

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,**

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.

Defendant.

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Case No. 03-2006 (EGS/JMF)

**DEFENDANT FELD ENTERTAINMENT'S NOTICE OF FILING
REGARDING THE AVAILABILITY OF MANDATORY INJUNCTIONS AND
DECLARATORY RELIEF UNDER THE ESA**

Pursuant to the briefing schedule set by the Court (docket entries 7/15/09) and as directed at the recent hearing, defendant Feld Entertainment, Inc. ("FEI") hereby submits its brief regarding the availability of mandatory injunctions and declaratory relief under the Endangered Species Act ("ESA").

I. MANDATORY INJUNCTIONS

As indicated in its post-trial briefings (DE 536 (4/24/09) at 32-33 & DE 541 (5/15/09) at 14-18), the D.C. Circuit has not addressed whether the remedy of compelling a private party to seek a permit is available in a citizen suit such as this. Since the hearing, we have continued to research the matter and have not located any ESA caselaw that has awarded any such relief (in this Circuit or elsewhere). Accordingly, FEI maintains that there is no authority or legal basis for this Court to proceed in the manner requested by plaintiffs as doing so would violate the ESA. See 16 U.S.C. § 1540(g)(1)(A) (any person may commence a citizen suit "to enjoin any person" allegedly violating the ESA or its regulations).

II. DECLARATORY RELIEF UNDER THE ESA

Research has not yielded any authority where declaratory relief alone, absent an injunction, has issued against a private party under the ESA. There are numerous cases in this Circuit and others in which citizen suits have been filed for “declaratory and injunctive relief” against the government to challenge its conduct under the ESA. The nature of these suits overwhelmingly consists of challenges to government conduct such as the agency’s decision to list (or not) a species as endangered or threatened, the agency’s failure to prepare an environmental impact statement, or some regulation passed by the agency. Unlike the instant case, where plaintiffs now seek declaratory relief only, declaratory and injunctive relief in the cases just described are *sought together*. See, e.g., Wyoming Outdoor Council v. Bosworth, 284 F. Supp. 2d 81, 82, 87 (D.D.C. 2003) (seeking declaratory and injunctive relief for alleged APA violation due to government failure to consult under ESA); Castlewood Products v. Norton, 264 F. Supp. 2d 9, 11 (D.D.C. 2003) (seeking declaratory and injunctive relief for APA challenge to seizure of lumber pursuant to ESA); American Lands Alliance v. Norton, 2004 WL 3246687, at *3 (D.D.C. June 2, 2004) (issuing injunction in challenge to species listing: “A mere declaratory judgment without any injunctive relief would create the anomalous result of allowing the FWS to continue applying an invalid regulation.”); Colorado River Cutthroat Trout v. Kempthorne, 448 F. Supp. 2d 170, 172-73 (D.D.C. 2006) (declaratory and injunctive relief under APA for failure to list trout as endangered); Am. Forest Resource Council v. Hall, 533 F. Supp. 2d 84, 85-86 (D.D.C. 2008) (declaratory and injunctive relief under APA challenging five-year status review of seabird).

As a result, declaratory relief is not the sole relief requested – it is sought in conjunction with an order either compelling or enjoining the agency’s action. That is decidedly different than

the present case where plaintiffs have abandoned their request for injunctive relief and are not statutorily entitled to claim compulsive relief against FEI. Cf. 16 U.S.C. 1540(g)(1)(B) (“compel the Secretary”). Moreover, the cases against the government are typically pleaded not just under the ESA but, again, in conjunction with an array of other federal statutes including the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), etc. that are not present in this case. Those statutory schemes expressly state that the court can order *the government* to act. See, e.g., ESA, 16 U.S.C. § 1540(g)(1)(B) (“to compel the Secretary”); APA, 5 U.S.C. §§ 702, 706 (recognizing right to mandatory or injunctive decree to, *inter alia*, compel agency action, and hold unlawful and set aside agency action). Specifically, section 10 of the APA expressly grants the court the power to declare agency action unlawful: the reviewing court shall “**hold unlawful** and set aside agency action, findings, and conclusions found to be [arbitrary and capricious].” 5 U.S.C. § 706(2)(A) (emphasis added). The ESA has no such counterpart for citizen suits against private persons. See 16 U.S.C. § 1540(g)(1)(A).

Notably, even under the ESA, courts will not enter declaratory judgment if it serves no useful purpose or the case is otherwise moot. Nat’l Wildlife Fed. v. Caldera, 2002 WL 628649, *4-5 (D.D.C. March 26, 2002); Greenpeace USA v. Mosbacher, 719 F. Supp. 21, 21 (D.D.C. 1989) (declining to enter declaratory judgment which would be “merely academic” and “could have no effect” where underlying claims were moot). The D.C. Circuit has expressed concern as to whether maintenance of a declaratory judgment is justified once the injunctive relief is moot. Defenders of Wildlife v. Norton, 89 Fed. Appx. 273, 2004 WL 438590 (D.C. Cir. 2004) (remanding to district court to determine issue). That case was brought pursuant to the ESA and

the APA, and on remand, the request for declaratory judgment was abandoned. See Ex. 1, Joint Motion for Modification of Remedial Order, Civ. No. 1:00-cv-2996-GK (DE 77) (4/29/04).

Research did yield authority where the plaintiffs actually pleaded the Declaratory Judgment Act. See The Ocean Conservancy v. Gutierrez, 394 F. Supp. 2d 147, 150 (D.D.C. 2005), *aff'd*, 488 F.3d 1020 (D.C. Cir. 2007) & Ex. 2, Ocean Conservancy Cmpt. ¶ 10. Coincidentally, this includes a case brought by plaintiff API itself, API v. Holsten, 541 F. Supp. 2d 1073, that plaintiffs now rely upon to argue a mandatory injunction should be compelled against FEI. (Ex. 3, Holsten Cmpt. ¶ 2).

Accordingly, as indicated in its post-trial briefings, FEI maintains that the ESA does not contemplate or support a citizen suit for declaratory judgment only. Although that is the remedy currently sought by plaintiffs, that is not how they pleaded their complaint. Declaratory relief alone in this case does not affect the rights of the parties, nor does it redress any alleged injuries by plaintiffs. What plaintiffs now seek is an impermissible advisory opinion, which the Court should decline to issue.

Dated this 17th day of July 2009.

Respectfully submitted,

/s/

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