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.	:	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OR ALTERNATIVELY PARTIAL RECONSIDERATION

Defendant Feld Entertainment, Inc. ("FEI") hereby opposes Plaintiffs' Motion for Reconsideration or Alternatively Partial Reconsideration (Sept. 7, 2007) ("Pl. Motion") (Docket No. 185).

INTRODUCTION

On August 23, 2007, the Court granted in part and denied in part FEI's motion for summary judgment. The Court specifically "grant[ed] defendant summary judgment as to the 21 elephants that are subject to a CBW [captive-bred wildlife] permit," thereby eliminating these elephants from controversy in this case. Memorandum Opinion at 23 (Aug. 23, 2007) ("Memorandum Opinion") (Docket No. 173); Order (Aug. 23, 2007) (Docket No. 172). This ruling was one of several issued on the same day, including the ruling on FEI's motion for leave to amend in which the Court observed that "[d]iscovery in this case has been going on for more than three and half years and defendant has already filed a motion for summary judgment. Although the Court did not resolve the motion for summary judgment prior to defendant's motion to amend, the motion for summary judgment has now been decided ***and the issues in this***

case have been narrowed." Memorandum Opinion at 4 (Aug. 23, 2007) (Docket No. 176) (emphasis added). The Court further underscored the narrowing of this case in its order on the discovery motions which specifically stated that "[c]onsistent with the Court's ruling on the motion for summary judgment . . . plaintiffs are only entitled to inspect those elephants which are not subject to a valid captive-bred wildlife permit." Order at 10 (Aug. 23, 2007) (Docket No. 178) (original emphasis).[1]

Rather than narrowing the issues, as contemplated by the Court's recent rulings, plaintiffs now seek to ***expand*** the issues in this case by rolling the clock back to the point before defendant's motion for summary judgment was even filed. Plaintiffs seek, with their motion for reconsideration, to put all 21 CBW elephants back into the case. Plaintiffs seek this result on two grounds.

First, plaintiffs assert falsely (Pl. Motion at 5) that FEI "misrepresented" the appellate history of *Atlantic Green Sea Turtle v. County Council of Volusia County*, 2005 U.S. Dist. Lexis 38841 (M.D. Fla. 2005), *appeal dismissed as moot*, No. 05-135683 HH Order (11th Cir. Jan. 20, 2006), because the district court's decision was "vacated on the merits." Pl. Motion at 5, 6. This claim is simply untrue as is evident from the plain terms of the orders in *Atlantic Green Sea Turtle* that FEI filed with its summary judgment reply. *See* Exhibits 20-22 to Reply in Support of Defendant's Motion for Summary Judgment (Oct. 27, 2006) ("FEI SJ Reply")(Docket No. 100). The case was dismissed as moot, and the judgment was vacated; the district court's decision on the merits in *Atlantic Green Sea Turtle* remained unaffected. Plaintiffs submit nothing to suggest otherwise.

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[1] Defendant also has filed a motion for reconsideration that would further narrow this case to six elephants. Motion for Reconsideration (Sept. 5, 2007) (Docket No. 183).

Second, plaintiffs argue that, even if the Court does not have jurisdiction to resolve their claim that FEI is violating the CBW permit with respect to those permitted elephants, the Court does have jurisdiction over plaintiffs' claim that FEI is "taking" those elephants in violation of section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, and FWS regulations. Pl. Motion at 5, 10-16. This point has no merit either and is essentially a rehash of plaintiffs' summary judgment opposition. As FEI pointed out in its summary judgment brief, the CBW permit is an absolute defense to plaintiffs' "taking" claims with respect to the elephants subject to that permit, regardless of how plaintiffs choose to assert those claims, either as an alleged violation of the permit, FWS regulations or the statute itself. Memorandum in Support of Defendant's Motion for Summary Judgment at 11, 24-28 (Sept. 5, 2006) ("FEI SJ Mem.") (Docket No. 82).

Plaintiffs present nothing that constitutes "new evidence," a "clear error" by the Court or "manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). Instead, plaintiffs merely disagree with proper and legally correct rulings against them by the Court that will serve to narrow this case for a potential trial, and that were made after a full and fair opportunity for plaintiffs to present their arguments. Plaintiffs offer no reason for the Court to reconsider its summary judgment decision on the CBW elephants, and their motion should be denied. In the event that the Court grants either of plaintiffs' requests for reconsideration of the partial summary judgment with respect to the CBW elephants, FEI respectfully requests that the Court include in its order the certification described in 28 U.S.C. § 1292(b).

ARGUMENT

I. THIS COURT CORRECTLY RELIED ON THE DECISIONS IN *ATLANTIC GREEN SEA TURTLE* AND *ENVIRONMENTAL PROTECTION CENTER* IN GRANTING SUMMARY JUDGMENT AS TO DEFENDANT'S CBW ELEPHANTS

A. The District Court's Decision in *Atlantic Green Sea Turtle* Was Not "Vacated on the Merits"

Atlantic Green Sea Turtle was an action by private parties under the "citizen suit" provision of ESA § 11(g), 16 U.S.C. § 1540(g), claiming, among other things, that a Florida county was "taking" sea turtles in violation of ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), and related regulations because the county's actions were contrary to an incidental take permit that had been issued to the county by the Department of Interior ("DOI") Fish and Wildlife Service ("FWS"). 2005 U.S. Dist. Lexis 38841 at *11-12. The court ruled that it had no jurisdiction under section 11(g) of the ESA to adjudicate a claim by a private plaintiff that another party was violating a permit issued by FWS and therefore unlawfully "taking" endangered species as a result. *Id.* at *43-44. This was because actions that otherwise would constitute a "taking" in violation of ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), are specifically excluded from the "taking" prohibition if they are covered by a permit issued by FWS pursuant to ESA § 10, 16 U.S.C. § 1539. As the court explained:

> Liability under ESA section 1538(a)(1)(B) expressly requires section 1539 to be inapplicable: "except as provided in section[] . . . 1539 of [the ESA] . . . it is unlawful for any person . . . to take [listed] species. . . ." Id. Section 1539 provides inter alia that "the Secretary may permit, under such terms and conditions as he shall prescribe, any taking otherwise prohibited by section 1538(a)(1)(B). . . ." Id. § 1539(a)(1)(B) (emphasis added). Although, at first blush, it might appear plausible to read the terms-and-conditions clause [of the permit] as a limit beyond which section 1538(a)(1)(B) applies, that is not so. Section 1539 sets forth an exception to section 1538(a)(1)(B) and contemplates a distinct enforcement mechanism that is not available to private

> citizens. For conduct that violates the terms and conditions of an incidental take permit, the ESA contemplates one enforcer.
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> "The provisions of [the ESA] and any regulations or permits issued pursuant thereto shall be enforced by the Secretary." Id. § 1540(e) (emphasis added). As enforcement tools, the Secretary "may" assess a civil penalty up to $25,000 for each knowing violation, or up to $500 for each unintentional violation, of the ESA or a permit issued thereunder. Id. § 1540(a). In addition, "the Secretary shall revoke a permit . . . if he finds that the permittee is not complying with the terms and conditions of the permit." Id. § 1539(a)(2)(C). In comparison, the ESA's citizen suit provision provides, in relevant part, for suits to enjoin violations only of the ESA and related regulations. The ESA, itself, simply does not provide a private enforcement mechanism covering the terms and conditions of incidental take permits.

Id. at *42-44.

The district court therefore ruled that it had no jurisdiction under the ESA "citizen suit" provision over the sea turtle "taking" claim and dismissed the action in an opinion dated May 3, 2005. *Id.* *60-61. Subsequent to this decision on the merits, the parties briefed the question of attorneys fees. On June 7, 2005, the clerk of the district court entered a "Judgment in a Civil Case" that denied the defendants' motion for attorneys fees but allowed defendants costs. *Atlantic Green Sea Turtle v. County Council*, No. 6:04-cv-1576-Orl-31KRS (M.D. Fla.), Judgment in a Civil Case (June 7, 2005), attached as Exhibit DX 21 to FEI SJ Reply. After this judgment concerning attorneys fees was entered -- which was the only judgment entered in the case[2] -- the case was appealed to the U.S. Court of Appeals for the Eleventh Circuit. During the pendency of the appeal, the case became moot due to the issuance of a new permit by FWS to the county. As a result, upon the motion of FWS, Pl. Motion, Ex. 4, the court of appeals issued an order that dismissed the appeal as moot and remanded the case with instructions to vacate the judgment and dismiss the action as moot:

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[2] *See* Docket Sheet, Civil Action No. 6:04-cv-1576-Orl-31KRS (M.D. Fla.) at p. 8, Exhibit 1 hereto.

> The "Motion to Dismiss Appeal as Moot," also construed as a motion to vacate the district court's judgment and to remand with instructions to dismiss the action below as moot, is GRANTED. The judgment is hereby VACATED, and this matter is REMANDED with instructions to dismiss the action as moot.

Atlantic Green Sea Turtle v. County Council, No. 05-13683-HH (11th Cir.), Order (Jan. 18, 2006), attached as Exhibit DX 21 to FEI SJ Reply.

As is clear from the plain terms of the Eleventh Circuit's order, the ***only*** thing vacated in the *Atlantic Green Sea Turtle* case was the June 7, 2005 judgment of the district court. The order of the court of appeals does not even refer to, much less "vacate," the lower court's May 5, 2005 opinion on the merits. The latter ruling was left undisturbed by the court of appeals, which is exactly how the district court viewed the appellate mandate. On remand, the district court entered an order that reopened the case and dismissed it as moot. There was no vacatur of the May 5, 2005 opinion:

> Pursuant to the Order of the Eleventh Circuit (Doc. No. 80) issued on January 18, 2006, it is ORDERED that the Clerk is directed to reopen the case. The case is DISMISSED as moot and the Clerk is directed to re-close the case.

Atlantic Green Sea Turtle v. County Council, No. 6:04-cv-1576-Orl-31KRS (M.D. Fla.), Order (Jan. 24, 2006), attached as Exhibit DX 22 to FEI SJ Reply. Plaintiffs simply ignore this order of the district court.

All of the foregoing orders in *Atlantic Green Sea Turtle* were attached as exhibits to FEI's summary judgment reply. Thus, there is no basis for the assertion that FEI "misrepresented" the appellate history of that case.[3]

[3] Ironically, while plaintiffs now wrongly accuse FEI of "misrepresentation," they do not address the fact that one of their current attorneys was counsel in the *Atlantic Green Sea Turtle* appeal. *See* Pl. Motion, Ex. 3. Therefore, there is no reason why any detail about that case that plaintiffs believe is pertinent could not have been included in plaintiffs' original opposition to FEI's motion for summary judgment.

Furthermore, contrary to plaintiffs' claims, it is clear that the court of appeals in *Atlantic Green Sea Turtle* did not vacate the lower court's May 5, 2005 decision "on the merits." Indeed, the case became moot on appeal, and the court of appeals never reached the merits of the district court's May 5, 2005 decision. Plaintiffs' citation (Pl. Motion at 6) to the appellants' statement of the issues, submitted before the case became moot, proves nothing other than the merits of the lower court's decision would have been reached had the case not become moot. However, when the case became moot, the Eleventh Circuit had no Article III jurisdiction because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). The court therefore was required to "dismiss the action for want of jurisdiction." 15 MOORE'S FEDERAL PRACTICE § 101.90 at p. 101-165 (3rd ed. 2007).

When FWS moved to dismiss the appeal in the Eleventh Circuit as moot, it could have sought vacatur of all of the orders entered by the district court, but it only sought vacatur of the judgment. *See* Pl. Motion, Ex. 4; *see also* Ex. 2 hereto. FWS either chose not to seek vacatur of the May 5, 2005 decision of the district court (possibly because it was favorable to FWS) or FWS waived that point. In either event, the court of appeals had no occasion to vacate that ruling -- which explains why neither the Eleventh Circuit nor the district court vacated the May 5, 2005 decision. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950) (when case became moot, government waived vacatur of judgment by not seeking that remedy); *Harris v. Bd. of Governors, FRS*, 938 F.2d 720, 723 (7th Cir. 1991) ("we are not required to dismiss the previous orders [on mootness grounds] if no party requests us to do so").

Moreover, even if the Eleventh Circuit's order could be construed as vacating the district court's May 5, 2005 order on mootness grounds (and it cannot be so construed), it would get

plaintiffs nowhere. A decision by a federal district court that was not moot when entered, but that is later vacated because the appeal becomes moot, still retains its full precedential value. The only effect that the vacatur has is to prevent the decision from having preclusive effect on the parties to the moot case. The *stare decisis* value of the decision remains unchanged. As one court of appeals has explained:

> ***[V]acating a decision because of supervening mootness does not destroy its precedential effect.*** The purpose of setting aside a decision on that ground is only to prevent the decision from having res judicata or collateral estoppel effect in future cases. . . . The district court's decision, when made, was within the court's power to make, because the case wasn't moot then. Its later becoming moot prevents appellate review and by doing so deprives the decision of the additional precedential force that it would have had if it had been affirmed by a higher court, but it does not eliminate whatever precedential force an unreviewed and unreviewable lower-court decision has.

United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) (citations omitted; emphasis added). *See also Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (an opinion of a court of appeals, "while vacated [as moot], ***continues to have persuasive force***") (emphasis added); *Harris*, 938 F.2d at 723 ("the only effect of vacatur [of district court orders on mootness grounds] is to deprive those orders of preclusive effect in subsequent litigation. ***It does not deprive them of such stare decisis effect as they may have***") (emphasis added).

Plaintiffs cite nothing to support their claim that the May 5, 2005 decision in *Atlantic Green Sea Turtle* was "vacated on the merits" because plaintiffs are simply wrong on that point.[4] Thus, this Court was clearly entitled (let alone did it commit some kind of "clear error") to rely

[4] Plaintiffs' citation to a Westlaw Keycite history of "vacated as moot," Pl. Motion at 6, is beside the point. As plaintiffs note, *id.*, Lexis reported no such history. The simple answer is that Lexis got it right and Westlaw got it wrong. Moreover, as shown above, vacating a decision on mootness grounds is not vacating it "on the merits" in any event because such a vacatur has no impact on the *stare decisis* effect of the decision.

on that decision for whatever persuasive effect the Court deemed appropriate to give the decision of another federal district court. The precedential effect of the district court's decision in *Atlantic Green Sea Turtle* was unaffected by anything that happened in that case on appeal.

Since plaintiffs are wrong about *Atlantic Green Sea Turtle*, they have no basis for distinguishing *Environmental Protection Center v. FWS*, 2005 U.S. Dist. Lexis 30843 (N.D. Cal. 2005), which followed the holding in *Atlantic Green Sea Turtle* and ruled that "[p]laintiffs may not seek permit enforcement directly under the ESA." *Id.* at *22. In short, this Court's citation to and reliance upon *Atlantic Green Sea Turtle* and *Environmental Protection Center* in ruling against plaintiffs as to the CBW elephants was perfectly appropriate.

Furthermore, this Court conducted its own analysis of the ESA and concluded correctly that the numerous references to "permit" in the enforcement provisions of ESA § 11 that govern actions by the Secretary of the Interior, coupled with the absence of any such reference in the "citizen suit" provision, make it clear that Congress intended to exclude permits from citizen suits. Memorandum Opinion at 19-20. *Atlantic Green Sea Turtle* and *Environmental Protection Center* simply confirm the Court's analysis of the statute, which stands on its own irrespective of these two cases.

B. The Reasoning of *Atlantic Green Sea Turtle* Is Fully Applicable Here

Plaintiffs argue that even if the Court has no jurisdiction over a challenge to FEI's compliance with its CBW permit, plaintiffs should still be allowed to bring a claim for what they allege are FEI's violations of the CBW regulation (50 C.F.R. § 17.21(g)) and FWS regulations regarding the conditions of animals held pursuant to a permit (50 C.F.R. §§ 13.41 & 13.48). Plaintiffs claim this is because although the citizen suit provision of ESA § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A), does not mention violations of permits, it does refer to violations of the regulations. Pl. Motion at 7-8. This is simply a repetition of an argument that plaintiffs made

unsuccessfully in opposition to FEI's summary judgment motion that the Court has already rejected. *See* Plaintiffs' Opposition to Defendants' [*sic*] Motion for Summary Judgment at 26-27, 39-40, 42-43 (Oct. 6, 2006) (Docket No. 96); Memorandum Opinion at 20-21. Therefore, the argument is not a proper basis for seeking reconsideration. The argument is flawed in any event.

As recognized by the district court in *Atlantic Green Sea Turtle*, plaintiffs' argument is foreclosed by the statute itself. None of the prohibitions in ESA § 9 – including the prohibition against violating any regulation issued by FWS under the statute, ESA § 9(a)(1)(G), 16 U.S.C. § 1538(a)(1)(G) – even comes into play if the activity at issue is subject to a permit issued pursuant to ESA § 10, 16 U.S.C. § 1539. This is because the section 9 prohibitions begin with the following statement: "Except as provided in section[] . . . 10 of this Act. . . ." 16 U.S.C. § 1538(a)(1). *See Atlantic Green Sea Turtle*, 2005 U.S. Dist. Lexis 38841 at *42-44. Plaintiffs do not dispute the point that FEI's CBW permit was issued pursuant to a regulation that was promulgated pursuant to the agency's authority under ESA § 10. Thus, the Court would not be able to reach plaintiffs' purported claim of regulatory violation without determining first whether the challenged activity is covered by FEI's CBW permit. And that inquiry, as this Court correctly ruled, is one inquiry that the Court does not have jurisdiction under the ESA to undertake.

Moreover, the two permit regulations cited by plaintiffs (50 C.F.R. §§ 13.41 & 13.48) by their own terms only apply to FEI by virtue of the permit itself and are conditions of the permit. *See* Exhibit DX 9 to FEI SJ Mem. As the court in *Atlantic Green Sea Turtle* ruled, determining whether these regulations have been observed would be determining whether permit conditions have been observed, and determining whether permit conditions have been observed cannot be done in a citizen suit under ESA § 11(g):

> The Conservationists correctly point out that a regulation requires "any person holding a permit under [the ESA] and any person acting under authority of such permit [to] comply with all conditions of the permit and with all applicable laws and regulations governing the permitted activity." 50 C.F.R. § 13.48. That point is to no avail. ***No injunction would be available to enforce such a general requirement because it would require nothing less than the Court to police the County's permit compliance. The ESA places that duty exclusively on the Secretary.*** *Id.* § 1540(a), (e). Furthermore, it is the executive (not the judicial) branch that is generally charged with such duties. See U.S. CONST. Art. II § 3.

2005 U.S. Dist. Lexis 38841 at *44 n.8 (emphasis added).[5]

Plaintiffs also attempt to avoid *Atlantic Green Sea Turtle* on the ground that the permit in that case was an incidental take permit "issued to a single entity and included detailed terms and conditions that applied solely to that entity" whereas FEI's CBW permit "is an entire set of 'regulations' that were issued by FWS." Pl. Motion at 8. This is a distinction without a difference. While FWS has stated that "the [CBW] regulation contains the permit," 58 Fed. Reg. 68323 (Dec. 27, 1993), the process established by that regulation nevertheless results in permits that are issued by FWS to holders of CBW animals. FEI's CBW permit is, in plaintiffs' own words, a permit issued to a single entity (FEI) that includes detailed terms and conditions applicable solely to FEI with respect to its captive-bred elephants. Exhibit DX 9 to FEI SJ Mem. ESA § 11(e), 16 U.S.C. § 1540(e), vests the Secretary of the Interior with the exclusive authority to enforce "permits issued pursuant [to the ESA]," and makes no distinction between incidental take permits or any other kind of permits.

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[5] In addition to the reasons stated above, plaintiffs' argument that somehow they have an independent claim against FEI for alleged violations of the CBW regulation (50 C.F.R. § 17.21(g)) – separate and apart from the allegation that FEI is in violation of its CBW permit – is entirely circular. Since plaintiffs assert that the regulation, § 17.21(g), is "the permit," Pl. Motion at 8, a claim that FEI is violating § 17.21(g) is a claim that FEI is violating "the permit" which is a claim that this Court has correctly ruled it does not have jurisdiction to consider in an ESA "citizen suit."

Plaintiffs' implication (Pl. Motion at 10) that the Court's ruling on the CBW elephants will somehow insulate those animals from protection under the ESA is entirely misplaced. As has already been shown at length, these animals are all subject to the standards specified, not only by the CBW regulation as administered and enforced by FWS, but also to the standards specified by the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, as administered and enforced by the Department of Agriculture. FEI SJ Mem. at 33-34; FEI SJ Reply at 19-20. Furthermore, as the Court has recognized, species held pursuant to CBW permits are subject to enforcement actions by the Secretary of the Interior. Memorandum Opinion at 18-19. Plaintiffs evidently do not like the fact that FWS does not believe that FEI's treatment of Asian elephants violates the CBW permit, Pl. Motion at 12-13 n.3, but that does not change the fact that the welfare of CBW animals is highly regulated by the federal government.

Plaintiffs argue that "it is impossible to fathom -- and the district court in *Atlantic Green Sea Turtle* certainly did not suggest -- why Congress would want citizens to enforce the ESA when entities are unlawfully taking species without a permit, but not when they are unlawfully taking species in violation of a 'permit' that is designed to protect the species." Pl. Motion at 10. There is no mystery here. Permit compliance and enforcement are better handled by actions by the Secretary of the Interior (as opposed to private actions) because the Secretary, through the FWS, issues the permit in the first place pursuant to an administrative procedure. Therefore, the agency is in a better position to judge whether a permittee's actions are in compliance with the terms of the permit as issued by the agency. As the court in *Atlantic Green Sea Turtle* observed, when it comes to policing permit compliance, "it is the executive (not the judicial) branch that is generally charged with such duties" which is why, the court observed, "[t]he ESA places that duty exclusively on the Secretary." 2005 U.S. Dist. Lexis 38841 at *44 n.8. *Cf. Spirit of the*

Sage Council v. Kempthorne, 2007 U.S. Dist. Lexis 63684 at *30-31 (D.D.C. 2007) ("permit revocation decisions are always fact intensive and require the exercise of agency discretion"). That permit compliance is not suited for private enforcement is illustrated by the instant case in which plaintiffs spend pages of their motion speculating about what is or is not covered by FEI's CBW permit -- all while FWS, the agency that issued the permit, is not even a party to this case.

II. THIS COURT HAS NO JURISDICTION OVER PLAINTIFFS' PURPORTED INDEPENDENT SECTION 9 "TAKING" CLAIM WITH RESPECT TO THE CBW ELEPHANTS

Plaintiffs contend that, even if the Court does not have jurisdiction in this "citizen suit" to consider their claim that FEI is violating the CBW permit and related regulations, the Court does have jurisdiction to consider their claim under ESA § 9 that FEI "is beating and striking elephants with bullhooks, keeping them chained for most of the day and night, and forcibly separating baby elephants from their mothers to make these animals perform tricks in the circus" because none of these activities, according to plaintiffs, is covered by the CBW permit and because FEI allegedly did not move for summary judgment on these grounds. Pl. Motion at 11. This argument also has already been made in the summary judgment proceeding, Pl. SJ Opp. at 27-29, 42-43, and, thus, is not "new" and is not a basis for reconsideration of the summary judgment ruling. The argument is misconceived in any event.

In the first place, plaintiffs' assertion about the scope of FEI's motion for summary judgment is simply wrong. The motion for summary judgment was made on the express ground that "plaintiffs' claims that FEI is 'taking' its Asian elephants in violation of section 9(a)(1)(B) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1)(B) (2000), fail as a matter for law for two reasons. . . . [T]he [CBW] elephants at issue . . . (ii) were bred in captivity in the United States and currently are subject to a valid captive-bred wildlife permit issued by the United States Fish and Wildlife Service ('FWS'), that explicitly authorizes FEI to 'take' them."

Defendant's Motion for Summary Judgment at 1-2 (Sept. 5, 2006) (Docket No. 82). In its supporting brief, FEI specifically noted that plaintiffs complained of FEI's alleged "'routine beatings of its elephants, its routine use of the bull hook, its chaining of elephants for long periods of time, and its forcible separation of baby elephants from their mothers,'" but also argued that, as a matter of law, "the CBW permit provides FEI with a safe harbor for ***any claim*** that it is 'taking' its captive-bred Asian elephants and is an absolute defense to plaintiffs' 'taking' claims. 50 C.F.R. § 17.21(g)." FEI SJ Mem. at 5, 28 (emphasis added). Thus, it is clear that, regardless of the pejorative language that plaintiffs use to characterize the practices that are the basis for their claims, FEI moved for summary judgment on all of those claims. There was no separate set of practices left uncovered by the motion. Nor did FEI limit its summary judgment motion to the claim that FEI is in violation of its CBW permit. FEI moved for summary judgment on all of plaintiffs' "taking" claims, regardless of how they were worded and regardless of the underlying facts, and the Court granted the motion in its entirety with respect to the CBW elephants.

Plaintiffs note here (Pl. Motion at 11) as they did in their summary judgment opposition (Pl. SJ Opp. at 28) that FEI did not submit evidence to refute the assertions of improper elephant "beatings" "chaining" and "forcible separations." This is not because plaintiffs' assertions are true or because FEI has no evidence to refute these outrageous charges. It is because, as FEI pointed out at the very outset of its summary judgment brief, FEI SJ Mem. at 2 n.3, what plaintiffs claimed happens with respect to the elephants was not material to the legal issues before the Court, which, as concerned the CBW elephants, was whether the Court even had jurisdiction to consider plaintiffs' claims. Plaintiffs assert that, contrary to summary judgment procedure, the Court "accepted defendant's characterization of the practices at issue." Pl.

Motion at 11. Plaintiffs cite nothing to support this because it never happened. Instead, the Court correctly ruled that plaintiffs did not create any issue of fact with respect to those facts that are material to the status of the CBW elephants and the Court's jurisdiction to consider claims that they are being "taken." Memorandum Opinion at 22-23.

Plaintiffs cannot evade the jurisdictional limitation on private party challenges to ESA permit compliance by pretending that they have a section 9 "taking" claim that can be addressed separate and apart from the CBW permit. As shown above, the "taking" prohibition of ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B), does not apply to conduct that is covered by a permit issued pursuant to ESA § 10, 16 U.S.C. § 1539. This is because the section 9 prohibitions begin with the following statement: "Except as provided in section[] . . . 10 of this Act. . . ." 16 U.S.C. § 1538(a)(1). The court in *Atlantic Green Sea Turtle* rejected the same argument that plaintiffs make here, holding that a permit issued under ESA § 10 renders the ESA § 9 "taking" prohibition inapplicable; the permit does not set "a limit beyond which ESA § 9 applies." 2005 U.S. Dist. Lexis 38841 at *42-44.

As this Court has found, there is no dispute as to the facts that FEI has 21 captive-bred Asian elephants and a currently valid CBW permit issued to FEI by FWS that expressly authorizes FEI "to take for normal husbandry practices . . . any Asian elephant." Exhibit DX 9 to FEI SJ Mem. Memorandum Opinion at 22-23. Therefore, with respect to the elephants that are subject to this permit – the 21 CBW elephants that the Court has ruled are out of this case – the Court could not address any statutory claim that these elephants are being "taken" without first determining whether the actions complained of are within the scope of the permit, because if they are within the scope of that permit, the statutory "taking" provision, by its own terms, does not apply. Whether FEI's actions are within the scope of the CBW permit is an inquiry that the

Court correctly ruled it has no jurisdiction to conduct under the "citizen suit" provision of the ESA.[6]

III. IF THE COURT GRANTS ANY PART OF PLAINTIFFS' MOTION, THE COURT SHOULD CERTIFY THE RULING FOR IMMEDIATE APPELLATE REVIEW

In the event that the Court grants either of plaintiffs' requests for reconsideration of the partial summary judgment with respect to the CBW elephants, FEI respectfully requests that the Court include in its order the certification described in 28 U.S.C. § 1292(b).[7] Whether, the Court has jurisdiction in this "citizen suit" over "taking" claims with respect to Asian elephants that are the subject of a CBW permit is a controlling issue of law because if, as the Court has already ruled, it has no jurisdiction, then plaintiffs have no "taking" claim with respect to such elephants. If the Court's original summary judgment is correct (and it is), litigation over the CBW elephants will be terminated entirely. However, given the discussion in the Memorandum Opinion and the discussion above, as well as the arguments of the parties in the summary judgment briefing, if the Court were to reverse its decision, then there clearly would be a substantial ground for a difference of opinion on this issue.

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[6] The cases cited by plaintiffs, Pl. Motion at 14-15, are inapposite. The "taking" claim that was allowed to proceed in *Atlantic Green Sea Turtle* was with respect to a bird (the piping plover) that was not referred to in the incidental take permit (which was limited to green sea turtles), so the question whether the permit holder's actions were in compliance with the turtle permit was not implicated by the "taking" claim as to the bird. 2005 U.S. Dist. LEXIS 38841 at *58. Here, FEI's CBW permit expressly covers Asian elephants. In *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998), *cert. denied*, 526 U.S. 1081 (1999), the court did not address the jurisdictional issue presented here and that case therefore has no bearing on the matter before the Court.

[7] Section 1292(b) permits appellate review of an otherwise interlocutory decision where the district court is "of the opinion that such order involves a controlling issue of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b).

CONCLUSION

Plaintiffs' motion should be denied.

Dated this 21st day of September, 2007.

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
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