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' SUBMISSION REGARDING THE COURT'S AUTHORITY TO ISSUE DECLARATORY RELIEF IN ADDITION TO INJUNCTIVE RELIEF IN THIS CASE

Pursuant to the Court's inquiry at the July 14, 2009 hearing, this submission addresses the Court's authority to grant the relief that has been requested by the plaintiffs in this case under the Endangered Species Act ("ESA").

1. Plaintiffs Have Not "Abandoned" Their Request For Injunctive Relief.

At the outset, plaintiffs wish to reiterate in the most emphatic terms that, contrary to the way defendant Feld Entertainment Inc. ("FEI") has chosen to characterize the relief that plaintiffs have suggested the Court craft in this case, plaintiffs have certainly not "abandoned" their request for injunctive relief. Rather, as they made absolutely clear in their Proposed Conclusions of Law, plaintiffs believe that it would be entirely proper for the Court to craft immediate injunctive relief to stop the bull hook and chaining practices that they have demonstrated to the Court are "taking" – i.e., "wounding," "harming," and "harassing" – the endangered Asian elephants in FEI's possession. See Plaintiffs' Proposed Conclusions of Law ("PCOL") at 44, ¶ 104.

However, in light of the eleventh hour "due process" concerns raised by FEI,[1] as well as this Court's inquiries during the trial about whether there is an appropriate way to incorporate the views of the federal government, plaintiffs simply suggested a two-tiered approach under which the Court would first issue its findings of fact and conclusions of law concerning the FEI practices that constitute a "take" under the ESA, and afford FEI 30 days to apply for a permit from the Fish and Wildlife Service ("FWS") to seek authority to engage in any such practices on the grounds that – as FEI has asserted – they nevertheless "enhance the propagation or survival of the species" within the meaning of Section 10 of the Act. See PCOL at 51, ¶ 116 (proposing that the Court "defer issuing immediate injunctive relief at least for a limited time to afford FEI the opportunity to initiate the section 10 permitting process") (emphasis added). As plaintiffs explained, should FEI refuse to seek such a permit – thus bypassing the Congressionally mandated mechanism for obtaining the FWS' authorization to engage in a "take" – the Court could then either order it to do so or simply enjoin the illegal practices. See id. (after 30 days, "[t]he Court will then decide whether it is necessary to issue further injunctive relief").

This is by no means an "abandonment" of plaintiffs' request for injunctive relief. On the contrary, it is simply a temporary deferment of injunctive relief to provide FEI an opportunity to bring itself into compliance with the law – the precise function of declaratory relief – as well as an eminently sensible way of crafting a remedial approach in this particular case. See California v. Grace Brethren Church, 457 U.S. 393, 408 n.21 (1982) (**"**In enacting the Declaratory Judgment Act, Congress

[1] See, e.g., Trial Tr. Feb. 26, 2009 p.m. at 58:23 - 59:59:05 (FEI's counsel complained that there would be a "due process" problem if the Court determined that FEI's practices were "taking" the elephants because "the agency has never applied"the take prohibition to FEI; see also Trial Tr. March 11, 2009 a.m. at 50:17 - 50:23 (stating that if the court were to declare that FEI's practices are "taking" the elephants, "then I think there's a significant problem here about whether it's fair to expect this company to have understood that.")

recognized the substantial effect declaratory relief would have on legal disputes. Thus, while Congress perceived declaratory judgments as a device to reduce federal-court abuses associated with injunctions, Congress also recognized that declaratory relief would 'settle controversies') (legislative history citations omitted) (emphasis added); see also Hecht v. Bowles. 321 U.S. 321, 329 (1944) ("[t]he essence of equity jurisdiction" is the power of the court "to mold each decree to the necessities of the particular case").

2. This Court Has Authority To Grant The Suggested Relief.

The Court clearly has authority to grant the suggested relief if the Court finds that this is the most appropriate way to remedy the particular violations of the ESA that have been demonstrated here. The citizen suit provision of the ESA provides that the Court may "enjoin any person . . . who is alleged to be in violation of any provision of [the ESA] or regulation issued under the authority thereof . . .," and it further provides that the Court "shall have jurisdiction . . . to enforce any such provision or regulation . . . ." 16 U.S.C. § 1540(g) (emphasis added).

Thus, FEI is wrong when it asserts that cases requiring the government to take certain actions are somehow different because they are pled under statutory schemes that "expressly state that the court can order the government to act." FEI Notice of Filing Regarding Relief (DE 551) at 3 (emphasis added). The citizen suit provision of the ESA expressly authorizes this Court to "enjoin any person," which includes FEI. 16 U.S.C. § 1540(g); see also 16 U.S.C. § 1532(13) ("person" includes "corporation"). Therefore, because an order requiring FEI to apply for a permit qualifies as an injunction – this Court has authority under the plain language of the statute to grant such relief that has been requested here. See, e.g., Black's Law Dictionary (8th ed. 2004) ("affirmative injunction" or "mandatory injunction" requiring a party to take action is "[a]n injunction that orders an affirmative act

or mandates a specified course of conduct") (emphasis added).

As plaintiffs have also stressed, FWS regulations specifically provide that all persons who wish to engage in practices for which a permit is required under the ESA – including either an "enhancement" or "incidental" permit to "take" an endangered species under Section 10 – "shall . . . obtain a valid permit authorizing such activity." 50 C.F.R. § 13.1 (emphasis added). Accordingly, once this Court finds that FEI's bull hook and chaining practices constitute the "take" of the Asian elephants, the permitting scheme embodied in Section 10 of he Act necessarily comes into play – i.e. the Court can order FEI to apply for a permit pursuant to this regulation. Therefore, under the plain language of the citizen suit provision, this Court has broad authority to craft appropriate relief that "enforces" both the prohibition against the "take" of a listed species as well as the binding regulation that requires FEI to obtain a permit for any such conduct.

One mechanism for such "enforcement,"as plaintiffs have suggested as an initial step, is for the Court to make appropriate findings and give FEI a brief period of time to invoke the mandatory permitting process – **indeed, FEI asserts that it is eligible for both an "enhancement" permit as well as an "incidental take" permit**. See FEI's Objections to Plaintiffs' Proposed Conclusions of Law, ¶ 110. Alternatively, the Court certainly may require FEI to apply for a permit for all activities that the Court finds constitute a "take." [2] Such relief would not only further enforcement of the statutory and

[2] See, e.g., Animal Protection Institute v. Holsten, 541 F. Supp.2d 1073, 1081 (D. Minn. 2008) (ordering state Department of Natural Resources to take all action necessary to insure no further taking of threatened Canada Lynx by trapping or snaring activities, "including, but not limited to: applying for an incidental take permit for Canada Lynx"); Strahan v. Coxe, 127 F.3d 155, 172 (1st Cir. 1997) (affirming district court's remedial order requiring state officials to pursue a Section10 permit); see also Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120-22 (D.D.C. see also Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120-22 (D.D.C. 2002) (Sullivan, J.), vacated as moot, 2003 WL 179848 (D.C. Cir. Jan. 23, 2008) (recognizing the court's authority to order the Secretary of the Navy to apply to the FWS for a

regulatory schemes, but would also be appealable. See, e.g., Cobell v. Norton, 334 F.3d 1128, 1137 (D.C. Cir. 2003) ("As the Supreme Court stated in Carson v. American Brands, Inc., 450 U.S. 79(1981), § 1292(a)(1) provides [appellate] jurisdiction over not just an injunction so-denominated, but over any order having the 'practical effect' of an injunction.").

Moreover, even aside from the plain language of the citizen suit provision, it is well established that a court sitting in equity may avail itself of the additional tool of declaratory relief in order to fashion appropriate relief in a particular case. As plaintiffs have explained in their proposed Conclusions of Law, see PCOL at 44-45, ¶¶ 103-104, this principle has been recognized in other ESA cases. Thus, in Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002), the court upheld the district court's decision not to dismiss as moot a case challenging the FWS's failure to make a final listing determination even though after the case had been filed the FWS had made a final decision, because the plaintiffs had also asked for declaratory relief that the FWS's decision process was unlawful. However, this Court need not resolve whether it could afford declaratory relief alone here, because plaintiffs also seek additional injunctive relief.[3]

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permit following a finding that the Navy was unlawfully taking migratory birds); Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (requiring the Navy to obtain a permit under the Clean Water Act authorizing it to discharge ordinance into the ocean).

[3]Moreover, because FEI is currently engaged in the practices that "take" the elephants, the cases it relies on for the proposition that declaratory judgment "serves no useful purpose," FEI Notice of Filing at 3, are not relevant here. Thus, in National Wildlife Federation v. Caldera, 2002 WL 628649 (D.D.C. March 26, 2002), the court simply held that it could not issue declaratory relief declaring unlawful the FWS's entire program for issuing permits for construction in the habitat of the endangered Florida panther, without running afoul of the Supreme Court's ruling in Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) that such "programmatic" challenges, rather than site-specific ones, are not ripe for review. In Greenpeace v. Mosbacher, 719 F. Supp. 21 (D.D.C. 1989), the court held that a challenge to the Secretary of Commerce's 1988 decision not to certify Iceland as a country that impairs international whaling conservation was moot even though the plaintiffs sought declaratory relief, because by the time

As Judge Kessler explained in Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 22-23 (D.D.C. 2002), vacated as moot, Defenders of Wildlife v. Norton, 89 Fed. Appx. 273, 2004 WL 438590 (D.C. Cir. 2004), "it is well-settled that when 'Congress [has] intended to create a right of action . . . [courts have] the availability of all appropriate remedies unless Congress has *expressly* indicated otherwise.'" (emphasis in original) (citing Franklin v. Gwinnett County Pub. Schs, 503 U.S. 60, 66 (1992) and Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982)). This principle was articulated over fifty years ago by the Supreme Court in Porter v. Warner Holding Co.:

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

328 U.S. 395, 398 (1946) (emphasis added).

As Judge Kessler further explained in Defenders of Wildlife, 239 F. Supp. 2d at 23, the ESA expressly provides that "[t]he injunctive relief provided by this subsection shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief . . .." Id., quoting 16 U.S.C. § 1540(g)(5) (emphasis added). Therefore, because, as discussed below, declaratory relief is available to the plaintiffs under the Declaratory Judgment Act, and because such relief would also assist in "enforcing" the ESA within the meaning of the citizen suit provision, this Court surely may conclude that the phased approach proposed

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the case was litigated Iceland had completely changed its practices and the Secretary had issued a new decision that was not before the court. Further, contrary to FEI's assertion, in Defenders of Wildlife v. Norton, 89 Fed. Appx. 273, 2004 WL 438590 (D.C. Cir. 2004), the Court of Appeals did not express any "concern" about whether declaratory relief was appropriate in that case, but simply remanded that issue to the district court after all of the parties agreed on appeal that the injunction that Judge Kessler had issued should be lifted.

by plaintiffs is the best way to ameliorate the ESA violations that are not at issue here. See also Freeman v. Pitts, 503 U.S. 467, 487 (1992) ("The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by the unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision.") (emphasis added).

3. The Court Can Issue Declaratory Relief Despite The Fact That Plaintiffs Did Not Cite The Declaratory Judgment Act In Their Complaint.

That plaintiffs did not specifically cite the Declaratory Judgment Act in their Complaint – which has always been captioned as one for Declaratory and Injunctive Relief – is of no consequence to the Court's ability to issue declaratory relief in fashioning a remedy in this case. The Declaratory Judgment Act ("DJA") "is not an independent source of federal jurisdiction." Schilling v. Rogers, 363 U.S. 666, 677 (1960). Rather, as the Supreme Court has established, it simply affords the Court an additional basis for crafting appropriate relief in any case over which the Court already exercises jurisdiction. See, e.g., Wilton v. Seven Falls Co. 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver") (emphasis added); Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd., 41 F.3d 764, 772 (1st Cir 1994) ("The DJA creates a particular remedy where a federal district court already has jurisdiction to entertain a suit").

Accordingly, it is not necessary to cite the actual statute in the Complaint for the Court to grant such relief. See, e.g., Townhouses of Highland Beach Condomin. v. QBE Ins. Corp., 504 F. Supp. 2d 1307, 1309-10 (S.D. Fla. 2007) (denying motion to dismiss based on failure to cite the Declaratory Judgement Act because that statute "is procedural in nature and is not an independent basis for federal jurisdiction"). Indeed, judges of this Court have issued declaratory relief in other cases where the DJA

is not cited in the Complaint.[4] Moreover, under Fed. R. Civ. P. 54(c), even if plaintiffs had not asked for any declaratory relief in their Complaint, this Court could nonetheless provide such relief in crafting the remedy in this case should the Court determine that this would be the most appropriate way to cure the violations of law that have been proven. See Fed. R. Civ. P. 54(c) ("Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings") (emphasis added).[5]

Here, however, plaintiffs have always sought declaratory, as well as injunctive relief. Thus, both the original 2000 Complaint in the predecessor suit, Civ. No. 00-1641, and the 2003 Complaint in this case, were captioned "Complaints For Declaratory and Injunctive Relief," and both Complaints specifically requested the Court to issue relief "declaring that defendants' treatment of its elephants

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[4] See, e.g., Colo. River Cutthroat Trout v. Kempthorne, 448 F. Supp. 2d 170 (D.D.C. 2006) (Friedman, J.) (see Amended Complaint, 2004 WL 5609563 (DE 45)); Humane Soc. of U.S. v. Johanns, 520 F. Supp. 2d 8 (D.D.C. 2007) (Kollar-Kotelly, J.) (see First Amended Complaint, 2006 WL 5710937 (DE 3)); Wright v. FBI, 613 F. Supp. 2d 13 (D.D.C. 2009) (Kessler, J.) (see Second Amended Complaint, 2003 WL 25629877 (DE 26)); Cobell v. Norton, 407 F. Supp. 2d 140 (D.D.C. 2005) (Lamberth, J.) (see Complaint, 1996 WL 34443583 (DE 1)); Bishop v. Int'l Ass'n of Bridge, 310 F. Supp. 2d 33 (D.D.C. 2004) (Kessler, J.) (see Complaint, 2003 WL 23781726 (DE 1)).

[5] See also Fed. R. Civ. P. 54 advisory committee notes (1937 adoption) (This provision "makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both.") (emphasis added); 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2664 (3d ed. 2000) ("If defendant has appeared and begun defending the action, adherence to the particular legal theories of counsel that may have been suggested by the pleadings is subordinated to the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not."); Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 388 F.3d 337, 341 (D.C. Cir. 2004) ("The liberal concepts of notice pleading embodied in the Federal Rules do not require the pleading of legal theories," but instead require only the pleading of basic factual allegations.); Katzenbach v. McClung, 379 U.S. 294, 296 (1964) (even where declaratory relief is not requested the courts may grant such relief where the pleading and proof show that such relief would be appropriate).

violates the ESA and that statute's implementing regulations," and "enjoining defendant[] from beating, wounding and injuring endangered elephants . . . and keeping elephants on chains for most of the day, unless and until it obtains permission from the FWS pursuant to the procedural and substantive requirements of section 10 of the ESA." See 2000 Complaint at 20; 2003 Complaint at 21. The Court of Appeals referenced this fact in its 2003 decision on standing, see ASPCA v. Ringling Bros., 317 F.3d 334, 335-336 (D.C. Cir. 2003) (noting that plaintiffs "sought a declaratory judgment that Ringling Bros. violated the Act and the regulations thereunder") (emphasis added), and FEI itself also referenced this fact in its 2005 motion for summary judgment in this case. See FEI Summary Judgment Memorandum (Sept. 5, 2006) (DE 82) at 1 ("Plaintiffs seek declaratory and injunctive relief . . .") (emphasis added). Accordingly, FEI cannot legitimately argue that it is now somehow prejudiced by the fact that plaintiffs have suggested that the Court issue declaratory relief in crafting the remedy in this case.

4. The Court Should Issue The Relief That Is Necessary To Stop The Violations of the ESA That Plaintiffs Have Demonstrated.

Again, plaintiffs certainly have not relinquished their claim for injunctive relief in this case. Moreover, if as FEI's counsel appeared to represent at the July 14, 2009 hearing, FEI would refuse to apply for a permit should the Court find that its treatment of the Asian elephants violates the ESA – despite FEI's insistence that it would be eligible for such a permit, see FEI Objection to Pl. COL ¶ 110 – then the Court should either order FEI to do so, or immediately enjoin the illegal practices. See, e.g., Transcript of July 14, 2009 Hearing at 103 (FEI's counsel stated that if the Court issues a declaratory judgment that FEI's practices are taking the elephants FEI "may or may not go get a permit"). As discussed above, there is no question that the Court has the authority to order FEI to comply with 50 C.F.R. § 13.1 and seek an appropriate permit from the FWS if it wishes to continue to engage in these

unlawful practices.

To use an analogy, when an agency is violating its obligation to engage in Section 7 consultation under the ESA with regard to a longstanding activity that may adversely affect an endangered species, a court has two ways of bringing the agency into compliance – either by immediately enjoining the agency action or by ordering the agency to undertake and complete the Section 7 process. See, e.g., Washington Toxics Coal. v. EPA, 413 F.3d 1024, 1030 (9th Cir. 2005) (rather than immediately enjoin the EPA's registration of pesticides, a practice that had been occurring for may years, "[t]he district court ordered EPA to initiate and complete section 7(a)(2) consultation according to a prescribed schedule."); Fla. Key Deer v. Stickney, 864 F. Supp. 1222, 1241-42 (S.D. Fla. 1994) (ordering consultation as remedy for violation of Section 7(a)(2)); accord, Strahan v. Linnon, 967 F. Supp. 581, 623 (D. Mass. 1997). Remedying a violation of Section 9 with respect to a long-term practice that "takes" an endangered species, as is the case here, is not fundamentally different, particularly when the authority for enforcement of both types of violations of the ESA is section 1540(g)(1)(A) – the violator must either immediately stop the "take" or attempt to obtain a permit for some or all of the otherwise unlawful practices, as the courts ordered in API v. Holsten, 541 F. Supp. 2d 1073 and Strahan v. Coxe, 127 F.3d 155.[6]

Although the Court certainly is not bound by the specific remedy proposed by plaintiffs, there is no question that if the Court finds that FEI is violating the ESA by wounding, harming, or harassing the endangered Asian elephants, the Court should craft appropriate relief to remedy these violations of

[6] At the July 14, 2009 hearing, plaintiffs' counsel further enumerated the precise FEI practices that plaintiffs believe the record clearly shows constitute a "take" under Section 9. See Transcript at 93-95. Accordingly, if the Court agrees that plaintiffs have met their burden of proof that these practices "wound," "harm," or "harass" the endangered elephants, FEI should either apply for a permit to engage in those practices or be ordered to stop them.

the law. Thus, in TVA v. Hill, 437 U.S. 153, 185 (1978), because "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities," the court issued an injunction to stop the completion of a new dam that would result in the extinction of an endangered species, because that was the only way to accomplish the goals of the ESA under the circumstances in that case. Here, however, as in Washington Toxics Coalition and other cases involving ongoing practices, the court may craft a different kind of remedy that will nevertheless accomplish the objectives of the Act – by declaring that FEI's practices violate the "take" prohibition, and triggering FEI's obligation to comply with the permitting process.

As the Supreme Court further explained in United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 496, 497-98 (2001):

> Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute . . . Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.

(emphasis added). Accordingly, here, because plaintiffs have met their burden to prove that FEI's un-permitted bull hook and chaining practices are "likely" "taking" the endangered Asian elephants, see, e.g., Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9th Cir. 1995), the Court should craft whatever relief it concludes will best ensure that those practices come to an end under the particular circumstances, whether it is declaratory or injunctive in nature, or, as requested by plaintiffs, a combination of both forms of relief. As this Court itself observed in Ctr. for Biological Diversity v. Pirie, 201 F. Supp. 2d 113, 120 (D.D.C. 2002), "Supreme Court precedent is clear that the range of potential remedies considered by a district court must include only remedies aimed at securing prompt compliance with the statute being violated by the defendants." (emphasis added).

Respectfully submitted,

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