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'S NOTICE OF FILING AUTHORITY REGARDING THE APPLICABILITY OF THE PRIMARY JURISDICTION DOCTRINE

At the direction of the Court, defendant Feld Entertainment, Inc. ("FEI") hereby files authority regarding the primary jurisdiction doctrine as it relates to plaintiffs' current request for relief: that this Court declare,[1] or enter "findings," that FEI's use of the bullhook and chains with respect to the six captive Asian elephants at issue violates the "take" provision of the Endangered Species Act ("ESA") and order FEI to apply for a permit with the Fish and Wildlife Service ("FWS").[2] In essence, plaintiffs, after abandoning their claim for injunctive relief, are

[1] Whether this Court has authority to enter a declaratory judgment even though plaintiffs failed to invoke the Declaratory Judgment Act in the complaints filed in this case (and its predecessor action), is addressed in a separate brief filed with the Court today, July 17, 2009.

[2] As plaintiffs' counsel stated at closing argument (3-18-09 a.m. at 13:3-23) (Meyer argument):

> THE COURT: Before you do that, tell me exactly what the relief is that you're seeking; what would the order look like? What would make your day?
>
> MS. MEYER: Oh, well, what would make my day? **I think the order we're looking for really are certain findings by you that the uses of the bull hook, if we're still on the bull hook claim, that they do constitute a take; they either harm, wound or harass the elephants, and based on those findings, what we would suggest the Court do is give Feld Entertainment some period of time to go to the Fish and Wildlife Service and apply for a permit under Section 10,** which is what one is supposed to do if they're engaged in activities that are taking endangered species, and then that whole process under Section 10 would kick in.

now asking this Court to "express[] a preliminary view" on the merits of this case and then refer it to the "expert" federal agency, an outcome which "is precisely what the doctrine of primary jurisdiction is designed to avoid." *Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 821 (1973).

FEI maintains that the only relief plaintiffs may seek is an injunction.[3] However, should this Court grant plaintiffs' request to refer this case to the FWS, the primary jurisdiction caselaw, as outlined below, makes clear that it must do so without first making ***any*** merits determination. To proceed otherwise defeats the very purpose of invoking the primary jurisdiction doctrine.

I. THE PRIMARY JURISDICTION DOCTRINE

Primary jurisdiction "is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). "One reason for the doctrine is to avoid the possibility that a court's ruling might disturb or disrupt the regulatory regime of the agency in question." *Am. Auto. Mfg. Ass'n v. Mass. Dep't Envtl. Prot.*, 163 F.3d 74, 81 (1st Cir. 1998). "A similar consideration is that the goal of national uniformity in the interpretation and application of a federal regulatory regime is furthered by permitting the agency that has primary jurisdiction over the matter in question to have a first look at the problem." *Id.*

> If Feld Entertainment believes that it can demonstrate that the activities we're complaining about are necessary to enhance the propagation and survival of the species, and, apparently, they have an argument that that's what goes on, **they can make that arguments [sic] to the expert agency;** the whole process of Section 10 would come into play. ...

[3] As FEI has shown, however, an injunction would not, either legally or factually, remedy any of the injuries claimed by either Rider or API. Consequently, there is no redressibility with respect to the only arguably applicable remedy that plaintiffs could invoke under the ESA.

"The doctrine is really two doctrines." *Arsberry v. Ill.*, 244 F.3d 558, 563 (11th Cir. 2001). "In its central and original form, in which it is more illuminatingly described, however, as 'exclusive agency jurisdiction,' it applies only when, in a suit involving a regulated firm but not brought under the regulatory statute itself, an issue arises that is within the exclusive original jurisdiction of the agency to resolve, although it will usually be subject to judicial review." *Id.* "The doctrine of primary jurisdiction is sometimes defined quite differently, as a doctrine that allows a court to refer an issue to an agency that knows more about the issue, even if the agency hasn't been given exclusive jurisdiction to decide it." *Id.* This latter application of the doctrine, which is relevant to the present case, "allows a federal court to refer a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion to an administrative agency with more specialized experience, expertise, and insight." *Id.* (quotations and citations omitted). "Whether the agency happens to be expert or not, a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer." *Lodge 1858, Am. Fed'n of Gov't Employees v. Webb*, 580 F.2d 496, 509 (D.C. Cir. 1978) (quotations and citation omitted). "In such cases, either court and agency have concurrent jurisdiction to decide an issue, or only the court has the power to decide it, and seeks merely the agency's advice." *Arsberry,* 244 F.3d at 564.

"There is no 'fixed formula' for application of the primary jurisdiction doctrine." *Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth.*, 239 F.R.D. 9, 19 (D.D.C. 2006) (Kennedy, J.) (citing *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64 (1956)). Courts in this district consider the following four factors when determining whether the doctrine should be invoked: "(1) whether the issue is within the conventional expertise of judges; (2) whether the issue lies within the agency's discretion or requires the exercise of agency

expertise; (3) whether there is a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made." *Id.* at 19-20.

"The agency's expertise is not limited to technical matters, but extends to the agency's mandate to implement ... and the concomitant policy judgments it must make." *Total Telecomm. Servs., Inc. v. AT&T*, 919 F. Supp. 472, 478 (D.D.C. 1996) (Urbina, J.); *see also Atchison, T. & S.F. Ry. Co.*, 412 U.S. at 820 ("National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case."); *Am. Auto. Mfg. Ass'n*, 163 F.3d at 86 ("The proper resolution of this issue will require consideration not only of the statutory language itself, but also of congressional intent and of public policy. It would therefore be preferable to have the EPA, the agency entrusted with interpreting and enforcing the federal government's environmental policy, reach its own conclusions.").

Contrary to plaintiffs' argument, primary jurisdiction is ***not*** limited to circumstances where "ongoing administrative proceedings are pending before an agency, ... or where there is some formal process whereby the plaintiff may seek relief from an agency." Pls. Post-Trial Brief (DE 534) (4/24/09) at 11 & Pls. Mem. Regarding Relevant Statutory and Regulatory Authority (DE 418) (2/13/09) at 10 n.9. While plaintiffs are correct that the above are situations in which the doctrine of primary jurisdiction may be invoked, they are examples only; the doctrine also has been invoked in ***other*** contexts. For example, in *Lodge 1858*, *supra*, the district court, in its discretion, exercised the doctrine of primary by holding the proceedings before the court in abeyance for sixty (60) days and referring to the Civil Service Commission the issue of whether an "employer-employee" relationship existed between NASA and certain non-civil service

employees. 580 F.2d at 499. There was no ongoing administrative proceeding in *Lodge 1858*, nor was there any discussion of a formal process whereby the plaintiffs could or could not have sought relief from the Civil Service Commission. Similarly, in *American Automobile Manufacturers Ass'n*, *supra,* the First Circuit invoked the doctrine of primary jurisdiction by refraining from deciding the appeal and staying further proceedings to allow plaintiffs-appellees, automobile manufacturers and dealers associations, to obtain a ruling from the Environmental Protection Agency ("EPA") as to whether Massachusetts' emissions program was preempted by the Clean Air Act ("CAA") and whether it was identical to a California standard exempted from the CAA. 163 F.3d at 86-87. As in *Lodge 1858*, there was no ongoing administrative proceeding, nor was there any mention of the plaintiffs' ability to seek relief from the EPA (or, for that matter, any discussion of the litmus test plaintiffs advocate).

II. WHEN PRIMARY JURISDICTION IS INVOKED AND THE CASE IS REFERRED TO AN AGENCY, THE COURT CANNOT EXPRESS A VIEW ON THE MERITS OF THE CLAIM

When a court invokes primary jurisdiction, it may, in its discretion (1) stay the case pending agency resolution (the very remedy plaintiffs now appear to be seeking) or (2) dismiss the case, provided that no party is prejudiced. *See, e.g., Himmelman v. MCI Commc'ns*, 104 F. Supp. 2d 1, 7-8 (D.D.C. 2000) (Urbina, J.). A court also may solicit an amicus brief from the appropriate government agency and then proceed with a merits determination. *See, e.g., TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 74-75 (2d Cir. 2002) ("Amicus briefs from an agency can serve much of the interest in consistency and uniformity of law that underlies the doctrine of primary jurisdiction, while avoiding some of the delay that sometimes results from dismissing on the ground of primary jurisdiction.") (soliciting amicus brief from the Federal Communications Commission ("FCC") on jurisdiction and on the substantive issues to be

determined; declining to dismiss considering the "relatively narrow" scope of the primary jurisdiction doctrine, the fact that all of the issues were questions of law, and that the court had received the FCC's views).

The D.C. Circuit has held that when a case is referred to an agency after primary jurisdiction is invoked, the court should not express a view on the merits of that claim: "Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and ***defer its consideration of the merits until an agency with special competence in the field has ruled on the issues*** ... ." *Lodge 1858*, 580 F.2d at 508-09 (emphasis added). Following the same rationale, Judge Urbina refused to grant a preliminary injunction after deciding that the invocation of the doctrine of primary jurisdiction was appropriate: "to engage in an analysis of whether injunctive relief would issue in this case, would require the court to analyze the underlying merits of the case, thereby encroaching into the FCC's primary jurisdiction. 'This is precisely what the doctrine of primary jurisdiction is designed to avoid.' ... ***The issuance of an injunction pending further agency action may indicate the court's opinion on the viability and legal validity of plaintiffs' claims—a result that should be avoided***." *Total Telecomm. Servs.*, 919 F. Supp. at 483 (quoting *Atchison, T. & S.F. Ry.*, 412 U.S. at 821) (emphasis added), *aff'd* 99 F.3d 448 (D.C. Cir. 1996).[4]

Indeed, the Supreme Court has held that it is reversible error for a district court to issue injunctive relief pending agency review for the very same reason. In *Atchison, Topeka & Santa Fe Railway Co.*, the Supreme Court reversed a district court's issuance of an injunction against an imposition of a rate increase pending further review of that increase on remand by the

[4] In an unpublished opinion in the appeal of *Total Telecommunications*, the D.C. Circuit held that it was "appropriate for the district court to dismiss the case ... ***without addressing appellants' application for preliminary injunction"*** because the FCC had primary jurisdiction. 1996 U.S. App. LEXIS 30354, at *1-2 (D.C. Cir. Oct. 4, 1996) (citing *Atchison, T. & S.F. Ry. Co.*) (emphasis added).

Interstate Commerce Commission ("ICC") *Id.* at 820-21. Because national transportation policy is in the primary jurisdiction of the ICC, the Court held that it "should refrain from expressing a preliminary view" on that policy; the issuance of an injunction may "undercut the policies served by the doctrine of primary jurisdiction" because doing so "may indicate what the court believes is permitted ... prior to an expression by the Commission of its view." *Id.* at 821.[5]

III. APPLICATION TO PLAINTIFFS' CURRENT REQUEST FOR RELIEF

At trial, plaintiffs posited for the first time that an injunction was not a "realistic" remedy, 3-18-09 a.m. at 14:24-15:3 (Meyer argument), and that the Court should instead declare and/or enter "findings" that FEI is in violation of the ESA and order FEI to apply for a permit. Although plaintiffs dispute whether the primary jurisdiction doctrine is applicable to this case, the newly-concocted remedy that they seek is functionally asking for the same result that would arise from invoking the doctrine: referral of the case to a federal agency, the FWS. Even assuming the Court has the authority under the ESA citizen-suit provision to order FEI to obtain a permit—which FEI disputes—*Atchison, Topeka & Santa Fe Railway Co., Lodge 1858*, and *Total Telecommunications* make clear that it would be error for this Court to determine whether FEI is "taking" the six captive Asian elephants at issue prior to such a referral.

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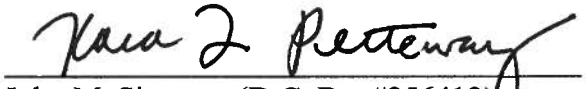
[5] Plaintiffs' own authority recognizes that the merits cannot be pre-judged prior to making a referral to the agency. The district court in *Strahan v. Coxe*, 939 F. Supp. 963 (D. Mass. 1996) (cited by plaintiffs) so stated: "In fashioning this remedy, I note that it is appropriate to afford the Defendants the opportunity to complete the administrative process that Congress envisioned in allowing incidental takes of endangered species, without influencing that process by issuing a ban on gillnets or lobster gear at this time." *Id.* at 991.

Dated this 17th day of July 2009.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Lance L. Shea (D.C. Bar #475951)
Michelle C. Pardo (D.C. Bar #456004)
Kara L. Petteway (D.C. Bar #975541)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643
Counsel for Defendant Feld Entertainment, Inc.