UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT FELD ENTERTAINMENT, INC.'S RESPONSE TO PLAINTIFFS' POST-TRIAL BRIEF

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Plaintiffs failed to carry their burden and did not prove a "take" at trial. Because of this, they abandoned their case theories throughout trial, eventually re-prioritizing API over Tom Rider and ultimately foregoing their claim for injunctive relief. Plaintiffs backpeddled feverishly in an effort to salvage their manufactured case. *Compare* Pls' Pre-Trial Brief at 28-29 (9/29/08) (DE 360-7) (relying *first* upon Circuit's ruling that Rider alleged standing and claiming "At trial, plaintiffs will demonstrate that Mr. Rider does in fact meet all of the requirements of Article III standing[.]") *with* counsel's arguments at the close of plaintiffs' case: "Let me start off, if I could, with API, because I think that this is actually a very crucial aspect of this case[,]" 2-26-09 at 81:5-7 (Glitzenstein); *see also id.* at 84:13-85:12 (standing for other organizational groups abandoned because "all you need is one, and we think that API is the cleanest case").[1] After Rider had been cross-examined, however, plaintiffs did not even need him anymore: "Do we need Rider? I think we'd like to have Rider." *Id.* at 85:13-15.

Plaintiffs brought this case as an injunction action, claiming that FEI had violated the Animal Welfare Act ("AWA") and its regulations. *See* Cmplt. at ¶ 47 (AWA establishes conditions under which animals may be used in entertainment); *id.* at ¶¶ 46, 47, 62, 67, 73, 75, 78, 79-84 (AWA allegations); *see also* PWC 91 at Rider's 4/12/01 60-day notice letter at 2 (claiming AWA violations) and at API's 7/22/05 60-day notice letter at 2 (same).[2] By halftime at trial, plaintiffs had claimed that the AWA was irrelevant to this case, *see* Pls' Memo. Regarding Relevant Statutory and Regulatory Authority at 1-2 (2/13/09) (DE 418) (claiming only ESA applies here "[d]espite *FEI's* persistent efforts to convert this lawsuit into an [AWA]

[1] Just two weeks prior to trial, Plaintiffs claimed in their Amended Objections and Responses to Defendant's Amended Pre-trial Statement that all of the organizational plaintiffs, including API, had independent standing. *Id.* at 3 (1/12/09) (DE 394).

[2] The USDA has already investigated and concluded otherwise. DX 71A (USDA no-violation letters closing investigations regarding Benjamin, complaints of Tom Rider, Archele Hundley, and others).

case"), and that a "take" could occur without any violation of the AWA:[3] "[A]buse is not the same thing necessarily as a take. It's true that if you're abusing an animal under a harassment definition, then you can consult the [AWA] regulations, but what this [ESA] regulates are all kinds of 'takes' that don't involve abuse[.]" 2-26-09 at 87:16-25 (Glitzenstein).

Finally, at closing arguments plaintiffs' counsel admitted (consistent with their own expert's testimony) that an injunction is not "realistic," and instead, plaintiffs want the Court to "enter findings" and *compel* FEI to apply for a permit so that "the whole process under Section 10 would kick in." 3-18-09 at 13:3-16:22 (Meyer); Plaintiffs' Post-Trial Brief at 19 (4/24/09) (DE 534) ("Pls' Brief") ("plaintiffs are not seeking an immediate injunction at this time"); *accord* 2-19-09 at 22:18-23:8 (Kinzley) (attempts have been made to regulate use of bullhook "But I think it can be very difficult for the handlers to have that sort of restriction, because of the way they need to control the elephants."). **This is *not* the relief pled in their complaint, which unequivocally claimed wholesale injunctive relief against FEI.** *See* Cmplt. ¶ 2 (*enjoin* FEI's continuing ESA violations); ¶ 3 (*enjoin* FEI's transporting, harming, harassing and taking of its elephants); ¶ 4 (*enjoin* FEI from beating, wounding, injuring and chaining its elephants "unless and until it obtains" a permit); ¶ 5 (forfeiture of FEI's elephants)[4] (emphasis added).

Although plaintiffs' counsel was quick to claim her attorneys' fees, 3-18-09 at 15:21-16:21 (Meyer), she still needed to confer further with her clients about what relief plaintiffs were seeking as to tethering, *id.* at 67:4-68:11. Again, this stands in stark contrast to the claims plaintiffs made last year when they said they had all the fact discovery necessary for the Court to enjoin FEI's use of chains. *See* Pls' Motion for Preliminary Injunction at 1-3 (5/21/08) (DE

[3] This new theory articulated by counsel seemingly interprets the AWA as applying only to instances of abuse.

[4] Plaintiffs dropped their claim for forfeiture. *See* Minute Order 6/11/08.

297). If FEI's practices were a true violation of the ESA, plaintiffs would not be asking the Court to "refrain" from entering injunctive relief.

Plaintiffs' continued waffling, nearly a decade after this litigation began, evidences more than just indecision: it completely undermines their claim that FEI's conduct somehow rises to the level of a "taking." What all of this maneuvering by plaintiffs proves is that this case has little (if anything) to do with the ESA and much to do with plaintiffs' crusade against elephants in captivity, free contact handling methods, and elephants performing in circuses. *See* FEI's Amended Pre-Trial Statement at 6-7 (1/5/09) (DE 391). The ESA does not prohibit elephants in captivity, free contact handling, and/or elephants performing in circuses. The Court should reject plaintiffs' claims, and enter final judgment in favor of FEI dismissing this lawsuit.

A. Plaintiffs Remain Unable to Subject FEI's Elephants to the Take Prohibition.

FEI has already briefed this issue, and will not repeat it here. *See* FEI's Post-Trial Brief at 2-4 (4/24/09) (DE 536) ("FEI's Brief"). In all the briefing, plaintiffs have not even attempted to explain why the "take" provision has never been applied to captive species, much less to circus animals that entertained spectators for decades before the ESA was ever envisioned. Nor have they convincingly explained why Congress would radically change a statute's framework without uttering a single word. *See Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C.*, 431 F.3d 803, 812 (D.C. Cir. 2005) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."). The reality is that unlike plaintiffs, Congress never intended the ESA to be an avenue for plaintiffs to force the circus to perform its final act.

1. The "take" prohibition applies only to wild animals.

"[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . ***take*** any [endangered] species within the United States...." 16 U.S.C. § 1538(a)(1)(B) (emphasis supplied). Plaintiffs focus on the word "any," arguing that it makes clear Congress' intent to

apply the "take" prohibition to captive animals. *See* Pls' Brief at 2-3. However, the word "any" does not elucidate what Congress meant by the word "take." And while this Court's prior ruling may mean that the "take" provision applies to FEI's pre-Act elephants, it does not articulate the standard for proving *how* an elephant has been "taken."

When the "take" provision is considered in context with the words used to describe it ("harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" 16 U.S.C. § 1532(19)), Congressional intent becomes clear.[5] Indeed, it makes little sense that animals in captivity would be pursued, hunted, shot, killed, trapped, captured, or collected. And if "wound" and "harm" apply to animals in captivity, then all endangered species who receive veterinary care or have their food and shelter provided are arguably being taken. *See* 50 C.F.R. § 17.3 (defining "harm" to mean "actually kill or injure" and habitat modification). Simply put, if "take" applies to captive species, then anyone who holds an endangered species in captivity, whether a circus, zoo, or wildlife sanctuary, is violating the "taking" prohibition according to plaintiffs. That cannot be the law, and FWS has already explicitly rejected such an approach. FEI's Brief at 7-8.[6] If the ESA is to truly be read literally, as plaintiffs claim they want, then FWS should not have defined "harass" to apply to captive elephants at all because they are exotic (non-native) to this country and have no habitat here.

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[5] Plaintiffs are wrong in asserting that the Supreme Court's opinion in *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or.*, 515 U.S. 687, n.15 (1995) is at odds with relying on the plain meaning of the word "take." The footnote plaintiffs cite (footnote 15) discusses whether the definition of "harm" requires a direct application of force. *Id.* Nowhere in the footnote does the Court discuss the application of the "take" prohibition to captive species. *See id.*

[6] As noted in *TVA v. Hill*, federal anti-"taking" statutes in effect prior to the ESA's enactment were limited either to certain species or to hunting on federal land. 437 U.S. 153, 175 (1978). None of these laws was applicable to captive animals. At the time the ESA was passed in 1973, the welfare of captive Asian elephants was already being regulated by the AWA, 7 U.S.C. § 2131 *et seq.* There is no evidence in the ESA's legislative history that, when Congress used the verb "take," it intended the word to have an entirely new focus, *i.e.*, as a standard of welfare for captive endangered species.

FEI's Brief at 1. FEI cannot "take" them from anything because they were already "taken" from their native countries before the ESA ever applied to them.

2. Any omission of the takings exemption must be a mistake that should be corrected.

Plaintiffs rely heavily on the ESA's 1982 amendment described as the "grandfather clause" as further support that the "take" prohibition must apply to FEI's elephants. Pls' Brief at 3-4. While it is true that when Congress amended Section 1538(b)(1), it removed the portion of the exemption that applied to the "taking" prohibition, there is no suggestion that this change was anything more than an oversight. *See* 16 U.S.C. § 1538(b)(1). Most notably, the history behind the 1982 amendment to the ESA demonstrates that the exemption was changed to preserve the CITES and port requirements. *See* H.R. CONF. REP. NO. 97-835, 97th Cong., 2nd Sess. at 35, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2860, 2876. There is no legislative history indicating that Congress intended the amendment to subject otherwise exempt pre-Act animals to the "takings" provision. *Id.* If such a significant revision were intended, it would be reflected at least somewhere in the volumes of legislative history. *See* Pub. L. No. 97-304, 96 Stat. 1411-27 (Oct. 13, 1982); *U.S. v. Dickerson*, 310 U.S. 554, 561 (1940) (noting that the adoption in new act of terminology different from language used in prior acts should not be per se indication of congressional intent); *Nat'l Ass'n of Sec. Dealers*, 431 F.3d at 812 ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so.").

What is more likely is that Congress' failure to explicitly include the "takings" provision in the 1982 amendment was an inadvertent mistake that this Court can and should correct. *See, e.g., Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit*, 435 F.3d 1140, 1146 (9th Cir. 2006) (striking word in statute and replacing it with exact opposite word); *Bowlby v. Nelson*, 1985 WL 56583 *1, 3-4 (D. Guam 1985) (parties should not obtain "a windfall due to a

drafting error"). Proof of Congress' error is the fact that despite amending the exemption, Congress *retained* the exemption from § 1538(a)(1)(G) that prohibits the violation of any FWS regulation. One of those regulations is the FWS's prohibition on takings. 50 C.F.R. § 17.21(c). Thus, under this scheme, the statute's literal terms provide an exemption from a regulatory taking pursuant to FWS regulations, but not an exemption from a statutory taking pursuant to the ESA. In other words, the same act would violate the ESA, but not violate the nearly identical regulation, thus leading to patently inconsistent results. Applying the ESA in such an incoherent manner could only distance the ESA from Congress' intent. *See United States v. Ryan*, 284 U.S. 167, 175 (1931) ("[L]iteral application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."). Thus, FEI disagrees that the Pre-Act regulatory exemption is invalid or that FWS just "forgot" that Congress overruled it 25 years ago. Pls' Brief at 13.

3. Plaintiffs want this Court to ignore Due Process.

Congress instructed the Secretary to "prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection." 16 U.S.C. § 1538(d)(3). Pursuant to Congress' instruction, the FWS adopted regulations, including the Pre-Act regulation. 50 C.F.R. § 17.4(a)(1)-(2)[7] That its elephants were pre-Act, covered by this exemption, and not subject to the ESA's prohibitions was confirmed when FEI was advised by FWS in 1975 that it was not required to apply for a permit to transport its elephants, and by the multiple CITES certificates that FWS has issued designating the elephants, including the elephants at issue here, as "pre-Act." DFOF ¶¶ 45, 47. This Court denied FEI's motion for summary judgment on the Pre-Act elephants, ruling that the regulation conflicted with the ESA's plain language. Order & Op. at 7-

[7] This exemption has remained in effect without change since 1975. Def's Proposed Findings of Fact ¶ 45 (4/24/09) (DE 535) ("DFOF").

5 (8/23/07) (DE 172).[8]

Plaintiffs' claim that they seek only prospective relief and thus FEI's due process rights are not triggered misses the point. Plaintiffs want this Court to make a finding that FEI's conduct qualifies as a "take." To support their position, plaintiffs rely on FEI's *past* conduct, calling it illegal among other choice words. The problem is that FEI reasonably relied on the FWS's advice that their conduct was in effect legal and in compliance with the ESA. DFOF ¶¶ 45, 47. The law has not changed since FEI first received this advice, and the FWS has never notified FEI that in fact its conduct is unlawful. Yet plaintiffs now claim that FEI's conduct has been unlawful for nearly three decades, that a permit is necessary, and that this Court should order FEI to apply for one. Hence, plaintiffs' suggestion that they are not attempting to hold FEI accountable for past violations is just a play on words.[9]

4. The permit plaintiffs want FEI to seek cannot exist under their regulatory scheme.

Plaintiffs' contention that FWS regulations conflict with the ESA's plain language is ironic given the relief they seek and their eagerness to cite other regulations that they believe support their cause. *See* Pls' Brief at 4 & n.1 (citing FWS regulation to exempt antelope from take prohibition). In fact, they devote most of a page to detailing the various FWS regulations

[8] Plaintiffs therefore argue that FEI has no right, as a private, regulated party, to rely upon a longstanding rule issued by FWS. *See* Pls' Brief at 13. *But see Cox v. La.*, 379 U.S. 559, 568-69 (1965); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 636 (D.C. Cir. 1996) (the "public justifiably relies upon administrative agencies' rules and interpretations"). But disregarding FEI's reasonable reliance and finding that the ESA does not exempt takings of pre-Act animals would disrupt settled expectations and constitute a denial of FEI's due process rights. U.S. CONST. AMEND. V; *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) ("Because Due Process requires that parties receive fair notice before being deprived of property, we have repeatedly held that in the absence of notice—for example where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

[9] FEI's due process rights are also implicated by the manner in which plaintiffs ask this Court to apply the "taking" prohibition. *See* FEI's Brief at 12-19. Plaintiffs' inability to articulate precisely what qualifies as a "take," *see infra*, renders the prohibition so vague that law enforcement and courts cannot enforce the ESA in a non-discriminatory, non-arbitrary way, thereby violating FEI's right to due process. Plaintiffs have no response to this obvious flaw in their interpretation. *See Smith v. Goguen*, 415 U.S. 566, 575-76 (1974) ("Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.").

that they claim prove the "take" prohibition applies to captive species. *See id.* But under plaintiffs' reading of the Pre-Act exemption, these regulations should also be contrary to the ESA's plain language. Plaintiffs should not be allowed to rely upon such regulations while simultaneously denying FEI a defense under the Pre-Act exemption regulation. Nor can they obtain relief that requires FEI to seek a permit from the FWS under the very "regulatory scheme that violates the plain language of Section 9." *Id.* at 13.

In asserting that FEI's pre-Act elephants are subject to a "takings" claim, plaintiffs urge this Court to ignore the original ESA exemption, overlook the FWS exemption and its 34-year history, rely upon *other* FWS take exemptions to find the ESA applies to captive animals, wholly disregard Congressional intent as well as the statutory and regulatory schemes, and instead rely *strictly* on the language in Congress' 1982 amendment to Section § 1538(b)(1). Plaintiffs' position would produce an absurd result that cannot withstand scrutiny under longstanding precedent. *United States v. Am. Trucking Assns.*, 310 U.S. 534, 542 (1940) (noting that "to take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute"); *Kaseman v. D.C.*, 444 F.3d 637, 642 (D.C. Cir. 2006) (statutes should be interpreted to avoid "untenable distinctions," "unreasonable results," or "unjust or absurd consequences"); *In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991) ("If a literal construction of the words be absurd, *the Act must be construed as to avoid the absurdity*.").

B. Plaintiffs Have Not Proven a "Take"

Far from the "mountain of evidence" they describe, *see* Pls' Brief at 2, plaintiffs failed to demonstrate even a molehill of credible evidence to support their claims. They proffered no credible instances of a "take" from guide use on any of the elephants at issue (or Zina). Mr. Rider testified to **only three such instances**: one each in New Haven, Connecticut (Karen),

Ottawa, Canada (Karen – elephant fight) and Richmond, Virginia (Zina). 2-12-09 a.m. at 51:15-52:2, 54:22-57:4, 59:23-60:21 (Rider). That evidence deserves no weight. DFOF ¶¶ 277-280. The only other such instance was described by Deborah Fahrenbruck and concerned Lutzi. That evidence deserves no weight. DFOF ¶ 282. According to Mr. Rider none of the elephants at issue or Zina had permanent marks or scars behind their ears. 2-12-09 p.m. at 119:6-123:2 (Rider). Any marks on those elephants were temporary and superficial. *Id.* at 119:2-123:2. Such is not evidence of a "take." Although Mr. Rider claimed in the complaint that the elephants were kept in chains for most of each day, Cmplt. ¶ 19 (DE 1), that claim as to those elephants was not borne out by his trial testimony. His chaining claims deserve no weight. DFOF ¶ 281. Plaintiffs' videotape snippets related to Blue Unit elephants do not establish any wounds, injuries or disruption of the essential behavior patterns of the elephants portrayed. That evidence deserves no weight. DFOF ¶ 283. Lanette Williams Durham's testimony about her observation of Jewel with a stiff leg in 2000 is inconclusive. 2-6-09 p.m. at 11:2-12:15 (Williams Durham). None of her testimony deserves any weight. DFOF ¶ 284, 328-331. Plaintiffs failed to prove that FEI's chaining practices constituted a "take" of the elephants at issue or Zina. FEI's objections to PFOF ¶268[10] (filed concurrently).

C. FEI's Conduct Is Excluded By the Definition of "Harass"

Plaintiffs claim FEI has committed a "take" by "harassing," "harming," and "wounding" its Asian elephants. *See* Pls' Brief at 6-9; Cmplt. ¶ 39; PWC 91 at 10-14. Plaintiffs are misguided, not only because the record demonstrates that FEI's elephant treatment is lawful, but also because the regulatory definition of "harass" is the only one that could possibly apply to captive species. In 1988, FWS amended the regulatory definition of "harass" to exclude from

[10] Plaintiffs' Proposed Findings of Fact (4/24/09) (DE 533).

the "taking" prohibition any "generally accepted ... [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." 50 C.F.R. § 17.3, 63 Fed. Reg. 48634, 48639 (9/11/98). Thus, where the handling of an Asian elephant with the guide, tethers, or otherwise complies with the AWA as administered by USDA, it is not "harassment" and therefore not a "taking" under the ESA.[11]

Applying the regulatory definition of "harm" and plaintiffs' plain meaning definition of "wound" to captive animals would render this "harass" exception meaningless, proving that neither term can apply to captive species. *See Sweet Home*, 515 U.S. at 701 ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). The FWS defines "harm" to include habitat modification that significantly impairs breeding, feeding, or sheltering. 50 C.F.R. § 17.3. Even plaintiffs acknowledge that the very nature of being held in captivity makes it likely that an animal's feeding and sheltering have been significantly modified. *See* Pls' Brief at 7. Similarly, Plaintiffs argue that any penetration of an elephant's hide by a guide is a "wound," making even ordinary veterinary procedures a "wound."[12] ***This interpretation urged by plaintiffs creates an irreconcilable conflict with how FWS has defined "harass" to exclude generally accepted husbandry practices, breeding, and vet care for captive animals.*** Husbandry includes, *inter alia*, trimming toenails and footpads – literally cutting off skin and tissue. DX 2 EHRG at 45. Under plaintiffs' interpretation, such husbandry would be lawful under the definition of "harass" but would nevertheless constitute an unlawful "wound" because tissue had been broken. Pls. Brief at 8-10.

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[11] Plaintiffs' claim that nothing FEI does is husbandry is unfounded. DX 2 EHRG (devoting chapters on each of the various husbandry topics contained in the guide: training, husbandry, tools, management, transporting, etc.); 3-9-09 a.m. at 14:12-19 (Jacobson) (exercise, husbandry, training, feeding, watering "is all one entire process").

[12] It defies logic that plaintiffs continue to insist that this Court should ignore the plain meaning of the word "take," but apply the plain meaning of the word "wound," particularly given that applying their definition of "wound" would mean that every captive animal is being "taken." *See* Pls' Brief at 9-10.

This interpretation would render the definition of "harass" as adopted meaningless. The result would be that every captive animal would be "taken" by virtue of being cared for even if that animal's care meets or exceeds the AWA. The FWS made clear, as even plaintiffs recognize, that it did not intend such practices to constitute a "take." *See* Pls' Brief at 7. Simply put, the FWS would have engaged in a useless act by excluding husbandry practices and veterinary care from the definition of "harass" if those same acts constitute "harm" and "wounds" and thus a "take" under the ESA. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (finding Secretary's reading violated familiar doctrine that Congress cannot be presumed to do a futile thing); *RCA Global Comms., Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (rejecting interpretation that "would deprive [provision] of all substantive effect, a result self evidently contrary to Congress' intent").

Plaintiffs' assertion that the FWS amended the regulatory definition of "harass" to facilitate breeding is a non-starter. *See* Pls' Brief at 7.[13] Whatever the original purpose, the plain language of the regulation excludes from the definition of "harass" generally accepted husbandry practices. And there is no dispute that use of guides and tethers are generally accepted husbandry tools. DFOF ¶¶ 178-80, 218. In fact, the evidence establishes that 90% of the institutions that keep elephants in the United States use the guide. DFOF ¶¶ 179-80. The record also establishes that FEI's use of guides and tethers does not constitute physical abuse or result in trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. DFOF ¶ 285. *See In re John F. Cuneo, et al.*, AWA Docket No. 03-0023, Decision and Order as to James G. Zajicek (May 2, 2006), *affirming* Chief ALJ Decision as to James G.

[13] FEI's Asian elephant breeding program is the most successful Asian elephant breeding program in North America. DFOF ¶¶ 33-34. Its success far exceeds that of protected contact facilities. For example, every elephant calf born at the Oakland Zoo under that system has died. DFOF ¶ 180.

Zajicek (Aug. 17, 2005) (USDA concluding that striking an Asian elephant with a guide and creating a bloody wound is not a violation of the AWA).

Indeed, USDA's APHIS, has inspected and investigated all aspects of FEI's care and handling of its Asian elephants on multiple occasions. Those investigations have always been closed with no further action taken. DFOF ¶¶ 347-49. Many of the investigations were instigated by plaintiffs and their own witnesses and concerned the same claims and evidence presented at trial. DFOF ¶¶ 350-59. The USDA's communications of no violation to FEI are the agency's official position on such matters. DFOF ¶ 349. Plaintiffs' insistence that this Court should simply ignore the USDA's findings, while crediting the testimony of their biased witnesses makes little sense. Because FEI's handling of its Asian elephants meets or exceeds the AWA standards, it cannot and does not constitute an improper "take" under the ESA.

D. Plaintiffs' Claims are Moot.

Jewell, Lutzi, Mysore, and Susan (and Zina) live at the CEC, a facility closed to the public. DFOF ¶¶ 28, 49. Because the undisputed evidence demonstrates that they are retired from performing and will never return to the circus, Mr. Rider will have no opportunity to see them again and will not be injured by their alleged mistreatment or have his potential injury redressed by Court intervention. *Id.* Plaintiffs' claims as to these elephants are therefore moot.[14] *See, e.g., Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999) ("Where an action has no continuing adverse impact and there is no effective relief that a court may grant, any request for judicial review of the action is moot."); *City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (case moot where court could offer no relief to redress claim).

[14] If this Court grants an injunction preventing guides and tethers, Karen and Nicole will be retired from circus performances and transferred to the CEC, where Mr. Rider will have no ability to see them again. DFOF ¶¶ 168, 203-04, 270, 272. Plaintiffs' claims as to Karen and Nicole will be moot as well.

Plaintiffs' insistence that the "capable of repetition, but evading review" and "voluntary cessation" exceptions to the mootness doctrine somehow save their claims is misplaced. The "capable of repetition" exception applies only in "exceptional situations." *Del Monte Fresh Produce Co. v. U.S.*, 565 F.Supp.2d 106, 112-13 (D.D.C. 2008). To fit this exception, plaintiffs must prove that: (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (mere physical or theoretical possibility insufficient). Plaintiffs cannot satisfy this standard. First, the challenged action is the use of guides and tethers, and, far from ceasing, that action continues at the CEC. Neither party disputes this. What has expired is Mr. Rider's ability to be injured from that action or have his injury redressed. Second, the record is devoid of any proof that Mr. Rider can suffer the exact same injury again. *Murphy*, 455 U.S. at 482-83 (refusing to apply exception without "reasonable expectation" or "demonstrated probability" that same controversy will recur involving same party); *Spirit of the Sage Council v. Norton*, 411 F.3d 225, 230 (D.C. Cir. 2005) (same); *Public Util. Comm'n of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1459 (9th Cir. 1996) (refusing to apply exception, in part, because it was "not reasonable to expect that this exact factual and legal situation will recur"). In fact the evidence proves that Mr. Rider can never again suffer aesthetic injury as a result of FEI's treatment of Jewell, Lutzi, Mysore, and Susan (or Zina).

The voluntary cessation exception applies when a defendant voluntarily ceases the challenged action *because of* the litigation, but is free to return to its illegal action at any time. *Clarke v. United States,* 915 F.2d 699, 705-06 (D.C. Cir. 1990) (reasoning that changes wholly independent of litigative process do not fall under voluntary cessation doctrine); *Del Monte,* 565 F.Supp.2d at 112-13 ("Because the act… was based on reasons independent of the litigation, the

Court does not consider the issuance of the license a "'voluntary cessation.'"); *Wyo. Outdoor Council v. Dombeck*, 148 F.Supp.2d 1, 8 n.1 (D.D.C. 2001) ("the voluntary cessation doctrine does not apply when the challenged activity stops for reasons unrelated to litigation"). The exception cannot apply here for at least three reasons. First, once again, the challenged action (the use of guides and tethers) has not ceased but rather continues, as plaintiffs often remind this Court, at the CEC. Second, there is absolutely no evidence that FEI moved any elephant to the CEC because of this litigation, a far more obvious reason being their age. *Compare* Susan (58 years), Jewel (58 years), Lutzi (59 years), Mysore (63 years), and Zina (48 years) *with* Karen (40 years) and Nicole (34 years). DFOF ¶ 287; DX 1; DX 308A (Jacobson Dep. at 72:1-15). Indeed, if litigation were the impetus, then all of the elephants at issue would have been transferred, and yet Karen and Nicole remain on the Blue Unit. DFOF ¶ 48. Third, the undisputed evidence is that these elephants will never return to a venue in which Mr. Rider will be able to observe them again, and thus there is no reasonable expectation that his alleged injury will be repeated. DFOF ¶ 126; 2-17-09 p.m. (12:50) at 48:7-20 (Mr. Rider admitting he has no access to CEC); *Del Monte*, 565 F.Supp.2d at 113-14 (lack of "reasonable expectation" that plaintiff will again be subjected to same alleged wrong is fatal to both exceptions). Plaintiffs' speculation that these CEC elephants may return to the circus is just that, baseless speculation unsupported by the record. Plaintiffs' claims regarding them are moot and must be dismissed.

E. Plaintiffs Cannot Obtain the Relief They Seek.

Plaintiffs ask the Court to: (1) declare that FEI's actions constitute a "take"; (2) order FEI to seek a permit under Section 10 of the ESA; and (3) potentially enter an injunction at some later date. Plaintiffs cite no authority for proceeding in this bifurcated manner, nor do they explain why this Court should maintain jurisdiction in perpetuity while the FWS evaluates FEI's permit application. But procedural hurdles are only the beginning of plaintiffs' problems.

Section 1540(g), which defines the ***only*** relief available to plaintiffs, provides that a citizen suit may be commenced "to ***enjoin*** any person ... who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof..." 1540(g)(1)(A) (emphasis supplied). On its face, this provision is aimed at *prohibiting* conduct that violates the ESA. Nowhere in the statute's plain language is declaratory relief, much less a mandatory injunction,[15] recognized as an available remedy. *Cf.* 5 U.S.C.S. § 706(1) (section of Administrative Procedure Act that allows a mandatory injunction). Courts nationwide, including this one, have interpreted § 1540(g) narrowly, refusing to expand its reach beyond its plain terms. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 172-74 (1997); *Salmon Spawning & Recovery Alliance v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1129 n.6 (Fed. Cir. 2008) (describing 1540(g)(1)(B) and (1)(C) as "narrow grounds"); *ASPCA v. Ringling Bros.*, 502 F.Supp.2d 103, 122 (D.C.C. 2007) (refusing to interpret 1540(g)(1)(A) to include suits to enforce permit terms).

Even plaintiffs' authorities have relied on § 1540(g) to order injunctions that ***prohibit*** conduct that would effectuate a "take," not require a private party to take some affirmative act or simply issue a declaration that the defendant is committing a "take." *See, e.g., Biodiversity Legal Found. v. Badgley*, 309 F. 3d 1166, 1176 (9th Cir. 2002) (injunctive relief under APA and declaratory relief under Declaratory Judgment Act, not ESA); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1062-64 (9th Cir. 1996) (logging of timber *precluded* because it would have harmed seabird); *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783-85 (9th Cir. 1995) (injunction issued to *prohibit* logging that would injure owls); *Center for Bio. Diversity v. Marina Point Develop. Assoc's.*, 434 F.Supp.2d 789, 794-96 (C.D. Cal. 2006) (injunction

[15] A mandatory injunction "alter[s], rather than preserve[s], the status quo by commanding some positive act." *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F.Supp.2d 1, 4 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998). Plaintiffs also did not plead a mandatory injunction. Cmpt. at 21 ¶ 4 (seeking injunction "unless and until" FEI obtains a permit from FWS).

entered to *stop* construction that caused significant habitat degradation to bald eagles).[16] Indeed, the availability of either remedy plaintiffs seek — compelling FEI to seek an ESA permit ESA or simply declaring a "take" — appears to be an issue of first impression in the D.C. Circuit.[17]

This Court's opinion in *Center for Biological Diversity v. Pirie*, 201 F.Supp.2d 113, 120-21 (D.D.C. 2002) — decided under the APA, not the ESA — does not compel a different conclusion. In *Pirie*, this Court found it had authority to compel the government to apply for a permit to ensure compliance with the Migratory Bird Act and the APA. *Id.* at 117 (emphasizing that APA provided exclusive right to relief). Unlike the ESA, the APA specifically recognizes that a mandatory injunction is an available remedy. 5 U.S.C. § 706(1); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003) (claim under APA authorizes court to compel action). The Court recognized its authority under the APA to order relief that would ensure compliance with the Act, including ordering the government to seek a permit, *so long as the granting of a permit was likely*. *Pirie*, 201 F.Supp.2d at 120-21. Because the defendants' prior permit applications had been denied, the Court instead issued a prohibitive injunction as the only means to ensure statutory compliance. *Id.* at 121-22.

This Court's holding in *Pirie* did not reach whether a mandatory injunction compelling a private party to seek a § 10 ESA permit is an available remedy. Equally significant, Plaintiffs

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[16] The two cases plaintiffs cite where a court ordered the defendant to seek a permit are inapposite. Both involved state officials, not private parties, and state licensing programs that allowed a third party's acts to result in serious injury or death to the endangered species in its critical habitat. *See API v. Holsten*, 541 F.Supp.2d 1073, 1081 (D. Minn. 2008); *Strahan v. Coxe*, 939 F.Supp. 963, 984, 990 (D. Mass. 1996), *aff'd* 127 F.3d 155, 171 (1997). FEI is a private citizen, and is obviously not tasked with administering state licensing programs regarding wild/non-captive animals that may conflict with the ESA. Further, FEI is not injuring or killing its elephants or disturbing their critical habitat. Equally important, in *API* it does not appear that the defendant challenged the court's ability under Section 1540(g) to compel a permit application. In fact, the defendant informed the court that it would seek a permit. *Holsten*, 541 F.Supp.2d at 1076.

[17] Notably, the Ninth Circuit has not reached the issue. *See Nat'l Wildlife Fed. v. Burlington N. RR.*, 23 F.3d 1508, 1513 (9th Cir. 1994) ("We need not decide whether injunctive relief at the demand of citizen plaintiffs includes the compulsory application for an incidental taking permit because we have found that the district court did not abuse its discretion in finding that injunctive relief is not warranted here.").

here insist that FEI would not qualify for a § 10 permit. *See* PCOL ¶ 111 (plaintiff disagrees that FEI's activities enhance or propagate the species).[18] Hence, the Court cannot and should not order FEI to apply for a permit because plaintiffs claim it is not likely to effectuate statutory compliance. *See Pirie*, 201 F.Supp.2d at 122.

Even if plaintiffs could muster some D.C. Circuit support for compelling FEI to seek a permit, they have not satisfied the higher standard attendant to obtaining a mandatory injunction, which involves a "fundamentally different inquiry" than a prohibitive injunction. *Columbia Hosp.*, 15 F.Supp.2d at 4-5 n.3 ("courts should be extremely cautious about issuing a [mandatory] injunction"). Plaintiffs must show "clearly" that they are entitled to mandatory injunction or that "extreme or very serious damage" will result if this Court denies one. *Id.* ("court should deny such relief 'unless the facts and law *clearly favor* the moving party"). Plaintiffs cite no law exempting them from this higher burden of proof. PCOL ¶ 107 (arguing for lower standard to obtain *prohibitive* injunction. Given plaintiffs' lack of clear proof of irreparable future harm, much less proof that "extreme or very serious damage" will result if FEI is not forced to seek a permit, plaintiffs do not and cannot satisfy this standard. *Columbia Hosp.*, 15 F.Supp.2d at 4-5 (explaining that power to issue a mandatory injunction should be "sparingly exercised"); *Moundridge v. Exxon Mobil Corp.*, 429 F.Supp.2d 117, 127 (D.D.C. 2006) (mandatory injunction should be viewed "with even greater circumspection").[19]

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[18] Plaintiffs' Proposed Conclusions of Law (4/24/09) (DE 533-2).

[19] Likewise, plaintiffs have failed to overcome the hurdle of proving that a declaration, without more, would redress their claims. *See Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246-49 (1952) (declaratory judgment action not permitted where "proposed decree can not end the controversy"). Unlike an injunction, a declaration alone would not force FEI to alter its conduct or cease the activities that Mr. Rider contends lead to his injuries. A declaration that FEI is committing a "take" therefore does nothing to redress his injuries and thus constitutes nothing more than an improper advisory opinion the Court should refuse to enter. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *Alliance for Democracy v. FEC*, 335 F.Supp.2d 39, 47 (D.D.C. 2004) (declining to grant declaratory judgment where declaration would not have any "concrete effect on any party").

Notably, the question of *defining* the conduct for which FEI must request a permit still exists. The conduct supposedly constituting a "take" must be specifically defined, or FEI cannot apply for a permit to continue that conduct.[20] 50 C.F.R. § 17.22 (propagation permit application must include "details of the activities sought to be authorized by the permit" and incidental take permit application must include "complete description of the activity sought to be authorized"). In their Complaints and throughout these proceedings, plaintiffs have maintained that any use of the guide and tethers constitutes an illegal "take." DFOF ¶ 21; *see, supra,* at 1-2. At trial, plaintiffs and their experts retreated from that bright line but were otherwise unable to agree. DFOF ¶ 227 (plaintiffs' experts disagreeing about limits on tethering); (2-18-09 p.m. at 99:2-102:25 (Kinzley), (2-19-09 p.m. at 101:12-24 (Paquette), (2-23-09 p.m. (2:00) at 54:12-14 (Buckley) (plaintiffs and their experts disagreeing about guide)). In closing, plaintiffs suggested that only certain uses of the guide and tethers would be illegal, particularly using the guide "to make elephants perform at the circus." DFOF ¶ 21. They further suggested that intent would matter, so that perhaps using the guide for veterinary or other "legitimate" purposes would not be a "take." (3-18-09 a.m. at 11:23-12:3 (Meyer argument)). Apparently, plaintiffs want this Court to fashion "know it when you see it" declaratory relief that requires FEI to consult the Court each time it wants to use a guide or tether.[21] Plaintiffs' request, which could not be more divorced from the ESA's plain language or due process, proves, once more, that even they know the remedies they seek are simply untenable.

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[20] Absent a specific definition of what is unlawful, the Court is also unable to render any declaratory relief. *See Winpisinger v. Watson*, 628 F.2d 133, 141 n.33 (D.C. Cir. 1980) (declaratory relief must be "phrased with precision . . . or it does not meet the needs of the parties and consequently would not resolve the dispute underlying the action").

[21] Plaintiffs cannot credibly suggest that a finding by this Court that the use of guides and tethers constitutes a "take" will not be used to go after every free contact circus and zoo in this country. *See* Pls' Brief at 16-17. It is incorrect to argue that the Court should simply disregard the overwhelmingly widespread use of guides and tethers in the elephant community in the U.S. as irrelevant "slippery slope fears" when the regulatory definition of "harass" *requires* an examination of what is generally accepted and whether it meets AWA minimum requirements.

F. Plaintiffs Denounce Primary Jurisdiction, Yet Seek Review By The Expert Agency.

Plaintiffs want this Court to declare FEI's actions constitute a "take," and then force FEI to apply to the FWS for a permit. Through its power to grant or deny a permit, the FWS will become the final arbiter of whether FEI can continue to use guides and tethers to manage its elephants. *See* 50 C.F.R. § 17.22. Thus, on one hand, plaintiffs insist that the issue should be left to an agency's discretion, while on the other hand they denounce the doctrine of primary jurisdiction, which provides that a court should defer to an agency if a matter involves considerations beyond the court's ordinary competence and within the agency's field of expertise. *See, e.g., MCI Comm'ns Corp., v. Am. Tel. & Tel. Co.*, 496 F.2d 214, 220 (3rd Cir. 1974); *AT&T v. MCI Comm. Corp.*, 837 F.Supp. 13, 16 (D.D.C. 1993). Either this Court is the expert and should determine the appropriate relief or it is not. Plaintiffs want it both ways.

Equally problematic for plaintiffs is that there is no existing permit program designed for this type of situation – non-CBW captive animals where no habitat destruction is involved. It is not improbable that the FWS will determine that a permit is not necessary because FEI's conduct does not constitute a take. *See* DFOF ¶¶ 45, 47; DX 5 (FWS advising FEI that a permit was unnecessary.). FEI would then be in an untenable position of being caught between two different determinations. If that is the result, who wins: the court or the agency? The possibility of conflicting rulings is the very purpose behind the primary jurisdiction doctrine. *MCI Comm'ns Corp.*, 496 F.2d at 220. Accordingly, as plaintiffs seemingly now agree, this Court should defer to the expert agency (here the USDA)[22] — who has already determined that FEI is not harassing its elephants in violation of the AWA — and dismiss this case. DX 71A. *Montgomery Envtl.*

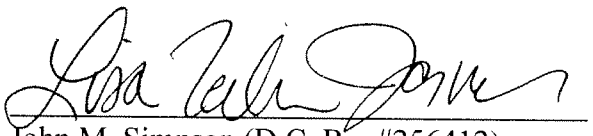
[22] Congress vested FWS with the authority to implement the ESA. 16 U.S.C. §§ 1533, 1540(f). FWS in turn has determined that whether a captive endangered species' treatment violates the ESA depends on whether the treatment complies with the Animal Welfare Act. FWS relies on USDA to determine whether the AWA is being violated. www.aphis.usda.gov/about_aphis/.

Coalition Citizens Coord. Comm. on Friendship Heights v. Wash. Suburban Sanitary Comm'n., 607 F.2d 378, 381-83 (D.C. Cir. 1979); *Total Telecomm. Serv., Inc. v. AT & T*, 919 F. Supp. 472, 483 (D.D.C. 1996); *see also Action for Children's Television v. FCC*, 59 F.3d 1249, 1257 (D.C. Cir. 1995) ("the present claim raises a question of first impression for the Commission, as is often the case as well where the doctrine of primary jurisdiction applies ..."). To do less would be to usurp the agency's authority.

The Court should deny all of plaintiffs' claims, enter judgment on behalf of FEI, award FEI its litigation costs and fees incurred in its defense of this action, and grant FEI any further relief the Court deems just.

Dated this 15th day of May, 2009.

Respectfully submitted,



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