































## Selected docket entries for case 10–1138

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Filed	Document Description	Page	Docket Text
01/21/2010			PETITION for Review of an order of the U.S. Department of Agriculture filed by Petitioner Ms. Kathy Jo Bauck w/service 01/21/2010 [3626706] [10–1138]
	 Petition Filed	2	
	 Cover Letter	3	
	 Form A	4	
	 Receipt	6	
	 Petition For Review Letter	7	
02/01/2010			MOTION to dismiss case, filed by Attorney Mr. Andrew Roland Varcoe for Respondent Mr. Thomas James Vilsack. w/service 02/01/2010. [3629947] [10–1138]
	 Motion filed	11	
	 Certificate of service	20	
02/17/2010			Status report filed by Mr. Thomas James Vilsack. w/service 02/17/2010 [3635126] [10–1138]
	 Respondent's Notice of Decision by Judicial Officer	21	
	 Exhibit 1	24	
02/18/2010			RESPONSE in opposition to motion to dismiss case, [3629947–2] filed by Attorney Mr. Zenas Baer for Petitioner Ms. Kathy Jo Bauck , w/service 02/18/2010. [3635897] [10–1138]
	 Petitioner's Response to Resp Motion for Summary Dismissal	27	
	 Certificate of Service of Response	29	
02/24/2010			MOTION to strike previously filed response , Doc. No. [3635897–2], filed by Attorney Mr. Andrew Roland Varcoe for Respondent Mr. Thomas James Vilsack. w/service 02/24/2010. [3637707] [10–1138]
	 Motion filed	30	
	 Certificate of service	34	
02/24/2010			REPLY to motion to dismiss case, [3629947–2], filed by Respondent Mr. Thomas James Vilsack. w/service 02/24/2010. [3637712] [10–1138]
	 Reply filed	35	
	 Certificate of service	39	
02/24/2010			JUDGMENT FILED – Granting [3629947–2] motion to dismiss case filed by Attorney Mr. Andrew Roland Varcoe for Respondent Mr. Thomas James Vilsack., Petition dismissed for lack of jurisdiction ROGER L. WOLLMAN, WILLIAM JAY RILEY and STEVEN M. COLLOTON Adp Mar 2010 [3637910] [10–1138]
	 Cover Letter	40	
	 Judgment: Judge Directed	41	
03/05/2010			MOTION to reconsider, vacate or modify the order of dismissal, [3637910–2], filed by Attorney Mr. Zenas Baer for Petitioner Ms. Kathy Jo Bauck. w/service 03/05/2010. [3641420] [10–1138]
	 Motion filed	42	
	 Declaration	53	
	 Exhibit A	55	
	 Certificate of Service	60	
03/08/2010	 Court Order	61	JUDGE ORDER: Having carefully reviewed the petitioner's motion to reconsider, vacate, or modify, the motion is denied. [3641420–2] Adp Mar 2010 [3641820] [10–1138]

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

---

Kathy Jo Bauck,

Petitioner,

v.

Thomas James Vilsack,  
Secretary of Agriculture,

Respondent.

---

**PETITION FOR REVIEW OF  
FINAL ORDER OF SECRETARY OF  
AGRICULTURE, 7 U.S.C. §2149(c),  
28 U.S.C. § 2342**

Kathy Jo Bauck, Petitioner, hereby petitions the Court pursuant to 7 U.S.C. §2143(c) for review of the Order of the Secretary of Agriculture, Thomas James Vilsack, by and through his delegated officer, William G. Jensen, Judicial Officer, which terminated Kathy Jo Bauck's Animal Welfare Act License No. 41-B-0159, and disqualified Mrs. Bauck 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 Court has exclusive jurisdiction to review final Orders of the Secretary of Agriculture. 28 U.S.C. § 2342.

The final Order was entered at Washington, DC, on December 2, 2009. this Petition is timely.

Dated: January 20, 2010

ZENAS BAER AND ASSOCIATES

By 

Zenas Baer (#120595)  
Attorney for Petitioner  
331 6th St., Box 249  
Hawley, MN 56549  
(218) 483-3372

**RECEIVED**

**JAN 21 2010**

**U.S. Court of Appeals  
Eighth Circuit-St. Paul, MN**

# ZENAS BAER LAW OFFICE

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LICENSED IN MINNESOTA AND NORTH DAKOTA

"QUALITY SERVICES SINCE 1929"

ZENAS BAER

MAGNUS WEFALD, (1900-1991)

JUDY AARSVOLD, LEGAL ASSISTANT  
CINDY WILLITS, LEGAL ASSISTANT

January 20, 2010

Clerk, U. S. Court of Appeals  
Room 500, Federal Court Building  
316 North Robert Street  
St. Paul, MN 55101

Re: Kathy Jo Bauck, Petitioner v. Thomas James Vilsack, Secretary of Agriculture,  
Respondent.

Dear Clerk:

Enclosed herewith please find the following documents for filing:

1. Original and three copies of the Petition for Review;
2. Original and three copies of Appeal Information Form A;
3. Original and three copies of the Petitioner's Motion for Stay of Agency Action FRAP Rule 18, Memorandum in Support of Motion, and Declaration of Zenas Baer; and
4. Filing fee of \$450.00;

Yours very truly,

ZENAS BAER LAW OFFICE



Zenas Baer  
[zbaer@zbaer.com](mailto:zbaer@zbaer.com)

ZB:ja  
Enc.

cc: Babak Rastgoufard  
Kathy Jo Bauck

RECEIVED  
JAN 21 2010  
U.S. Court of Appeals  
Eighth Circuit-St. Paul, MN

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT  
PETITIONER/APPELLANT'S FORM A  
APPEAL INFORMATION FORM

Kathy Jo Bauck,

Petitioner,

v.

COUNSEL: NAME, ADDRESS AND  
TELEPHONE NUMBER

Zenas Baer  
Zenas Baer Law Office  
331 6<sup>th</sup> St., P. O. Box 249  
Hawley, MN 56549  
(218) 483-3372  
[zbaer@zbaer.com](mailto:zbaer@zbaer.com)

Thomas James Vilsack,  
Secretary of Agriculture,

Respondent.

COUNSEL: NAME, ADDRESS AND  
TELEPHONE NUMBER

Babak A. Rastgoufard  
Office of General Counsel  
United States Department of Agriculture  
1400 Independence Avenue SW  
Washington, DC 20250-1417  
(202) 720-5935  
[babak.rastgoufard@usda.gov](mailto:babak.rastgoufard@usda.gov)

LIST ISSUES ON APPEAL (For administrative purposes). You may indicate that this also serves as your statement of issues under FRAP 10(b)(3). **YES.**

1. **Does Kathy Jo Bauck have a right to a hearing before her AWA license is terminated?**
2. **Is the summary termination of Kathy Jo Bauck's AWA license, based on a State Court conviction, which evidence was illegally obtained by an animal rights infiltrator who, through intentional conduct caused a dog to become emaciated, in compliance with due process requirements?**
3. **Does the U.S. Department of Agriculture deprive Kathy Jo Bauck of her property rights by revoking an AWA license without affording her the benefit of a hearing?**

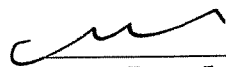
**RECEIVED**  
JAN 21 2010  
U.S. Court of Appeals  
Eighth Circuit-St. Paul, MN<sub>4</sub>

4. **Does the act of the Secretary of Agriculture in revoking Kathy Jo Bauck's AWA license, based solely on the deliberate, willful and wanton conduct of an animal rights infiltrator, who gained access to the facilities through fraud and deception, deprive Bauck of property without due process?**
5. **Does the termination of Kathy Jo Bauck's AWA license, based on a rule which incorporates any federal, state or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, amount to an unconstitutional delegation of powers to local entities which deprives Bauck of substantive due process, and that such laws are void as to vagueness?**

FOR LEAD COUNSEL ONLY

**I have discussed settlement possibilities on appeal with my client. This appeal is not amenable to settlement.**

Dated: January 20, 2010

  
\_\_\_\_\_  
Zenas Baer, Lead Counsel

31929

ORIGINAL

**RECEIPT OF PAYMENT**  
 — UNITED STATES COURT OF APPEALS —  
 for the  
 EIGHTH CIRCUIT  
 at St. Paul

RECEIVED FROM

Zenas Baer

		ACCOUNT	AMOUNT
GENERAL AND SPECIAL FUND			
086900	Docketing Fees	510000	150
322340	Sales of Publications & Opinions	086900	100
322350	Copy Fees	086400	200
322360	Miscellaneous (include certification fee)		
510000	Judicial Services		
		<b>TOTAL</b>	<b>450</b>
		Case Number or Other Reference <u>10-1138</u>	

All checks, money orders, drafts, etc. are accepted subject to collection. Full credit will not be given until the negotiable instrument has been accepted by the financial institution on which it was drawn.

DATE	20	Cash	Check	M.O.	Credit	DEPUTY CLERK
			<input checked="" type="checkbox"/>			<u>CH</u>

**United States Court of Appeals**

***For The Eighth Circuit***

Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329

**St. Louis, Missouri 63102**

**Michael E. Gans**  
*Clerk of Court*

**VOICE (314) 244-2400**  
**FAX (314) 244-2780**  
[www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

January 21, 2010

Mr. Zenas Baer  
ZENAS & BAER  
331 Sixth Street  
P.O. Box 249  
Hawley, MN 56549-0000

RE: 10-1138 Kathy Jo Bauck v. Thomas James Vilsack

Dear Mr. Baer:

We have received a Petition for Review of an order of the U.S. Department of Agriculture in the above case, together with a check in the sum of \$450 for the docket fee. Receipt for docketing fee will be sent through the mail.

Counsel in the case must supply the clerk with an Appearance Form. Counsel may download or fill out an [Appearance Form](#) on the "Forms" page on our web site at [www.ca8.uscourts.gov](http://www.ca8.uscourts.gov).

The petition has been filed and docketed. A copy of the petition is hereby served upon the respondent in accordance with Federal Rule of Appellate Procedure, 15(c).

We have also received and filed a Motion for Stay of Agency Action Frap Rule 18. An order regarding the filing of a response by respondent relating to that motion will be sent under separate Notice of Docket Activity.

Your attention is invited to the briefing schedule pertaining to administrative agency cases, a copy of which will be sent under separate Notice of Docket Activity. The clerk's office provides a number of practice aids and materials to assist you in preparing the record and briefs. You can download the materials from our website, the address of which is shown above. Counsel for both sides should familiarize themselves with the material and immediately confer regarding the briefing schedule and contents of the appendix.

On June 1, 2007, the Eighth Circuit implemented the appellate version of CM/ECF. Electronic filing is now mandatory for attorneys and voluntary for pro se litigants proceeding without an attorney. Information about electronic filing can be found at [www.ca8.uscourts.gov/files/cmecfstandingorder.pdf](http://www.ca8.uscourts.gov/files/cmecfstandingorder.pdf). In order to become an authorized Eighth Circuit filer, you must register with the PACER Service Center at <https://pacer.psc.uscourts.gov/psco/cgi-bin/cmecf/ea-regform.pl>. Questions about CM/ECF may be addressed to the Clerk's office.

Michael E. Gans  
Clerk of Court

CYZ

Enclosure(s)

cc: Mr. James Michael Kelly  
Mr. Babak A. Rastgoufard

District Court/Agency Case Number(s): D-09-0139



**Caption For Case Number: 10-1138**

**Kathy Jo Bauck,**

**Petitioner**

**v.**

**Thomas James Vilsack,  
Secretary of Agriculture,**

**Respondent**

**Addresses For Case Participants: 10-1138**

Mr. Zenas Baer  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 10-1138

---

KATHY JO BAUCK,

Petitioner,

v.

THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,

Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE , AWA Dkt. No. D-09-1139

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RESPONDENT'S MOTION FOR SUMMARY DISMISSAL,  
PURSUANT TO CIRCUIT RULE 47A, FOR LACK OF JURISDICTION

---

JAMES MICHAEL KELLY  
Associate General Counsel

Of counsel:

BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

BRIAN J. SONFIELD  
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ANDREW R. VARCOE  
Attorney  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-4733

February 2010

**MOTION FOR SUMMARY DISMISSAL,  
PURSUANT TO CIRCUIT RULE 47A, FOR LACK OF JURISDICTION**

Pursuant to Fed. R. App. P. 27 and Rule 47A(b) of the Rules of this Court, Respondent, the Secretary of the United States Department of Agriculture (USDA), moves herein for summary dismissal of this appeal for lack of jurisdiction over this case, which arises under the Animal Welfare Act, 7 U.S.C. §§ 2131-59 (AWA). See 8th Cir. R. 47A(b) (“The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction.”); see also 8th Cir. R. 47A(a).

**DISCUSSION**

In this case, the USDA Judicial Officer (JO) issued a decision and order terminating Petitioner Kathy Jo Bauck’s AWA license and disqualifying her for 2 years from becoming licensed under the AWA or otherwise obtaining, holding, or using an AWA license, directly or indirectly through any corporate or other device or person. In re: Bauck, 68 Agric. Dec. \_\_, \_\_, 2009 WL 4838286, \*7 (Dec. 2, 2009). The Administrator of USDA’s Animal and Plant Health Inspection Service (APHIS) had determined that Ms. Bauck’s retention of an AWA license would be contrary to the purposes of the AWA. That determination was made in light of Ms. Bauck’s criminal convictions in Minnesota state court for

(1) practicing veterinary medicine without a veterinary license or temporary permit and (2) animal torture and animal cruelty. Id. In his order, the JO concluded that Ms. Bauck was unfit to be licensed under the AWA and that the Administrator's determination was reasonable. Id. On January 21, 2010, Ms. Bauck filed a Petition for Review of the JO's order in this Court.<sup>1</sup>

In her Petition for Review, Ms. Bauck relies on two statutory provisions in invoking this Court's appellate jurisdiction to review the JO's order. Neither provision furnishes this Court with jurisdiction.

First, Bauck cites 28 U.S.C. § 2342, which provides in pertinent part that the courts of appeals have exclusive jurisdiction to review "all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7." 28 U.S.C. § 2342(2) (emphasis added). The Animal Welfare Act does not appear in either of the underlined chapters of Title 7 of the U.S. Code. Chapter 9 of Title 7 is the Packers and Stockyards Act. Chapter 20A of Title 7 is the Perishable Agricultural Commodities Act. The AWA is Chapter 54 of Title 7. 28 U.S.C. § 2342 does not

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<sup>1</sup> On the same date, Ms. Bauck filed Motions for Stay of the JO's order before both the JO and this Court. USDA is filing today a motion to extend the deadline for responding to the Motion to Stay that Ms. Bauck filed before this Court. If this Court grants this Motion for Summary Dismissal, the Motion for Stay will become moot.

provide for appellate jurisdiction in AWA cases.

Second, Bauck cites 7 U.S.C. § 2149(c).<sup>2</sup> 7 U.S.C. § 2149(c) provides:

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. [Emphasis added.]

7 U.S.C. § 2149(c) does not apply to this case. That is because the JO's order in this case is not a "final order of the Secretary [of USDA] issued pursuant to this section [i.e., 7 U.S.C. § 2149]." 7 U.S.C. § 2149 authorizes USDA to issue orders to sanction persons for violating the AWA or the AWA regulations. The JO's order in this case is not such an order.

Orders terminating AWA licenses are not issued pursuant to 7 U.S.C. § 2149. That is because USDA's authority to terminate AWA licenses flows from USDA's authority to issue licenses, which derives from 7 U.S.C. § 2133 and from the regulations implementing 7 U.S.C. § 2133, rather than from 7 U.S.C. § 2149. See In re: Animals of Montana, Inc., 68 Agric. Dec. \_\_, \_\_, 2009 WL 624354, at

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<sup>2</sup> Bauck also cites 7 U.S.C. § 2143(c), but this appears to be a clerical error. Section 2143(c) does not pertain to federal court jurisdiction.

\*2 (2009) (“The power to require and issue licenses under the [AWA] includes the power to terminate a license and to disqualify a person from becoming licensed.”) (citing cases); id. (citing 7 U.S.C. § 2133).<sup>3</sup> Termination “is not a penalty, but [is] instead remedial in nature.” In re: Vigne, 67 Agric. Dec. \_\_\_, \_\_\_, 2008 WL 5111321, at \*7 (distinguishing between license termination pursuant to 9 C.F.R. § 2.12 and license revocation pursuant to 7 U.S.C. § 2149); see id. at \*6 (“The Acting Administrator [of APHIS] seeks to terminate Ms. Vigne’s [AWA] license, not to punish her for her actions, but because Ms. Vigne’s actions reflect on her fitness to be licensed under the [AWA].”); Animals of Montana, Inc., 2009 WL 624354, at \*8. In particular, USDA regulations provide that “[a] license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.” 9 C.F.R. § 2.12; see also 9 C.F.R. §§ 2.5(a), 2.11(a),(d). Unlike a license revocation, which is permanent, 9 C.F.R. § 2.10(b), a license termination does not prevent the terminated licensee

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<sup>3</sup> 7 U.S.C. § 2133 provides in pertinent part that “[t]he Secretary [of USDA] 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 [section] 2153 of this title.” (Emphasis added.) 7 U.S.C. § 2151 further provides that “[t]he Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.”

from applying again for a license at the end of the term of disqualification (if any) specified in the decision terminating the license. Cf. 9 C.F.R. § 2.11(b).

By contrast with USDA orders terminating AWA licenses of persons deemed unfit to be licensed, USDA orders under sections 2149(a) and 2149(b) (leaving aside section 2149(d), which provides for criminal penalties enforceable in federal courts) issue only for violations of the AWA or the AWA regulations. In this case, the JO did not conclude -- and APHIS did not argue in the administrative proceedings -- that Ms. Bauck had violated the AWA or the AWA regulations. Instead, the JO upheld APHIS's determination pursuant to 9 C.F.R. §§ 2.11 and 2.12 that Ms. Bauck's criminal law violations rendered her unfit to be licensed. In particular, the JO concluded that Ms. Bauck's criminal law violations fall within 9 C.F.R. §§ 2.11(a)(6), which provides that an AWA license will be denied to any person who 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."<sup>4</sup> For this reason, the JO's order was a "final order of the Secretary [of

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<sup>4</sup> Cf. id. § 2.11(a)(4) (license will not be issued to anyone "found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty within 1 year of application, or after 1 year if the Administrator determines



USDA]” issued pursuant to 7 U.S.C. § 2133, not 7 U.S.C. § 2149. See Bauck, 68 Agric. Dec. at \_\_, 2009 WL 4838286, at \*2 (citing 7 U.S.C. § 2133, 9 C.F.R. § 2.11, and id. § 2.12).

What underscores this conclusion is that the JO’s order in this case did not include any of the remedies that are authorized under 7 U.S.C. § 2149(a) or (b). A violation of the AWA or the AWA regulations would have triggered revocation or suspension sanctions under 7 U.S.C. § 2149(a) or civil money penalties or cease and desist orders under 7 U.S.C. § 2149(b). The JO’s order did not issue any of these sanctions.<sup>5</sup> Again, termination of a license and attendant terms of disqualification from licensing are not penalties for violation of the AWA.

Although 7 U.S.C. § 2149(c) does not provide a basis for judicial review of the JO’s order, Bauck may seek judicial review of the order in federal district court

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that the circumstances render the applicant unfit to be licensed”).

<sup>5</sup> Nor did the JO’s order state that judicial review of the order was available under 7 U.S.C. § 2149. When the JO issues a final order pursuant to 7 U.S.C. § 2149(a) or (b), the order typically will indicate that the administrative respondent has the right to seek judicial review of that decision in the appropriate court of appeals pursuant to 7 U.S.C. § 2149(c). See, e.g., In re: Coastal Bend Zoological Ass’n, 67 Agric. Dec. \_\_, \_\_ & n.5, 2008 WL 345911, \*16 & n.5 (citing 7 U.S.C. § 2149(c)), aff’d sub nom. Brock v. USDA, 335 Fed. Appx. 436 (5th Cir. 2009) (per curiam). By contrast, when the JO issues a final order terminating an AWA license, the order will not contain any such indication. See, e.g., Vigne, 2008 WL 5111321, at \*9.

pursuant to 7 U.S.C. § 2146(c). Section 2146(c) provides that the district courts “are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of[,] this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in section 2149(c) of this title.” Cf. Haviland v. Butz, 543 F.2d 169, 171 n.9 (D.C. Cir. 1976) (holding that 7 U.S.C. § 2146(c) provided district court with jurisdiction over suit by owner of dog and pony show claiming that he was not subject to regulation under AWA).

## CONCLUSION

For the foregoing reasons, Respondent USDA respectfully requests that this Court summarily dismiss this appeal for lack of jurisdiction pursuant to Circuit Rule 47A.

Respectfully submitted,

JAMES MICHAEL KELLY  
Associate General Counsel

BRIAN J. SONFIELD  
Assistant General Counsel

/s/ Andrew R. Varcoe  
ANDREW R. VARCOE  
Attorney  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-4733

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

February 2010

**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on February 1, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Andrew R. Varcoe

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 10-1138

---

KATHY JO BAUCK,

Petitioner,

v.

THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,

Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE, AWA Dkt. No. D-09-1139

---

RESPONDENT'S NOTICE OF DECISION BY JUDICIAL OFFICER

---

JAMES MICHAEL KELLY  
Associate General Counsel

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

BRIAN J. SONFIELD  
Assistant General Counsel  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-2714

February 2010

**RESPONDENT’S NOTICE OF DECISION BY JUDICIAL OFFICER**

Pursuant to this Court’s Order dated February 2, 2010, Respondent respectfully advises the Court that the Judicial Officer has granted Petitioner Kathy Jo Bauck’s administrative stay motion. A copy of the Judicial Officer’s order, dated February 16, 2010, is attached as Exhibit 1.

In his order, the Judicial Officer states that his prior decision terminating Ms. Bauck’s Animal Welfare Act license is “stayed pending the outcome of proceedings for judicial review.” The stay order further provides that it “shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.” Since the Judicial Officer has granted Ms. Bauck the relief that she requested, Respondent submits that her duplicative motion for a stay submitted to this Court should be denied as moot.

Respectfully submitted,

JAMES MICHAEL KELLY  
Associate General Counsel

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

/s/ Brian J. Sonfield  
BRIAN J. SONFIELD  
Assistant General Counsel  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-2714

February 2010

**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on February 17, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Brian J. Sonfield

**EXHIBIT 1**



USDA  
OAL/VOHC

2010 FEB 16 PM 2:18

RECEIVED

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. D-09-0139
	)	
Kathy Jo Bauck, an individual,	)	
d/b/a Puppy's on Wheels, a/k/a	)	
"Puppies on Wheels" and	)	
"Pick of the Litter,"	)	
	)	
Respondent	)	Stay Order

I issued *In re Kathy Jo Bauck*, \_\_\_ Agric. Dec. \_\_\_ (Dec. 2, 2009), in which I terminated Ms. Bauck's Animal Welfare Act license and disqualified Ms. Bauck from becoming licensed under the Animal Welfare Act for 2 years. On January 21, 2010, Ms. Bauck filed a "Motion for Stay Pending Appeal Pursuant to 5 U.S.C. § 705" [hereinafter Motion for Stay], and a "Memorandum in Support of Motion for Stay Pending Appeal." Ms. Bauck also incorporated by reference a "Memorandum in Support of Motion to Stay Agency Decision Pending Appeal" which she has filed with the United States Court of Appeals for the Eighth Circuit.

On February 5, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Opposition to Respondent's Motion for Stay." On February 16, 2010, the

Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on Ms. Bauck's Motion for Stay.

Ms. Bauck's motion for a stay, pending before the United States Court of Appeals for the Eighth Circuit, would normally deprive me of jurisdiction to rule on the Motion for Stay pending before me; however, the Administrator asserts the Eighth Circuit has directed the United States Department of Agriculture to advise the court when I have ruled on Ms. Bauck's Motion for Stay (Complainant's Opposition to Respondent's Motion for Stay at 4). After a careful review of Ms. Bauck's filings in support of her Motion for Stay and the Administrator's filing in opposition to Ms. Bauck's Motion for Stay, I grant Ms. Bauck's Motion for Stay in accordance with 5 U.S.C. § 705.

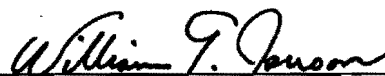
For the foregoing reasons, the following Order is issued.

**ORDER**

The Order in *In re Kathy Jo Bauck*, \_\_ Agric. Dec. \_\_ (Dec. 2, 2009), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

Done at Washington, DC

February 16, 2010



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William G. Jenson  
Judicial Officer

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

---

Kathy Jo Bauck,

Petitioner,

v.

Thomas James Vilsack,  
Secretary of Agriculture,

Respondent.

**PETITIONER'S RESPONSE TO  
RESPONDENT'S MOTION FOR  
SUMMARY DISMISSAL  
PURSUANT TO RULE 47A FOR  
LACK OF JURISDICTION**

Court File No. 10-1138

---

The Respondent has filed a Motion to Dismiss for Lack of Jurisdiction of this Appeal of a termination of an Animal Welfare Act License. The Motion should be denied. This Court has jurisdiction under 7 U.S.C. §2149(C) and 28 U.S.C. §2342(2).

Kathy Jo Bauck had her Animal Welfare Act (AWA) License terminated by decision of the Judicial Officer of the USDA on December 2, 2009. Kathy Jo Bauck was a "dealer" who was "aggrieved by a Final Order of the Secretary". 7 U.S.C. §2149(C). The termination of an Animal Welfare Act License is pursuant to the authority contained in 7 U.S.C. §2131 through §2159. (See Code of Federal Regulations, Title 9, Chapter 1, Part 1 (Authority: 7 U.S.C. §2131 through §2159)).

The Secretary suggests that an alternate basis for review is contained in 7 U.S.C. §2146, however, such section grants authority to the Secretary of USDA for enforcement of the Act. The Secretary can prosecute violations of the Act pursuant to 7 U.S.C. §2146. The District Court is vested with jurisdiction to enforce, to prevent and restrain violations of the Animal Welfare

Act and “shall have jurisdiction in all other kinds of cases under this Act except as provided in [7 U.S.C. §2149(C)].” U.S.C. §2146(C).

The exclusive jurisdiction to review the termination of the Animal Welfare Act License issued to Kathy Jo Bauck is the United States Court of Appeals for the Eighth Circuit. 7 U.S.C. §2149(C).

RESPECTFULLY SUBMITTED:

Dated this 18 day of February, 2010.

ZENAS BAER LAW OFFICE

By 

Zenas Baer (#120595)  
Attorney for Petitioner  
331 6<sup>th</sup> Street, PO Box 249  
Hawley, MN 56549  
(218) 483-3372

**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on 2/18/10, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Zenas Baer

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 10-1138

---

KATHY JO BAUCK,

Petitioner,

v.

THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,

Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE , AWA Dkt. No. D-09-1139

---

RESPONDENT'S MOTION TO STRIKE, AS UNTIMELY,  
PETITIONER'S RESPONSE  
TO RESPONDENT'S MOTION FOR SUMMARY DISMISSAL

---

JAMES MICHAEL KELLY  
Associate General Counsel

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

BRIAN J. SONFIELD  
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Washington, D.C. 20250-1406  
(202) 720-4733

February 2010

**RESPONDENT’S MOTION TO STRIKE, AS UNTIMELY,  
PETITIONER’S RESPONSE  
TO RESPONDENT’S MOTION FOR SUMMARY DISMISSAL**

Pursuant to Fed. R. App. P. 27, Respondent, the Secretary of the United States Department of Agriculture (USDA), requests herein that this Court strike the response filed by Petitioner’s counsel on February 18, 2010, in opposition to USDA’s motion for summary dismissal of this appeal. The response filed by Petitioner on February 18 is untimely.

**DISCUSSION**

On February 1, 2010, USDA electronically filed and served a motion for summary dismissal of this appeal for lack of jurisdiction pursuant to Fed. R. App. P. 27 and 8th Cir. R. 47A. Petitioner’s response to the motion, if any, was due no later than on February 15, 2010.<sup>1</sup>

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<sup>1</sup> Under Fed. R. App. P. 27(a)(3)(A), as amended effective December 1, 2009, Petitioner’s response to the motion for dismissal was due “within 10 days after service of the motion unless the court shortens or extends the time.” Fed. R. App. P. 26(c), as amended effective December 1, 2009, added 3 days to the 10 days afforded by Rule 27(a)(3)(A). See Fed. R. App. P. 26(c) (“When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.”). 13 days after February 1, 2010, was February 14, 2010, which was a Sunday, so Petitioner’s response was due on the following day. See Fed. R. App. P. 26(a)(1)(C).

Petitioner's counsel did not file a response to the motion for summary dismissal by the February 15 deadline. Instead, Petitioner's counsel filed a two-page response on February 18. Petitioner's response does not explain the delay.<sup>2</sup>

Petitioner gives no equitable or other reason for excusing her counsel's failure to comply with Fed. R. App. P. 27. "Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings." Fed. R. App. P. 27(a)(3)(A) advisory committee's note (2002). The rule should be enforced here.

It should be noted that on the merits, Petitioner's response to the motion does not set forth any substantial basis for denying summary dismissal here.<sup>3</sup> Even if this Court were to consider Petitioner's response on the merits, it would make no difference to the outcome of this case.

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<sup>2</sup> Counsel for USDA notes that on or about the day when counsel for Petitioner filed his response to the motion for summary dismissal, counsel for Petitioner stated to a USDA attorney that he had not been aware of the motion. Counsel for USDA respectfully submits that this consideration should make no difference to the disposition of this motion to strike. Because counsel for Petitioner received USDA's motion for summary dismissal by electronic service, he was on notice of USDA's motion on the day that it was filed. Moreover, counsel for Petitioner has not sought leave from the Court to file his response out of time.

<sup>3</sup> USDA is filing today a separate reply in support of its motion for summary dismissal. In that reply, USDA briefly responds on the merits to Petitioner's response to the motion.



## CONCLUSION

Respondent respectfully requests that this Court strike, as untimely, Petitioner's response to Respondent's motion for summary dismissal of this appeal.

Respectfully submitted,

JAMES MICHAEL KELLY  
Associate General Counsel

BRIAN J. SONFIELD  
Assistant General Counsel

/s/ Andrew R. Varcoe  
ANDREW R. VARCOE  
Attorney  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-4733

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

February 2010

**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on February 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Andrew R. Varcoe

IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 10-1138

---

KATHY JO BAUCK,

Petitioner,

v.

THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,

Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE, AWA Dkt. No. D-09-1139

---

RESPONDENT'S REPLY  
IN SUPPORT OF ITS MOTION FOR SUMMARY DISMISSAL,  
PURSUANT TO CIRCUIT RULE 47A, FOR LACK OF JURISDICTION

---

JAMES MICHAEL KELLY  
Associate General Counsel

BRIAN J. SONFIELD  
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Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

February 2010

**REPLY IN SUPPORT OF MOTION FOR SUMMARY DISMISSAL  
FOR LACK OF JURISDICTION**

In his motion for summary dismissal, Respondent, the Secretary of the United States Department of Agriculture (USDA), has explained why this Court lacks jurisdiction over this case, which arises under the Animal Welfare Act, 7 U.S.C. §§ 2131-59 (AWA). In her opposition to the motion, Petitioner Kathy Jo Bauck offers no persuasive response to USDA's motion. Because jurisdiction is lacking, Petitioner's appeal should be dismissed.<sup>1</sup>

**DISCUSSION**

As USDA explained in the motion for summary dismissal, neither of the statutory provisions relied on by Petitioner furnishes this Court with jurisdiction over this appeal. In her response to the motion, Petitioner offers no argument for jurisdiction under the first provision, 28 U.S.C. § 2342, which does not apply to the AWA at all. Petitioner does offer an argument for jurisdiction under the second provision, 7 U.S.C. § 2149, but this argument is plainly lacking in merit.

Quoting 7 U.S.C. § 2149(c), Bauck notes that she is a "dealer" in animals who is "aggrieved by a final order of the Secretary." The quotation is misleading: the jurisdictional grant in section 2149(c) applies only to dealers and other named

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<sup>1</sup> In addition, Petitioner's response to the motion is untimely. Today USDA is filing a motion to strike the response on that basis alone.

parties who are “aggrieved by a final order of the Secretary issued pursuant to this section.”<sup>2</sup> As the motion for dismissal explains, orders terminating AWA licenses are not “issued pursuant to this section [7 U.S.C. § 2149].” USDA’s authority to terminate AWA licenses derives from 7 U.S.C. § 2133 and from the regulations implementing 7 U.S.C. § 2133, rather than from 7 U.S.C. § 2149. Bauck does not acknowledge, much less rebut, USDA’s explanation of this key issue.<sup>3</sup>

Finally, Bauck errs in suggesting that she may not seek judicial review of the USDA Judicial Officer’s order in federal district court pursuant to 7 U.S.C. § 2146(c). Bauck correctly points out that section 2146(c) “grants authority to the Secretary of USDA for enforcement of the Act.” But that is not all that section 2146(c) does. Section 2146 vests the district courts not only “with jurisdiction specifically to enforce, and to prevent and restrain violations of[,] this chapter,”

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<sup>2</sup> Section 2149(c) provides: “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.”

<sup>3</sup> Bauck’s response to the motion does acknowledge that her license was terminated by the USDA Judicial Officer, and does not claim that the license was revoked or suspended.

but also with “jurisdiction in all other kinds of cases arising under this chapter, except as provided in section 2149(c) of this title.” (Emphasis added.)

### CONCLUSION

For the foregoing reasons, and for the reasons stated in USDA’s motion for summary dismissal, Respondent USDA respectfully requests that this Court summarily dismiss this appeal for lack of jurisdiction pursuant to Circuit Rule 47A.

Respectfully submitted,

JAMES MICHAEL KELLY  
Associate General Counsel

Of counsel:  
BABAK A. RASTGOUFARD  
Office of the General Counsel  
Marketing Division  
U.S. Department of Agriculture  
Washington, D.C.

BRIAN J. SONFIELD  
Assistant General Counsel

/s/ Andrew R. Varcoe  
ANDREW R. VARCOE  
Attorney  
U.S. Department of Agriculture  
Washington, D.C. 20250-1406  
(202) 720-4733

February 2010

**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

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s/ Andrew R. Varcoe

**United States Court of Appeals**

***For The Eighth Circuit***

Thomas F. Eagleton U.S. Courthouse  
111 South 10th Street, Room 24.329

**St. Louis, Missouri 63102**

**Michael E. Gans**  
*Clerk of Court*

**VOICE (314) 244-2400**  
**FAX (314) 244-2780**  
[www.ca8.uscourts.gov](http://www.ca8.uscourts.gov)

February 24, 2010

Mr. Zenas Baer  
ZENAS & BAER  
331 Sixth Street  
P.O. Box 249  
Hawley, MN 56549-0000

RE: 10-1138 Kathy Jo Bauck v. Thomas James Vilsack

Dear Counsel:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review [Federal Rules of Appellate Procedure](#) and the [Eighth Circuit Rules](#) on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Michael E. Gans  
Clerk of Court

MER

Enclosure(s)

cc: Mr. James Michael Kelly  
Mr. Babak A. Rastgoufard  
Mr. Brian J. Sonfield  
Mr. Andrew Roland Varcoe

District Court/Agency Case Number(s): D-09-0139



**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 10-1138

---

Kathy Jo Bauck,

Petitioner

v.

Thomas James Vilsack,  
Secretary of Agriculture,

Respondent

---

Appeal from Department of Agriculture  
(D-09-0139)

---

**JUDGMENT**

The motion of respondent for dismissal of this appeal for lack of jurisdiction is granted.

The petition is hereby dismissed for lack or jurisdiction.

February 24, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No. 10-1138

---

KATHY JO BAUCK

Petitioner,

v.

THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,

Respondent.

---

ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE, AWA Dkt. No. D-09-1139

---

**PETITIONER'S MOTION TO RECONSIDER, VACATE OR MODIFY  
THE ORDER OF DISMISSAL PURSUANT TO CIRCUIT RULE 27B**

Zenas Baer  
ZENAS BAER LAW OFFICE  
331 6<sup>th</sup> St., Box 249  
Hawley, MN 56549  
(218) 483-3372

**MOTION FOR RECONSIDERATION, VACATION OR MODIFICATION  
OF THE ORDER GRANTING SUMMARY DISMISSAL  
FOR LACK OF JURISDICTION**

This Court granted Respondent's Motion to Dismiss for Lack of Jurisdiction pursuant to Federal Rules of Appellate Procedure 27, and Rule 47A(b) of the Rules of Court. The Petitioner did not become aware of the outstanding Motion in a timely manner. (Declaration of Z. Baer) Petitioner filed a cursory late response to the Motion on February 18, 2010. It is doubtful that the Court considered the arguments contained therein. This Court issued an Order for Dismissal with Judgment of Dismissal entered on February 24, 2010.

Circuit Rule 27B(d) authorizes a party adversely affected by an Order issued under Rule 27B(c) to file a Motion to Reconsider, Vacate or Modify such Order. Such Motion must be made within ten (10) days after its entry. The Order and Judgment having been entered on February 24, 2010, the 10-day window to respond expires on March 10, 2010. (FRAP 26 a period less than 11 days excludes Saturdays, Sundays and legal holidays). This Motion for Reconsideration is timely.

In the interests of justice this Court should reevaluate the jurisdiction issue.

**DISCUSSION**

Petitioner, Kathy Jo Bauck (hereinafter "Bauck"), has owned and continues to operate an Animal Welfare Act licensed kennel for more than twenty (20) years.<sup>1</sup> In

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<sup>1</sup>Bauck filed a Motion to stay the termination of her AWA license simultaneously with this appeal. The USDA Judicial Officer granted the stay.

April and May of 2008, her facility was infiltrated by an animal rights activist, Jason Smith aka Christopher Parrett aka John Knoldt aka Chris Paxton (hereinafter Smith), who was in the employment of Companion Animal Protection Society (CAPS). CAPS states its mission to be to close down all “puppy mills” which they define as a breeder who sells puppies to pet stores. Smith, while in the employment of CAPS, intentionally, deliberately and willfully deprived an English Mastiff dog of food and water for an extended period of time. The dog became emaciated. Smith documented the emaciated English Mastiff and delivered the evidence to the County Prosecutor who used the evidence to prosecute Bauck for cruelty to animals. Bauck was convicted and sentenced on a single count of cruelty to animals based on the emaciation of the English Mastiff.

Respondent Thomas James Vilsack, Secretary of Agriculture (hereinafter Secretary), commenced a proceeding under authority of 7 U.S.C. §2149 to terminate Bauck’s AWA license. The license was summarily terminated, which deprived Bauck of her right to be heard. After exhausting administrative remedies, Bauck filed the instant appeal pursuant to 7 U.S.C. § 2149(c).

This Court has exclusive jurisdiction to hear the appeal and should reverse, vacate or modify the Order dismissing the appeal. In his Motion, the Secretary erroneously argues that the license termination was not an “Order of the Secretary issued pursuant to this Section” (7 U.S.C. § 2149) but rather an order issued pursuant to 7 U.S.C. § 2133. This is in direct contravention of the Findings of the Judicial Officer and the admissions of the Secretary in the administrative proceedings below.

## DISCUSSION

Bauck's AWA license was terminated by the USDA Judicial Officer (J.O.) on December 2, 2009. *In re Bauck*, 68 Agric.Dec. , 2009 WL 4838286 \*7 (December 2, 2009). Bauck was a dealer in possession of an Animal Welfare Act license. (*In re Bauck*, 2009 WL 4838286 \*7) The Secretary commenced the proceedings against Bauck under the authority granted by 7 U.S.C. §§ 2139-2159 (the "Act") and the regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1-3.142). *In re Bauck*, 2009 WL 4838286 \*1. The J.O. found that the Secretary commenced the proceeding using the Rules governing adjudicative proceedings brought pursuant to 7 U.S.C. § 2149. *In re Bauck* at \*3. Bauck filed a timely appeal of the termination of her license with this Court. Jurisdiction is based on 7 U.S.C. § 2149(c).

This Court is granted the exclusive jurisdiction to hear this appeal. The AWA expressly grants the Eighth Circuit exclusive jurisdiction to review an appeal by anyone aggrieved by a final decision of the Secretary. In relevant part, the jurisdictional grant states

"any dealer . . . aggrieved by a final Order of the Secretary issued pursuant to this section, may, within 60 days after entry of such Order, seek review of such Order in the appropriate United States Court of Appeals . . . 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).

The Secretary does not argue and concedes that Bauck was aggrieved by a final Order of the Secretary, which terminated her AWA license. The only argument made by the Secretary is that the termination proceedings was not done pursuant to the authority granted in 7 U.S.C. § 2149 but rather 7 U.S.C. § 2133. The Secretary, to reach this conclusion, makes an extremely convoluted circuitous argument that the termination was not commenced pursuant to the express grant of authority but rather a vague, interpreted or implied authority granted under the rubric of “the power to issue licenses implies the power to terminate licenses”. The argument lacks merit and is contradicted by the J.O.’s Decision.

**1. The Administrator of APHIS Commenced the Proceeding Pursuant to 7 C.F.R. § 1.133, which Governs Only Adjudicative Proceedings under 7 U.S.C. § 2149 .**

The core argument presented by the Secretary is that the Order terminating Bauck’s license was not “issued pursuant to [7 U.S.C. § 2149]”. Implicit in the argument is the concession that if the Order terminating the license of Bauck was issued “pursuant to” 7 U.S.C. § 2149 then the Circuit Court has exclusive jurisdiction.

The J.O. found that the Secretary commenced the proceedings to terminate Bauck’s license pursuant to Rules of Adjudicative Procedure which are applicable only to proceedings under 7 U.S.C. § 2149. “The Administrator asserts he instituted the instant proceeding pursuant to 7 C.F.R. § 1.133(b), not 7 C.F.R. § 1.133(a)”. *In re Bauck*, 2009 WL 4838286\*3. 7 C.F.R. § 1.133 is part of the Rules of Practice governing formal adjudicatory administrative proceedings instituted by the Secretary. The Adjudicatory

Rules apply only to certain sections of the AWA. 7 C.F.R. § 1.131, (“applicable to all adjudicatory proceedings under the statutory provisions listed below . . .”) The Adjudicatory Rules apply only to proceedings commenced under Section 19 of the Animal Welfare Act (7 U.S.C. § 2149). 7 C.F.R. § 1.131.

The Secretary argued below and the J.O. determined the proceeding to terminate the AWA license of Bauck was commenced pursuant to 7 C.F.R. § 1.133, which is only applicable to adjudicatory proceedings commenced under 7 U.S.C. § 2149. The Secretary cannot have it both ways. If the Secretary commenced the license termination under Adjudicatory Rules applicable only to proceedings brought pursuant to 7 U.S.C. § 2149 the termination must have of necessity have been brought under the authority of 7 U.S.C. § 2149. Logic does not permit a contrary conclusion. The argument of the Secretary notwithstanding Jurisdiction lies with the Court of Appeals not the District Court as argued by the Secretary. Jurisdiction is in the Court of Appeals for the Eighth Circuit by the admission of the Secretary of Agriculture. The Secretary’s decision by the J.O. must be upheld if it is supported by substantial evidence. *Cox v. United States Department of Agriculture*, 925 F2d 1102, 1104 (8<sup>th</sup> Circuit), *cert. denied*, 502 U.S. 860, 112 S.Ct. 178, 116 L.Ed.2d 141 (1991). The Secretary concluded the termination proceedings were instituted pursuant to Adjudicatory Rules only applicable to a 7 U.S.C. § 2149 proceeding. This decision is binding on the Secretary.

**2. The Secretary’s Argument is Unpersuasive.**

The Secretary argues that the license termination was commenced pursuant to 7

U.S.C. § 2133. This argument is directly contrary to the admission of the Secretary and the decision of the J.O. who found the proceedings to terminate Bauck's license were instituted pursuant to 7 C.F.R. § 1.133, which applies only to 7 U.S.C. § 2149 of the Animal Welfare Act. The argument that the termination of a license flows from 7 U.S.C. § 2133 is without foundation.

The Secretary cites a series of decisions from which he argues that the Order terminating Bauck's license is not issued pursuant to 7 U.S.C. § 2149. The cases cited reveal a "house of cards" that does not stand up under cursory scrutiny. All of the cases cited by the Secretary rely on dicta from *In re Bradshaw*, 50 Agric.Dec. 499, 1991 WL 290586. In *Bradshaw*, the J.O. held that "any person licensed as a dealer who has violated the Act (without any limitation on when that violation occurred) may have the license suspended or revoked. *Id.* \*506, \*\*6.

To support his decision on the broad application of the Animal Welfare Act, the J.O. stated

"In addition to the authority in 7 U.S.C. § 2149(a), discussed above, . . .

[t]he power to require and issue licenses under the Animal Welfare Act

includes power to deny a license, to suspend or revoke a license, to

disqualify a person from becoming licensed, and to withdraw a license."

*Bradshaw* at \*506, \*\*6 (underlining supplied).

Nothing in the *Bradshaw* decision suggests that the power to terminate a license is derived from 7 U.S.C. § 2133. In fact *Bradshaw* recognizes expressly that the authority



to terminate a license exists under 7 U.S.C. § 2149. *Id.*

The *Bradshaw* quote appears in *In re Vigne*, 2008 WL 5111321, where the J.O. simply restated “the power to require and issue licenses under the Animal Welfare Act includes the power to deny a license, to suspend or revoke a license, to disqualify a person from becoming licensed, and to withdraw a license.” *Vigne* at \*2. It is of note that the language quoted from *Bradshaw* does not mention a license termination. The issue in *Vigne*, as it applied to licensing, was the applicable statute of limitations. *Vigne* at \*6. The J.O. concluded that the Statute of Limitations contained in 28 U.S.C. § 2462 applied to penalties or forfeitures in enforcement proceedings with a limitation period of four years. The J.O. concluded that the termination of an Animal Welfare Act license was “remedial and outside the scope of the limitations set forth in 28 U.S.C. § 2462.” *Vigne* at \*6. Nothing in *Vigne* suggests that the Court of Appeals is not the proper Court to hear the appeal of a termination of a license.

The next case cited by the Secretary is *In re Amarillo Wildlife Refuge*, 2009 WL 248415. *Amarillo* lends no support to the argument that the Eighth Circuit does not have jurisdiction to hear the appeal. *Amarillo* simply quotes the *Bradshaw* language “the power to require and issue licenses under the Animal Welfare Act includes the power to deny a license, to suspend or revoke a license, to disqualify a person from becoming licensed, and to withdraw a license.” *Amarillo* cites to *Bradshaw* and *Vigne*. It must be remembered that the quote from *Bradshaw* was a discussion of the power of the Secretary to discipline a license holder for violations of the Act that occurred prior to the issuance

of a license. The *Bradshaw* Court specifically found such jurisdiction existed under 7 U.S.C. § 2149.

Finally, the Secretary cites to *In re Animals of Montana*, 2009 WL 624354, for the proposition that the Eighth Circuit does not have jurisdiction to hear this appeal. Again, the only support is a regurgitation of the *Bradshaw* language “the power to require and issue licenses under the Animal Welfare Act includes the power to terminate a license and to disqualify a person from becoming licensed.” *Animals of Montana* at \*2. The above decision leads no support to the claim that this court lacks jurisdiction.

The Secretary argues that since the termination of Bauck’s license did not also include remedies authorized under 7 U.S.C. § 2149(a) or (b), it therefore cannot have been a proceeding commenced under 7 U.S.C. § 2149. This is a misread of the statute. A termination of a license is well within the spectrum of authority granted to the Secretary under 7 U.S.C. § 2149(a). The Secretary may suspend a license summarily up to 21 days and after notice and a hearing, may continue the suspension for an additional period of time as he may specify, or revoke such license. A termination of a license for a 2-year time period is well within the scope of remedies available under 7 U.S.C. § 2149(a). A 2 year termination is expressly within the authority granted to “continue the suspension for an additional period of time as he may specify”. The Secretary parses words arguing that there is a distinction between “termination” and “suspension” and “revocation”. The argument advanced is that “revocation” is permanent and “termination” is temporary. The Secretary is expressly authorized to suspend a license for a period of time, after

notice and hearing, pursuant to 7 U.S.C. § 2149. A suspension for a time less than forever is temporary.

Finally, the argument that 7 U.S.C. § 2149(c) granting a dealer who is aggrieved by a final Order of a Secretary, a right of appeal to the Eighth Circuit, does not include a termination of a license is inconsistent with the statute as a whole. The heading of 7 U.S.C. § 2149(c) is titled “Appeal of Final Order by Aggrieved Person; Limitations; Exclusive Jurisdiction of United States Courts of Appeals”. Bauck is a dealer whose license to operate was terminated in a proceeding commenced under Adjudicatory Rules that apply only to 7 U.S.C. § 2149.

The Secretary’s argument that 7 U.S.C. § 2146 gives a right of appeal is without merit. A licensee is caught in a catch 22. If the licensee were to appeal to the District Court, the Secretary would argue that the exclusive jurisdiction is in the Court of Appeals because it commenced the proceeding pursuant to 7 C.F.R. § 1.133 which is applicable only to adjudicatory proceeding commenced under 7 U.S.C. § 2149. This appeal having been filed in the Court of Appeals, the Secretary argues that the appeal should be filed in District Court. Nothing in 7 U.S.C. § 2146 gives an “aggrieved person” the right of review.

As a member of the practicing Bar of almost 30 years the express language of the statute grants jurisdiction to the Court of Appeals. Any other reading is unnatural, illogical, and a stretch. The specific language of 7 U.S.C. § 2149(c) can be nothing more than a grant of exclusive jurisdiction to the Eighth Circuit for an aggrieved licensee in a

proceeding instituted pursuant to 7 U.S.C. § 2149. A Finding that this Court lacks jurisdiction would mean that Bauck would be deprived a right of review.

**CONCLUSION**

The Eighth Circuit Court of Appeals has original jurisdiction to hear this case by admission of the Secretary and a Finding of the J.O. They commenced the proceeding pursuant to adjudicatory regulations applicable only to 7 U.S.C. § 2149 (7 C.F.R. § 1.133). The specific language of 7 U.S.C. § 2149(c) applies to Bauck, who had her AWA license terminated by the Secretary. The Court should reconsider and deny the Motion of the Secretary to dismiss for lack of jurisdiction.

Dated: March 5, 2010

ZENAS BAER LAW OFFICE

By 

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Zenas Baer (#120595)  
Attorney for Petitioner  
331 6th St., Box 249  
Hawley, MN 56549  
(218) 483-3372

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No. 10-1138

---

**KATHY JO BAUCK**

Petitioner,

v.

**THOMAS JAMES VILSACK, SECRETARY OF AGRICULTURE,**

Respondent.

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**ON PETITION FOR REVIEW OF AN ORDER OF THE SECRETARY,  
U.S. DEPARTMENT OF AGRICULTURE, AWA Dkt. No. D-09-1139**

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**DECLARATION OF ZENAS BAER**

Zenas Baer  
ZENAS BAER LAW OFFICE  
331 6<sup>th</sup> St., Box 249  
Hawley, MN 56549  
(218) 483-3372

I declare that my name is Zenas Baer. I am over the age of eighteen and I am fully competent to make this declaration. I know each of the facts set forth herein based on personal firsthand knowledge.

1. This Declaration is given to explain the delay in responding to the Secretary's Motion to Dismiss.

2. I did not become aware of the filing of a Motion for Dismissal for Lack of Jurisdiction in the Eighth Circuit until a telephone conversation with Mr. Varcoe and Mr. Rastgoufard on or about February 16, 2010.

3. The Motion for Dismissal for Lack of Jurisdiction was filed apparently simultaneously with a Motion to extend the time to respond to a stay.

4. Some of the email transmissions have come to my office in what appears to be a garbled foreign language. (See attached Exhibit A)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on March 5, 2010.



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Zenas Baer

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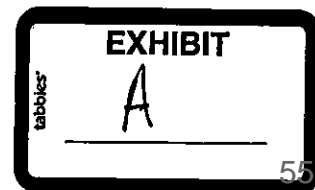
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**CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

I hereby certify that on February 24, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Andrew R. Varcoe

CERTIFICATES OF SERVICE  
FOR DOCUMENTS FILED USING CM/ECF

Petitioner's Motion to Reconsider, Vacate or Modify the Order of  
Dismissal Pursuant to Circuit Rule 27B;  
Declaration of Zenas Baer and Exhibit A Attached

I hereby certify that on March 5, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



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Zenas Baer

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 10-1138

Kathy Jo Bauck,

Petitioner

v.

Thomas James Vilsack, Secretary of Agriculture,

Respondent

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Appeal from Department of Agriculture  
(D-09-0139)

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**ORDER**

Having carefully reviewed the petitioner's motion to reconsider, vacate, or modify, the motion is denied.

March 08, 2010

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans