UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT INC.'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Defendant Feld Entertainment, Inc. ("FEI") hereby replies to Plaintiffs' Opposition to Defendant Feld Entertainment, Inc.'s Motion for Reconsideration or, in the Alternative, for Certification Pursuant to 28 U.S.C. § 1292(b) (Sept. 19, 2007) ("Pl. Opp.") (Docket No. 189).

1. **The standing issue raised in defendant's motion must be addressed because it goes to the Article III jurisdiction of this Court.** Plaintiffs do not dispute, nor could they, that this case was originally dismissed on Article III standing grounds and was reinstated by the D.C. Circuit in 2003 solely on the basis of "the injury that Rider allegedly suffers from the mistreatment of ***the elephants to which he became emotionally attached.***" *ASPCA v. Ringling Bros.*, 317 F.3d 334, 337 (D.C. Cir. 2003) (emphasis added). Nor do they dispute the point that, of the elephants left in this case after the Court's August 23, 2007 summary judgment ruling, there are only ***six elephants*** as to which Rider has the claimed "emotional attachment." Instead, plaintiffs argue that the Court does not need to consider the standing issue because FEI did not "move for summary judgment on the issue of Mr. Rider's standing" but "simply asserted this

additional point in its reply brief regarding its motion for summary judgment based on entirely different legal arguments." Pl. Opp. at 3. Plaintiffs' argument is unavailing.

Since, as plaintiffs admit, the standing point was raised in the summary judgment briefing, there is no question that it was before the Court, and, it is equally clear, the Court did not address the standing point in the summary judgment decision. Moreover, Rider's standing to sue – which is the sole basis upon which any of the organizational plaintiffs has been found to have standing to sue – is a point that the Court has an independent obligation to address, regardless of how it is raised or, indeed, whether or not any party raises it all. This is because standing goes to the jurisdiction of the Court under Article III of the Constitution. Without such jurisdiction, the Court has no authority to proceed with the case – even if the issue comes up for the first time on appeal. The Supreme Court has long since rejected the approach that plaintiffs advocate here, namely, "proceed[ing] immediately to the merits, despite jurisdictional objections." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998). As the Court observed:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514 (1869). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, [177 U.S. 449,] 453 [(1900)]. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the

> United States" and is "inflexible and without exceptions." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

Id. at 94-95. Finding that plaintiff had no standing to sue, the Supreme Court dismissed the complaint in *Steel Co.*, even though the lower court had proceeded to decide the case on the merits: "However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers." *Id.* at 110. *See also Humane Society v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995) (case dismissed by court of appeals for lack of standing even though the district court had already proceeded to decide the entire case on its merits).

Thus, regardless of how the standing issue has been brought to the Court's attention, it must be addressed. Here it is clear that the Court of Appeals has already determined that the Article III jurisdiction of this Court is predicated upon Rider's attachment to particular elephants. As the Court of Appeals framed the question before it: "In *Babbitt*, we left open the question whether 'emotional attachment to a particular animal . . . could form the predicate of a claim of injury.' *Id.* at 98. We answer that question in the affirmative today." *ASPCA*, 317 F.3d at 337. Therefore, it is clear that this Court does not have Article III jurisdiction to proceed with this case as to any elephant other than the six as to which Rider claims an "emotional attachment."

Plaintiffs also claim that the four organizational plaintiffs have all "alleged standing with respect to all of the elephants at issue." Pl. Opp. at 4. However, this Court has already ruled that the organizational plaintiffs have no standing to sue. *ASPCA v. Ringling Bros. & Barnum and Bailey Circus*, No. 00-1641 (D.D.C. June 29, 2001) (organizational plaintiffs have no standing because they have no "aesthetic" or "informational" injury). The D.C. Circuit left this ruling undisturbed on appeal. *ASPCA*, 317 F.3d at 338. The organizational plaintiffs do not explain why they are not bound by this Court's prior determination that they have no standing or offer

any change in circumstances that would call that ruling into question. Therefore that ruling is controlling as the law of this case. *Cf. Spirit of the Sage Council v. Kempthorne*, 2007 U.S. Dist. Lexis 63684 at *17-18 (D.D.C. 2007) (prior ruling of the Court that plaintiffs had standing would be followed as the law of the case because there were no changed circumstances and the "parties should not have to battle for the same judicial decision again without good reason").

2. ***Bennett v. Spear*, 520 U.S. 154 (1997), is controlling**. Plaintiffs assert that *Bennett* does not control this case because they have made no claim against the Fish and Wildlife Service ("FWS") and they "have not challenged any action by . . . FWS . . . ." Pl. Opp. at 2. This argument is misplaced for two reasons. *First*, there is nothing in *Bennett* to suggest that its holding was limited to actions brought directly against FWS. Instead, *Bennett* determined, based on the language of section 11 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540, that only certain types of FWS action could be subject to judicial review in a private "citizen suit." 520 U.S. at 173-74. The regulation at issue here – FWS's longstanding exclusion for pre-Act species, 50 C.F.R. § 17.4 – is not one of the actions that is reviewable pursuant to *Bennett*.

Second, plaintiffs clearly did challenge FWS action when, citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), and similar cases, they argued that 50 C.F.R. § 17.4 cannot be given effect here because it is "unlawful." Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 13 (Oct. 6, 2006) (Docket No. 96). Indeed, the lawfulness of section 17.4 necessarily was called into question by plaintiffs' position because if that regulation is applied in this case, the pre-Act elephants are exempt from the "taking" provision.

Plaintiffs also ignore the point made in *Bennett* that construing section 11 of the ESA to permit judicial review of any FWS action other than the ones specifically listed in that section would undercut well established limits on judicial review of agency action under the

Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* 520 U.S. at 174. That is precisely what has happened here. Plaintiffs have obtained a declaration in this "citizen suit" that 50 C.F.R. § 17.4 – a regulation that has been in effect without challenge since 1975 – is unenforceable, even though it is well established in this Circuit that an action by plaintiffs against FWS under the APA for the same relief would be barred as completely untimely and could be pursued only through a petition to the agency for amendment to or rescission of the regulation. *See* Reply in Support of Defendant's Motion for Summary Judgment at 7 (Oct. 27, 2006) (Docket No. (100) (c*iting Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1213-14 (D.C. Cir. 1996); *Common Sense Salmon Recovery v. Evans*, 329 F. Supp.2d 96, 100 (D.D.C. 2004)).

3. A section 1292(b) appeal would be appropriate. Plaintiffs' response to the request for certification pursuant to 28 U.S.C. § 1292(b) is not persuasive. The question whether 32 of FEI's elephants are "pre-Act" and therefore not covered by the "taking" provision is obviously a "controlling" issue of law because if FEI is correct on this point, the litigation will end as to those elephants. It likewise is a question as to which there is a "substantial ground for difference of opinion" because this is an issue of first impression. Plaintiffs cite no other decision on this issue, so it is obvious why there are no "conflicting decisions in other circuits." Pl. Opp. at 6. Moreover, as shown above and in the summary judgment briefing, entertaining plaintiffs' *Chevron* challenge to 50 C.F.R. § 17.4 at this late date, when an identical claim by plaintiffs against the agency that issued this regulation would be barred, does conflict with the law of this Circuit.

Plaintiffs suggest that an interlocutory appeal would unduly delay this case. Pl. Opp. at 7-8. This is a red herring. FEI has not suggested that proceedings in this Court be stayed while

the Court of Appeals determines whether it would entertain a section 1292(b) appeal. Thus, no delay would ensue.

CONCLUSION

Accordingly, for the reasons stated herein and in defendant's motion, defendant's motion should be granted. The Court should reconsider its ruling on the pre-Act exclusion issue and narrow this case down to the elephant Nicole. In the alternative, the Court should narrow the case down to the only elephants in the pre-Act category as to which plaintiffs (at this point in the proceedings) have standing to sue: Susan, Lutzi, Jewell, Karen, Mysore and Nicole. In the further alternative, the Court should modify that part of the summary judgment order addressing the pre-Act issue to include the certification pursuant to 28 U.S.C. § 1292(b).

Dated this 20th day of September, 2007.

Respectfully submitted,

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