to report her acquisition of a serval. In addition, Dr. Goldentyer relied upon emails from Mr. Ayers which she thought showed that Ms. Carney had lied about having kittens bottle fed out of state, because Ms. Carney admitted in later statements that kittens had died. Neither births nor deaths were reported to the State or USDA. The witness was not aware of the conclusions of a pre-approval inspection of Ms. Carney's premises by USDA inspectors.

After Ms. Carney's license application was denied, Mr. DeMarce applied for licenses in his name, which APHIS denied. Petitioner DeMarce could not demonstrate that he was engaged in activity for which an AWA license would be issued. Dr. Goldentyer also took issue with the fact that Petitioner used various business names on the applications, which she found was not an ordinary business practice.

Petitioner Carney's AWA breeder's license had expired in the summer of 2010 because she had not timely applied for renewal. According to USDA regulations, if a licensee fails to renew a license, it is cancelled, and the licensee would need to apply for a new license. Ms. Carney had then applied for a new license as a dealer, but she was not approved because she was not engaged in breeding or dealing business activity.

Dr. Goldentyer acknowledged speaking with Ms. Carney about her applications on several occasions, but did not recall advising her that she should apply for an exhibitor's license or get a pair of breeding servals. The witness stated that USDA issued licenses to businesses where appropriate. She stated, "It's a matter of what you're actually doing. It's not a matter of trying to find a way to get a license." (Tr. at 146). Dr. Goldentyer testified that some businesses have licenses to broker and transport animals, but are not breeders. However, if the stated purpose of

a business is breeding, and there is no breeding taking place, then a license would not be approved.

Dr. Goldentyer did not know whether a ruling by the Superior Court of Georgia would have returned Ms. Carney's cats to her if she had been able to secure her USDA license.

*Sherry Carney* (Tr. at 163 - 171)

Ms. Carney testified that Dr. Goldentyer had advised her to get a breeding pair of servals, and she went to Florida and brought back a female who was pregnant. The kittens all died. Ms. Carney asserted that she told Mr. Ayers that they had died. After she read statements he had written, Ms. Carney called him to dispute his remarks about kittens being bottle fed. Mr. Ayers agreed that he may have misheard her. Ms. Carney further testified that she was attempting to breed her cats, but Canadian lynx are difficult breeders. She was saving to purchase a female caracal, and meanwhile hoped to breed the serval with the male caracal. She thought that the serval may have been pregnant when the cats were confiscated, because the cat had gained weight.

Ms. Carney explained that although her fences are not locked, they are latched, and cannot be opened by animals. She admitted that people could gain access to the animals. However, she explained, a gate that gives access to her driveway is usually locked, which prevents people from getting near the animals.

Ms. Carney testified that she inadvertently left the serval off of her application. She also did not know that she needed to inform state officials about animal deaths and acquisitions. She did not consider the omissions outright falsehoods. Ms. Carney told Brooke Smith of the DNR that she had applied for an APHIS AWA exhibitor's license, and Ms. Smith agreed to hold her Georgia application pending USDA's approval.

Ms. Carney had no warning that the State would confiscate her cats, and she learned that two of them have since died. She believed that if USDA had worked with her and issued her a license, her cats would not have died.

*David DeMarce* (Tr. at 171-176)

Mr. DeMarce did not understand why his applications for an AWA license from USDA were not approved. He believed that he and Ms. Carney were unfairly treated, and that despite a good record of caring for animals, their animals were confiscated and given to a facility that had been cited with many violations of the AWA. He did not think that Ms. Carney's recordkeeping violations should have resulted in confiscation of the animals. He further believed that he and Ms. Carney should have been given notice of the confiscation and been allowed an opportunity to place the animals with facilities that they were familiar with. Mr. DeMarce was concerned that there appeared to be little regard for the welfare of the confiscated animals.

#### **4. Discussion**

The preponderance of the evidence before me demonstrates that Petitioners made good faith, but ultimately unsuccessful, efforts to breed exotic cats under the auspices of a valid State license and a valid APHIS AWA dealer license. I fully credit Ms. Carney's testimony that a serval she brought from Florida gave birth to kittens that died. It is consistent with an affidavit she signed on May 11, 2011, and with her answers to discovery. See, RX-17 and RX-23. I give limited weight to the testimony of Mr. Ayers about kittens being bottle-fed, as his recall was not reliable and he admittedly has a hearing impairment. I credit his testimony that Petitioners' animals were well cared for, as he had inspected the premises many times in the fifteen or so years that Ms. Carney held a license.

Despite the evidence of breeding efforts, Ms. Carney allowed her original APHIS AWA dealer license to lapse, and it became clear that applications for a new dealer license would not

be approved by USDA. See, RX-18 through RX-23. At the same time, Petitioners were subjected to an inspection of the cats' housing by the State DNR, which was an unusual event. Discussions with the state inspectors brought the need for a USDA license into sharp focus, as renewal of the State license relied, at least in part, on Petitioners' holding a valid APHIS AWA license. In an attempt to comply with the state mandate, Ms. Carney and Mr. DeMarce applied for an APHIS AWA exhibitor's license individually and jointly. APHIS returned several applications as incomplete and eventually denied a joint application for several reasons.

Dr. Goldentyer testified, consistent with the denial letter of May 23, 2012 (attached to the Petition), that APHIS concluded that Petitioners had made false statements on their applications to DNR by not identifying all of their animals and then further violated state law by failing to report the acquisition and deaths of animals. Although I credit Ms. Carney's testimony that the omission of the serval from the application was inadvertent, she also continued to list three lynx, despite full knowledge that one had died. Regardless of Ms. Carney's intentions, she certified to the accuracy of the information, and the need for accurate records is more than a trivial requirement for the DNR. In the absence of routine inspections, reports by licensees were the primary manner by which the state assured compliance. I therefore find sufficient evidence to support USDA's denial of Petitioners' application on the grounds of false statements about animal inventory.

I also credit Ms. Carney's testimony that kittens had died, and further find that she did not lie to Mr. Ayers about the whereabouts of the kittens. This conclusion does not weaken APHIS' reasons for denying the license application, however, because APHIS relied on the state's determination, which concluded that Ms. Carney had failed to report the deaths of the kittens and the lynx, and had not accurately listed her inventory of animals. Ms. Carney's assertion that she did not know she had to report deaths of animals is not entirely credible, as she held a license

with the DNR for many years and should have been familiar with that agency's requirements, which accompany application renewals. See, RX-2, RX-3. Her contentions are undermined by the fact that she affirmatively reported on her DNR application that she owned three lynx, despite the death of one.<sup>2</sup>

APHIS further found that Ms. Carney willfully made a false statement to DNR personnel by telling them that her application for an APHIS AWA license was pending. Several applications by Petitioners had been returned as incomplete and it is not inconceivable that Ms. Carney equated incomplete applications as "pending" because APHIS had not made determinations in those. However, the preponderance of the evidence establishes that there was no active license application with APHIS at the time of her meeting with DNR.

In its letter of May 23, 2012, as additional grounds for denying the exhibitor license APHIS considered the fact that Petitioners had no Georgia license. I appreciate the "chicken and egg" aspect of Petitioners' dilemma in that both agencies required that Petitioners be licensed. I even sympathize with Ms. Carney's frustrated hopes that APHIS could give her a license that would allow her to keep her animals. Without a USDA AWA dealer or exhibitor license, Petitioners could not keep exotic mammals under Georgia law.

Georgia law requires persons who want to possess any wild animal to obtain a wild animal license from the Georgia DNR. O.C.G.A. §§ 27-5-1, 27-5-4(a), 27-5-5. Wild animal licenses may be granted "only to persons engaged in the wholesale or retail wild animal business or persons exhibiting wild animals to the public." O.C.G.A. § 27-5-4(b). In addition, only individuals with a license from USDA APHIS, or who have obtained a written exemption from such, may hold a Georgia wild animal license for mammals. O.C.G.A. § 27-5-4-b. RX-1(a). Lt.

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<sup>2</sup> I decline to give any weight to the evidence regarding the integrity of the enclosures for Petitioners' cats, as APHIS did not rely upon the state's conclusions on that issue in its decision to deny the license application.

O'Neal testified that Petitioners' cats are considered wild animals because they are not native species of Georgia. Tr. at 31.

The record corroborates Dr. Goldentyer's testimony that USDA did not approve a dealer's license because Petitioners did not appear to be breeding animals as a dealer. RX-8. Ms. Carney had allowed her license to lapse. Even assuming that I would find that Petitioner had filed complete applications and reports with DNR, thereby impugning APHIS' reliance upon DNR's conclusions and overturning its determination, Petitioners produced no evidence of a business plan to use the animals in an exhibit. It is clear from the record before me that Petitioners were not engaged in a business for which an APHIS AWA license would be granted. Without that license, Petitioners did not qualify for a Georgia wild animal license.

Reviewing all the evidence in the light most favorable to Petitioners, I must conclude that there is no dispute of material fact regarding false statements made by Ms. Carney on her DNR applications and to DNR personnel<sup>3</sup>. It is further uncontroverted that Petitioners did not have a Georgia wild animal license, and would be ineligible for one without an APHIS license. Although it is regrettable that Petitioners were not provided advance notice of the confiscation of their animals, those determinations by the Georgia DNR are outside the scope of my authority.<sup>4</sup>

Accordingly, Respondent's motion for summary judgment is hereby GRANTED.

### III. FINDINGS OF FACT

1. Petitioners are individuals with a mailing address in Carrollton, Georgia.

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<sup>3</sup>Respondent has submitted evidence and made argument alleging that Petitioner Carney violated law and regulations involving transporting animals across state lines. I have given no weight to this evidence and argument because the determination letter denying Petitioners' joint application for an AWA license issued May 23, 2012 does not refer to that allegation as grounds for denial. See, PX-1.

<sup>4</sup> Petitioners pursued their remedies before an Administrative Law Judge for the State of Georgia (RX-10), Georgia's Superior Court (RX-11), and then before the Georgia State Court of Appeals (RX-25). Despite the outcome of that litigation, for the reasons stated herein, Petitioners are not qualified to be licensed as exhibitors under the AWA.

2. From 2003 to August 1, 2010, Petitioner Carney held APHIS AWA dealer's license # 57-B-0157, d/b/a "Fascinating Felines".
3. Ms. Carney attempted to breed exotic cats but was not successful.
4. On or about July 26, 2009, Ms. Carney's AWA license renewal application stated that she had acquired one animal and had earned no money from activities regulated by the AWA in the previous year.
5. Ms. Carney's AWA license was renewed for a period due to expire August 1, 2010.
6. On August 16, 2010, Ms. Carney submitted a renewal application to APHIS, which stated that she had neither acquired nor sold any animals, nor had earned any money from regulated activities.
7. On August 27, 2010, APHIS advised Petitioner Carney that the license had been canceled upon a determination that she did not engage in activities covered by the AWA.
8. In October 2010, Petitioner Carney acquired a female serval from a licensed dealer in Florida, and kittens born to that serval later died.
9. On November 8, 2010, Petitioner Carney applied for a new AWA dealer's license which noted the acquisition of a serval on loan.
10. On February 22, 2011, APHIS returned the application without a determination on the grounds that the agency was unable to confirm that Ms. Carney was engaged in activities covered by the Act.
11. On January 27, 2012, Petitioner David DeMarce applied for a new AWA dealer's license for a business identified as "Crazy Cats" that used the same address as Ms. Carney's.
12. On February 22, 2012, APHIS returned the application as incomplete, noting that Mr. DeMarce owned the property jointly with Ms. Carney, and advising that no regulated activity had been described.

13. On March 14, 2012, Petitioner David DeMarce applied for an AWA exhibitor's license for "Krazy Kats" at the same address as Ms. Carney's enterprise.
14. On April 3, 2012, APHIS returned the application as incomplete, again noting that no regulated activity had been described.
15. On April 26, 2012, Petitioners filed a joint application for an exhibitor's license for a partnership named "Critter Crazy", identifying nine animals.
16. On May 23, 2012, APHIS denied the application on the grounds that Petitioners were unfit to be licensed by APHIS.
17. Petitioners sought review of APHIS' decision.
18. Neither Petitioner possessed a Georgia wild animal license at the time of the APHIS denial.
19. Petitioner Carney's Georgia license application was initially not processed because she had not provided a copy of an APHIS AWA license, and then was denied for failure to report the acquisition and demise of animals, and failure to breed or exhibit animals.
20. Petitioner Carney's application to Georgia did not accurately identify the animals in her inventory.
21. Petitioner Carney's statements to the DNR that an application was pending approval by USDA is not accurate, as the record shows applications were returned as incomplete.
22. Petitioner Carney did not have a valid APHIS AWA license since April, 2010.
23. There is no evidence of record establishing that Petitioner DeMarce ever held an AWA license.
24. On November 16, 2011, the State of Georgia confiscated Petitioner Carney's animals for violations of its wild animal statute and regulations.
25. Petitioner Carney sought review of Georgia's actions in Georgia courts.

#### IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.
2. There is no factual dispute involving the material issue in this matter, and summary judgment in favor of Respondent is appropriate.
3. The laws and regulations of the State of Georgia pertaining to the possession of a wild animal require that Petitioners hold a valid APHIS AWA license.
4. Petitioner Carney's omissions on a certified application for a Georgia wild animal license, failure to report deaths and acquisition of animals, and assertions that an application for an AWA license were pending at APHIS constitute false statements that support the denial of an AWA license.

#### **ORDER**

The APHIS Administrator's determination of May 23, 2012, is supported by the preponderance of the evidence. Petitioners' application for an exhibitor's license under the Animal Welfare Act is hereby DENIED.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 25<sup>th</sup> day of November, 2013, in Washington, D.C.

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Janice K. Bullard  
Administrative Law Judge