

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

USARK FLORIDA, INC., et al.,

Case No. 2021-CA-977

Plaintiffs,

v.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,
et al.,

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR LEAVE TO AMEND INITIAL COMPLAINT**

Plaintiffs, pursuant to Florida Rule of Civil Procedure 1.190(a), provide this memorandum of law in support of their May 3, 2022 motion for leave to amend their initial complaint.

BACKGROUND AND SUMMARY

Since the filing of their original complaint, Plaintiffs have conducted substantial discovery and learned additional facts that require them to amend and clarify the claims and issues to be tried. Specifically, Plaintiffs have learned additional information regarding the basis (or lack thereof) for Defendant Florida Fish and Wildlife Conservation Commission's (the "Commission") promulgation of the challenged rules.

Article IV, section 9 of the Florida Constitution grants to the Commission the "regulatory and executive powers of the state with respect to *wild animal life*." Art. IV, § 9, Fla. Const. (emphasis added). It is on this basis that the Commission has promulgated the rules in question. The Florida Constitution does not define the term "wild animal life." Through discovery, the Commission, via its agency representative, has taken the position that its jurisdiction over wild

animal life extends to any species that is not domesticated. (See **Exhibit 1**, Kristen Sommers Dep. 32:8-36:24, 288:18-289:11.) Plaintiffs' animals are commonly husbanded, multiple generations removed from the wild, often to yield "morphs" with attributes not found in the wild, but the Commission states these animals are subject to regulation regardless of actual impacts on animals in the wild. The risks that Defendants identify are purely speculative because they are not grounded in any known escapes. The purported risks are also misleading and overstated.

The Commission has even taken the position that it may shutter an entire industry on the basis of misleading and untested economic risks and human health and safety risks of Plaintiffs' animals. (See Ex. 1, Sommers Dep. 35:12-36:2, 38:19-39:14.) But neither purported jurisdictional basis is mentioned in the Commission's constitutional mandate. Consequently, Plaintiffs request leave to amend their complaint to add a new claim (Count III), which requests a declaratory judgment that the Commission lacks jurisdiction to promulgate the challenged rules on these facts.

Defendants suggest that the doctrines of res judicata or collateral estoppel prevent amending the complaint, but neither doctrine applies on these facts. Moreover, the prior case that this Court decided found that 2020 SB 1414 was at odds with rather than in support of the Commission's regulations. The issue Plaintiffs wish to raise in their proposed Count III has not been addressed by any court: specifically, whether the Commission may regulate the possession of captive animals including husbanded ones and morphs several generations removed from the wild, including for non-ecological reasons that are divorced from the goals of "protecting, preserving and promoting the wildlife of the State as a public asset." See *Barrow v. Holland*, 125 So. 2d 749, 750 (Fla. 1960).

Additionally, since the filing of their original complaint, several former plaintiffs have decided not to pursue their claims. Specifically, the following entities and individuals no longer desire to be parties to this lawsuit and previously filed notices of voluntary dismissal: Anthony and Renee Caporale; Jason Hood; Josh Barger; Patrick C. Cannarozzi; Aquatic N Exotic, Inc.; and Mystic Reptiles, LLC. The proposed First Amended Complaint reflects the updated set of Plaintiffs as of May 3, 2022. Furthermore, the First Amended Complaint streamlines some counts and deletes Plaintiffs' claim that the challenged rules impair vested rights—a claim that was resolved by the Court's July 30, 2021 temporary injunction order.

As explained herein, the Court should grant Plaintiffs' motion for leave to amend.

MEMORANDUM OF LAW

A. Legal Standard

Leave to amend shall be given freely when justice so requires. Fla. R. Civ. P. 1.190(a).

As the First District Court of Appeal has explained:

Our rules of civil procedure evidence a clear policy that, absent exceptional circumstances, requests for leave to amend pleadings be granted. Although granting leave to amend rests within the sound discretion of the trial court, all doubts should be resolved in favor of allowing amendment. It is the public policy of this state to freely allow amendments to pleadings so that cases may be resolved upon their merits. As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile.

Thompson v. Publix Supermarkets, Inc., 615 So. 2d 796, 797 (Fla. 1st DCA 1993) (internal quotation marks and citations omitted). Because amendment would not prejudice Defendants, Plaintiffs have not abused the privilege to amend, and amendment would not be futile, the Court should grant Plaintiffs' motion for leave to amend.

B. Defendants Will Not Be Prejudiced by Amendment

“Whether granting the proposed amendment would prejudice the opposing party is analyzed primarily in this context of the opposing party’s ability to prepare for the new allegations or defenses prior to trial.” *Morgan v. Bank of N.Y. Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016). The requested amendment would not prejudice Defendants.

Under the Court’s July 22, 2022 revised case management order, discovery is not set to close until October 31, 2022, and a trial date has not been set. Consequently, Defendants have sufficient time to prepare for the new allegations prior to trial. In fact, both parties have already conducted discovery related to this claim. After Plaintiffs raised the issue in written discovery and depositions, Defendants’ counsel asked several Plaintiffs about the Commission’s jurisdiction over different species, including by asking for their personal definitions of terms like “wildlife,” “captive wildlife,” and “domesticated animals.” (See, e.g., **Exhibit 2**, Plaintiff Hector Berrios Dep. 61:3-62:17.)

In other words, all parties have already acted under the assumption that these issues are part of this lawsuit. See *Hartong v. Bernhart*, 128 So. 3d 858, 862 (Fla. 5th DCA 2013) (trial court erred in denying post-trial motion for leave to amend complaint on issue that “both parties had developed . . . throughout discovery and the trial” which had been tried by consent); *Smith v. Smith*, 971 So. 2d 191, 194-95 (Fla. 1st DCA 2007) (holding that issue not raised in pleadings could be tried by implied consent where opposing party’s attorney raised the issue at the final hearing and questioned his client about it). Thus, Defendants have sufficient time to meet the new allegations and will not be prejudiced by the requested amendment.

B. Plaintiffs Have Not Abused the Privilege to Amend

Leave to amend should generally be granted when the privilege to amend has not been abused. *Thompson*, 615 So. 2d at 797. This is Plaintiffs' first request to amend their complaint; consequently, it would be an abuse of discretion to deny leave to amend. *Cf. id.* (holding that trial court should have granted leave to amend when, among other things, this was the appellant's first request to amend the complaint); *Morgan*, 200 So. 3d at 795 ("Appellant has not abused the privilege to amend, because the denied motion at issue was the first time she sought to amend her answer.").

C. Plaintiffs' Amendment Is Not Futile

Lastly, amendment is not futile. With respect to the only new count in the First Amended Complaint, Plaintiffs have sufficiently stated a cause of action for declaratory relief concerning whether the challenged rules are within the Commission's jurisdiction. "Courts have held that proposed amendments are futile when they are not pled with sufficient particularity or are 'insufficient as a matter of law.'" *Morgan*, 200 So. 3d at 796 (quoting *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003)). Importantly, "[t]he test of the sufficiency of a complaint in a declaratory judgment action is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention but whether he is entitled to a declaration of rights at all." *Orange Cnty. v. Expedia, Inc.*, 985 So. 2d 622, 623 (Fla. 5th DCA 2008).

In proposed Count III, Plaintiffs have stated a claim for declaratory relief, alleging each of the elements necessary to that claim: (1) there is a bona fide, actual, practical need for the declaration; (2) the declaration deals with a present, ascertained, or ascertainable state of facts; (3) some immunity, power, or privilege of Plaintiffs is dependent upon fact or law applicable to

facts; (4) Defendants have an actual, present, adverse, and antagonistic interest in the subject matter; (5) Defendants, as the parties with that antagonistic or adverse interest, are all before the Court by proper process; and (6) the relief sought is not merely legal advice. *See id.* at 625; *see also* Proposed First Am. Compl. ¶¶ 19, 68-69, 123-136. Plaintiffs have alleged that they are impacted by the challenged rules, either individually or on behalf of their membership in the case of USARK Florida, and have a practical need for a declaration concerning the Commission's regulatory power as the exercise of that power impacts Plaintiffs' rights to operate their businesses and possess certain animals. Defendants, including the Commission, have an actual, present, adverse, and antagonistic interest with respect to Plaintiffs' claim concerning the Commission's jurisdiction, and all necessary Defendants are before the Court by proper process. Thus, Plaintiffs' First Amended Complaint sufficiently states a claim that Plaintiffs are entitled to the requested declaration in Count III.

In response, Defendants suggest that the proposed amendment is futile on the grounds of res judicata. Response at 6. They point to a 2020 lawsuit in which USARK Florida and other plaintiffs successfully challenged 2020 SB 1414. *See U.S. Ass'n of Reptile Keepers, Fla. Chapter v. Fla. Fish & Wildlife Conservation Comm'n*, No. 2020 CA 1277 (Fla. 2d Cir. Ct. 2020). But that case is distinguishable on numerous grounds, and neither the doctrine of res judicata nor collateral estoppel bars the claim Plaintiffs now seek to bring.

As this Court knows, the prior case concerned a largely different set of plaintiffs, the only overlap being association plaintiff USARK Florida.¹ The plaintiffs there challenged legislation, 2020 SB 1414, which contradicted the Commission's rules on certain reptile species. Thus, the case concerned the constitutionality of legislation contradicting the Commission's rules.

¹ Former Plaintiff Chris Cannarozzi also appeared in the 2020 lawsuit, but he has since dismissed his claims in this case.

Although the Legislature is constitutionally permitted to “enact laws in aid of the Commission,” it could not enact laws that clearly contradict the Commission’s existing regulations, as SB 1414 did. *Id.* ¶ 31.

What was not at issue in the 2020 case was whether the Commission’s regulations comported with the Commission’s own constitutional authority. In granting summary judgment to the plaintiffs in the 2020 lawsuit and finding that SB 1414 “conflict[ed] with [the Commission’s] rules and regulations concerning wild animal life” in violation of the Florida Constitution, the Court stated that the Commission’s constitutional authority must accord “with and [is] subject to applicable Commission rule and other laws.” Order Granting Plaintiffs’ Amended Motion for Partial Summary Judgment ¶¶ 2, 4, 5, 32 in *U.S. Ass’n of Reptile Keepers, Fla. Chapter v. Fla. Fish & Wildlife Conservation Comm’n*, No. 2020 CA 1277 (Fla. 2d Cir. Ct. Sept. 24, 2020). Those are the caveats that Plaintiffs seek to test in this case—whether the regulations subsequently adopted by the Commission are reasonable and accord with the Constitution, including the principles of due process and the Commission’s authority to enact reasonable rules and regulations concerning “wild animal life.”

As Defendants note, the plaintiffs in the 2020 litigation conceded that the Commission was constitutionally charged with the regulation of “wild animal life.” See Compl. ¶¶ 25-28 in *U.S. Ass’n of Reptile Keepers, Fla. Chapter v. Fla. Fish & Wildlife Conservation Comm’n*, No. 2020 CA 1277 (Fla. 2d Cir. Ct. 2020). The issue in this case is different; specifically, whether the Commission’s regulatory authority extends to all of Plaintiffs’ caged animals no matter how many generations removed from the wild, how husbanded they are and how speculative are the ecological risks to animals in the wild, and, if that regulatory authority does extend that far, whether the Commission exercised that authority in a manner consistent with due process.

Neither res judicata nor collateral estoppel applies to bar Plaintiffs' proposed claim. A party seeking to invoke res judicata must establish four identities: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004). A party seeking to invoke collateral estoppel must establish the following five elements:

(1) the identical issue was presented in a prior proceeding; (2) the issue was a critical and necessary part of the prior determination; (3) there was a full and fair opportunity to litigate the issue; (4) the parties to the prior action were identical to the parties of the current proceeding; and (5) the issue was actually litigated.

Marquardt v. State, 156 So. 3d 464, 481 (Fla. 2015).

Regardless of any overlap in parties, "for collateral estoppel to apply, it is essential that the question common to both causes of action was *actually adjudicated* in the prior litigation." *Fernandez v. Cruz*, Nos. 3D21-1513, 3D21-1514, 2022 WL 1760593, at *4 (Fla. 3d DCA June 1, 2022) (internal quotation marks and alterations omitted; emphasis added). "Similarly, for res judicata to apply, identity of the cause of action is required." *Id.* Neither doctrine applies here because the issue and cause of action in proposed Count III differ from the cause of action and issue before the Court in the 2020 litigation; the Commission's jurisdiction to promulgate the rules was not at issue and thus could not be adjudicated in the 2020 litigation.

In the 2020 litigation, the Court was required to assess whether SB 1414 conflicted with the Commission's regulations as they existed on July 1, 2020, when SB 1414 went into effect. The question before the Court there was whether SB 1414 was constitutional, including whether it was properly enacted "in aid of" the Commission under article IV, section 9 of the Florida Constitution. SB 1414 directly conflicted with the rules of the Commission, so this Court properly determined that the legislation was not in aid of the Commission. The Commission has

since amended those rules. In *this* case, the Court must decide the constitutionality of rules adopted by the Commission in February 2021 concerning some but not all of the reptile species impacted by SB 1414. In 2020, the Court could not and did not adjudicate the question of whether the Commission’s later-promulgated rules concerning some of the same reptile species accorded with the Commission’s constitutional authority. For that reason alone, the Court should find that neither res judicata nor collateral estoppel applies to render Plaintiffs’ proposed claim futile.

The Commission also claims that the subsequent amendment of the Florida Constitution has “rendered moot” Plaintiffs’ argument that the Florida Supreme Court has limited the Commission’s jurisdictional authority in cases like *Barrow v. Holland*, 125 So. 2d 749 (Fla. 1960). *See* Response at 2. In *Barrow*, the Florida Supreme Court held that animals “legitimately removed from their natural condition and . . . brought into confinement through private ownership . . . cease to be a subject of regulation by” the Commission’s predecessor, the Game and Fresh Water Fish Commission (the “GFC”). *Id.* at 750. But Defendants do not explain how constitutional amendment (or statutory amendment, *see* Response at 2) granted the Commission broader authority than that it inherited from the GFC with respect to wild animal life, whether possessed in captivity or not.

Defendants’ reliance on *Miramar v. Bain* shows just how weak their argument is. There, the Fourth District ruled that there was no conflict between the then-GFC’s caging requirements and a local ordinance prohibiting a homeowner from fencing her front yard for her cougars. *Miramar v. Bain*, 429 So. 2d 40 (Fla. 4th DCA 1983). Pursuant to statute, the homeowner had received a Class II wildlife animal permit from the GFC to possess them. *Id.* at 42. The permit required the homeowner to have a “perimeter fence of sufficient height and strength to deter

entry by the general public.” *Id.* After the homeowner constructed the fence, the city of Miramar sued her for a zoning violation. *Id.* at 41. The homeowner argued that “the city lacked jurisdiction to require removal of the fence because the Commission had exclusive jurisdiction of the matter and it had approved the fence.” *Id.* at 42. The GFC had not required the fence, but had approved it after the fact.

Resolving this dispute in favor of the city, it was easiest for the court to assume that the GFC “has exclusive authority to enact rules and regulations governing wildlife such as those that are the subject of this appeal,” yet determine that “no conflict exists between the regulations of the Commission and the ordinance of the City of Miramar which prohibits fencing of front yards in a single family residential area.” *Id.* at 43. The court’s statement about the GFC’s authority was dicta as the city never contested the GFC’s authority to regulate the height or strength of fences, much less to issue Class II licenses. The city simply argued that its fence ordinance governed disposition of the case. *Id.* at 42. The GFC was not even a party to the lawsuit.

Naturally, we cannot know for certain what the court in *Miramar v. Bain* would have done if the GFC had required the front yard fence and opposed the city’s zoning enforcement action. This just points to the lack of foundation the case provides to Defendants. What is plain is that the court decided for the city against the homeowner and in so doing cabined the GFC’s jurisdiction over penned animals based on the city’s legal rights.

The issue Plaintiffs wish to raise in their proposed Count III has not been addressed by any court: specifically, whether the Commission may regulate the possession of captive animals including husbanded ones and morphs several generations removed from the wild, including for non-ecological reasons (i.e., economic and human health and safety reasons) that appear divorced from the goals of “protecting, preserving and promoting the wildlife of the State as a

public asset.” *See Barrow*, 126 So. 2d at 750. Plaintiffs have adequately stated a claim for declaratory relief regarding that issue, and Defendants have not established that Plaintiffs’ sought-after amendment is futile.

WHEREFORE, Plaintiffs respectfully request that this Court grant them leave to file the First Amended Complaint attached to Plaintiffs’ May 3, 2022 motion for leave to amend.

Dated: August 8, 2022

Respectfully Submitted,

HOLLAND & KNIGHT LLP

/s/Tiffany A. Roddenberry

Nathan A. Adams, IV
Florida Bar No. 90492
Tiffany A. Roddenberry
Florida Bar No. 92524
Lawrence E. Sellers, Jr.
Florida Bar No. 300241
315 South Calhoun Street, Suite 600
Tallahassee, Florida 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832
larry.sellers@hklaw.com
nathan.adams@hklaw.com
tiffany.rodtenberry@hklaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on August 8, 2022, via the Court’s e-filing system to all counsel of record in this case.

/s/ Tiffany A. Roddenberry

Tiffany A. Roddenberry

EXHIBIT 1

United States Association of Reptile Keepers

vs.

Florida Fish and Wildlife

Deposition of:

Kristen Sommers

February 10, 2022

Vol 01

PHIPPS REPORTING

Raising the Bar!

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 2021-CA-997

UNITED STATES ASSOCIATION
OF REPTILE KEEPERS, FLORIDA
CHAPTER, et al.,

Plaintiffs,

vs

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,
et al.,

Defendants.

REMOTE DEPOSITION OF
KRISTEN SOMMERS
AGENCY REPRESENTATIVE OF
FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION

VOLUME 1 (Pages 1 - 134)

Thursday, February 10, 2022
9:32 a.m. - 12:42 p.m.

LOCATION: Remote via Zoom
Tallahassee, Florida

STENOGRAPHICALLY REPORTED BY:
CINDY A. LAYER, CSR

Job No. 232372

1 A. Again, this is a pretty common
2 definition in the dictionary. Things that are not
3 native are things that did not evolve in the place
4 where they are found. So something, for instance,
5 that did not evolve in that area is not considered
6 indigenous to that area. This is common language
7 that's in Merriam's Dictionary.

8 Q. So suppose there is a nonnative cow in
9 a fenced pasture. Is that nonnative cow in a
10 fenced pasture captive wildlife, domestic -- as far
11 as FWC would treat that --

12 A. That's something that's been in
13 captivity and domesticated for hundreds of years,
14 so that would be considered a domestic animal.

15 Q. A domestic animal now, so that's a new
16 phrase. How do you distinguish a domestic animal
17 from captive wildlife?

18 A. Captive wildlife are animals that are
19 not then having a long history of domestication.

20 Q. So would it be your division's view
21 that you do not have authority to regulate the
22 breeding or trading of nonnative cows?

23 A. It depends. So there's some things
24 that are considered ungulates that we do have
25 authority over because they're not the standard

1 cow. They're not part of the domesticated species.
2 Same thing with some birds, same thing with deer.
3 I don't oversee captive wildlife, so some of those
4 nuances I'm not as familiar with.

5 Q. Can you give me an example of a
6 nonstandard cow over which FWC would assert --

7 A. I can't, but what I'm saying is
8 philosophically there might be some things that
9 have domestic animals, like certain kinds of maybe
10 chicken or something, I don't know, but there are
11 certain animals that we don't regulate because they
12 have a long history of being domesticated.

13 Q. Okay. So am I correct that ranchers of
14 nonnative cows, they do not have to obtain a
15 license from FWC to import, raise, breed nonnative
16 cows, do they?

17 A. We do not oversee cows, your standard
18 cows that are part of agriculture.

19 Q. But if there was a nonstandard cow,
20 would the rancher have to obtain a license to
21 import, breed, raise that cow?

22 A. Likely, yes, but I'm not sure. Again,
23 I'm not involved in the captive wildlife nuances.

24 Q. That's not withstanding that that would
25 be a fenced in or not released into the wild

1 **nonnative cow; is that right?**

2 A. I'm not sure what you're asking. Can
3 you rephrase?

4 Q. If this cow in question that we're
5 talking about was fenced in, that wouldn't itself
6 change the fact that there would potentially need
7 to be a license; is that right?

8 A. I don't believe so, so yeah.

9 Q. What about a nonnative dog in a fenced
10 yard or home, are there circumstances where your
11 division would assert jurisdiction over nonnative
12 dogs?

13 A. There's a lot of canidae that we do
14 actually have authority over, so when you're
15 talking about a domestic dog, a standard domestic
16 dog, that's not the same thing as what you're
17 saying is a nonnative dog. So if you're talking
18 about something that's in the dog family, we have
19 regulated some of those.

20 Q. So would that be something akin to a
21 feral cat, a feral dog, would that be something you
22 would --

23 A. It's not the same thing. Those are
24 domestic animals.

25 Q. So what is the kind of dog that you

1 **have in mind that you potentially would regulate?**

2 A. I believe we actually did put one of
3 the dog-like species in 2019 on our prohibited
4 list.

5 Q. Do you know the name of that species?

6 A. Off the top of my head, no, I don't
7 have the list of animals in front of me.

8 Q. From your perspective, that was because
9 it was not a historically domesticated animal; is
10 that what you're saying?

11 A. It's not a domestic animal.

12 Q. Now, so let me ask, this dog we're
13 talking about, what was the reason it was put on
14 the species list? Is it because the species poses
15 risk to animal wildlife, to people, all of the
16 above, or what's the reason?

17 A. So anything that gets put on one of our
18 lists is a threat to either the ecology,
19 environment, human health and safety, or economics.
20 That's part of the triage we go through. It
21 doesn't have to cause a risk to all three.

22 Q. One of the three is enough, is that
23 what you're saying, or does it have to be two of
24 three?

25 A. It can be.

1 Q. So one of the three can be enough?

2 A. Yes.

3 Q. Now, I'm not trying to play devil's
4 advocate. I am trying to understand this, though.
5 I know there are many people who argue that cows
6 are environmentally -- you know, bad for the
7 environment, right? And so if you follow that
8 logic, they could be ecological, environmental
9 threats. Why wouldn't FWC regulate nonnative cows?

10 A. So to get back to what we were talking
11 about before, a domestic cow is different than wild
12 animal life that we have authority over.

13 Q. I take it that you believe that a
14 lizard, such as the lizards we're going to talk
15 about today, is it your view that those have not
16 historically been domesticated?

17 A. They're not domestic animals.

18 Q. When you say that, what's the premise
19 for -- how do you reach that conclusion?

20 A. They have not had hundreds of years of
21 domestication. They're not a standard domestic
22 animal as is commonly assumed by the general
23 public. Just because something is being bred
24 doesn't mean it's domestic, or domesticated.

25 Q. Okay. If I understand your logic, if

1 Dachshunds, I guess that's a domestic dog, if they
2 escaped -- if they were able to actually escape and
3 establish themselves in the wild and cause harm to
4 the wild, you would still not regulate the
5 Dachshund; is that right?

6 A. That's my understanding.

7 Q. Concerning breeders generally, you
8 know, whether they be dog breeders, or cow
9 breeders, whatever kind of breeders, lizard
10 breeders, are you basically saying that the
11 jurisdiction of FWC to regulate them hinges upon
12 this distinction of domestic and nondomestic; is
13 that right?

14 A. Are you asking whether or not I believe
15 that our authority has to do with whether something
16 is domestic or not?

17 Q. Yes.

18 A. Yes.

19 Q. So if there's a breeder of a
20 nondomestic animal who has those animals in
21 captivity, that breeder, by virtue of the animal
22 not being domestic, would be one that you can
23 regulate; is that right?

24 A. We do.

25 Q. And does your -- from your standpoint

1 of the division, does your regulatory authority
2 hinge upon scientific evidence that the animal in
3 question could pose an ecological risk, or to use
4 your example, the three things you said was
5 ecological, human health -- what was the third?

6 A. Economic.

7 Q. Economic. So in order for your agency
8 to establish regulatory jurisdiction over the
9 animal, must one of these three be implicated, or
10 could you do it anyway?

11 A. The captive wildlife is regulated
12 regardless of any of those three, so those are
13 separate rules. But any of the wildlife,
14 regardless of whether it poses a risk, we have
15 jurisdiction over.

16 Q. Even though it's captive; is that
17 right?

18 A. Same thing with native species.

19 Q. Let me ask you a question: Suppose
20 there was no scientific evidence that further
21 regulating a nonnative species would incrementally
22 protect wild animal life, are you saying FWC would
23 nevertheless have the authority to regulate in that
24 circumstance?

25 A. Let me make sure I understand your

1 question. Are you asking whether or not we have
2 the authority to regulate a species even if it
3 doesn't pose a risk to other species?

4 **Q. Correct.**

5 A. Yes, because if it poses a risk to
6 human health and safety, whether it poses a risk to
7 the economy, whether it doesn't pose a risk but
8 we're trying to preserve the species, the agency
9 has authority over wild animal life.

10 **Q. So you fell back to the other two of**
11 **the three in the triad. Suppose there was no human**
12 **health consequences either, would you still have**
13 **the ability to regulate that animal?**

14 A. Yes, because it's within our authority.

15 **Q. Suppose there was mixed scientific**
16 **evidence that further regulating a nonnative**
17 **species would protect wild animal life, so there's**
18 **some evidence in favor, some evidence against, but**
19 **there are unambiguous adverse consequences for**
20 **breeders, would FWC then still have the authority**
21 **to impose the regulation?**

22 A. FWC has the authority to regulate
23 wildlife.

24 **Q. So is that a yes?**

25 A. I'm trying to figure out what you're

United States Association of Reptile Keepers

vs.

Florida Fish and Wildlife

Deposition of:

Kristen Sommers

February 10, 2022

Vol 02

PHIPPS REPORTING

Raising the Bar!

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO. 2021-CA-997

UNITED STATES ASSOCIATION
OF REPTILE KEEPERS, FLORIDA
CHAPTER, et al.,

Plaintiffs,

vs

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,
et al.,

Defendants.

REMOTE DEPOSITION OF
KRISTEN SOMMERS
AGENCY REPRESENTATIVE OF
FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION

VOLUME 2 (Pages 135 - 341)

Thursday, February 10, 2022
1:15 p.m. - 6:17 p.m.

LOCATION: Remote via Zoom
Tallahassee, Florida

STENOGRAPHICALLY REPORTED BY:
CINDY A. LAYER, CSR

Job No. 232372

1 risks roughly in the same area, the human health
2 risks maybe a little bit lower than some of the
3 other snakes. So it says overall risk to Florida
4 here, uses the word high, and I think in the other
5 instances it was very high. So is this a
6 reflection of -- is the difference a reflection of
7 where these indicators are as compared to the other
8 indicators for the other snakes?

9 A. It actually has more to do with the
10 outcome from the risk screening tool.

11 Q. The outcomes from what?

12 A. The risk screening tool that we've
13 talked about previously.

14 Q. So the risk screening tool, when it
15 produced the results, did it actually say high in
16 this instance and the other ones it said very high?

17 A. Yes.

18 Q. If I was to take this and say, okay, I
19 want to look at -- let's say there was a summary
20 like this for feral cats, and I was to go look at
21 that summary and see the ecological risk factors
22 associated with that, and then look at the overall
23 risk to Florida, what do you think I would see?
24 Would I see something very similar to this? Would
25 I see something completely different? What would I

1 **see?**

2 MS. PARNELL: Objection, form.

3 A. We don't regulate feral cats, so I
4 don't look at the risks of that, and I wouldn't
5 even have conjecture onto feral cats.

6 BY MR. ADAMS:

7 **Q. Interesting. Why don't you regulate**
8 **feral cats because -- why?**

9 A. They're considered domestic species, as
10 we spoke about during the first hour of this
11 deposition.

12 **Q. What about feral hogs, do you regulate**
13 **feral hogs?**

14 A. We manage feral hogs, but I do not
15 regulate feral hogs.

16 **Q. So if I was going to look at this kind**
17 **of a summary for a feral hog, would you expect that**
18 **I would see something very similar to this, very**
19 **different? What would I expect to see?**

20 MS. PARNELL: Objection, form.

21 A. I don't know. We'd have to go through
22 and do the assessment, so that would be complete
23 conjecture on my part.

24 BY MR. ADAMS:

25 **Q. Are there any advantages of moving the**

1 scrub python from the conditional list to the
2 prohibited list that we have not discussed?

3 A. No.

4 Q. Let's look at the reticulated python at
5 370, please. Here there's another habitat
6 suitability model, and is this one also reliant
7 upon the Reed and Rodda study?

8 A. This, as is quoted, it's cited, is a
9 picture of Reed and Rodda 2009, just like the
10 others we've discussed earlier.

11 Q. Reticulated pythons, are they still not
12 established in Florida?

13 A. Thankfully, no.

14 Q. Here again there's some literature that
15 suggests the reticulated pythons are
16 physiologically unable to reproduce and establish
17 in wild populations in Florida. Are you aware of
18 that literature?

19 A. No.

20 Q. So that literature was not taken into
21 account in connection with this; is that right?

22 A. No, that's not what I said. I said I'm
23 not aware of it. However, I did not conduct the
24 risk screening information. Andrea Sizemore did.
25 So she would have had all of the literature that

EXHIBIT 2

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

UNITED STATES ASSOCIATION
OF REPTILE KEEPERS, FLORIDA
CHAPTER, et al.,

Plaintiffs,

vs.

CASE NO. 2021-CA-000977

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION, et al.,

Defendants.

-----/

DEPOSITION OF
HECTOR BERRIOS

ON BEHALF OF: The Defendants
DATE: May 26, 2022
TIME: 9:02 a.m. - 11:54 a.m.
LOCATION: All Parties Appearing Via Zoom
REPORTED BY: Lisa Babcock
 Stenographic Court Reporter
 Notary Public
 State of Florida at large

FOR THE RECORD REPORTING
1500 MAHAN DRIVE - SUITE 140
TALLAHASSEE, FLORIDA 32308
850.222.5491

1 APPEARANCES OF COUNSEL:

3 On behalf of the PLAINTIFFS:

4 TIFFANY RODDENBERRY, ESQUIRE
 5 tiffany.roddenberry@hklaw.com
 6 Holland & Knight
 7 315 South Calhoun Street, Suite 600
 8 Tallahassee, Florida 32301-1872
 9 850.425.5658

9 On behalf of the DEFENDANTS:

10 RHONDA E. PARNELL, ESQUIRE
 11 rhonda.parnell@myfwc.com
 12 Florida Fish and Wildlife Conservation Commission
 13 620 South Meridian Street
 14 Tallahassee, Florida 32399-1600
 15 850.487.1764

15 EXAMINATION INDEX

16 HECTOR BERRIOS	PAGE
17 DIRECT BY MS. PARNELL	3
18 CROSS BY MS. RODDENBERRY	82
19 (No exhibits.)	
20	
21 Certificate of Oath	87
22 Certificate of Reporter	88
23 Errata Sheet	89
24 Read and Sign Letter	90
25	

1 PROCEEDINGS

2 WHEREUPON,

3 HECTOR BERRIOS

4 was called as a witness, having first been duly sworn to
5 speak the truth, whole truth, and nothing but the truth,
6 was examined and testified as follows:

7 THE WITNESS: Yes.

8 DIRECT EXAMINATION

9 BY MS. PARNELL:

10 Q. Mr. Berrios, my name is Rhonda Parnell. I
11 represent FWC in this litigation.

12 Could you please state your name for the record?

13 A. Hector Berrios, Jr.

14 Q. Have you ever had your deposition taken before?

15 A. No.

16 Q. I'm sorry. Could you speak up just a little bit.

17 A. No, I have not.

18 Q. Thank you. So what's going to happen is I'm
19 going to ask some questions. You're going to truthfully
20 answer those questions. And there's a couple ground rules
21 I'd like to go over.

22 The court reporter is going to take down
23 everything that we say. If you could please use words, no
24 head shakes, no uh-huh and huh-uh, as they don't translate
25 well to the transcript. If you happen to do that or only

1 A. I don't know that it was a requirement to provide
2 which specific animals for this purpose?

3 Q. What is -- what do you believe the definition of
4 "wildlife" is?

5 A. I guess animals that live unconfined to cages,
6 human control.

7 Q. All right. What would be your definition of
8 "captive wildlife"?

9 A. Raised and bred in a controlled human
10 environment.

11 Q. What do you -- what do you think the
12 definition of "domesticated animals" is?

13 (Court reporter clarification.)

14 THE WITNESS: I believe ones that show
15 characteristics different from their wild counterparts
16 based on captivity.

17 BY MS. PARNELL:

18 Q. Can you give me an example of what you are
19 talking about?

20 A. Sure. A dog has a demeanor slightly different
21 than a wild wolf. Therefore, to me, the dog shows a
22 domesticated character, whereas, the wolf is wild.

23 Q. And do you know what the definition of "tame
24 animals" is?

25 A. Can you repeat that?

1 Q. Do you know the definition of "tame animals"?

2 A. Tame. I don't know the definition of "tame," no.

3 Q. How do you classify the animals that you have on
4 your property?

5 A. Captive-bred reptiles.

6 Q. Does that mean that they are wildlife?

7 A. No.

8 Q. They are not?

9 A. They are not.

10 Q. And why aren't they considered wildlife in your
11 eyes?

12 A. They were captively bred, produced, raised,
13 maintained, fed all within a confined environment.

14 Q. Okay. So that makes them what?

15 A. Captive-bred animals.

16 Q. They're just animals. They're not wildlife?

17 A. No.

18 MS. RODDENBERRY: Objection; form.

19 BY MS. PARNELL:

20 Q. Do -- if a wild tegu is captured from the wild,
21 do you believe that it is captive wildlife?

22 A. If a tegu is captured in the wild, do I believe
23 it's captured wildlife?

24 Q. Once you capture it, right, you take it from the
25 wild and now you now possess it, is that captive wildlife?