

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

ANIMAL WELFARE INSTITUTE, et al.,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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) **Case No: 03-2006 (EGS/JMF)**
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**DEFENDANT FELD ENTERTAINMENT, INC.'S PETITION FOR
ATTORNEYS' AND EXPERT WITNESS FEES**

FEE PETITION

EXHIBIT 4

(Pet., Ex. 4)

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

BORN FREE USA, et al.,

Plaintiffs,

v.

**GALE NORTON, Secretary, Department
of the Interior, et al.,**

Defendants,

and

**THE ZOOLOGICAL SOCIETY OF SAN
DIEGO, et al.,**

Intervenor-Defendants.

Civil Action No. 03-1497 (JDB)

MEMORANDUM OPINION

Plaintiffs, who include several organizations and two individuals interested in the welfare of elephants, bring this case against the United States Department of the Interior and the Fish and Wildlife Service ("FWS") (collectively, the "federal defendants"), challenging FWS's decision to issue permits to the San Diego Zoo and the Lowry Park Zoo (collectively, the "zoos") for the importation of eleven African elephants from Swaziland. Presently before the Court is plaintiffs' motion for a preliminary injunction to prevent the import of the elephants until this Court reaches a final determination on the merits. Although the expedited briefing on plaintiffs' motion was completed only on August 6, 2003, the parties require a decision on the motion for a preliminary injunction by today, August 8, because the zoos, who have intervened as defendants, represent

Plaintiffs ask the Court to reject Mr. Reilly's representations that he will kill the elephants. They point to Mr. Reilly's statements in the record that he will do everything possible to avoid culling the elephants, and they note that they have identified certain reserves in Africa that state that they would accept the elephants. Plaintiffs also note Mr. Reilly's long history with these elephants and his affinity for wildlife. Ultimately, however, they essentially ask the Court to take a leap of faith that, despite Mr. Reilly's statements in his affidavit that he will cull the elephants, in fact he will not do so.⁴

The Court cannot take such a leap. Granted, the Court does not appreciate brinksmanship. But the statements in Mr. Reilly's affidavit are unequivocal. Moreover they are generally consistent with his other statements about his intentions throughout the administrative record, see, e.g., AR 2 (Sept. 1., 2001, Memo from Mr. Reilly); AR 49; AR 75 (June 18, 2003, notice by Mr. Reilly), and thus seem to reflect well-considered views developed independent of this litigation. Although plaintiffs claim to have found suitable homes for the elephants, Mr. Reilly makes clear in his affidavit that he does not intend to pursue any alternatives other than immediate culling. Moreover, the Court notes in this regard, although culling may seem offensive, it has been previously employed to reduce animal populations in southern Africa. AR 40.

At the hearing in this matter, plaintiffs argued that the zoos may already have some control over the elephants and thus can prevent culling, at least until a final decision on the merits. The zoos, however, deny such control, and the import contracts produced to the Court by

⁴ In the end, as stated unequivocally by counsel for plaintiffs at the conclusion of the August 6 hearing, given the choice plaintiffs would rather see the elephants dead than in a zoo.

the zoos upon request of the plaintiffs do not indicate that the zoos would have the ability legally or factually at this time to prevent Mr. Reilly from culling the elephants. In sum, therefore, the Court must accept that if the elephants are not imported in the immediate future they will be culled.

In contrast to the relative certainty of the outcome in the event plaintiffs' motion for a preliminary injunction were granted, it is worth noting that it remains unclear what the disposition of the elephants would be in the event that the Court denied the motion but ultimately ruled in favor of plaintiffs on the merits after the elephants have been imported. Counsel for FWS explained at the hearing that in such circumstances, FWS could attempt to export the elephants back to Swaziland but FWS could not control whether or not Swaziland would accept the elephants. In light of Mr. Reilly's statements about the need to remove the elephants in the first place, the Court finds it implausible to believe Swaziland would take the elephants back. Moreover, although the issue was not briefed by the parties, a potential complication in seeking alternative destinations might be that CITES would make it difficult to export the elephants to any other country if this Court found that the initial importation into the U.S. had been invalid.

With this background, the Court will consider the relevant harms to plaintiffs, the federal defendants, the zoos, and the public.

A. Plaintiffs

Plaintiffs ask the Court to maintain the status quo because their interests will be irreparably harmed if the elephants are imported and placed at zoos. Plaintiffs are correct that their interests – or at least the purported interests of the individual plaintiffs in appreciating the elephants and feeling concern for their welfare, rather than the informational interests of the

organizational plaintiffs – will in fact be harmed if the animals are placed in the zoos. Moreover, as discussed above, in the event the Court denies a preliminary injunction and the elephants are imported, it may be that the elephants could not later be placed in an environment consistent with plaintiffs' interests even if the Court were ultimately to rule in favor of plaintiffs on the merits.

On the other hand, if an injunction is granted the elephants will be culled. This might appear to mean, somewhat ironically, that plaintiffs would be irreparably injured as the result of the very injunction that they request; however, at the August 6 hearing in this matter, counsel for plaintiffs explained that, from plaintiffs' perspective, the elephants will be better off – and thus plaintiffs' interests will be more fully advanced – if the elephants are killed rather than imported and placed in the zoos. Taking the plaintiffs at their word, the Court concludes, on balance, that plaintiffs' interests – interests about which the Court has some concerns in terms of standing – will be harmed if an injunction is not granted, yet somewhat advanced if an injunction is granted.

B. Federal Defendants

With regard to the federal defendants, the Court does not see why those entities have more than an abstract interest in the disposition of the elephants. Although the Department of the Interior and FWS undoubtedly have an institutional interest in seeing their policy vindicated, they are detached government bodies that do not, as a practical matter, stand to gain or lose based on what happens to the elephants as a result of the Court's preliminary injunction decision.

C. Zoos

The zoos undoubtedly have an interest in importing the elephants for use in their breeding programs. Culling of the elephants in the event an injunction is issued will thus substantially harm the zoos. On the other hand, it may be that the zoos could successfully import elephants

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**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-01497-JDB**

BORN FREE USA et al v. NORTON et al
Assigned to: Judge John D. Bates
Cause: 16:1538 Endangered Species Act

Date Filed: 07/10/2003
Date Terminated: 02/24/2004
Jury Demand: None
Nature of Suit: 893 Environmental
Matters
Jurisdiction: U.S. Government
Defendant

Plaintiff

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Date Filed	#	Docket Text
07/10/2003	<u>1</u>	COMPLAINT against GALE NORTON, STEVEN WILLIAMS (Filing fee \$ 150.) , filed by RICHARD ALLAN, ANIMAL LEGAL DEFENSE FUND, ANIMAL PROTECTION INSTITUTE, ANIMAL WELFARE INSTITUTE, BORN FREE FOUNDATION, BORN FREE USA, ELEPHANT ALLIANCE, ELEPHANT SANCTUARY, IN DEFENSE OF ANIMALS, TOSHINOSUKE KATOH, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, SAN DIEGO ANIMAL ADVOCATES.(mpt,) (Entered: 07/15/2003)
07/10/2003	<u>2</u>	LCvR 26.1 - CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by plaintiffs (mpt,) (Entered: 07/15/2003)
07/10/2003		SUMMONS (4) Issued as to GALE NORTON ; STEVEN WILLIAMS, U.S. Attorney and U.S. Attorney General (mpt,) (Entered: 07/15/2003)
07/14/2003		Case Reassigned to Judge John D. Bates. Judge Reggie B. Walton no longer assigned to the case. (mpt,) (Entered: 07/15/2003)
07/14/2003	<u>3</u>	NOTICE of Appearance by Gary Charles Adler on behalf of LOWRY PARK ZOOLOGICAL GARDEN, ZOOLOGICAL SOCIETY OF SAN DIEGO (mpt,) (Entered: 07/15/2003)
07/15/2003		MINUTE ENTRY: Upon agreement of the parties, and pursuant to the conference call on July 11, 2003, it is hereby ORDERED that The Zoological Society of San Diego and Lowry Park Zoological Garden are admitted as Intervenor-Defendants in this matter. Signed by Judge John D. Bates on 7/15/03. (lcjdb2) (Entered: 07/15/2003)
07/15/2003	<u>4</u>	ORDER setting briefing schedule. Signed by Judge John D. Bates on 7/15/03. (lcjdb2) (Entered: 07/15/2003)
07/16/2003	<u>5</u>	NOTICE by GALE NORTON, STEVEN WILLIAMS <i>of Filing of Administrative Record</i> (Attachments: # <u>1</u> Affidavit # <u>2</u> Index to Administrative Record)(Navaro, Ann) (Entered: 07/16/2003)
07/16/2003	<u>6</u>	NOTICE of Appearance by Ann D. Navaro on behalf of GALE NORTON, STEVEN WILLIAMS (Navaro, Ann) (Entered: 07/16/2003)
07/18/2003	<u>7</u>	MOTION for Preliminary Injunction by RICHARD ALLAN, ANIMAL