ORAL ARGUMENT IS REQUESTED

15-1174

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BIG CATS OF SERENITY SPRINGS, INC., doing business as Serenity Springs Wildlife Center, NICK SCULAC, JULIE WALKER, and JULES INVESTMENT, INC.,

Plaintiffs-Appellees.

v.

CINDY RHODES and TRACY THOMPSON,

Defendants-Appellants,

and

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, and OTHER UNNAMED USDA EMPLOYEES,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(ROBERT E. BLACKBURN, J.)

BRIEF FOR THE APPELLANTS

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

GLOSSARY

Abbreviation	Definition
APA	Administrative Procedure Act
APHIS	Animal and Plant Health Inspection Service
AWA	Animal Welfare Act
USDA	U.S. Department of Agriculture

INTRODUCTION

This damages action against two officials with the U.S. Department of Agriculture in their personal capacities was brought by the owners of a facility that exhibits exotic felines and other exotic animals. The facility and its owners are subject to the federal Animal Welfare Act and its regulations, which authorize not only unannounced, warrantless inspections by federal government inspectors during business hours in order to ensure the humane care and treatment of the animals, but also confiscation of the animals if circumstances indicate that the animals' health is in danger.

The plaintiffs do not challenge the constitutionality of the statutory inspection scheme, which other courts have upheld. Instead, they sue two federal inspectors for damages in a dispute that arose out of an adverse inspection report. The two defendant inspectors arrived at the facility to enforce a previous deadline mandating veterinary treatment of two injured tiger cubs and got no response to their efforts to gain entry to the site. The plaintiffs contend that the inspectors violated the Fourth Amendment by enlisting local sheriff's deputies – pursuant to a federal regulation that required them to do so – to cut the locks on the facility to allow their entry to attend to the tiger cubs.

This appeal is from the district court's order denying qualified immunity to

the two inspectors and from its rejection of their argument that a Bivens[1] damages remedy is unavailable here in light of the comprehensive statutory scheme of the Animal Welfare Act, which provides for administrative and judicial review of various agency actions taken under the statute and regulations. The district court made three basic errors: it misapplied Supreme Court case law in holding that a Bivens remedy was available; it incorrectly held that requesting sheriff's deputies to cut the locks pursuant to federal regulation was a clearly established Fourth Amendment violation when there was no precedent for finding such a violation; and it even denied qualified immunity on a section 1983 claim against the federal inspectors, on the theory that, in asking the deputies to cut the locks pursuant to federal regulation, the inspectors somehow were acting under color of state law, rather than federal law.

The district court's order should be reversed and the case remanded for dismissal of the Bivens and section 1983 claims and for further proceedings on the tag-along claims for declaratory relief.

STATEMENT OF JURISDICTION

The plaintiffs asserted jurisdiction in district court pursuant to 28 U.S.C. 1331, among other statutes. In an order entered on March 25, 2015, the district

[1] See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

court adopted the magistrate's recommendation to deny the individual defendants' motion to dismiss based on qualified immunity on the Bivens and section 1983 claims and to affirm the right of the plaintiffs to pursue a Bivens remedy. The individual defendants filed a notice of appeal on May 22, 2015, which was timely under Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure and 28 U.S.C. 2107(b).

As we will explain in more detail in Point I, this Court has jurisdiction over this interlocutory appeal from the district court's order pursuant to 28 U.S.C. 1291. Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) ("a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of § 1291"); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); see also Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (on a qualified-immunity appeal, the question of "recognition of the entire [Bivens] cause of action" is within the jurisdiction of the court of appeals).

STATEMENT OF THE ISSUES

1. Whether "special factors" foreclose a Bivens remedy in an administrative search case under the Fourth Amendment, when the statute authorizing the searches provides a comprehensive scheme of regulation that includes administrative and judicial review of various agency actions.

2. Whether the district court erred in denying qualified immunity on the

Fourth Amendment claim, when it is not clearly established that the conduct of a particular administrative search under a statutory administrative search scheme that is consistent with the Fourth Amendment is subject to additional Fourth Amendment scrutiny "as applied."

3. Whether the district court erred in denying qualified immunity on the section 1983 claim, when the federal inspector defendants were acting pursuant to federal law, and not under color of state law.

All three issues were raised in the defendants' motion to dismiss, Aplt. App. 69-84, 87-88, and were decided by the district court in its order adopting the magistrate judge's recommendation, Aplt. App. 171-72.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

Congress enacted the Animal Welfare Act (AWA) in 1970 with the goal of "insur[ing] that animals intended for use in research facilities or for exhibition purposes * * * are provided humane care and treatment," "assur[ing] the humane treatment of animals during transportation in commerce," and "protect[ing] the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen." 7 U.S.C. 2131. (Relevant statutes and regulations may be found in Addendum C to this brief.) The AWA gives the Secretary of Agriculture the authority to "promulgate standards to govern the humane handling,

care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. 2143(a)(1). An "exhibitor" is defined as someone who "exhibit[s] any animals * * * to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not * * *." 7 U.S.C. 2132(h).

The statute also provides that (with a narrow exception not applicable here) any exhibitor or other regulated entity is required to obtain a license from the Secretary upon payment of a fee and demonstration that the facilities comply with standards promulgated by the Secretary. 7 U.S.C. 2133 (license); 7 U.S.C. 2143 (standards). The Secretary is directed to "make such investigations or inspections as he deems necessary to determine" compliance at least once a year, and must be given access to the business places and records "at all reasonable times." 7 U.S.C. 2146(a). The AWA sets forth the penalties that may be imposed for noncompliance, following notice and opportunity to be heard: temporary suspension or revocation of a license, 7 U.S.C. 2149(a); civil penalties, 7 U.S.C. 2149(b); and criminal penalties, 7 U.S.C. 2149(d). The license suspension and civil penalties are subject to judicial review in a court of appeals. 7 U.S.C. 2149(c). However, other matters are subject to the jurisdiction of the district courts: "The United States 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." 7 U.S.C. 2146(c).

The Secretary's regulations require regulated entities to allow inspectors from the Animal and Plant Health Inspection Service (APHIS) – an agency within the Department of Agriculture – to enter the entities' places of business during business hours, examine required records, make copies of the records, inspect and photograph the facilities, property and animals, and document the conditions and the areas in which there is noncompliance. 9 C.F.R. 2.126(a). The licensee is required to make available "a responsible adult * * * to accompany APHIS officials during the inspection process." 9 C.F.R. 2.126(b). Following the inspection, APHIS inspectors write a report indicating any areas of noncompliance, and these reports are published in a searchable database at the APHIS website.

The AWA directs the Secretary to issue regulations that allow inspectors to "confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply" with the statute and regulations. 7 U.S.C. 2146(a). The regulations thus provide that, in the event the APHIS inspector finds an animal to be suffering as a result of the licensee's noncompliance, the inspector is to make a reasonable effort to notify the licensee of the animal's condition and request that it be corrected; if the licensee refuses, the inspector "may confiscate the animal(s) for care, treatment, or disposal." 9 C.F.R. 2.129(a). If the inspector cannot locate

the responsible person, he is required to "contact a local police or other law officer to accompany him to the premises and shall provide for adequate care when necessary to alleviate the animal's suffering." 9 C.F.R. 2.129(b). But if "in the opinion of the Administrator, the condition of the animal(s) cannot be corrected by this temporary care, the APHIS official shall confiscate the animals." Id.

B. Facts and Proceedings Below.

1. This case arises out of an APHIS inspection on May 7, 2013, that took place at the wildlife facility operated by the lead plaintiff, Big Cats of Serenity Springs, Inc. (Big Cats), an organization in Calhan, Colorado, that houses exotic felines and other exotic animals. The district court's order was on a motion to dismiss, and the relevant facts (which we assume to be true for purposes of this appeal) are taken largely from the amended complaint and from an exhibit to the original complaint.

Big Cats is licensed under the AWA as an exhibitor of wild animals and therefore is subject to unannounced inspections by APHIS. According to the complaint, Nick Sculac, the founder of Big Cats, had "confrontations over the years" with APHIS inspectors and felt they had been "overzealous" in their reports and citations, including those relating to the care of two tiger cubs, Maverick and Baxter. Aplt. App. 51 ¶¶ 22-23. Some of the alleged "questionable citations" and "harassing behavior" arose from disagreements over the veterinary care provided to

those two cubs. Aplt. App. 51 ¶¶ 23-24. A further reason for the confrontations appears to have been Sculac's insistence that inspections must occur only during a relatively small portion of the inspection period authorized by the applicable regulation. Aplt. App. 58-59 ¶¶ 62-69.

During an inspection on April 10, 2013, two APHIS inspectors, defendants Cindy Rhodes and Tracy Thompson, noticed that a tiger cub named Maverick had injured his right front leg. Aplt. App. 28. Rhodes and Thompson wrote an inspection report citing Big Cats for failure to "'maintain programs of adequate veterinary care'" and requiring that Big Cats have Maverick evaluated by a veterinarian no later than April 16, 2013. Aplt. App. 27-28 (quoting report). When Rhodes and Thompson returned on April 18 for a "focused inspection," they found that Maverick's condition "'appeared to be worsened,'" and that Big Cats had not used appropriate methods to reduce his pain. Aplt. App. 28. Accordingly, they directed that a veterinary evaluation be made by the following morning at 10:00 a.m. Id.

When Rhodes and Thompson conducted another focused inspection of Maverick on May 6, 2013, they found, in addition, that he had a limp and swelling in his right hind leg. Aplt. App. 29. They also noticed that Baxter, a second tiger cub, was limping as well. Aplt. App. 30; see Aplt. App. 37 (May 6 inspection report) ("a severe limp on his right hind leg with noticeable swelling of the ankle

area"); id. (Baxter "would 'bunny hop' a short distance before flopping to the ground and would carry or barely touch his toes when walking"). The plaintiffs allege that the two cubs had already been examined by two veterinarians, who had prescribed medications for them, and were about to be examined two days later. Aplt. App. 51-52 ¶ 25. But the May 6 inspection report concluded with a directive that the two tiger cubs be evaluated by a veterinarian "as soon as possible but not later than 8:00 AM on 5/7/2013," the next day. Aplt. App. 37; see Aplt. App. 52 ¶ 27.

On May 7, Sculac arrived at the Big Cats facility at 6:00 a.m., having been unable on the 6th to persuade his veterinarians to come to the facility to examine the cubs by 8:00 a.m. Aplt. App. 53-54 ¶¶ 28-29, 32. Although his veterinarians advised against it, Aplt. App. 31, Sculac loaded the cubs into the carrier and transported them to the clinic of one of the veterinarians, arriving around 7:00 a.m. Aplt. App. 53-54 ¶ 32. Rhodes, Thompson, and "at least one other USDA employee" arrived at the Big Cats facility at about 8:00 a.m., the designated deadline for the examination. Aplt. App. 54 ¶ 33. The outer gate was locked, and there were "No Trespassing" signs posted at the gate. Aplt. App. 54 ¶ 34. According to the plaintiffs, the Big Cats employee who was present, Devon Devries, "did not see or hear the inspectors." Aplt. App. 54 ¶ 35.

Unable to enter the locked gate or make contact with Big Cats employees or

Sculac,[2] Thompson called the El Paso County Sheriff's Office (see 9 C.F.R. 2.129(b)) at around 8:45 a.m., and two sheriff's deputies arrived in response to the call. Aplt. App. 54-55 ¶¶ 36-37. According to the plaintiffs, Thompson and Rhodes falsely told the deputies that they had "'court orders'" to seize the two cubs, that they were being refused access, that the court order allowed them entry to "seize" the cubs, and that they were concerned about possible harm if one of the cats got loose. Aplt. App. 54-55 ¶ 37.[3] The plaintiffs allege that, based on these statements, the deputies cut the chains on the outer gate, entered the facility with the inspectors, and at the direction of the inspectors cut the chains on a second, interior gate. Aplt. App. 55 ¶¶ 39-40. The inspectors and the deputies then entered the interior gate and walked over to where the two cubs had been housed. Along the way, they encountered Devries, the Big Cats employee, who informed them that the cubs were with Sculac at the veterinary clinic. Aplt. App. 55-56 ¶¶ 40-41. After Devries called Sculac and confirmed that he was still at the clinic, the

[2] The inspectors' efforts to make contact with Sculac and the employee at the facility are detailed in the May 7 inspection report. Aplt. App. 90.

[3] We assume the truth of the allegation that the inspectors told the deputies they had a "court order," as indicated in the deputies' report. Aplt. App. 41. But the plaintiffs also plead that the inspectors told the deputies the alleged court order allowed them to seize the cubs, which suggests that the inspectors actually told the deputies that they had a notice of confiscation, and that the deputies misunderstood that as a court order. Confiscation of animals is authorized by agency notice, not by court order. 9 C.F.R. 2.129.

inspectors and deputies left, with the inspectors heading to the clinic. They did not seize the two cubs. Aplt. App. 56 ¶¶ 42-44.

2. The plaintiffs have sued the two inspectors on a Bivens theory, alleging a Fourth Amendment violation and a section 1983 claim for inducing the sheriff's deputies to help them enter the premises, and adding two claims for declaratory relief against the agency.

The defendants moved to dismiss the amended complaint, arguing that a Bivens remedy should not be created in light of the alternative process under the AWA that offers administrative and judicial review; that the defendants are entitled to qualified immunity for the warrantless search in light of New York v. Burger, 482 U.S. 691 (1987); that the section 1983 claim cannot proceed against federal inspectors, who were acting under color of federal and not state law; and that the court lacked jurisdiction over the claims for declaratory relief. The magistrate judge recommended that the claims for declaratory relief brought by the individual plaintiffs (but not by Big Cats) be dismissed but that in all other respects the motion be denied.

First, the magistrate judge recommended rejection of the defendants' argument that special factors counseled against creation of a Bivens remedy. Because Bivens itself was a Fourth Amendment case, she concluded that there was no need to create a new remedy at all. Aplt. App. 143. And since there was no need to

create a new remedy, it was unnecessary even to consider whether an alternative statutory scheme provided a remedy. Aplt. App. 144 ("Therefore, the Court need not determine in this case whether 'Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration,' [Schweiker v.] Chilicky, 487 U.S. [412,] 423 [(1988)], because the Court is not being asked to create a new Bivens remedy.").

Second, the magistrate judge recommended denial of qualified immunity. Accepting the plaintiffs' view that they were not challenging the constitutionality of the warrantless administrative inspection scheme in general but only the forcible, warrantless entry in this case, Aplt. App. 147-50, the magistrate judge determined that the relevant precedent was not Burger but rather Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), which addressed a forcible entry by an inspector. Aplt. App. 150-51. In Colonnade, the Supreme Court "concluded that '[u]nder the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.'" Aplt. App. 151 (quoting Colonnade, 397 U.S. at 77). The magistrate judge then cited provisions of the AWA and its regulations that made it an offense to refuse admission, "reveal[ing] that Congress did not specifically authorize inspectors to forcibly enter a licensee's premises in order to inspect

for violations of the AWA," Aplt. App. 153, and she therefore concluded that Colonnade clearly established that forcible warrantless entry was unlawful. Aplt. App. 154. The magistrate judge went on to decide, somewhat backwards, that the complaint also stated a Fourth Amendment claim based on the warrantless entry. Aplt. App. 154-56.

Third, recognizing that this Court has never decided whether federal officials can act under color of state law when working with state officials, the magistrate judge analyzed how the Court has addressed the issue of private parties working with state officials for purposes of section 1983. Aplt. App. 158-60. According to the magistrate judge, when it is federal officials working with state officials, the best analogy is to private parties who are engaged in "'joint action'" with state officials, acting "'in concert'" and "'shar[ing] a specific goal to violate the plaintiff's constitutional rights by engaging in a particular course of action.'" Aplt. App. 160 (quoting Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453, 1455 (10th Cir. 1995) (private security company and employees were sued under section 1983)). The magistrate judge admitted there were two problems with application of this theory: first, the absence of a shared goal between federal and state officials, given the plaintiffs' allegation that the federal inspectors lied to the sheriff's deputies, and second, the APHIS inspectors' status as federal officers acting with federal authority. Aplt. App. 161. But she nevertheless concluded that the inspec-

tors had in fact acted under color of state law in light of the plaintiffs' allegation that "the breach of the Big Cats facility that forms the basis of Plaintiffs' Fourth Amendment claim was undertaken by local law enforcement officers at the request of the Inspector Defendants." Aplt. App. 161-62. The magistrate judge therefore recommended denial of the motion to dismiss the section 1983 claim. Aplt. App. 162.

Last, the magistrate judge recommended dismissal of the claims for declaratory relief for lack of standing but otherwise recommended denial of the motion to dismiss the plaintiffs' claims for declaratory relief. Aplt. App. 162-68. (The declaratory claims are not part of this appeal.)

The district court agreed with the magistrate judge in all respects, and it entered an order that denied the motion to dismiss, except insofar as it dismissed the individual defendants' declaratory claims. Aplt. App. 172-73.

SUMMARY OF ARGUMENT

The plaintiffs operate a facility that exhibits exotic felines and other exotic animals, a facility that is subject to unannounced federal inspections pursuant to the Animal Welfare Act. The plaintiffs concede that this inspection scheme under federal law is fully consistent with the Fourth Amendment.

But despite their concession, the plaintiffs contend in this lawsuit that a particular inspection violated the Fourth Amendment, because the inspectors, in

compliance with a federal regulation, enlisted local sheriff's deputies to help them enter the plaintiffs' facility when they were unable to reach a responsible person there to admit them for possible confiscation of two injured tiger cubs who had not been given satisfactory veterinary care.

The district court's order allowing the plaintiffs to proceed on their Bivens and section 1983 claims should be reversed for three reasons:

First, in adopting the magistrate judge's recommendation that it was not necessary even to consider whether a Bivens remedy should be created in the specific context of this case, the district court ignored repeated holdings of the Supreme Court that the decision whether to create a Bivens remedy is context-specific. While Bivens was a Fourth Amendment case, it simply does not follow that a Bivens remedy must be available in every other Fourth Amendment case, especially when Congress has provided a comprehensive alternative statutory process through which the constitutional issue may be addressed. Given that comprehensive statutory process, this case presents a different context from Bivens itself. In the Animal Welfare Act, Congress has provided for administrative and judicial review of several types of actions taken by employees of the Animal and Plant Health Inspection Service. As the Supreme Court intimated in Wilkie v. Robbins, 551 U.S. 537 (2007), and as this Court and others have expressly held, the availability of this type of review of agency action forecloses the creation of a

Bivens remedy.

Second, even assuming it would be appropriate to create a Bivens remedy here, the district court erred in denying qualified immunity to the two APHIS inspectors. It is not clearly established that the conduct of a particular administrative search in an otherwise lawful scheme of administrative searches may separately violate the Fourth Amendment, much less that the particular conduct of the inspectors here was unlawful. The Supreme Court looks at the constitutionality of the statutory scheme of administrative searches as a whole, and its leading case, New York v. Burger, 482 U.S. 691 (1987), has never been understood to inquire into the conduct of an individual search. Nor does Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), clearly establish that a forcible entry during an administrative search violates the Fourth Amendment. Here, the APHIS inspectors acted pursuant to an express federal regulation that authorized their actions. Under the regulation, when a licensee refuses to treat an animal who is suffering, an inspector may, in certain circumstances "confiscate the animal(s) for care, treatment, or disposal." 9 C.F.R. 2.129(a). When the licensee's representative is unavailable, the inspector is required to "contact a local police or other law officer to accompany him to the premises" to allow him to "provide for adequate care when necessary to alleviate the animal's suffering" and, if necessary, "confiscate the animals." 9 C.F.R. 2.129(b). Given this legal authority to enter the facility

accompanied by local law enforcement, the district court erred in concluding that Colonnade clearly established that such an entry violates the Fourth Amendment.

Finally, the district court erred in permitting the section 1983 action to proceed. It wrongly held that the federal inspectors, acting pursuant to federal law, were somehow acting under color of state law because they obeyed a federal regulation that required the participation of local law enforcement in entering the licensee's facility. Neither the Supreme Court nor this Court has ever held that federal officials have acted under color of state law for purposes of liability under section 1983. The district court's holding – that federal officials acting under color of their federal authority should be treated for state-action purposes exactly the same as private citizens acting under color of no legal authority – has no precedent in this Circuit or in the Supreme Court. But even if federal officials are deemed to have acted under color of state law when they are part of a conspiracy formed by state or local officials, the plaintiffs have alleged no such conspiracy; to the contrary, they have alleged that the local sheriff's deputies acted at the direction of the APHIS inspectors. Those inspectors were exercising authority under federal law.

STANDARD OF REVIEW

A denial of a motion to dismiss based on qualified immunity is reviewed de novo. Brown v. Montoya, 662 F.3d 1152, 1162 (10th Cir. 2011). The issue of

whether "special factors" foreclose a Bivens remedy is also reviewed de novo. Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009), cert. denied, 558 U.S. 1148 (2010). In reviewing the adequacy of a complaint, the court assumes the truth of well pleaded factual allegations but gives no credence to legal conclusions or conclusory allegations of fact. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1214 (10th Cir. 2011).

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THIS INTERLOCUTORY APPEAL.

On May 26, 2015, the Court ordered the parties to brief the question of appellate jurisdiction. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.

A. This is a qualified-immunity appeal from an order of the district court denying the defendants' motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court observed that "the applicability of the [collateral-order] doctrine in the context of qualified-immunity claims is well established." Id. at 672. It has, in fact, been well established for 30 years. See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("a district court's denial of a claim of qualified immu-

nity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment").

Similarly, the Supreme Court has held that, on a qualified-immunity appeal, a court of appeals has jurisdiction to consider the defendants' argument that "special factors" foreclose a Bivens remedy. Wilkie v. Robbins, 551 U.S. 537, 549 n.4 (2007) (because "the recognition of the entire [Bivens] cause of action" is directly implicated by the defense of qualified immunity, "the Court of Appeals had jurisdiction over this issue, as do we"). In fact, this Court anticipated the jurisdictional ruling in Wilkie almost two decades earlier in Hill v. Department of the Air Force, 884 F.2d 1318, 1320 (10th Cir. 1989) (per curiam), cert. denied, 495 U.S. 947 (1990) ("Because we find no Bivens remedy under the circumstances of this case, we need not address the qualified immunity issue.").

B. The present appeal from the denial of qualified immunity on a motion to dismiss fits comfortably within the case law governing appealability. In this appeal, we assume the truth of the well pleaded factual allegations of the amended complaint. Based on the assumed truth of those allegations, we argue that there was no violation of a clearly established constitutional right and that it was error to extend the Bivens remedy to a case under the Animal Welfare Act, which offers an alternative process to protect the constitutional interests that are raised in this

action.

The Court's May 26 order observes that, in some cases, an appeal on qualified immunity may not be taken. This is certainly correct, but appealability problems typically arise when a district court finds that there are disputed issues of material fact precluding summary judgment. In such a case, the court of appeals lacks jurisdiction over an appeal challenging the sufficiency of the evidence against the defendant. See Johnson v. Jones, 515 U.S. 304 (1995). The decision that this Court cites in its May 26 order makes precisely that point: "Under the Supreme Court's direction in Johnson v. Jones * * *, however, this court has no interlocutory jurisdiction to review 'whether or not the pretrial record sets forth a "genuine" issue of fact for trial.'" Estate of Booker v. Gomez, 745 F.3d 405, 409 (10th Cir. 2014) (quoting Johnson, 515 U.S. at 320). Compare Behrens v. Pelletier, 516 U.S. 299, 313 (1996) (internal citation omitted) ("summary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established'").

The limitations expressed in Johnson and in cases like Estate of Booker regarding disputed issues of fact in summary-judgment cases have no application here, where our appeal is from the denial of a motion to dismiss and we assume the truth of the factual allegations in the complaint. Iqbal, 556 U.S. at 674 ("The

concerns that animated the decision in Johnson are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings."). This case presents issues of law, not of fact: whether the complaint adequately pleads a clearly established constitutional violation and whether a Bivens remedy may be pursued in these circumstances. See id. at 673 (question whether complaint adequately pleads violation of clearly established law is "clearly within the category of appealable decisions").

This Court, accordingly, has appellate jurisdiction under 28 U.S.C. 1291.

II. THE AVAILABILITY OF ADMINISTRATIVE AND JUDICIAL REVIEW OF AGENCY ACTIONS UNDER THE ANIMAL WELFARE ACT FORECLOSES THE CREATION OF A BIVENS REMEDY.

The district court erred in endorsing the magistrate judge's mistaken analysis of "special factors" and in denying dismissal of the Bivens claim. Its order should be reversed.

A. The Supreme Court Has Limited The Availability Of The Bivens Remedy, Especially When Congress Has Provided A Comprehensive Alternative Process For Addressing An Alleged Injury.

1. In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized an implied right of action for damages against federal officials in their individual capacities. But after a decade, the Court began to cut back on that remedy.

Indeed, since 1980, when Carlson v. Green, 446 U.S. 14 (1980), was decided, the Court has "responded cautiously to suggestions that Bivens remedies be extended into new contexts." Schweiker v. Chilicky, 487 U.S. 412, 421 (1988). So cautious has the Court been that it has, in fact, never extended Bivens during that time. See Minneci v. Pollard, 132 S. Ct. 617, 622-23 (2012) (listing cases); Wilkie, 551 U.S. at 550 (same); Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("Since Carlson we have consistently refused to extend Bivens liability to any new context or new category of defendants."). As Wilkie made clear, a Bivens action is "not an automatic entitlement no matter what other means there may be to vindicate a protected interest," and "in most instances we have found a Bivens remedy unjustified." 551 U.S. at 550.

The Court's original decision in Bivens was an outgrowth of an idea that was prevalent at the time: that courts had the authority to "infer" or judicially create a private right of action from a statute. Malesko, 534 U.S. at 66-67. And just as the Court later "retreated" from its willingness to infer a private right of action from federal statutes, id. at 67 n.3, the Court also retreated from its willingness to create private rights of action directly under the Constitution. See Robinson v. Sherrod, 631 F.3d 839, 842 (7th Cir. 2011) ("Bivens is under a cloud, because it is based on a concept of federal common law no longer in favor in the courts: the concept that for every right conferred by federal law the federal courts can create a remedy

above and beyond the remedies created by the Constitution, statutes, or regulations.").

2. As the Supreme Court explained in Wilkie, there are two issues in deciding whether to create a Bivens remedy in a particular context: first, "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages," and second, "even in the absence of an alternative," whether, applying a common-law approach, there may be "'special factors counselling hesitation'" in creating such a remedy. Wilkie, 551 U.S. at 550 (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)). "Special factors" counsel hesitation in creating a Bivens remedy when Congress's failure to provide a damages remedy has not been "inadvertent." Chilicky, 487 U.S. at 423; see Hill, 884 F.2d at 1320-21. Under Bush and Chilicky, "it is the comprehensiveness of the [alternative] statutory scheme involved, not the 'adequacy' of specific remedies extended thereunder, that counsels judicial abstention." Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc); accord, Hill, 884 F.2d at 1320-21.

This Court and others have expressly held that a Bivens remedy may not be created to challenge actions by agency officials when there is a statutory scheme that permits judicial review of agency action under the Administrative Procedure Act (APA). Robbins v. Wilkie, 300 F.3d 1208, 1212 (10th Cir. 2002) ("The APA

is the proper avenue for reviewing an agency's action or decision. If Appellant attempted to hold Defendants liable for alleged constitutional violations committed while reaching a final agency decision, a Bivens action would not be available."); see also Western Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1122-23 (9th Cir. 2009), cert. denied, 559 U.S. 1106 (2010); Sinclair v. Hawke, 314 F.3d 934, 940 (8th Cir. 2003) ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the Administrative Procedure Act is sufficient to preclude a Bivens action.").

The Supreme Court has also indicated that APA review would preclude a Bivens remedy: "The Court in Wilkie observed that the ranch owner had an adequate remedy for the 'unfavorable agency actions,' because, '[f]or each [such] claim, administrative review was available, subject to ultimate judicial review under the APA.'" Western Radio, 578 F.3d at 1122 (quoting Wilkie, 551 U.S. at 552); see Wilkie, 551 U.S. at 553-54 ("Robbins has an administrative, and ultimately a judicial, process for vindicating virtually all of his complaints" since "final agency action, as in canceling permits, for example, was open to administrative and judicial review").

Although the APA provides no damages remedy, that does not alter the special-factors analysis; both Chilicky and Bush were cases in which the plaintiffs could not obtain damages through the alternative statutory process. See Chilicky,

487 U.S. at 425 (as in Bush, despite lack of damages, "Congress * * * has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were"); Western Radio, 578 F.3d at 1123. See also Garcia de la Paz v. Coy, 786 F.3d 367, 377 (5th Cir. 2015) ("The absence of monetary damages in the alternative remedial scheme is not ipso facto a basis for a Bivens claim.").

B. The District Court Misapplied The "Special Factors" Analysis.

1. The district court erred in adopting the recommendation of the magistrate judge, who declined to consider "special factors." Because, like Bivens, this is a Fourth Amendment case, the magistrate judge simply assumed that a Bivens damages remedy could be pursued against the individual federal officials in this case; she reasoned that it was unnecessary to engage in the analysis of alternative remedies mandated by Supreme Court precedent, "because the Court is not being asked to create a new Bivens remedy." Aplt. App. 144.

The law is to the contrary. Whether a Bivens remedy is available is not analyzed on an amendment-by-amendment basis. Compare Davis v. Passman, 442 U.S. 228 (1979) (allowing Bivens action under the Fifth Amendment's due-process clause), with Schweiker v. Chilicky, supra (denying Bivens remedy under due-process clause in light of alternative remedial scheme). See also Garcia de la Paz, 786 F.3d at 372. The proper question is not whether the plaintiffs invoke the same

constitutional amendment as in an earlier case; it is whether this case presents a new context – for example, a new alternative remedy or a new class of defendant. See Arar v. Ashcroft, 585 F.3d 559, 571-72 (2d Cir. 2009) (en banc).

This case presents the new context of a Fourth Amendment claim where there is an alternative statutory process for protecting the constitutional interests at issue. This case therefore does not present a generic Fourth Amendment claim as in Bivens; rather, it involves a specific type of Fourth Amendment claim arising out of a statute that provides an alternative remedy. Wilkie, 551 U.S. at 550; see Minneci, 132 S. Ct. at 621; Garcia de la Paz, 786 F.3d at 375 (declining to create Bivens remedy in Fourth Amendment case where there was an alternative remedial scheme).

2. A Bivens remedy cannot be created in this context, where the AWA expressly provides a series of remedies to regulated entities. Under the AWA, the Secretary may suspend a regulated entity's license or impose civil penalties and may also issue a cease or desist order. 7 U.S.C. 2149(a), (b). These actions are subject to challenge not only administratively, see Marine Mammal Conservancy, Inc. v. Department of Agric., 134 F.3d 409 (D.C. Cir. 1998), but, when final, are subject to a petition for review in the court of appeals. 7 U.S.C. 2149(c); see Lesser v. Espy, 34 F.3d 1301 (7th Cir. 1994). Although that procedure does not apply to an adverse inspection report like the one that led to the events in this case,

such a report may be challenged administratively by "send[ing] a detailed, written appeal to the regional director in the appropriate Animal Care regional office" within 21 days of the finalized report. U.S. Dep't of Agric., APHIS 41-05-015, Animal Care Factsheet, Appeals Process, at 1 (July 2014) (Appeals Process), available at http://www.aphis.usda.gov/publications/animal_welfare/2014/appeals_process.pdf. See U.S. Dep't of Agric., Animal Welfare Inspection Guide, at 2-6 (2013) ("Any facility with a disagreement about the inspection findings may follow the inspection appeals process."), available at http://www.aphis.usda.gov/animal_welfare/downloads/Animal%20Care%20Inspection%20Guide.pdf. This is precisely how the plaintiffs have proceeded here; they have availed themselves of an appeal to the regional director, see Aplt. App. 26-35, and they have used their appeal letter to complain that the sheriff's deputies cut the facility's locks. Aplt. App. 32.

Congress has also provided recourse to judicial review. Once the agency resolves an entity's appeal, the final inspection report is published on the agency's online database. That final report constitutes final agency action: "All decisions made by the appeals teams are final and represent USDA's final determination of compliance." Appeals Process, at 1. Thus, a licensed entity affected by such an action may seek judicial review in district court under the Administrative Procedure Act. Jurisdiction over the APA action would be founded upon 7 U.S.C.

2146(c), a provision of the Animal Welfare Act declaring that "[t]he United States district courts * * * shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in section 2149(c) of this title." And under the APA, the licensee could raise Fourth Amendment arguments related to the particular inspection. 5 U.S.C. 706(2)(B); cf. Hodgins v. U.S. Dep't of Agric., 238 F.3d 421 (Table), 2000 WL 1785733, at *4-*8 (6th Cir. 2000) (unpublished) (considering Fourth Amendment claim on petition for review of civil penalty and license suspension); Lesser, 34 F.3d at 1305-09 (same); Cox v. U.S. Dep't of Agric., 925 F.2d 1102, 1106 (8th Cir. 1991) (First Amendment). No damages could be awarded under the APA against the individual inspectors. See 5 U.S.C. 702 ("relief other than money damages"). Given decades of experience with the APA, Congress's failure to provide a damages remedy in the Animal Welfare Act was not "inadvertent." See Chilicky, 487 U.S. at 423.

3. The district court thus erred in adopting the magistrate judge's flawed recommendation that a Bivens remedy be allowed to proceed. This case represents an entirely new Fourth Amendment context, distinct from Bivens, and there is a comprehensive alternative statutory scheme that forecloses the creation of a Bivens remedy in this context.

III. THE DISTRICT COURT ERRED IN DENYING QUALIFIED IMMUNITY ON THE BIVENS AND SECTION 1983 CLAIMS.

A. When The Defense Of Qualified Immunity Is Raised, The Plaintiff Must Show Both That The Defendant's Conduct Violated A Constitutional Right And That The Right Was Clearly Established.

1. "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Wilson v. Layne, 526 U.S. 603, 614 (1999) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). But qualified immunity is not just a defense to liability; it "is 'an entitlement not to stand trial or face the other burdens of litigation.'" Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. at 526).

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The analysis of whether the right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." Saucier, 533 U.S. at 201. "We have repeatedly told courts * * * not to define clearly established law

at a high level of generality." al-Kidd, 131 S. Ct. at 2084.

Qualified immunity asks whether reasonable officers would have understood that certain conduct violated constitutional rights, and officers are not "expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555, 562 (1978); Swanson v. Town of Mountain View, 577 F.3d 1196, 1200 (10th Cir. 2009) ("we do not force public officials to guess how the law will have developed by the time their actions are scrutinized in federal court"). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 131 S. Ct. at 2083 (emphasis added). This Court has held that there generally "must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (internal quotation marks omitted).

2. "Qualified immunity requires a 'two-step sequence.'" Morris v. Noe, 672 F.3d 1185, 1191 (10th Cir. 2012) (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009)). When qualified immunity is raised, it is the plaintiff's burden to show both (a) that the defendant violated a constitutional right and (b) that the constitutional right was clearly established at the time of the challenged conduct. Id. "[O]fficials enjoy a presumption of immunity when the defense of qualified immunity is raised." Pahls v. Thomas, 718 F.3d 1210, 1227 (10th Cir. 2013).

Courts may, in their discretion, choose which of the two elements of the qualified-immunity inquiry to address first; they may address the existence of a constitutional right or may focus immediately on whether such a right, assuming it exists, was clearly established. Pearson, 555 U.S. at 236; see Kerns v. Bader, 663 F.3d 1173, 1180-81 (10th Cir. 2011), cert. denied, 133 S. Ct. 645 (2012).

3. In this case, the qualified-immunity inquiry on the Bivens claim should focus on the second element (not clearly established), while on the section 1983 claim, it should focus on the first element (no claim for relief). On both claims, the federal inspectors were entitled to qualified immunity, and the district court erred in denying their motion to dismiss.

B. The Inspectors Are Entitled To Qualified Immunity On The Fourth Amendment Bivens Claim, Because The Complaint Does Not Plead The Violation Of A Clearly Established Right.

The district court erred in denying qualified immunity to the inspectors on the Bivens claim alleging a Fourth Amendment violation. There is no clearly established Fourth Amendment right to be free from a warrantless search of a locked area during an administrative search that otherwise satisfies Fourth Amendment requirements, when it is reasonable to believe that the warrantless search of that locked area is authorized by federal law.

1. As The Plaintiffs Concede, The Administrative Inspection Scheme In The Animal Welfare Act Is Consistent With The Fourth Amendment.

The plaintiffs concede that, in general, warrantless administrative inspections under the Animal Welfare Act are fully consistent with the Fourth Amendment, but they claim to be making an "as applied" challenge based on the inspectors' conduct during the search. See Aplt. App. 150 (Magis. R&R) ("They do not challenge the constitutionality of the USDA conducting warrantless searches of Big Cats pursuant to the AWA. As they note, 'Defendants Thompson and Rhodes have, for many years, completed dozens of warrantless searches of the Big Cats facility without incident.'"); Aplt. App. 102 (Pls. Opp. to Motion to Dismiss) ("the question is not whether all warrantless USDA searches are unconstitutional; the question is whether the May 7, 2013 warrantless search was"). Their concession is well founded.

The Supreme Court has long recognized that "the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes," and that a business owner "has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." New York v. Burger, 482 U.S. 691, 699 (1987). See also See v. City of Seattle, 387 U.S. 541, 545 (1967) ("administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be

compelled through prosecution or physical force within the framework of a warrant procedure").

However, the Court has permitted warrantless administrative inspections in "closely regulated" industries, so long as the authorizing statutes satisfy certain requirements. In United States v. Biswell, 406 U.S. 311 (1972), a statute authorized official entry into firearms dealers' premises for inspection of business records and the firearms and ammunition, agents requested access without warrant and were allowed in. The Court explained that "close scrutiny" of firearms traffic was central to crime control and assisting states in regulating firearms traffic within their borders. Id. at 315. Unannounced warrantless inspections were necessary to proper enforcement of the law and were therefore reasonable under the Fourth Amendment. Id. at 316.

In contrast, in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), IRS agents inspecting a catering business for compliance with tax laws applicable to authorized liquor dealers broke the lock on a liquor storeroom after they were refused access for lack of a search warrant. The Court noted the long history of government regulation of the liquor industry, going back to the pre-revolutionary era, but it held that the nonconsensual, warrantless search of the storeroom was unauthorized by statute: "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the

Fourth Amendment and its various restrictive rules apply." Id. at 77. See also Donovan v. Dewey, 452 U.S. 594 (1981) (upholding warrantless inspections of underground mines by federal mine inspectors); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (holding that warrantless OSHA inspections for workplace safety hazards were unconstitutional).

Ultimately, in Burger, the Court synthesized its case law, holding that Colonnade and Biswell stand for the proposition that "[b]ecause the owner or operator of commercial premises in a 'closely regulated' industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search," have a "lessened application." 482 U.S. at 702. See City of Los Angeles v. Patel, ___ S. Ct. ___, No. 13-1175, 2015 WL 2473445, at *10 (June 22, 2015).

Under Burger, a warrantless inspection of commercial premises is reasonable if it meets three criteria:

1) In the "closely regulated" industry, "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." Burger, 482 U.S. at 702.
2) Warrantless inspections must be "'necessary to further [the] regulatory scheme,'" to avoid, for example, the inadvertent alerting of the owner that an inspection is imminent. Id. at 702-03 (quoting Donovan v. Dewey, 452 U.S.

at 600).

3) The certainty and regularity of the inspection program must provide a "'constitutionally adequate substitute for a warrant.'" Id. (quoting Donovan v. Dewey, 452 U.S. at 603). In Burger, this was provided by (a) informing the business operator that regular inspections will be made, (b) setting forth the scope of the inspections to let the operator know how to comply, (c) notifying the operator about who the authorized inspectors are, and (d) limiting the time, place, scope of the inspections. Id. at 711-12.

Under Burger, AWA inspections conducted by APHIS inspectors satisfy all of these criteria, and no warrant is required. See, e.g., Lesser, 34 F.3d at 1306 ("Application of the Burger test to the facts of this case demonstrates that on balance a search conducted by the APHIS pursuant to the Animal Welfare Act fits within the exception to the warrant requirement for 'closely regulated' industries."). Indeed, as mentioned above, the plaintiffs concede this point. See Aplt. App. 150.

The plaintiffs thus do not challenge the administrative inspection scheme, arguing instead that Colonnade prohibits a forcible warrantless administrative inspection, absent specific statutory authority. Aplt. App. 150-51. The magistrate judge agreed, and then recommended denial of qualified immunity on the ground that Colonnade clearly established the law, because "Congress did not specifically authorize the use of forcible entry in the statute authorizing USDA inspections of

animals." Aplt. App. 154.

The denial of qualified immunity is incorrect for two reasons: first, it is not clearly established that conduct of a particular search is subject to additional Fourth Amendment scrutiny "as applied," when the statutory administrative search scheme as a whole satisfies the Fourth Amendment; and second, even if an "as applied" challenge could be mounted, it is not clearly established that the legal authority under the AWA is inadequate to support a forced entry.

2. It Is Not Clearly Established That The Conduct Of A Particular Search Under A Scheme of Warrantless Administrative Searches That Is Consistent With The Fourth Amendment May Separately Violate The Fourth Amendment "As Applied."

It is not clearly established that an official may violate the Fourth Amendment "as applied" during a warrantless administrative search conducted under a statutory scheme that is conceded to comply with the Fourth Amendment. Reasonable inspectors in the position of Rhodes and Thompson could have believed that, when the overall statutory inspection scheme is consistent with the Constitution, their own actions in conformance with that statutory scheme are necessarily consistent with the Constitution.

While there are many cases addressing challenges to administrative searches, as in Burger, there is virtually no authority for the proposition that a party subject to an administrative search may challenge the agents' conduct in a specific

warrantless entry while at the same time conceding that the overall administrative scheme meets the three-part test of Burger. "As applied" Fourth Amendment challenges to administrative searches are rare, and when they are made, they typically attempt to carve out a particular type of search (not a specific individual search) from the otherwise permissible statutory scheme. Courts analyze "as applied" challenges under the Burger test.

For example, in S&S Pawn Shop Inc. v. City of Del City, 947 F.2d 432 (10th Cir. 1991), this Court upheld the overall warrantless administrative inspection scheme, analyzing the traditional three Burger factors for an administrative inspection, but after doing so considered whether the particular inspection was invalid "as applied." The Court was concerned not with whether the conduct of the inspectors violated the Fourth Amendment but with whether the Fourth Amendment barred "a scheme that would allow a warrantless search based on recently discovered evidence that criminal activity had occurred." Id. at 440; see id. (inspections of pawn shop had been "conducted only after a pawned item matched an item reported as stolen or when the person who pawned the item was known to traffic in stolen goods"). In addressing that question of validity "as applied," the Court analyzed the third factor of the Burger test: whether the statute contained a constitutionally adequate substitute for a warrant, and in particular whether the statute sufficiently constrained the discretion of law enforcement. Id. at 439

("Appellant also maintains that the statute lacks restrictions to limit the discretion of the officers conducting the search."); id. at 441 n.7 ("we analyze the searches at issue under appellant's challenge to the statute for failure to restrain the discretion of law enforcement officials").

Similarly, in United States v. Gwathney, 465 F.3d 1133 (10th Cir. 2006), cert. denied, 550 U.S. 927 (2007), this Court addressed the Burger test in an "as applied" challenge. There, a state officer inspecting a commercial truck at the "port of entry" not only cross-checked the cargo against the bill of lading but also noticed some non-conforming boxes and opened them to find a large amount of marijuana. In his criminal proceedings, the driver challenged the search of the boxes, but this Court upheld the search under Burger, holding that the state inspection statute authorized entry not only to inspect the blocking and bracing of the cargo but also the cargo itself: "'The Burger criteria apply to a regulatory scheme generally, not to the particular search at issue.'" Id. at 1139-40 (quoting United States v. Maldonado, 356 F.3d 130, 136 (1st Cir. 2004)). See also Free Speech Coalition, Inc. v. Attorney General, 787 F.3d 142, 168-72 (3d Cir. 2015) (addressing an "as applied" Fourth Amendment challenge under the first and second Burger factors).

The decision in LeSueur-Richmond Slate Corp. v. Fehrer, 666 F.3d 261 (4th Cir. 2012), on which the plaintiffs relied in district court, Aplt. App. 102-03, does

not clearly establish anything to the contrary. In expressing the possibility that the Fourth Amendment may be violated by the inspectors' conduct in a specific search, the Fourth Circuit acknowledged that "the [Supreme] Court's jurisprudence on warrantless administrative searches has never inquired into conduct," and that, under Burger, "if an agent is acting pursuant to a statute and the statute is constitutional, the agent's conduct necessarily is constitutional as well." Id. at 268 n.3. The court's speculation about "as applied" challenges to the conduct of an individual search was qualified by the court's concession that the Supreme Court has never addressed whether "a state official, acting pursuant to a constitutional law that permits warrantless inspections, can still violate the Fourth Amendment through her conduct." Id. at 268.

In the absence of "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts," Casey, 509 F.3d at 1284 (internal quotation marks omitted), the proposition that the conduct of an individual administrative search may separately violate the Fourth Amendment was not "beyond debate," al-Kidd, 131 S. Ct. at 2083, and the district court erred in denying qualified immunity to Rhodes and Thompson.

3. The Inspectors Reasonably Could Have Believed That Federal Law Authorized Them To Ask The Sheriff's Deputies To Help Them Enter The Facility By Cutting The Locks.

The second reason there is no clearly established violation here is that reas-

onable officials in the position of Rhodes and Thompson could have believed that they had sufficient legal authority to request law enforcement to cut the locks to enable them to enter the facility. Unless "every" reasonable official in their position would have known that they did not, they are entitled to qualified immunity. al-Kidd, 131 S. Ct. at 2083.

Here, the two APHIS inspectors exercised their authority to enter the facility pursuant to 9 C.F.R. 2.129. Section 2.129 is authorized by statute; a provision of the AWA provides that: "The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if * * * such animal is held by an exhibitor." 7 U.S.C. 2146(a).

Under section 2.129, an inspector who finds that an animal is suffering as a result of a licensee's noncompliance with the AWA and regulations must try to get the licensee to correct the animal's condition. If the licensee refuses, the inspector "may confiscate the animal(s) for care, treatment, or disposal." 9 C.F.R. 2.129(a). But if a responsible person at the facility cannot be located, the inspector must "contact a local police or other law officer to accompany him to the premises and shall provide for adequate care when necessary to alleviate the animal's suffering." 9 C.F.R. 2.129(b). Then, if "the condition of the animal(s) cannot be corrected by

this temporary care, the APHIS official shall confiscate the animals." Id.

While section 2.129 is not explicit about cutting the locks or forcible entry by other means, authorization for forcible entry is implicit in the regulation. Not only does it require the civilian APHIS inspector to contact local law enforcement but it also provides that in the absence of the responsible person, the inspector "shall provide for adequate care" and "shall confiscate the animals" if temporary care is not feasible. 9 C.F.R. 2.129(b). It is impossible to provide care to animals or to confiscate them, as the regulation calls for, if the inspector cannot get into the facility.

Because the regulation assumes that forcible entry is permitted in the type of situation faced by Rhodes and Thompson in this case, it was reasonable for the inspectors to believe they had sufficient legal authority to enter with local law enforcement, even if the Court ultimately concludes they did not. See Wilson v. Layne, 526 U.S. at 617 ("important to our conclusion was the reliance by the United States marshals in this case on a Marshals Service ride-along policy" that authorized their entry along with media, especially where "the state of the law" was "at best undeveloped"); Roska v. Peterson, 328 F.3d 1230, 1251 (10th Cir. 2003).

The district court erred in concluding that the inspectors' conduct here violated a clearly established right under Colonnade, and Rhodes and Thompson should have been granted qualified immunity on the Fourth Amendment Bivens

claim.

C. The Inspectors Are Entitled To Qualified Immunity On The Section 1983 Claim, Because The Complaint Does Not Plausibly Plead That The Inspectors Acted Under Color Of State Law.

The district court also erred in denying qualified immunity on the section 1983 claim, because the complaint fails to state a claim for relief against federal officials who were acting under color of federal law.

1. Section 1983 provides a statutory cause of action for the deprivation of rights "under color of" state law. Federal officials acting under color of federal law may not be sued under section 1983. Courts need to be "attentive[] to the different powers and duties of different government officials, especially when their authority derives from different sources and, as here, different sovereigns." Pahls, 718 F.3d at 1235 (internal quotation marks and citation omitted). The district court, however, treated the federal inspectors as having acted under color of state law, because it was alleged that those inspectors had "enlisted" local officials (sheriff's deputies) to violate constitutional rights. Aplt. App. 171 n.2. The court's legal theory is mistaken, and the complaint in this case fails to plead facts supporting it.

The notion that officials of the U.S. Department of Agriculture may be acting under color of state law makes little sense. The Secretary of Agriculture is a member of the President's Cabinet, who is appointed by the President, by and with

the advice and consent of the Senate. Thus, he is a "Head[] of Department[]" under the Appointments Clause of the U.S. Constitution, Burnap v. United States, 252 U.S. 512, 515 (1920) (Head of Department means "the Secretary in charge of a great division of the executive branch of the government * * * who is a member of the Cabinet"); see Freytag v. Commissioner, 501 U.S. 868, 886 (1991), and he exercises "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

When performing their inspections, Rhodes and Thompson were acting pursuant to the AWA and its implementing regulations, both of which are exercises of federal authority. The AWA provides that "[t]he Secretary shall make such investigations or inspections as he deems necessary" to ensure compliance with the statute and regulations, and that "for such purposes, the Secretary shall, at all reasonable times, have access to the places of business" of regulated entities. 7 U.S.C. 2146(a). The statute defines "Secretary" to include not only the Secretary himself but also "his representative who shall be an employee of the United States Department of Agriculture." 7 U.S.C. 2132(b). In other words, the inspectors are the "Secretary" under the statute, and they are acting with the federal authority that Congress conferred on the head of an executive department.

2. Nevertheless, and in the absence of any case law from this Court, the magistrate judge treated federal officials exactly the same as private citizens in

analyzing whether action taken together with state or local officials is under color of state law. Aplt. App. 158-60. The two situations are not the same.

When a private citizen acts alone and without state officials, the person is acting under color of no law, i.e., totally as a private citizen, in no capacity that could be deemed governmental. But in some instances, when acting together with state officials, the private citizen may be deemed to be acting under color of state law. See Filarsky v. Delia, 132 S. Ct. 1657, 1662-65 (2012) (discussing the historical use of private citizens in governmental capacities). The Supreme Court has accepted the idea of "state action" by private individuals if there is a sufficiently close nexus between the individual and the state. See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

For federal officials, the situation is entirely different. The Supreme Court has never accepted the idea that federal officials can engage in state action. Unlike private citizens, federal officials possess their own legal authority under federal law, which is superior to state law under the Supremacy Clause of Article VI of the Constitution. Federal law is their source of authority to act in the first place, even if they are alleged to have acted in violation of the Constitution. See, e.g., Bivens, 403 U.S. at 389 (describing issue as whether a constitutional violation committed by a "federal agent acting under color of his authority" subjects the agent to a

damage action). To hold that federal officials are acting under color of state law would be to supplant their constitutionally superior federal status.

In adopting the magistrate judge's recommendation, the district court ignored this distinction between federal officials and private citizens, relying on Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969), a case in which the plaintiff alleged that federal officials had conspired with state officials to deprive him of his rights and had acted in part under the influence of state officials. Aplt. App. 171-72 n.2. As the district court recognized, the decisions from other circuits that treat federal officials the same as private citizens in "color of state law" analysis all trace back to Kletschka.

But the reasoning of Kletschka is dubious, and it should not be followed by this Court. In Kletschka, the Second Circuit offered no real justification for its holding – only that "[w]e can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." 411 F.2d at 448. And the court gave no explanation why joint activity between federal and state officials should be characterized as under color of state law, instead of under color of federal law. Federal law, after all, is supreme. The only conceivable reason for the court to have treated joint federal-state activity as under color of state law is that when Kletschka was decided in 1969, Bivens had not yet been decided, and section 1983

was the only place to look for a remedy. That remedy would have been unavailable if the court had ruled that the federal officials had acted under color of federal law. Today, all constitutional claims against federal officials have to be pursued under the regime of Bivens, subject to all of the rules the Supreme Court has established; the dubious rationale of Kletschka has no continuing relevance.

3. But even if the reasoning of Kletschka were plausible and supported a conclusion that federal officials may act under color of state law when actually conspiring with state officials, the plaintiffs have not alleged such a conspiracy here. They have not even sued the sheriff's deputies.

Rather than pleading a conspiracy with the deputies, the plaintiffs have alleged that the deputies were acting at the direction of the federal defendants. The amended complaint alleges: "At the direction of the USDA inspectors, the deputies cut the chains on this second gate * * *." Aplt. App. 55 ¶ 40. It also alleges: "Relying upon the USDA's representations, the deputies cut the chains on the external gate * * *." Aplt. App. 55 ¶ 39.[4]

The magistrate judge posited that the inspectors were acting under color of state law, because they needed the local sheriff's deputies to cut the locks and could

[4] The allegation that the inspectors "acted under color of state law when they induced the deputies to cut the chains," Aplt. App. 57 ¶ 52, is a legal conclusion that is not assumed to be true on a motion to dismiss. Rural Water Dist. No. 4 v. City of Eudora, 659 F.3d 969, 983 (10th Cir. 2011) ("We do not, however, accept as true any of Douglas-4's legal conclusions.").

not have cut them themselves without that assistance. Aplt. App. 161-62. That theory ignores the fact that it is the federal regulations under the AWA that require the inspectors to request local assistance: "In the event that the APHIS official is unable to locate or notify the dealer, exhibitor, intermediate handler, or carrier as required in this section, the APHIS official shall contact a local police or other law officer to accompany him to the premises and shall provide for adequate care when necessary to alleviate the animal's suffering." 9 C.F.R. 2.129(b). That is, when Rhodes and Thompson enlisted the sheriff's deputies to assist them, the inspectors were, in doing so, exercising their authority under color of federal law.

4. If, however, this Court should decide here for the first time that federal officials operating pursuant to federal law can actually be acting under color of state law, the two inspectors would still be entitled to qualified immunity on the section 1983 claim for the same reasons they are entitled to immunity on the Bivens claim: the substantive law was not clearly established.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed. The case should be remanded with instructions to dismiss the Bivens claims and the section 1983 claim and to proceed further on the remaining declaratory claims.

STATEMENT REGARDING ORAL ARGUMENT

We request oral argument. The district court's order denying qualified

immunity would force individual federal officials to engage in discovery, subject them to trial, and potentially hold them personally liable in damages for actions taken within their official authority.

Respectfully submitted,

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AUGUST 2015

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman, 14 point type. Based on a word count under Microsoft Word 2010, this brief contains 11,300 words, including the footnotes, but excluding the tables, statement of related appeals, certificates, and addenda.

/s/ Edward Himmelfarb

_____

Edward Himmelfarb
Attorney for the Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) if required to file additional hard copies, the ECF submission is an exact copy of those documents; and (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Forefront Endpoint Protection 2010, version 2.1.11804.0, last updated August 3, 2015, and according to that program is free from viruses.

/s/ Edward Himmelfarb

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Attorney for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2015, I served the foregoing Brief for the Appellants on the following by filing the brief through the ECF system, with which counsel are registered:

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I also certify that I filed the brief by causing seven copies to be sent by Federal Express, for overnight delivery, to the Clerk of the United States Court of Appeals for the Tenth Circuit.

/s/ Edward Himmelfarb

Edward Himmelfarb
Attorney for the Appellants

ADDENDUM A – MAGISTRATE JUDGE'S RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03275-REB-KLM

BIG CATS OF SERENITY SPRINGS, INC., doing business as Serenity Springs Wildlife Center,
NICK SCULAC,
JULIE WALKER, and
JULES INVESTMENT, INC.,

Plaintiffs,

v.

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture,
CINDY RHODES,
TRACY THOMPSON, and
OTHER UNNAMED USDA EMPLOYEES,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on **Defendants' Motion to Dismiss** [#23][1] (the "Motion"). Plaintiffs filed a Response to the Motion [#28] and Defendants filed a Reply [#29] in further support of the Motion. Pursuant to 28 U.S.C. § 636(b)(1) and D.C.COLO.LCivR 72.1(c), the Motion has been referred to the undersigned for a recommendation regarding disposition [#24]. On October 8, 2014, the Court heard oral argument regarding the Motion. *See generally Transcript* [#39]. The Court has reviewed the Motion, the Response, the Reply, the entire case file, and the applicable law, and is

[1] "[#23]" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

sufficiently advised in the premises. For the reasons set forth below, the Court respectfully **RECOMMENDS** that the Motion [#23] be **GRANTED in part** and **DENIED in part**.

I. Background

A. Allegations

On December 4, 2013, Plaintiffs initiated this lawsuit by filing their Complaint [#1]. On February 19, 2014, they filed their First Amended Complaint [#15], in which they assert four claims against Defendants relating to a May 7, 2013 United States Department of Agriculture ("USDA") inspection of Plaintiff Big Cats of Serenity Springs, Inc. ("Big Cats"). *Am. Compl*. [#15] ¶¶ 2, 22-45. First, Plaintiffs bring a Bivens[2] action against Defendants Rhodes, Thompson, and an unknown USDA inspector (the "Inspector Defendants") for allegedly violating Plaintiff's Fourth Amendment right to be free from unreasonable searches and seizures. *Id*. ¶¶ 46-49. Second, Plaintiffs bring a claim under 42 U.S.C. § 1983 against the Inspector Defendants "because they acted under color of state law when they induced the deputies to cut the chains and enter the premises . . . ." *Id*. ¶¶ 50-54. Third, Plaintiffs seek a declaratory judgment "declaring that [Defendant] Thompson inappropriately overrode the medical advice of [Plaintiff] Big Cats' veterinarians and declaring that, in the future, the USDA cannot force [Plaintiff] Sculac to choose between following the medical advice of his veterinarians and the mandates of a USDA inspector." *Id*. ¶¶ 55-60. Finally, Plaintiffs "seek a declaratory judgment that the USDA must follow its

[2] In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court created a cause of action for money damages and injunctive relief against federal officials acting under color of their authority for violations of an individual's constitutional rights, 403 U.S. at 395-97. *Bivens* only authorizes suit against federal officials in their individual capacities. *Smith v. United States*, 561 F.3d 1090, 1093 (10th Cir. 2009).

own regulations and that it cannot conduct a warrantless search of the Big Cats facility outside of 'normal business hours' solely because an inspector 'want[s] to' or because an inspector subjectively 'believe[s] [it] necessary to determine the welfare status of the animals . . . .'" *Id*. ¶¶ 61-72. In addition to declaratory relief, Plaintiffs seek compensatory and punitive damages, costs, expenses, and prejudgment interest. *Id*. ¶¶ 73-77.

In support of their claims, Plaintiffs allege that on May 6, 2013, Defendants Rhodes and Thompson visited Big Cats "to conduct a follow-up inspection of Maverick, an injured tiger cub." *Id*. ¶ 25. Plaintiffs maintain that Maverick received treatment from two veterinarians but that, "[d]espite this medical treatment . . . [Defendants] Rhodes and Thompson cited [Plaintiff] Sculac on May 6 for failing to [take appropriate methods to relieve Mavericks's and Baxter's[3]] pain and distress . . .'[.]" *Id*. ¶¶ 25-26. Plaintiffs aver that the inspection report relating to the May 6, 2013 inspection "required that the cubs be evaluated no later than 8:00 the following morning (May 7, 2013)." *Id*. ¶ 27. According to Plaintiffs, Plaintiff Sculac asked Defendant Thompson if Maverick and Baxter could be seen by one of their veterinarians on May 8, 2013, when they were already scheduled for a follow-up appointment. *Id*. Plaintiffs allege that Defendant Thompson refused this request. *Id*. ¶¶ 27, 31.

Plaintiffs further allege that both of Maverick and Baxter's treating veterinarians did not want them transported, but because of the May 6, 2013 inspection report's requirement that the cubs be evaluated by 8:00 a.m. on May 7, 2013, Plaintiff Sculac made

[3] According to Plaintiffs, "Maverick's littermate, Baxter, had also recently been found with an injured leg. He had been prescribed (and was taking) Meloxicam (an anti-inflammatory) and calcium supplements." *Id*. ¶ 25.

arrangements for Dr. Marsden to evaluate the cubs early in the morning of May 7, 2013. *Id*. ¶ 30. Plaintiffs aver that on May 7, 2013, Plaintiff Sculac arrived at Big Cats at approximately 6:00 a.m. to capture and load the cubs so he could take them to be evaluated by Dr. Marsden. *Id*. ¶ 32. Plaintiffs maintain that Plaintiff Sculac arrived at Dr. Marsden's clinic at approximately 7:00 a.m. and assisted her with her evaluation of the tiger cubs. *Id*. According to Plaintiffs, Plaintiff Sculac went to his truck at approximately 10:00 a.m. and heard his cell phone ringing. *Id*. "The call was from Devon Devries, an employee at Big Cats [who] indicated that USDA inspectors and armed police officers were inside the facility demanding to know where Maverick and Baxter were." *Id*.

Plaintiffs allege that the Inspector Defendants arrived at Big Cats on May 7, 2013 at approximately 8:00 a.m. *Id*. ¶ 33. They maintain that the outer gate was locked and that near the gate were two signs indicating "NO TRESPASSING" AND "TRESPASSERS WILL BE PROSECUTED." *Id*. ¶ 34. Plaintiffs aver that Ms. Devries was at the facility but did not see or hear the Inspector Defendants arrive. *Id*. ¶ 35.

Plaintiffs further allege that at approximately 8:45 a.m., Defendant Thompson called the El Paso County Sheriff's Office "and requested 'urgent' assistance" at the facility. *Id*. ¶ 36. Plaintiffs aver that when the two deputies arrived at Big Cats, Defendants Thompson and Rhodes "falsely told the deputies: (a)[ ] that they (the inspectors) had obtained 'court orders' to seize two animal cubs at the facility . . . ; (b)[ ] that [Plaintiff] Sculac was 'refusing to allow them access to the facility;' (c)[ ] that their court order allowed them" to enter the property and seize the animals; (d) "that they were unsure to what lengths someone at the facility would go to keep the animals; and (e)[ ] that they (the inspectors) were concerned that someone could get hurt if one of the cats were let loose." *Id*. ¶ 37. Plaintiffs maintain

that "there are no such court orders" and that "the inspectors lied to the police officers to induce them to cut the chains and enter the facility." *Id*. ¶ 38. As a result, Plaintiff's aver that "the deputies cut the chains on the external gate, and the inspectors and deputies entered the locked, private facility." *Id*. ¶ 39. Plaintiffs allege that the Inspector Defendants and the deputies parked their cars inside the facility and the "deputies cut the chains on [the] second gate" that had a "prominent sign" stating "DO NOT ENTER WITHOUT AN EMPLOYEE." *Id*. ¶¶ 39-40.

According to Plaintiffs, the Inspector Defendants and deputies "walked through a significant portion of the facility before arriving where Maverick and Baxter were housed." *Id*. ¶ 40. Plaintiffs allege that the Inspector Defendants "eventually saw Ms. Devries and approached her demanding . . . to know where Maverick and Baxter were." *Id*. ¶ 41. Plaintiffs aver that Ms. Devries "was shocked and alarmed to suddenly see three USDA agents and two heavily armed police officers appear inside the locked, private facility" and told them that the tiger cubs "were with Mr. Sculac at the veterinarian clinic." *Id*. Plaintiffs allege the Ms. Devries called Plaintiff Sculac who confirmed that he was at Dr. Marden's clinic and that not long after the telephone call, "the USDA agents and then the police officers left . . . ." *Id*. ¶¶ 42-43. Plaintiffs maintain that "[a]t no time did any of the Plaintiffs give any of the Defendants permission to enter the property on May 7, 2013." *Id*. ¶ 45.

B. The Motion

Defendants filed the Motion in response to the First Amended Complaint. In it, they seek dismissal of all four claims asserted by Plaintiffs. Regarding Plaintiffs' first claim, Defendants argue that "Plaintiffs lack[ ] a *Bivens* remedy" for their Fourth Amendment claim. *Motion* [#23] at 7. Defendants further argue that the Court would have to create a

Bivens remedy in this instance and that the Court should not do so because the "AWA[4] and its implementing regulations provide an alternative, existing process to protect the right of an exhibitor like Big Cats or Sculac — a process that includes notice, the opportunity to be heard before the USDA, and the right to pursue judicial review of an adverse decision." *Id*. at 8-9. In the alternative, Defendants argue that even if a *Bivens* remedy exists for Plaintiff's Fourth Amendment claim, the Inspector Defendants are entitled to qualified immunity. *Motion* [#23] at 11-21. Regarding Plaintiff's second claim, brought pursuant to 42 U.S.C. § 1983, Defendants argue that the Inspector Defendants were not acting under color of state law, but rather federal law, and that this claim therefore fails as a matter of law. *Id*. at 24-25. Finally, with regard to Plaintiffs' declaratory judgment claims, Defendants argue that those claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiffs failed to exhaust their administrative remedies. *Id*. at 21-24. In the alternative, Defendants argue that Plaintiffs "lack standing to pursue these claims because they haven't suffered an injury in fact that is concrete, imminent, or redressable." *Id.* at 23 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

In their Response, Plaintiffs argue that a *Bivens* remedy exists for their Fourth Amendment claim. *Response* [#28] at 6-8. Plaintiffs further maintain that, "while this Court is not faced with the question of whether it should create a 'new' *Bivens* remedy," the AWA regulations do not provide a mechanism through which they can bring their Fourth Amendment claim. *Id*. at 8. Plaintiffs further argue that the Inspector Defendants are not entitled to qualified immunity. *Id*. at 8-19. Regarding Plaintiffs' § 1983 claim, they argue

[4] The "AWA" is the Animal Welfare Act, 7 U.S.C. §§ 2331-59, the statute under which Plaintiff Big Cats is licensed. *Am. Compl*. [#15] ¶ 14.

that the Inspector Defendants acted under color of state law because they conscripted local law enforcement to cut the locks at the facility in order to gain entrance to Big Cats. *Id*. at 24-26. Finally, regarding the claims seeking declaratory judgment, Plaintiffs argue that the Court has jurisdiction because they seek to challenge the application of the regulations as written and do not seek amendment of the regulations themselves. *Id*. at 19-21. Plaintiffs further argue that they have standing to assert their third and fourth claims because the relief sought would affect the behavior of the parties going forward. *Id*. at 21-24.

In their Reply, Defendants maintain their position that the Court would have to create a new *Bivens* remedy and argue that the AWA provides "a mechanism for [P]laintiffs to seek judicial review of the May 7, 2013, inspection report" and that "the APA[5] . . . permits judicial review of a final agency action that is 'contrary to constitutional right, power, privilege, or immunity.'" *Reply* [#29] at 2. Defendants also revisit their argument that they are entitled to qualified immunity. *Id*. at 2-9. Regarding Plaintiffs' declaratory judgment claims, Defendants argue that

> [P]laintiffs confirm that they lack standing to pursue claims three and four. It is now clear that they seek, solely based on the events of May 7, equitable relief "in the future". [citation omitted]. Yet, the amended complaint has no allegations of an immediate threat that inspectors Rhodes or Thompson will continue, after May 7, to allegedly violate AWA regulations or the Constitution.

Id. at 10. Finally, regarding the § 1983 claim, Defendants maintain that this statute does not apply to federal officials. *Id*. at 10. Defendants further argue that the claim should be stricken as redundant. *Id*.

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[5] "APA" means the Administrative Procedure Act. Defendants specifically rely on 5 U.S.C. § 702, which states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

II. Standard of Review

A. Federal Rule of Civil Procedure 12(b)(1)

The purpose of a motion to dismiss pursuant to Rule 12(b)(1) is to test whether the Court has jurisdiction to properly hear the case before it. Because "federal courts are courts of limited jurisdiction," the Court must have a statutory basis to exercise its jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); Fed. R. Civ. P. 12(b)(1). Statutes conferring subject-matter jurisdiction on federal courts are to be strictly construed. *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: facial attack or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, when reviewing a factual attack on a complaint, the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.* at 1003. With a factual attack, the moving party challenges the facts upon which subject-matter jurisdiction depends. *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)). The Court's reliance on "evidence outside the pleadings" to make findings concerning purely jurisdictional facts does not convert a motion to dismiss pursuant to Rule 1 2(b)(1) into a motion for summary judgment pursuant to Rule 56. *Id.*

B. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994); Fed. R. Civ. P. 12(b)(6) (stating that a complaint may be dismissed for "failure to state a claim upon which relief can be granted"). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999) (citation omitted). To withstand a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570); *see also Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) ("The complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." (quoting *Twombly*, 550 U.S. at 570)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (brackets in original; internal quotation marks omitted).

To survive a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in

the complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a factual allegation has been stated, "but it has not show[n][]that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a). *Iqbal*, 552 U.S. at 679 (second brackets added; citation and internal quotation marks omitted).

III. Analysis

A. Fourth Amendment Claim

1. Existence of a *Bivens* Remedy

As an initial matter, the Court must determine whether Plaintiffs may bring their Fourth Amendment claim as a *Bivens* action against Defendants in their individual capacities. As noted above, in *Bivens*, 403 U.S. 388, the United States Supreme Court created a cause of action for money damages and injunctive relief against federal officials acting under color of their authority for violations of an individual's constitutional rights, 403 U.S. at 395-97. In *Bivens*, the plaintiff argued that a warrantless search of his home and his arrest by the Federal Bureau of Narcotics was a violation of his Fourth Amendment rights. *Id*. at 389-90. The Supreme Court held that he was "entitled to recover money damages for any injuries he [ ] suffered as a result of the agents' violation of the [Fourth] Amendment." *Id*. at 397.

Defendants maintain that Plaintiffs do not have a *Bivens* remedy because "the Supreme Court has recognized this damages remedy in only two types of cases: for violations of the Cruel and Unusual Punishment Clause, [citation omitted]; and violations

of the equal protection component of the Fifth Amendment's Due Process Clause, [citation omitted]." *Motion* [#23] at 7. However, Defendants ignore that fact that *Bivens* itself recognized a remedy for alleged Fourth Amendment violations. As this Court recently explained, *Bivens* remedies have been recognized in "three circumstances" by the Supreme Court: "alleged Fourth Amendment violations by federal officers, alleged violations of the equal protection component of the Due Process Clause of the Fifth Amendment; and alleged Eighth Amendment violations." *A Just Cause v. United States*, --- F.Supp.2d ---, 2014 WL 1876144, at *8 (D. Colo. May 9, 2014); *see generally Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (engaging in qualified immunity analysis of Fourth Amendment *Bivens* claim). Accordingly, it is unclear to the Court why Defendants maintain that the Court must fashion a *new Bivens* remedy to allow Plaintiffs' Fourth Amendment claim that the Inspector Defendants illegally searched Big Cats to proceed.

Defendants further argue that *Schweiker v. Chilicky*, 487 U.S. 412 (1988) holds "that a statute can preclude a *Bivens* remedy even if it does not provide compensation for constitutional violations." *Motion* [#23] at 7. In that case, the Supreme Court "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. In particular, the Court emphasized that Congress is in a better position than the courts to weigh the competing policy imperatives involved in the creation of remedies for aggrieved employees. *See Bush v. Lucas*, 462 U.S. 367, 389 (1983). Because of its better vantage point, Congress may preclude a *Bivens*-type constitutional action by express declaration or by creating an exclusive statutory remedy. *See Chilicky*, 487 U.S. at 421; *Lucas*, 462 U.S. at 377-78. Additionally, "special factors" may foreclose the bringing of a *Bivens* action even "in the absence of affirmative action by Congress."

Chilicky, 487 U.S. at 421 (internal quotation marks omitted); *Lucas*, 462 U.S. at 377; *Bivens*, 403 U.S. at 396-97. As the Court explained in *Chilicky*:

> [T]he concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

487 U.S. at 423. Defendants, therefore, argue that the Court should not create a new *Bivens* remedy in this case. However, again, in *Bivens* itself the Supreme Court recognized that the plaintiff could bring a claim against the federal officers for an alleged violation of his Fourth Amendment right to be free of unreasonable searches and seizures. Therefore, the Court need not determine in this case whether "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," *Chilicky*, 487 U.S. at 423, because the Court is not being asked to create a new *Bivens* remedy.

Accordingly, to the extent the Motion argues that Plaintiffs' Fourth Amendment *Bivens* claim should be dismissed, the Court respectfully **recommends** that the Motion be **denied**.

2. Qualified Immunity

Defendants seek qualified immunity on Plaintiffs' Fourth Amendment claim against the Inspector Defendants for monetary relief. *Motion* [#23] at 11-21. Government officials are entitled to qualified immunity from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

in their position would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity offers protection both from trial and the other burdens of litigation. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). When defendants raise qualified immunity in a Rule 12(b)(6) motion to dismiss, the Court employs a two-step process. One part of the inquiry is whether the facts taken in the light most favorable to the plaintiff sufficiently allege a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "If no [c]onstitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* However, "if a violation could be made out on a favorable view of the parties' submissions, the [other part of the inquiry] is to ask whether the right was clearly established." *Id*. The Supreme Court has held that courts are no longer required to address the inquiries in a particular order when evaluating a qualified immunity claim. *Sarno v. Reilly*, No. 12-cv-00280-REB-KLM, 2013 WL 1151818, at *6 (D. Colo. Jan. 17, 2013) (citing *Pearson v. Callahan*, 555 U.S. 223 (2009)).

Courts must determine whether the allegedly-violated constitutional right was clearly established in "the context of the particular case before the court, not as a general, abstract matter." *Simkins v. Bruce*, 406 F.3d 1239, 1241 (10th Cir. 2005). That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer [in each defendant's position] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Furthermore, in order for a constitutional right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clear weight of authority from other circuits must have established the constitutional right.

Medina v. City & Cnty. of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992). In other words, there must be case authority in which a constitutional violation was found based upon similar conduct. *See Callahan v. Millard Cnty.*, 494 F.2d 891, 903 (10th Cir. 2007).

a. Clearly Established Right

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourth Amendment's prohibition against unreasonable searches and seizures applies to administrative inspections of private commercial property. *Marshall v. Barlow's, Inc*., 436 U.S. 307, 311 (1978). An owner or operator of a business thus has a reasonable expectation of privacy in commercial property. This expectation, however, is different from, and indeed somewhat lesser than, the privacy expectation in one's home. *See Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981). While a search of a private residence generally must be conducted pursuant to a warrant in order to be reasonable, *Payton v. New York*, 445 U.S. 573 (1980), a warrantless administrative search of commercial property does not per se violate the Fourth Amendment. In *Marshall v. Barlow's, Inc*., 436 U.S. at 313, the Supreme Court stated that in "closely regulated" industries—namely, those which have long been subject to close supervision and inspection—the privacy interests of business owners may be so attenuated, and the government's interest in regulating the particular industry so strong, that a warrantless inspection of the commercial premises might be reasonable within the meaning of the Fourth Amendment.

Defendants argue that at the time of the May 7, 2013 inspection, the law was not

clearly established "such that every reasonable APHIS[6] inspector would have understood that her warrantless inspection of Big Cats' facility was unreasonable under the Fourth Amendment." *Motion* [#23] at 13 (citation omitted). Defendants further argue that because Big Cats operates in a "closely regulated" industry, it has a "'reduced expectation of privacy . . . .'" *Id*. at 14 (quoting *New York v. Burger*, 482 U.S. 691, 707 (1987)). Applying the three-part *Burger* test, Defendants maintain that Plaintiffs cannot show that the Inspector Defendants violated a clearly established right. *Id*. at 15. Further, Defendants argue:

> At the time of the warrantless inspection at Big Cats' facility in 2013, "not a single judicial opinion had held that" conducting such a search of an AWA-regulated wild animal exhibitor is unreasonable under the Fourth Amendment. *al-Kidd*, 131 S. Ct. at 2083. Neither the Supreme Court nor the Tenth Circuit has addressed the particular constitutional question raised here, such that "existing precedent [has] placed the statutory or constitutional question beyond debate." *Id*.

Motion [#23] at 15 (modifications in original).

Plaintiffs argue that Defendants "miss[ ] the point" because they "have not alleged that warrantless searches of the Big Cats facility are *per se* unreasonable." *Response* [#28] at 9. Instead, Plaintiffs state that "the question is whether the May 7, 2013 warrantless search was" unconstitutional. *Id*. Relying on *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), Plaintiffs argue that "cutting the chains securing the Big Cats' facility and entering the premises without consent violates Plaintiffs' Fourth Amendment rights" because "the AWA . . . does not authorize forcible entry, but instead provides for a penalty when a licensee refuses to permit a warrantless inspection." *Response* [#28] at 11. Plaintiffs maintain that "[w]hen the inspectors follow" the safeguards

[6] Defendants state that Defendants Rhodes and Thompson work for the Animal, Plant and Health Inspection Service ("APHIS") of the USDA. *Motion* [#23] at 1.

built into the AWA, "a warrantless search may be reasonable . . . . [b]ut when inspectors ignore these safeguards and exercise their discretion in violation thereof, they are no longer entitled to claim that a warrantless search is reasonable." *Id*. at 12 (citations omitted). In support of their position that the May 7, 2013 inspection was not constitutional, Plaintiffs aver that "an inspector is not permitted to enter a licensed facility with locked gates or no trespassing signs unless 'prior approval has been obtained from the facility.'" *Id*. at 13 (quoting *Compl., Ex. 1* [#1-1] (the "Guide") §§ 9.1.1, 4.1.1). In addition, Plaintiffs argue that "a 'responsible adult' must be at the facility to accompany an inspector." *Id*. at 14 (quoting 9 C.F.R. § 2.126(b) and Guide [#1-1] § 9.1.1). Plaintiffs further maintain that "*Colonnade* clearly and unmistakenly put federal agents on notice that they cannot forcibly enter a locked facility in order to conduct a warrantless, administrative search absent Congressional authority permitting the forcible entry." *Id*. at 16. Plaintiffs also argue that regulations limiting the inspectors' discretion put them on notice that their conduct was unlawful. *Id*. at 17.

In their Reply, Defendants argue that "*Colonnade* no longer provides the applicable legal framework" and that *Burger* "provides the applicable test to determine whether a warrantless inspection of a closely regulated industry is constitutional." *Reply* [#29] at 3. Defendants maintain that "the Court may *not* rely on a federal regulation (9 C.F.R. § 2.126) or on the Guide to conclude that the Fourth Amendment right at issue is clearly established." *Id*. at 4 (emphasis in original). Defendants further argue that even if the Court considered the regulation and the Guide, they do not limit the APHIS' powers of inspection or set policy. *Id*. at 5.

As an initial matter, the Court agrees with Plaintiffs that they are not challenging the

statutory scheme governing the USDA's warrantless searches, but rather are challenging the application of that statutory scheme by the Inspector Defendants on May 7, 2013 at Big Cats. *See, e.g., LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 268-69 (4th Cir. 2012) (holding "that under the Fourth Amendment a party may challenge both the constitutionality of the Act permitting warrantless searches as well as the conduct of the government officials in a particular case"). In *LeSueur*, the Fourth Circuit closely analyzed *Burger* and discussed the distinction between a challenge to a statute and a challenge to the conduct of an agent under the statute. *Id*. The court concluded:

> In *Burger*, the Supreme Court was presented with the question of what the Fourth Amendment requires of statutes that permit warrantless administrative searches, and it answered by laying out a three-prong test. *See supra* note 1. To hold that there are additional requirements would be to ignore *Burger's* plain holding. . . . The three-pronged *Burger* test permits warrantless searches so long as the relevant statute satisfies some rather basic standards. But as *Turner [v. Dammon*, 848 F.2d 440 (4th Cir. 1988)] demonstrates—a case where the police conducted over one hundred warrantless searches without any justification or explanation, and did not issue a single citation, *Turner*, 848 F.2d at 445—statutes that satisfy *Burger* can still be twisted into a tool of government harassment.

Id. at 268. The Court finds this reasoning persuasive. In further support of this reading of *Burger*, the Court notes that in that case the Supreme Court explained that "[i]t [wa]s undisputed that the inspection was made solely pursuant to the administrative scheme." *Burger*, 482 U.S. at 716 n.27. Therefore, the *Burger* test is designed to test the constitutionality of a statutory scheme that allows warrantless searches; it does not serve as the test to apply when determining whether the officers' conduct during a particular warrantless search that is governed by a constitutional statutory scheme was itself constitutional. If the constitutionality of the conduct of the officers executing a warrantless search under a constitutional statutory scheme was only required to meet the *Burger* test,

officers could behave with impunity because they could rely on the circular argument that the search was conducted pursuant to a constitutional statutory scheme and, therefore, their conduct while executing that search was constitutional regardless of how they behaved. As a result, citizens would have no basis for challenging the conduct of the officers during the search, rather than the constitutionality of the statutory scheme itself.

That is exactly the issue raised by Plaintiffs in this case. They do not challenge the constitutionality of the USDA conducting warrantless searches of Big Cats pursuant to the AWA. As they note, "Defendants Thompson and Rhodes have, for many years, completed dozens of warrantless searches of the Big Cats facility without incident." *Response* [#28] at 9. What is at issue here is the conduct of the Inspector Defendants on May 7, 2013 when they executed that particular warrantless search. *Id*.

Therefore, rather than applying the three *Burger* factors to the May 7, 2013 inspection, the Court must consider "whether it would be clear to a reasonable officer [in each defendant's position] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. As noted above, the Court must look to Supreme Court and Tenth Circuit authority, or the clear weight of authority from other circuits, when determining if the constitutional right was clearly established on May 7, 2013. *Medina*, 960 F.2d at 1498.

Plaintiffs rely on *Colonnade* for the proposition that "federal agents cannot *forcibly* enter a licensee's premises without a warrant." *Response* [#28] at 10 (emphasis in original). In *Colonnade*, the holder of a federal liquor dealer's license brought suit after a member of the Alcohol and Tobacco Tax Division of the Internal Revenue Service broke the lock on a store room at the liquor store without a warrant and removed bottles of liquor

"which [he] apparently suspected of being refilled contrary to the command of 26 U.S.C. § 5301(c)." *Colonnade*, 397 U.S. at 72-74. The applicable statute allowed the owner or agent of a licensee to refuse to admit a Treasury Department employee, but, in such an instance, the licensee had to pay a fee. *Id*. at 74. The Court further explained that "[W]here Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id*. at 77. The Court further noted that "this Nation's traditions [ ] are strongly opposed to using force without definite authority to break down doors." *Id*. The Court concluded that "[u]nder the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector." *Id*.

Plaintiffs point to a variety of statutes to argue that, like the statute in *Colonnade*, the AWA "provides a penalty when a licensee refuses to permit a warrantless inspection." *Response* [#28] at 11. First, they cite to 7 U.S.C. § 2146(b), a provision of the AWA, which states:

> (b) Penalties for interfering with official duties
>
> Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punished as provided under sections 1111 and 1114 of Title 18.

7 U.S.C. § 2146(b). Notably this subsection immediately follows subsection a, which governs "[i]nvestigations and inspections" of licensees.

Second, Plaintiffs cite to 9 C.F.R. § 2.126(a), a regulation promulgated by the Secretary of Agriculture regarding the confiscation and destruction of animals pursuant to the AWA, which states:

> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> > (1) To enter its place of business;
> > (2) To examine records required to be kept by the Act and the regulations in this part;
> > (3) To make copies of the records;
> > (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
> > (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

9 C.F.R. § 2.126(a).

Third, Plaintiffs rely on 7 U.S.C. § 2149(b), a provision of the AWA, which states:

> (b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order
>
> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty

> assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 2149(b).

The Court's review of the AWA and the related regulations reveals that Congress did not specifically authorize inspectors to forcibly enter a licensee's premises in order to inspect for violations of the AWA. Congress did provide a framework for inspections in 7 U.S.C. § 2146(a) as follows:

> (a) Investigations and inspections
>
> The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

7 U.S.C. § 2146(a). As the Supreme Court explained in *Colonnade*, "where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. at 77. Notably, Congress did not specifically authorize the use of forcible entry in the statute authorizing USDA inspections of animals. Accordingly, the Court concludes that under *Colonnade*, decided in 1970, "it would be clear to a reasonable officer [in each defendant's position] that" forcibly entering premises to conduct an inspection under the AWA in the absence of definite statutory authority or a warrant "was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. As a result, the Court finds that as of May 7, 2013, the constitutional right that Plaintiffs assert was violated was clearly established.

b. Constitutional Violation

To determine whether the Inspector Defendants are entitled to qualified immunity, the Court must also determine whether the facts taken in the light most favorable to the Plaintiffs sufficiently allege a constitutional violation. *Saucier*, 533 U.S. at 201. The Fourth Amendment protects people from unreasonable searches of their "persons, houses, papers, and effects." U.S. Const. amend. IV. To assert a violation of Fourth Amendment rights, the individual must demonstrate that he had an "expectation of privacy in the place searched, and that his expectation [wa]s reasonable." *United States v. Gordon*, 168 F.3d 1222, 1225 (10th Cir.1999) (citing *Minnesota v. Carter*, 525 U.S. 83 (1998)). The Supreme Court has found that an expectation of privacy is reasonable if it is derived from a source "outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id*. (citing *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978)). The burden is on the individual asserting

the right to show that he had a reasonable expectation of privacy. *United States v. Conway*, 73 F.3d 975, 979 (10th Cir.1995).

Plaintiffs allege that the Inspector Defendants arrived at Big Cats on May 7, 2013 at approximately 8:00 a.m. *Am. Compl*. [#15] ¶ 33. They maintain that the outer gate was locked and that near the gate were two signs indicating "NO TRESPASSING" AND "TRESPASSERS WILL BE PROSECUTED." *Id*. ¶ 34. Plaintiffs further allege that at approximately 8:45 a.m., Defendant Thompson called the El Paso County Sheriff's Office "and requested 'urgent' assistance" at the facility. *Id*. ¶ 36. Plaintiffs aver that when the two deputies arrived at the Big Cats facility, Defendants Thompson and Rhodes "falsely told the deputies: (a)[ ] that they (the inspectors) had obtained 'court orders' to seize two animals cubs at the facility . . . ; (b)[ ] that [Plaintiff] Sculac was 'refusing to allow them access to the facility;' (c)[ ] that their court order allowed them" to enter the property and seize the animals; (d) "that they were unsure to what lengths someone at the facility would go to keep the animals; and (e)[ ] that they (the inspectors) were concerned that someone could get hurt if one of the cats were let loose." *Id*. ¶ 37. Plaintiffs maintain that "there are no such court orders" and that "the inspectors lied to the police officers to induce them to cut the chains and enter the facility." *Id*. ¶ 38. As a result, Plaintiffs aver that "the deputies cut the chains on the external gate, and the inspectors and deputies entered the locked, private facility." *Id*. ¶ 39. Plaintiffs allege that the Inspector Defendants and the deputies parked their cars inside the facility and the "deputies cut the chains on [the] second gate" that had a "prominent sign" stating "DO NOT ENTER WITHOUT AN EMPLOYEE." *Id*. ¶¶ 39-40. According to Plaintiffs, the Inspector Defendants and deputies "walked through a significant portion of the facility before arriving where Maverick and Baxter were housed."

Id. ¶ 40. Plaintiffs maintain that "[a] no time did any of the Plaintiffs give any of the Defendants permission to enter the property on May 7, 2013." *Id*. ¶ 45.

The Court finds that these allegations sufficiently allege a Fourth Amendment claim. As noted above, while licensees are subject to warrantless searches pursuant to the AWA, the specific conduct alleged by Plaintiffs, forcible entry, was not authorized by Congress. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As *Colonnade* made clear, "closely regulated" industries may be inspected without a warrant when such inspections are authorized by Congress, but "where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. at 77.

Accordingly, to the extent the Motion seeks dismissal of Plaintiffs' Fourth Amendment claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court respectfully **recommends** that the Motion be **denied**.

B. Section 1983 Claim

Defendants argue that Plaintiffs' § 1983 claim fails as a matter of law because "§ 1983 does *not* apply to defendants acting under color of federal law." *Motion* [#23] at 24-25 (emphasis in original). They further argue that the § 1983 claim should be stricken pursuant to Fed. R. Civ. P. 12(f) because it "is redundant and duplicative of the *Bivens* claim, which already 'lies against the federal official[s] in [their] individual capacity.'" *Id*. at 25 (quoting *Simmat*, 413 F.3d at 1231) (modifications in original).

Rule 12(f) permits the Court to "strike from a pleading an insufficient defense or any

redundant, immaterial, impertinent, or scandalous matter." "The rule's purpose is to conserve time and resources by avoiding litigation of issues which will not affect the outcome of a case." *Sierra Club v. Tri-State Generation & Transmission Ass'n*, 173 F.R.D. 275, 285 (D. Colo. 1997) (citing *United States v. Smuggler-Durant Mining Corp*., 823 F.Supp. 873, 875 (D. Colo. 1993)); *see also RTC v. Schonacher*, 844 F.Supp. 689, 691 (D. Kan. 1994) (stating that Rule 12(f)'s purpose "is to minimize delay, prejudice, and confusion by narrowing the issues for discovery and trial"). However, motions to strike are disfavored and will only be granted under the rarest of circumstances. *Sierra Club*, 173 F.R.D. at 285. As such, the moving party's "burden of proof is a heavy one." *Holzberlein v. OM Fin. Life Ins. Co.*, No. 08-cv-02053-LTB, 2008 WL 5381503, at *1 (D. Colo. Dec. 22, 2008). Further, "[e]ven where the challenged allegations fall within the categories set forth in the rule, a party must usually make a showing of prejudice before the court will grant a motion to strike." *Sierra Club*, 173 F.R.D. at 285. Moreover, regardless of whether the moving party has met its burden to prove that allegations contained in a pleading violate Rule 12(f), discretion remains with the Court to grant or deny the motion. *See* Fed. R. Civ. P. 12(f) (denoting only that allegations which are subject to Rule 12(f) "may" be stricken). Here, Defendants do not offer any argument that the § 1983 claim should be stricken because they will be prejudiced. As a result, they have failed to meet their heavy burden of demonstrating that this claim should be stricken pursuant to Fed. R. Civ. P. 12(f).

Moreover, Defendants fail to acknowledge that Plaintiffs may seek "duplicative" relief under federal and state statutes and common addressing the allegedly illegal conduct. Pursuit of alternative claims for similar relief is expressly permitted in federal jurisprudence. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or

defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); *see, e.g., Boulware v. Baldwin*, 545 F.App'x 725, 729 (10th Cir. 2013) ("Federal pleading rules have for a long time permitted the pursuit of alternative and inconsistent claims." (citing cases)). Therefore, to the extent the Motion argues that the § 1983 claim should be stricken pursuant to Fed. R. Civ. P. 12(f), the Court respectfully **recommends** that the Motion be **denied**.

With regard to Defendants' alternative argument that this claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because a § 1983 claim cannot be asserted against federal agents, Plaintiffs point to authority from other jurisdictions for the proposition that "when the Federal actors conscript local law enforcement, they can be found to be acting under color of state law." *Response* [#28] at 24. In pertinent part, 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. "[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting [ ] 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). The question here is whether federal agents acting jointly with state agents are acting under color of state law for purposes of § 1983 actions.

Plaintiffs rely on *Reynoso v. City and County of San Francisco*, 2012 WL 646232 (N.D. Cal. Feb. 28, 2012), for the proposition that federal agents can be held liable under § 1983. *Response* [#28] at 25. In *Reynoso*, local police officers and agents of the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") entered the plaintiffs' residence and conducted a search. *Id*. at *1. The plaintiffs brought Fourth Amendment claims against the defendants who filed motions to dismiss those claims. *Id*. at *6. The California court found that, while "[f]ederal officials are generally not liable under § 1983 unless they are acting under color of state law, . . . [t]hey may, however, be liable under Section 1983 'if they are found to have conspired with or acted in concert with state officials to some substantial degree.'" *Id*. at *5 (quoting *Cabrera v. Martin*, 973 F.2d 735, 742 (9th Cir. 1992)). The court found that the plaintiffs "sufficiently alleged a 'symbiotic relationship' between the federal defendants and the state to claim liability under § 1983" because "[t]he SFPD conducted the initial entry into plaintiffs' residence. After the premises was secured, the ATF agents merely substituted themselves for the agents of the City and County of San Francisco in the break-in of plaintiffs' home and took up the search and seizure initiated by the City and County of San Francisco authorities." *Id*. at *6 (internal quotation marks and citations omitted).

The parties point to no binding Tenth Circuit authority that establishes a test, like the "symbiotic relationship" test, that would be applicable to this case. The only parallel the Court has found is the standard applied by the Tenth Circuit when determining whether a *private party* is acting under color of state law and, therefore, may be subject to liability under § 1983. *See, e.g., Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447-

57 (10th Cir. 1995) (discussing four tests: the nexus test, the symbiotic relationship test[7], the joint action test, and the public function test). Of the four tests used by the Tenth Circuit to determine whether a private party is acting under color of state law, the one that most closely fits the situation at hand is the joint action test, which asks the Court to "examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Id*. at 1453 (citing *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir.1989), *cert. denied*, 493 U.S. 1056 (1990) and *Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d 1068, 1076-80 (5th Cir.1985)). The Tenth Circuit has determined that "[u]nder this approach, state and private entities must share a specific goal to violate the plaintiff's constitutional rights by engaging in a particular course of action." *Id*. at 1455. That requirement is problematic in the case at hand because Plaintiffs allege that the Inspector Defendants lied to the deputies and that the deputies cut the locks on the gates, allowing the federal agents entry into Big Cats, based on the Inspector Defendants' representation that they had court orders.

> Specifically, Plaintiffs allege that the Inspector Defendants are liable
>
> under Section 1983 because they acted under color of state law when they induced the deputies to cut the chains and enter the premises by making false statements including (1) they had court orders that allowed them to seize the animals and to enter the premises, and (2) they feared that the animals may be let loose and cause harm to others.

Am. Compl. [#15] ¶ 52. Plaintiffs further allege that "[r]elying upon the USDA's representations, the deputies cut the chains on the external gate, and the inspectors and

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[7] While it shares a name with the test discussed in *Reynoso*, this test is applicable to situations when "the state has so far insinuated itself into a position of interdependence with a private party that it must be recognized as a joint participant in the challenged activity." *Gallagher*, 49 F.3d at 1451 (internal quotation marks and citations omitted).

deputies entered the locked, private facility." *Id*. ¶ 39. In addition, Plaintiffs maintain that

> Mr. Sculac, through his attorneys, has more than once requested copies of these alleged "court orders." The USDA has refused to even affirm that they exist. Upon information and belief, there are no such court orders; instead, the inspectors lied to the police officers to induce them to cut the chains and enter the facility.

Id. ¶ 38. Therefore, there are two major problems with attempting to shoe-horn the facts of this case into the analysis under the joint action test applicable to private persons. First, there could be no "shared specific goal" because, according to the allegations in the Amended Complaint, the deputies were acting on misinformation. Second, the Inspector Defendants approached the deputies not as regular private citizens, but with the authority invested in them as federal agents who stated that they had court orders that allowed them entrance.

Because of these significant problems with application of the test applied by the Tenth Circuit to determine whether private persons are acting under color of state law, the Court finds the logic of *Reynoso* persuasive. In that case, federal agents and local law enforcement officers both entered a home after the local law enforcement officers forcibly entered the premises. 2012 WL 646232, at *1. In that case, as here, the local law enforcement officers were used to breach the barrier to entrance of the private home or facility. That breach is at the heart of Plaintiffs' Fourth Amendment claim and there is no reason to believe that the Inspector Defendants could have breached the Big Cats facility without the deputies' assistance. Therefore, based on the facts of this case, the Court concludes that because Plaintiffs have alleged that the breach of the Big Cats facility that forms the basis of Plaintiffs' Fourth Amendment claim was undertaken by local law enforcement officers at the request of the Inspector Defendants, they have sufficiently

alleged that the Inspector Defendants were acting under color of state law. *See Reynoso*, 2012 WL 646232, *5-*6.

Therefore, to the extent the Motion argues that the § 1983 claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because a § 1983 claim cannot be asserted against federal agents, the Court respectfully **recommends** that the Motion be **denied**.

C. Declaratory Judgment Claims

Finally, Defendants argue that Plaintiffs' third and fourth claims, which seek declaratory relief, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction. *Motion* [#23] at 21-24. Specifically, Defendants argue that "[b]ecause [P]laintiffs seek in claims three and four an interpretation of AWA regulations that would require their amendment, they must follow the APA and present these issues in a petition for rulemaking to amend the AWA rules." *Id*. at 23 (citing 5 U.S.C. § 553(e)). Defendants rely on The Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 6901, *et seq*., to argue that Plaintiffs must exhaust all administrative remedies before filing suit against the Secretary of the USDA.[8] Plaintiffs argue that they do not seek amendment of AWA regulations, but rather they "seek declarations that Defendants violated the AWA

[8] 7 U.S.C. § 6912(e) states:

Exhaustion of administrative appeals

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against--

(1) the Secretary;

(2) the Department; or

(3) an agency, office, officer, or employee of the Department.

regulations *as written*, and that, in the future, the USDA must follow its regulations *as written*." *Response* [#28] at 20 (emphasis in original).

Defendants again appear to misunderstand Plaintiffs' claims. In their third claim, Plaintiffs seek a declaratory judgment "declaring that [Defendant] Thompson inappropriately overrode the medical advice of [Plaintiff] Big Cats' veterinarians and declaring that, in the future, the USDA cannot force [Plaintiff] Sculac to choose between following the medical advice of his veterinarians and the mandates of a USDA inspector." *Am. Compl*. [#15] ¶¶ 55-60.[9] In their fourth claim, Plaintiffs "seek a declaratory judgment that the USDA must follow its own regulations and that it cannot conduct a warrantless search of the Big Cats facility outside of 'normal business hours' solely because an inspector 'want[s] to' or because an inspector subjectively 'believe[s] [it] necessary to determine the welfare status of the animals . . . .'" *Id*. ¶¶ 61-72.[10] On their face, these claims do not seek *amendment* of AWA regulations, rather they ask the Court to address the *application* of AWA regulations to Plaintiff Big Cats in the future. Therefore, Defendants' reliance on 5 U.S.C.

[9] Plaintiffs base this claim on 9 C.F.R. § 2.40(b)(2), which states: "Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include [ ] [t]he use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care . . . ."

[10] Plaintiffs base this claim on 9 C.F.R. § 2.126(a), which, among other things, requires licensees to allow APHIS officials to enter the place of business "during business hours." Pursuant to 9 C.F.R. § 1.1, "business hours" is defined as "a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holidays, each week of the year, during which inspections by APHIS may be made."

§ 553(e)[11] and 7 C.F.R. § 1.28[12] are misplaced because each of these provisions govern requests to amend or repeal existing rules. Defendants do not cite to any applicable statute or regulation that offers a means for Plaintiffs to appeal Defendants' application of existing rules.

Courts have been asked to consider whether plaintiffs who challenge the application of a federal statute or regulation by a federal employee or official are required to exhaust administrative remedies. A review of such cases reveals that the conclusion reached by other courts that have faced this issue is logical—if the challenged statute provides a method for challenging the application, the plaintiffs must follow it before filing suit. However, in cases in which the statute does not provide such a remedy, the plaintiffs may file suit without filing an administrative action or appeal. *See, e.g., Munsell v. Dep't of Agriculture*, 509 F.3d 572, 591-592 (D.C. Cir. 2007) (dismissing *Bivens* action because 9 C.F.R. § 306.5[13] "establishes an extremely straightforward process for appealing the decisions of FSIS officials . . . ."); *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997) ("Where a plaintiff is challenging the *validity* of a regulation, the rule of exhaustion normally requires that the plaintiff petition for rulemaking.") (emphasis added); *Templeton's Serv., Inc. v. Mobil Oil Corp.*, 402 F. Supp. 368, 374 (E.D. Mich. 1975) (rejecting motion to dismiss

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[11] "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[12] "Petitions by interested persons in accordance with 5 U.S.C. 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions."

[13] This regulation governs inspections of meat and poultry products by individuals employed by the Food Safety and Inspection Service ("FSIS"), an agency of the USDA.

for failure to exhaust administrative remedies because "Plaintiffs here seek only an application of [Federal Energy Administration]'s price regulations to the facts of this suit and do not in any way challenge the regulations themselves."). This is sensible because where no administrative remedy exists, potential plaintiffs are left with no recourse other than filing suit.

As the *Templeton's* court explained:

> The doctrine of exhaustion of administrative remedies provides generally "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." The doctrine applies most commonly where the relevant statute provides for the exclusivity of administrative procedures in order to avoid premature interruption of the administrative process and to permit an agency to apply a statute in the first instance. Likewise, where Congress has committed certain functions or matters which require application of special expertise to the discretion of an agency, courts ordinarily defer to the agency at the outset. The doctrine, however, is not without exceptions, and its application hinges upon the particulars of a given case. Accordingly, the court must examine the statute here involved, its legislative history, the adequacy of the administrative remedies provided, and other relevant authorities under the circumstances of this case.

Templeton's Serv., Inc., 402 F.Supp. at 370 (internal citations omitted). Here, the only regulation or statute identified by the parties that discusses the type of relief Plaintiffs seek is 7 U.S.C. § 2146(c), a provision of the AWA stating:

> The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, 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)[14] of this title.

7 U.S.C. § 2146(c). Accordingly, the Court concludes that Plaintiffs were not required to

[14] This section governs "violations by licensees" and provides for license suspension and criminal penalties.

exhaust administrative remedies and that, pursuant to 7 U.S.C. § 2146(c), this Court has jurisdiction over Plaintiffs' third and fourth claims.

Therefore, to the extent the Motion argues that the declaratory judgment claims should be dismissed for lack of jurisdiction, the Court respectfully **recommends** that the Motion be **denied**.

In the alternative, Defendants argue that Plaintiffs "lack standing to pursue these claims because they haven't suffered an injury in fact that is concrete, imminent, or redressable." *Motion* [#23] at 23 (citing *Lujan*, 504 U.S. at 560). Plaintiffs argue that they do have standing because the issues they are asking the Court to resolve, "if granted, will result in the 'settling of some dispute which affects the behavior of *the defendant[s] toward the plaintiff[s].*'" *Response* [#28] at 22 (quoting *Jordan v. Sosa*, 654 F.3d 1012, 1019 (10th Cir. 2011)) (emphasis in *Jordan* and modifications in original).

As noted above, Plaintiffs are asking the Court to enter a declaratory judgment "declaring that [Defendant] Thompson inappropriately overrode the medical advice of [Plaintiff] Big Cats' veterinarians and declaring that, in the future, the USDA cannot force [Plaintiff] Sculac to choose between following the medical advice of his veterinarians and the mandates of a USDA inspector," *Am. Compl*. [#15] ¶¶ 55-60, and declaring "that the USDA must follow its own regulations and that it cannot conduct a warrantless search of the Big Cats facility outside of 'normal business hours' solely because an inspector 'want[s] to' or because an inspector subjectively 'believe[s] [it] necessary to determine the welfare status of the animals . . . .'" *Id*. ¶¶ 61-72. Plaintiffs allege that Plaintiff Big Cats "is licensed by the USDA" and that "inspectors routinely conduct unannounced inspections of licensed

facilities (including Big Cats) to ensure compliance with the AWA" *Id*. ¶¶ 14-15. In addition, 7 U.S.C. § 2146(a) mandates that each licensed facility be inspected at least once each year:

> The Secretary [of Agriculture] shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.

7 U.S.C. § 2146(a). Further, 9 C.F.R. § 2.126 requires AWA licensees to allow APHIS officials to inspect their premises during business hours. Taken together, these alleged facts and the regulation make it clear that as long as the licensed Plaintiff[15] (the "Licensed Plaintiff") continues to be licensed, it will be subject to inspection at least once each year.

As the Tenth Circuit made clear in *Jordan*, "[a]lthough a plaintiff may present evidence of a past injury to establish standing for retrospective relief, he must demonstrate a continuing injury to establish standing for prospective relief." 654 F.3d at 1019 (citing *PETA v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir.2002)). In this case, Plaintiffs' allegations make clear that Plaintiff Big Cats may continue to be subject to the alleged past injury and, therefore, it has standing to pursue the declaratory judgment claims. *Cf. Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 192 (3d Cir.1990) ("[T]he plaintiff must demonstrate that the probability of that future event occurring is real and substantial,

[15] Plaintiffs allege only that Plaintiff Big Cats is a licensee. *Am. Compl*. [#15] ¶ 14. During the October 8, 2014 oral argument, Plaintiffs' counsel stated that "Jules Investments may not be the right plaintiff" but noted that Plaintiffs Nick Sculac and Big Cats are "undoubtably licensed [sic] holders who are being inspected regularly . . . ." *Trans*. [#39] 56:24-57:5. However, because the Court is considering a motion to dismiss, it must only consider the allegations in the Amended Complaint as true and cannot take counsel's statement at the oral argument as fact. Accordingly, because the Amended Complaint does not allege that any other Plaintiff is a licensee, the Court assumes for purposes of this Recommendation only that the only licensed Plaintiff is Big Cats.

'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 460 (1974))). However, because there is no allegation that the other Plaintiffs are licensed, there is no basis to believe that they may be subject to continuing injury sufficient to establish standing for prospective relief. *See Jordan*, 654 F.3d at 1019.

Therefore, to the extent the Motion argues that the declaratory judgment claims should be dismissed because Plaintiffs lack standing, the Court respectfully **recommends** that the Motion be **granted in part** and **denied in part** and that the declaratory judgment claims asserted by Plaintiffs Nick Sculac, Julie Walker, and Jules Investment, Inc. be **dismissed**.

IV. Conclusion

Accordingly, for the reasons stated above, the Court respectfully **RECOMMENDS** that the Motion [#23] be **GRANTED in part** and **DENIED in part**.

The Court FURTHER **RECOMMENDS** that, to the extent the Motion argues that the declaratory judgment claims should be dismissed because Plaintiffs lack standing, the Motion be **GRANTED in part** and **DENIED in part** and that the declaratory judgment claims asserted by Plaintiffs Nick Sculac, Julie Walker, and Jules Investment, Inc. be **DISMISSED without prejudice**.[16] In all other aspects, the Court respectfully **RECOMMENDS** that the Motion be **DENIED**.

IT IS **ORDERED** that pursuant to Fed. R. Civ. P. 72, the parties shall have fourteen

[16] *See Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir. 1990) (holding that prejudice should not attach to a dismissal when a plaintiff has made allegations "which, upon further investigation and development, could raise substantial issues").

(14) days after service of this Recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. A party's failure to serve and file specific, written objections waives de novo review of the Recommendation by the District Judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party's objections to this Recommendation must be both timely and specific to preserve an issue for de novo review by the District Court or for appellate review. *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996).

Dated: January 5, 2015

BY THE COURT:

Kristen L. Mix
United States Magistrate Judge

ADDENDUM B – DISTRICT COURT'S ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 13-cv-03275-REB-KLM

BIG CATS OF SERENITY SPRINGS, INC., doing business as Serenity Springs Wildlife Center,
NICK SCULAC,
JULIE WALKER, and
JULES INVESTMENT, INC.,

Plaintiffs,

v.

THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture,
CINDY RHODES,
TRACY THOMPSON, and
OTHER UNNAMED USDA EMPLOYEES,

Defendants.

ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Blackburn, J.

The matters before me are (1) the **Recommendation of United States Magistrate Judge** [#40],[1] filed January 5, 2015; and (2) defendants' corresponding **Objections to the Recommendation of U.S. Magistrate Judge** [#41], filed January 20, 2015. I overrule the objections, adopt the recommendation, and deny the apposite motion to dismiss in all but the single particular suggested by the magistrate judge.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed, and have considered carefully the

[1] "[#40]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

recommendation, the objections, and the applicable caselaw. The recommendation is exhaustively detailed and cogently reasoned. So thoroughly has the magistrate judge considered and analyzed the issues raised by and inherent to the motion that any further exegesis on my part would constitute little more than a festooned reiteration of her excellent work.

Like the arguments of their motion, defendants' objections generally attempt to characterize plaintiffs' claims regarding defendants' conduct of the search of their premises as challenges to the inspection report generated as a result thereof. Plaintiffs' claims are not so described or delimited, however, and it is their allegations that control in resolving the present motion. The magistrate judge has explained and explored the relevant distinction between a challenge to the statute itself – which implicates the framework of ***New York v. Burger***, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) – and a challenge to an officer's conduct under the statute – which does not. I find her analysis persuasive. Moreover, I concur with her conclusion that a ***Bivens*** remedy is cognizable on the facts alleged here, as well as her recommendation that plaintiffs may assert, as an alternative theory, a violation of section 1983 premised on the federal officials alleged enlistment of state law enforcement officers in their attempt to forcibly enter plaintiffs' premises without a warrant.[2]

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[2] Noting that the Tenth Circuit has not yet addressed whether a viable cause of action may arise under section 1983 where federal officials (as opposed to private parties) allegedly enlist the assistance of state officials to violate constitutional rights, the magistrate judge found the California district court's unpublished decision in ***Reynoso v. City and County of San Francisco***, 2012 WL 646232 (N.D. Cal Feb. 28, 2012) persuasive. I note that the legal principle on which the ***Reynoso*** court relied was not *sui juris*, but traces back at least as far as the Second Circuit's decision in ***Kletschka v. Driver***, 411 F.3d 436 (2nd Cir. 1969). In ***Kletschka***, the court concluded that such a result was a logical extension of the principle that holds federal actors liable under section 1983 where they act jointly with private parties:

Thus, I find and conclude that the arguments advanced, authorities cited, and findings of fact, conclusions of law, and recommendation proposed by the magistrate judge should be approved and adopted.

THEREFORE, IT IS ORDERED as follows:

1. That the **Recommendation of United States Magistrate Judge** [#40], filed January 5, 2015 is approved and adopted as an order of this court;

2. That the objections stated in defendants' **Objections to the Recommendation of U.S. Magistrate Judge** [#41], filed January 20, 2015, are overruled;

3. That **Defendants' Motion To Dismiss** [#23], filed April 21, 2014, is granted in part and denied in part, as follows:

a. That the motion is granted insofar as it seeks dismissal of the declaratory judgment claims to the extent they are asserted by the non-licensee plaintiffs, who lack standing to pursue such claims, and those

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> We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons. It was the evident purpose of § 1983 to provide a remedy when federal rights have been violated through the use or misuse of a power derived from a State. When the violation is the joint product of the exercise of a State power and of a non-State power then the test under the Fourteenth Amendment and § 1983 is whether the state or its officials played a 'significant' role in the result.

Id. at 448-49 (internal citation omitted). This same principle also has been relied on by the United States Courts of Appeals for the Third, Fifth, Eighth, and Ninth Circuits as well district courts in the Sixth and First Circuits. ***See Gibson v. United States***, 781 F.2d 1334, 1343 (9th Cir. 1986), ***cert. denied***, 107 S.Ct. 928 (1987); ***Premachandra v. Mitts***, 753 F.2d 635, 641 (8th Cir. 1985); ***Krynicky v. University of Pittsburgh***, 742 F.2d 94, 99 (3rd Cir. 1984), ***cert. denied***, 105 S.Ct. 2018 (1985); ***Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board***, 735 F.2d 895, 900 n.7 (5th Cir. 1984); ***Bergman v. United States***, 551 F.Supp. 407, 412 (W.D. Mich. 1982)***; Richardson v. Virgin Islands Housing Authority***, 1982 WL 704983 at *4 n.5 (D. Virgin Islands Feb. 23, 1981).

claims are dismissed with prejudice; and

b. That in all other respects, the motion is denied; and

4. That at the time judgment enters, judgment with prejudice shall enter on behalf of defendants against plaintiffs Nick Sculac, Julie Walker, and Jules Investment, Inc., as to the Third and Fourth Claims for Relief asserted in the **Complaint for Damages, Declaratory Judgment, and Other Relief** [#1], filed December 4, 2013.

Dated March 25, 2015, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge

ADDENDUM C – STATUTES AND REGULATIONS

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7 U.S.C. 2131

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order--

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. 2132

§ 2132. Definitions

In this chapter:

* * *

(b) The term "Secretary" means the Secretary of Agriculture of the United States or his representative who shall be an employee of the United States Department of Agriculture.

* * *

(h) The term "exhibitor" means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

* * *

7 U.S.C. 2133

§ 2133. Licensing of dealers and exhibitors

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: Provided, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title: *Provided*, *however*, That a dealer or exhibitor shall not be required to obtain a license as a dealer or exhibitor under this chapter if the size of the business is determined by the Secretary to be de minimis. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder.

7 U.S.C. 2143

§ 2143. Standards and certification process for humane handling, care, treatment, and transportation of animals

(a) Promulgation of standards, rules, regulations, and orders; requirements; research facilities; State authority

(1) The Secretary shall promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.

* * *

7 U.S.C. 2146

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

(b) Penalties for interfering with official duties

Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punished as provided under sections 1111 and 1114 of Title 18.

(c) Procedures

For the efficient administration and enforcement of this chapter and the regulations and standards promulgated under this chapter, the provisions (including penalties) of sections 46, 48, 49 and 50 of Title 15 (except paragraph (c) through (h) of section 46 and the last paragraph of section 49 of Title 15), and the provisions of Title II of the Organized Crime Control Act of 1970, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering and enforcing the provisions of this chapter and to any person, firm, or corporation with respect to whom such authority is exercised. The Secretary may prosecute any inquiry necessary to his duties under this chapter in any part of the United States, including any territory, or possession thereof, the District of Columbia, or the Commonwealth of Puerto Rico. The powers conferred by said sections 49 and 50 of Title 15 on the district courts of the United States may be exercised for the purposes of this chapter by any district court of the United States. The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, 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.

7 U.S.C. 2149

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

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

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to

obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

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

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

(d) Criminal penalties for violation; initial prosecution brought before United States magistrate judges; conduct of prosecution by attorneys of United States Department of Agriculture

Any dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, who knowingly violates any provision of this chapter shall, on conviction thereof, be subject to imprisonment for not more than 1 year, or a fine of not more than $2,500, or both. Prosecution of such violations shall, to the maximum extent practicable, be brought initially before United States magistrate judges as provided in section 636 of Title 28, and sections 3401 and 3402 of Title 18, and, with the consent of the Attorney General, may be conducted, at both trial and upon appeal to district court, by attorneys of the United States Department of Agriculture.

9 C.F.R. 2.126

§ 2.126 Access and inspection of records and property; submission of itineraries.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

(c) Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, shall submit a written itinerary to the AC Regional Director. The itinerary shall be received by the AC Regional Director no fewer than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site. If the exhibitor accepts an engagement for which travel will begin with less than 48 hours' notice, the exhibitor shall immediately contact the AC Regional Director in writing with the required information. APHIS expects such situations to occur infrequently, and exhibitors who repeatedly provide less than 48 hours' notice will, after notice by APHIS, be subject to increased scrutiny under the Act.

(1) The itinerary shall include the following:

(i) The name of the person who intends to exhibit the animal and transport the animal for exhibition purposes, including any business name and current Act license or registration number and, in the event that any animal is leased, borrowed, loaned, or under some similar arrangement, the name of the person who owns such animal;

(ii) The name, identification number or identifying characteristics, species (common or scientific name), sex and age of each animal; and

(iii) The names, dates, and locations (with addresses) where the animals will travel, be housed, and be exhibited, including all anticipated dates and locations (with addresses) for any stops and layovers that allow or require removal of the animals from the transport enclosures. Unanticipated delays of such length shall be reported to the AC Regional Director the next APHIS business day. APHIS Regional offices are available each weekday, except on Federal holidays, from 8 a.m. to 5 p.m.

(2) The itinerary shall be revised as necessary, and the AC Regional Director shall be notified of any changes. If initial notification of a change due to an emergency is made by a means other than email or facsimile, it shall be followed by written documentation at the earliest possible time. For changes that occur after normal APHIS business hours, the change shall be conveyed to the AC Regional Director no later than the following APHIS business day. APHIS Regional offices are available each weekday, except on Federal holidays, from 8 a.m. to 5 p.m.

9 C.F.R. 2.129

§ 2.129 Confiscation and destruction of animals.

(a) If an animal being held by a dealer, exhibitor, intermediate handler, or by a carrier is found by an APHIS official to be suffering as a result of the failure of the dealer, exhibitor, intermediate handler, or carrier to comply with any provision of the regulations or the standards set forth in this subchapter, the APHIS official shall make a reasonable effort to notify the dealer, exhibitor, intermediate handler, or carrier of the condition of the animal(s) and request that the condition be corrected and that adequate care be given to alleviate the animal's suffering or distress, or that the animal(s) be destroyed by euthanasia. In the event that the dealer, exhibitor, intermediate handler, or carrier refuses to comply with this request, the APHIS official may confiscate the animal(s) for care, treatment, or disposal as indicated in paragraph (b) of this section, if, in the opinion of the Administrator, the circumstances indicate the animal's health is in danger.

(b) In the event that the APHIS official is unable to locate or notify the dealer, exhibitor, intermediate handler, or carrier as required in this section, the APHIS official shall contact a local police or other law officer to accompany him to the premises and shall provide for adequate care when necessary to alleviate the animal's suffering. If in the opinion of the Administrator, the condition of the animal(s) cannot be corrected by this temporary care, the APHIS official shall confiscate the animals.

(c) Confiscated animals may be:

(1) Placed, by sale or donation, with other licensees or registrants that comply with the standards and regulations and can provide proper care; or

(2) Placed with persons or facilities that can offer a level of care equal to or exceeding the standards and regulations, as determined by APHIS, even if the persons or facilities are not licensed by or registered with APHIS; or

(3) Euthanized.

(d) The dealer, exhibitor, intermediate handler, or carrier from whom the animals were confiscated must bear all costs incurred in performing the placement or euthanasia activities authorized by this section.