UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S NOTICE OF FILING AUTHORITY REGARDING THE APPLICABILITY OF THE PRIMARY JURISDICTION DOCTRINE

Contrary to the contention of Feld Entertainment, Inc.'s ("FEI"), see FEI's Notice of Filing Regarding The Primary Jurisdiction Doctrine ("FEI Prim. Jur. Br.") (DN 550), the primary jurisdiction doctrine has no application to this case for several reasons.

First, as explained in plaintiffs' other filing today, see Plaintiffs' Submission Regarding Declaratory Relief ("Pl. Dec. Rel. Sub."), plaintiffs have not "abandon[ed] their claim for injunctive relief," and are not asking that the Court express a "preliminary view on the merits" here. FEI Prim. Jur. Br. at 1-2. To the contrary, plaintiffs have suggested that the Court initially craft declaratory relief, based on specific findings, that FEI is in violation of the Endangered Species Act's ("ESA") take prohibition, 16 U.S.C. § 1539, after which the Court would provide FEI a brief period of time to apply for a permit before crafting any injunctive relief. Pl. Dec. Rel. Sub. at 1-2. The rationale for this staged approach is three-fold: (1) it would respond to FEI's insistence that its due process rights are somehow at risk from immediate application of the

ESA[1]; (2) it would trigger the Congressionally mandated process whereby the expert agency would assess whether take should be authorized, and on what specific conditions; and (3) it would allow the Court to take into account the pursuit of a permitting process in determining the nature and extent of any injunctive relief. See Strahan v. Coxe, 939 F. Supp. 963 (D. Mass. 1996).[2]

In any case, since FEI's entire primary jurisdiction argument is based on the false premise that plaintiffs have "abandoned" any request for injunctive relief, the Court need go no farther to reject this argument.

Second, FEI overlooks the critical distinction between the approach plaintiffs have suggested here, and the purpose and function of a referral to an agency under the primary jurisdiction doctrine. Primary jurisdiction was created to permit the courts to allow an agency to decide a specific issue pending before the Court. See Reiter v. Cooper, 507 U.S. 258, 268-69

---

[1] See Trial Tr. 58:23-59:5, Feb. 26, 2009 p.m. (Mr. Simpson: "I think when you're dealing with a standard like this, Judge, at some point there's a due process issue in the case. We're standing here in 2009 being sued for a taking. I don't think the standard gives fair notice. You know, the agency has never applied it. There has never been a case that says this is a taking. At some point, 35 years after the statute's passed, I think you have a right to rely on the state of the law"); see also Def. Obj. to Pl. Proposed Conc. of Law (DN 540) ¶ 111 ("FEI is entitled to notice of whatever it is that is supposed to be enjoined, otherwise it has no ability to comply meaningfully with any such order and could not even seek a permit to cover whatever it is that is supposedly unlawful. To proceed otherwise is unconstitutional").

[2] For example, if FEI is pursuing a Section 10 permit in good faith, the Court could take that into account in determining the extent and nature of any injunctive relief to craft during the permitting process. That is precisely what occurred in Strahan – a case relied on by FEI, see FEI Prim. Jur. Br. at 7, n.5, but that squarely supports the approach plaintiffs have suggested. Thus, in that case, the Court found that certain practices by non-federal actors violated the ESA's take prohibition, directed the parties to pursue the permitting process, and took that into consideration in refraining from crafting more far-reaching injunctive relief. See 939 F. Supp. at 990-92.

(1993). Here, by contrast, plaintiffs have invoked the ESA's expansive citizen suit provision, 16 U.S.C. § 1540 – a provision crafted by Congress precisely to ensure that "private attorneys general" may supplement federal enforcement," Bennett v. Spear, 520 U.S. 154, 165 (1997) – to request that the Court resolve whether FEI's treatment of its Asian elephants violates the "take" prohibition of the Act. 16 U.S.C. § 1538. The function plaintiffs have suggested for the FWS is entirely different; in the Section 10 process, that agency will determine whether – and under what conditions – to grant a permit authorizing "take" to occur. Id. § 1539. Not surprisingly, FEI has not identified any remotely analogous case where primary jurisdiction was invoked to avoid resolving a claim on the merits.

To the contrary, there is a long line of cases where federal courts have done precisely what plaintiffs are asking the Court to do here – i.e., determine, pursuant to its de novo review authority, whether a defendant has violated ESA Section 9. 16 U.S.C. § 1538. While some of these cases have been against federal agencies,[3] others have involved state and local entities,[4] and

---

[3] See, e.g., Defenders of Wildlife v. Martin, No. 05-248, 2007 WL 641439 (E.D. Wash. Feb. 26, 2007) (federal agency violating Section 9); Am. Rivers v. U.S. Army Corps of Eng'rs, 271 F. Supp. 2d 230 (D.D.C. 2003) (same); Defenders of Wildlife v. Envtl. Prot. Agency, 688 F. Supp. 1334 (D. Minn. 1988), aff'd, 882 F.2d 1294 (8th Cir. 1989) (same); Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), aff'd sub nom. Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991) (same).

[4] See, e.g., Swinomish Indian Tribal Cmty. v. Skagit County Dike Dist. No. 22, No. C07-1348, 2008 WL 6150419 (W.D.Wash. Sept. 5, 2008) (local district violated Section 9); Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073 (D. Minn. 2008) (state agency violating Section 9); Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70 (D. Me. 2008) (same); United States v. Town of Plymouth, 6 F. Supp. 2d 81 (D. Mass. 1998) (preliminarily finding local government violating Section 9); Strahan v. Coxe, 939 F. Supp. 963 (D. Mass. 1996), aff'd 127 F.3d 155 (1st Cir. 1997) (state agency violated Section 9); Loggerhead Turtle v. County Council of Volusia County, 896 F. Supp. 1170 (M.D. Fla. 1995) (preliminarily finding County to be violating Section 9); United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992) (local water district violating Section 9); Swan View Coal., Inc. v. Turner, 824 F. Supp.

still others have involved private parties.[5] In each of these cases the courts decided, as a threshold matter, whether the defendant was involved in a take, without referring that issue to the primary jurisdiction of the FWS.

Indeed, several Courts have expressly rejected the argument FEI presses here, explaining that the primary jurisdiction doctrine cannot be invoked to avoid the "take" issue but, rather, that the FWS's expertise is properly brought to bear in any ensuing permitting process. See, e.g., Coho Salmon v. Pac. Lumber Co., 61 F. Supp. 2d 1001, 1015 (N.D. Cal. 1999); see also Loggerhead Turtle, 896 F. Supp. at 1177. As the court explained in Coho Salmon, while the Section 10 process requires the "FWS to determine the extent of the impact on coho salmon resulting from the issuance of an" incidental take permit, "[i]n contrast, enforcement of the ESA's prohibition against the 'take' of endangered or threatened species has been placed squarely within the jurisdiction of the courts through the ESA's citizen suit-provision." 61 F. Supp. 2d at 1015 (emphasis added); Loggerhead Turtle, 896 F. Supp. at 1177 ("[T]he Court is called upon to ascertain whether the County's activities will likely result in future takings of protected sea turtles. This is no invasion of the [FWS's] expertise"); see also Sierra Club v.

---

923 (D. Mont. 1992) (state agency violating Section 9); Palila v. Haw. Dep't. of Land and Nat. Res., 471 F. Supp 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (state agency violating Section 9); Palila v. Haw. Dep't. of Land and Nat. Res., 649 F. Supp 1070 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988) (same).

[5] See, e,.g., Seattle Audubon Soc'y v. Sutherland, No. 06-1608, 2007 WL 2220256, (W.D. Wash. Aug. 1, 2007) (enjoining private party based on Section 9 violation); Ctr. for Biological Diversity v. Marina Point Dev. Assoc., 434 F. Supp. 2d 789 (C.D. Cal. 2006) (private company found violating Section 9); Marbled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995), aff'd 83 F.3d 1060 (9th Cir. 1996) (same); National Wildlife Fed'n v. Burlington N. R.R., Inc., No. CV-91-79-GF, 1992 WL 613680 (D. Mont. May 28, 1992), aff'd 23 F.3d 1508 (9th Cir. 1994) (same).

Tri-State Generation & Transmission Ass'n, 173 F.R.D. 275, 283-84 (D. Colo. 1997) (citing cases rejecting primary jurisdiction arguments, and explaining, "[l]ike the majority of these courts, I find that applying the doctrine of primary jurisdiction to citizen suits would frustrate Congress's intent, as evidenced by its provisions for citizen suits, to facilitate broad enforcement of environmental-protections laws and regulations") (emphasis added).[6]

Accordingly, FEI's effort to conflate (a) FEI invoking the administrative process after the Court finds a violation of Section 9, with (b) the primary jurisdiction doctrine – whereby the Court would refer to the FWS the issue of whether there is a Section 9 violation in the first instance – must be rejected. Far from "functionally asking for the same result" as would occur under the primary jurisdiction doctrine, as FEI asserts, FEI Prim. Jur. Br. at 7, plaintiffs seek a sensible remedy under which the Court would perform the role Congress contemplated in

[6] As courts have also explained in the context of other environmental statutes, primary jurisdiction has no role where a plaintiff is proceeding under a citizen suit provision and the statute specifically permits the federal government to pursue the case should it so choose. See, e.g., PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 618-19 (7th Cir. 1998) (invoking primary jurisdiction "would be an end run around RCRA. Congress has specified the conditions under which the pendency of other proceedings bars suit under RCRA and, as we have just seen, those conditions have not been satisfied here"); Black Warrior Riverkeeper, Inc. v. Birmingham Airport Auth., 561 F. Supp. 2d 1250, 1255 (N.D. Ala. 2008) ("Because the statutory language of the [Clean Water Act] clearly provides for situations where an enforcement action is commenced [by the government] between the time the 60 day notice is sent and a lawsuit filed, the court finds the defendants' arguments concerning primary jurisdiction unpersuasive"). Under the ESA, the agency has an absolute right to intervene in a suit, 16 U.S.C § 1540(g)(3)(b), but the agency has not done so here, although it was provided copies of plaintiffs' sixty-day notice letters, PWC 91. Cf. Disability Rights Council of Greater Wash. v. WMATA, 239 F.R.D. 9, 20 (D.D.C. 2006) (rejecting primary jurisdiction referral where "plaintiffs have acted within their statutory rights to bring an action before this court"). Indeed, this reasoning must apply with particular force here, where Congress framed the citizen suit provision with "remarkable breadth" even when compared to other citizen suit provisions. Bennett, 520 U.S. at 165.

enacting the citizen suit provision, while at the same time triggering the administrative review process that the ESA prescribes for all authorized takes.[7]

Finally, even putting aside those ESA and other environmental cases, the primary jurisdiction doctrine has no application here because there is no provision under the ESA that would allow the plaintiffs to compel the agency to resolve or even address the matter. See Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 687-88 (1965) ("Finally, we must reject the unions' primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination"); Rohr Indus., Inc. v. WMATA, 720 F.2d 1319, 1323, (D.C. Cir. 1983) ("[w]here no administrative remedy exists, the doctrine of primary jurisdiction does not apply") (other citations omitted).

Thus, while many of the cases cited by defendants involve statutes that contain administrative procedures whereby a petitioner may formally apply to the agency for relief and is then statutorily entitled to a response, see, e.g., FEI Prim. Jur. Br. at 2 (citing Reiter, 507 U.S. at 267, n.3 (explaining that under primary jurisdiction doctrine the court would "stay[ ] its proceedings while the shipper files an administrative complaint under § 11701(b)"), the only available route for relief in the ESA is the citizen suit provision at issue here. See also Total Telecom. Svcs. v. Am Tel. and Tel., 919 F. Supp. 472, 482, n.15 (D.D.C. 1996) (noting

---

[7] On the other hand, when FEI's view on primary jurisdiction is considered alongside its position on the availability of declaratory relief, FEI appears to be taking the position that the Court must either totally abdicate its judicial review function, or craft immediate far-reaching injunctive relief – there is evidently no middle ground in FEI's peculiar conception of the law. As explained in the other memorandum being filed today, there is certainly no jurisprudential reason why the Court cannot, as an initial matter, issue declaratory relief triggering the Section 10 process.

availability of administrative remedy in invoking primary jurisdiction); Himmelman v. MCI Comm. Corp., 104 F. Supp. 2d 1, 9 (D.D.C. 2000) (noting that the plaintiff can petition the agency, which "will be statutorily obligated to investigate the complaint and issue an order within prescribed time periods").[8]

Defendants have referenced two cases where apparently there was no specific statutory provision requiring the agency to consider the matter. FEI Prim. Jur. Br. at 4-5 (citing Am. Auto Mfr. Ass'n v. Mass. Dep't of Envtl. Prot. ("Am. Auto."), 163 F.3d 74, 81 (1st Cir. 1998) and Lodge 1858, Am. Fed. of Gov't Employees v. Webb, 580 F.2d 496 (D.C. Cir. 1978)). However, those cases are instructive regarding the perils of going down the road FEI is suggesting, even aside from its impropriety in a case including an expansive citizen suit provision, where the Court has already conducted a six-week long trial and collected volumes of evidence.

Thus, in Am. Auto., where the court requested the opinion of the Environmental Protection Agency on several legal issues concerning the proper interpretation of the Clean Air Act, the court subsequently recognized that this course "was not a wise one," because the issues before the Court "fall squarely within this Court's jurisdiction . . .." Assn of Intl Auto. Mfrs., Inc. v. Comm., Mass. Dept of Envtl Prot. ("Auto Mfrs."), 208 F.3d 1, 4-5 (1st Cir. 2000). Thus, two years after the referral to EPA the court ultimately resolved the very matters that had been

---

[8] The doctrine may also come into play when there are proceedings pending before the agency, but even under those circumstances courts have been unwilling to invoke the doctrine where plaintiffs are proceeding under the ESA. See, e.g., Loggerhead Turtle, 896 F. Supp. at 1180-82 (resolving Section 9 claim despite the fact that the County had applied for a permit under Section 10); Coho Salmon, 61 F. Supp. 2d at 1015-16 ("the pendency of [defendant's incidental take] application is not relevant to whether [defendant's] timber harvesting operations have resulted or will imminently result in the 'take' of coho salmon in the watersheds at issue in this action").

the subject of the referral. Id. Similarly, here, even putting aside the fact that plaintiffs are not requesting, and have never requested, that the Court refer the question of whether FEI is engaged in a "take" to the FWS, such a course would not obviate the need for this Court ultimately to resolve whether defendant's conduct constitutes an unlawful take, since the FWS's views on the matter would be advisory only. See also Lodge 1858, Am. Fed. of Gov't Employees. v. NASA, 424 F. Supp. 186 (D.D.C. 1976) (reviewing, and largely rejecting, agency findings made after referral pursuant to primary jurisdiction).[9]

Because there is no basis for invoking primary jurisdiction here, FEI's further argument that the Court may not resolve the merits of plaintiffs' claims is also baseless. FEI Prim. Jur. Br. at 5-7. Once again, plaintiffs are not asking the Court to solicit the views of the FWS as to whether a take is occurring here; they believe they have more than adequately demonstrated to the Court that FEI is taking its endangered Asian elephants. Indeed, FEI's counsel as much as admitted this point when he conceded that the record shows that FEI is both "wounding" the elephants and "harming" – i.e., injuring – them within the plain language of those statutory terms. See Plaintiffs' Proposed Conclusions of Law (DN 543-3) ¶¶ 82-84.

Rather, plaintiffs have simply suggested that, as a precursor to crafting injunctive relief, the Court – upon finding a "take" – provide FEI an opportunity to seek a permit with the FWS

---

[9] Again, it is critical to bear in mind that the analogy to this case would be the Court referring the threshold question of whether there is a take to the FWS – which plaintiffs do not believe is appropriate or necessary – not FEI applying for a Section 10 permit after finding a violation of Section 9, which plaintiffs have proposed. However, as plaintiffs have previously suggested, if the Court were to consider soliciting the FWS's views – e.g., in the form of an amicus brief – on whether FEI's conduct constitutes an impermissible take, it should do so after making factual findings based on the extensive testimony and exhibits reviewed by the Court. That would ensure that the FWS's views are based on the same factual predicate. See Plaintiffs' Mem. Regarding Relevant Stat. and Reg. Auth. (DN 418) (Feb. 13, 2009) at 8, n.7.

under Section 10 of the ESA. Once again, nothing about that manner of proceeding implicates the principles of primary jurisdiction.[10]

Respectfully submitted,

/s/ Howard M. Crystal

Howard M. Crystal (D.C. Bar No. 446189)
Katherine A. Meyer (D.C. Bar No. 244301)
Eric R. Glitzenstein (D.C. Bar No. 358287)

Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206

Dated: July 21, 2009

Counsel for Plaintiffs

[10] As noted, see supra at 2, n.2, FEI's reliance on Strahan, 939 F. Supp. 963, for the proposition that the court should not make any findings before referring the matter to the agency is unavailing. FEI Prim. Jur. Br. at 7, n.5. In that case, before specifically ordering the defendants to apply for a permit under ESA Section 10, 939 F. Supp. at 990, the court made extensive findings that defendants were engaged in the unlawful "take" of listed species. See, e.g., id. at 984 ("I find that there is sufficient evidence in the record before me that the entanglement of endangered whale species in fishing gear in Massachusetts waters causes injury or death to those species"); id. at 989 ("[I]t is clear that endangered whales use Massachusetts coastal waters where gillnets and lobster gear are placed, and that gillnets and lobster gear have harmed endangered whales and are likely to continue doing so"). What the court declined to do was issue an injunction before allowing the permitting process to go forward, id. at 991-992 – precisely what plaintiffs have suggested should be done here.