

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 07-1532 (EGS)
AMERICAN SOCIETY FOR THE)	
PREVENTION OF CRUELTY TO)	
ANIMALS, <u>et al.</u> ,)	
)	
Defendants.)	

**REPLY IN SUPPORT OF FELD ENTERTAINMENT INC.'S
MOTION TO DISMISS, OR IN THE ALTERNATIVE TO STAY,
MEYER GLITZENSTEIN & CRYSTAL'S COUNTERCLAIM**

EXHIBIT 2



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(202) 518-3700

February 16, 2012

By Electronic Mail

Brenda Tapia
Division of Management Authority
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Room 212, Arlington VA 22203
email: DMAFR@fws.gov

Re: Comments on Application for Renewal of Captive-bred Wildlife Registration
by Feld Entertainment, Inc., PRT-720230, 77 Fed. Reg. 2314 (Jan. 17, 2012)

Dear Ms. Tapia:

Please consider these comments submitted by the Wildlife Advocacy Project ("WAP") on the application for renewal of the Captive-bred Wildlife Registration ("CBW") sought by Feld Entertainment, Inc. ("FEI"). These comments are limited to FEI's request for renewal of its registration relating to Asian elephants (*Elaphus maximus*). For the reasons set forth below, the renewal request should either be denied or conditioned on changes in FEI's care and treatment of the Asian elephants covered by the registration.

I. FEI'S APPLICATION DOES NOT ESTABLISH THAT THE ACTIVITIES FOR WHICH FEI SEEKS A CBW REGISTRATION SATISFY THE STATUTORY STANDARD.

Under the Endangered Species Act ("ESA" or "Act"), the "registration" sought by FEI must satisfy the standard embodied in section 10(a)(1)(A) of the Act, *i.e., the activities for which the registration is sought* must be "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). However, the activities for which FEI seeks FWS authorization do not satisfy that standard. FEI breeds and maintains captive Asian elephants in order to operate its highly profitable Ringling Bros. and Barnum and Bailey Circus for popular entertainment purposes, not to "enhance the propagation or survival of the affected species."

FEI has presented no evidence that breeding and maintaining elephants so that they can perform circus tricks enhances the survival or propagation of the species within the meaning of section 10(a)(1)(A) of the Act. *See also* 44 Fed. Reg. 54002, 54007 (Sept. 17, 1979) (FWS explanation that activities may be covered by a captive-bred registration if the "*purpose of such activity* is to enhance the propagation or survival of the affected species") (emphasis added). To

the contrary, by displaying the animals engaging in fundamentally unnatural behaviors, FEI is in effect misleading the public concerning the biology, ecology, physiology and other attributes and features of the species; this hardly constitutes “enhanc[ing]” the species’ survival or propagation.¹

In its renewal application, FEI refers to purported “educational” activities. The FWS has previously suggested that such activities cannot afford an adequate legal or factual foundation for an “enhancement” permit.² In any event, FEI’s application cannot support a finding of enhancement here. To begin with, the “Center for Elephant Conservation” (“CEC”) – which, according to FEI, is where the “[b]reeding activities primarily occur” (FEI Application at 1), and where the elephants are chained on concrete for much of the day, and/or are confined in isolation in small enclosures – is not generally accessible to the public, as FEI acknowledges (App. at 7).

¹ In *ASPCA et al. v. FEI*, Civ. No. 03-2006, which involved the plaintiffs’ claim that FEI’s practices “take” Asian elephants in violation of section 9 of the Act, various leading elephant experts opined on FEI’s practices at a trial held in 2009. Because the district court ultimately found that the plaintiffs lacked standing, the court did not address the expert testimony or the other evidence introduced at trial that bears on FEI’s treatment of the elephants, and some of which relates directly to FEI’s rationale for renewal of its captive-bred registration. Of particular relevance to FEI’s contention that it is “educating” the public concerning Asian elephants, one of the leading elephant experts in the world, Dr. Joyce Poole, testified that the FEI elephants are forced to perform circus tricks and engage in behaviors that bear no relationship to how the animals act in the wild, and that they are denied their ability to engage in their most basic natural behaviors, such as walking long distances, exploring their surroundings, socializing with other elephants, and comforting one another. See *ASPCA Plaintiffs’ Proposed Findings of Fact (“PFF”)* at ¶¶ 84-89, 107. Upon request by the Service, WAP can provide copies of publicly available materials from the trial, including the parties’ post-trial submissions, trial testimony of the experts and others, and any exhibits admitted at trial.

² Notably, in 1993, the FWS amended the definition of “enhance the propagation or survival” to eliminate “education through exhibition” as the sole justification for relying on a CBW registration, to make it clear that the CBW program is available “only [to] those persons who engage in beneficial captive breeding.” 58 Fed. Reg. 68323, 68325 (Dec. 27, 1993). In so doing, the FWS explained its concern that, under its registration system, “captive-bred animals . . . might be used for purposes that do not contribute to conservation, such as for pets, research that does not benefit the species, or for entertainment.” 57 Fed. Reg. 548, 550 (Jan. 7, 1992) (emphasis added). The Service further explained that it also has “sincere doubts about the relative conservation benefits that are provided to non-native species in the wild from the public exhibition of living wildlife.” 58 Fed. Reg. 68324. Accordingly, the Service itself has long suggested that purported “education,” particularly through activities associated with popular “entertainment,” should be viewed skeptically as a rationale for a CBW registration; again, that is especially the case with respect to “education” in connection with circus elephants who are engaging in highly abnormal behaviors that can only impede genuine public understanding about the animals’ natural activities and behaviors.

As for the “education” that occurs while the elephants are on tour – such as at “open houses” and during “animal walks” when the elephants are traveling to venues to perform – FEI has provided no data to demonstrate that these activities in fact serve a useful education function, let alone that they enhance the survival or propagation of the species. *See also* 77 Fed. Reg. 2314 (indicating that the FWS will seek to base its decision on the renewal request on “quantitative information or studies”). Indeed, it is far more likely that members of the public are actively misled in various ways, including by concluding that the handling practices they witness – such as FEI’s routine use of the bullhook on the elephants, *see infra* at 4-6 – are humane and compatible with the elephants’ well-being.

FEI’s other enhancement rationales are also lacking. FEI asserts that its “breeding program” has the “largest gene pool in North America.” However, maintaining that gene pool has nothing to do with the survival or conservation of wild Asian elephants, because FEI never has, and evidently has no plans to, reintroduce any of these elephants into the wild; rather, once again, these animals are bred in order to participate in a traveling circus. This simply bears no meaningful relationship to the enhancement or propagation of the species.³

FEI’s other “enhancement” rationale is that it has supported elephant conservation efforts in various countries and funded research on elephant reproductive health in the “North American elephant population.” App. at 9. However, not only does FEI’s application provide virtually no supporting documentation as to how these activities have in fact enhanced the survival or propagation of the species in the wild but, more important, they cannot, under the plain language of the ESA, be relied on to establish that the *otherwise prohibited activities* will meet the statutory standard. Section 10(a)(1) provides that the Service may permit “any act otherwise prohibited by Section 1538 [Section 9] . . . to enhance the propagation or survival of the affected species.” 16 U.S.C. § 1538(a)(1)(A). Therefore, it is the precise activity that would otherwise be prohibited – *i.e.*, the breeding and maintenance of elephants on the road and at the CEC – that must be determined to be enhancing the conservation of the species. FEI’s funding of *other*, unrelated activities cannot transform an activity that bears no relationship to conservation or enhancement into an authorized activity.⁴

³ It is noteworthy that FEI is not a member of the “Species Survival Program” or the “Taxon Advisory Group” for Asian elephants – the conservation programs developed by the American Zoo Association – and could not become such a member because a traveling circus cannot satisfy the AZA’s standards of care in a number of ways. *See* PFF at ¶¶ 74, 244, 246-49, 364-65, 370, 437.

⁴ Indeed, in September 2003, the FWS *proposed* to amend its enhancement regulations to *expand* the enhancement rationale to include situations like this one, *i.e.*, in which a permit applicant is offering to fund unrelated conservation activities in order to justify what would be an otherwise prohibited take. *See* 68 Fed. Reg. 53327 (Sept. 10, 2003). That proposal was abandoned in the face of extensive objections from public commenters. The FWS should not apply an approach that it intentionally, and correctly, abandoned in a rulemaking.

II. FEI'S APPLICATION DOES NOT COMPLY WITH 50 C.F.R. § 13.41

Under 50 C.F.R. § 13.41, “[a]ny live wildlife possessed under a [FWS] permit must be maintained under humane and healthful conditions.” FEI cannot satisfy that standard either for the elephants living at the CEC or for those on the road. Accordingly, the FWS should deny the renewal application, or condition it in such a manner as to comply with the regulation.

With respect to the elephants at the CEC – where most of FEI’s breeding practices take place – FEI’s own employees have admitted that the elephants are chained on concrete for many hours each day. *See* PFF at ¶ 250 (the elephants are generally chained on concrete for 16 or more hours each day). They are chained on two alternate legs, one front and one hind leg, and have very little opportunity to move around or to interact with other elephants. *Id.* The elephants at the CEC have spent so much time chained that they have worn grooves into the concrete floor. *Id.* at ¶¶ 251-52. The General Manager of the CEC, Gary Jacobson, has testified that one of the CBW elephants, Shirley, was chained on concrete for 22 ½ hours a day, and that other young elephants at the CEC spend much of their lives chained alone. *Id.* at ¶¶ 252-63.

The FEI elephants who travel in the circus also spend much of their time chained on hard surfaces. Ringling Brothers is the only circus in the United States that transports its elephants by train, and it is FEI’s common practice to chain the elephants on two legs when they are on the train. PFF at ¶¶ 224, 225. FEI’s own “Transportation Orders,” which show a portion of the time that the elephants are chained from one city to the next, demonstrate that the elephants are chained in the train, which has hard surfaces, for an average of 26 hours when the circus travels from one venue to another, and that they are often kept chained in the box cars for 60-70 consecutive hours or more, and sometimes as much as 90-100 hours. *Id.* at ¶¶ 226-234. The elephants are also extensively chained when they are at performing venues. *Id.* at ¶¶ 237-42.

Elephants subjected to such extensive chaining are not being “maintained under humane and healthful conditions.” According to Dr. Poole, who has studied elephants performing natural behaviors – such as traveling long distances in search of food – such chaining practices are “very detrimental” and “very harmful” to the elephants’ physical and psychological well-being. PFF at ¶ 269. Another expert, veterinarian Dr. Phil Ensley, who cared for elephants at the San Diego zoo for many years, examined thousands of pages of medical records concerning the FEI elephants and found that nearly all of them suffer from chronic medical conditions that have been caused and/or exacerbated by FEI’s extensive chaining practices. These conditions include chronic foot problems, split toenails, infected toenails, foot abscesses, lamenesses, uneven wear on the soles of the feet, arthritis, tuberculosis, and pressure or bed sores – which are decubital ulcers or lesions that form when a bony protuberance on the elephant (such as a cheek or hip bone) routinely rubs up against a hard surface from which the animal cannot escape. PFF at ¶¶ 272-273; *see also* ¶¶ 274-313. The prevalence of these conditions in the FEI elephants should preclude the Service from making the finding – which it must in order to grant the renewal permit – that the elephants are maintained under healthful and humane conditions. At the very least, it should cause the Service to carefully scrutinize the conditions

under which the elephants are maintained before making a determination on the renewal application.⁵

Of particular relevance to FEI's request for a CBW permit, the available evidence reflects that the foot, joint, and other musculoskeletal problems are significantly worse in the FEI elephants even when compared with other captive Asian elephants. According to Dr. Ensley's exhaustive review, the incidence of such disorders is far higher in the FEI elephants than in other study populations and, indeed, Dr. Ensley found that close to hundred percent of all of the elephants in FEI's care have medical conditions associated with standing for many hours on hard surfaces, such as nail cracks, nail bed abscesses, and food pad disorders. PPF at ¶ 317. Further, FEI's medical records reflect that the same kinds of foot and other musculoskeletal disorders are being manifested in the young elephants who were born at FEI and, with rare exceptions, who have been in FEI's possession and subject to its chaining and other practices for their entire lives. *Id.* at ¶ 318. In particular, Dr. Ensley found that "of the 16 young elephants that were bred in captivity, 14 had similar injuries and findings to what" Dr. Ensley found with regard to the older elephants. *Id.* (quoting Trial Tr. 6520-66:12, Feb. 24, 2009 p.m.).

An additional indication that the elephants are not being maintained under "humane and healthful conditions" is that many of the FEI elephants engage in extensive "stereotypic" behavior – such as repetitive swaying, bobbing, and weaving – both at the CEC and while being transported, which is generally accepted in the scientific community as one "marker of the adversity" of captive conditions. PPF at ¶¶ 330-331. Leading elephant behavior experts confirmed that such stereotypic behavior is not performed by elephants in the wild, and it is strong evidence that the animals – who, once again, engage in extensive locomotion and are highly mobile – are being subjected to highly stressful conditions by being extensively chained, *id.* at ¶¶ 334-48; such behaviors also exacerbate the elephants' foot and leg problems associated with extensive chaining practices. *Id.* at ¶¶ 348-50. Of particular relevance to FEI's request for a CBW permit, young elephants who have spent their entire lives at FEI have been documented engaging in extensive stereotypic behavior, indicating that this behavior developed as a result of the conditions at the CEC and on the road. *Id.* at ¶ 336.

The FEI elephants are also subjected to extensive bull hook use, which is also incompatible with a finding that they are being maintained under "humane and healthful conditions." FEI's own documents and testimony reflect that the elephants are struck with bull hooks in order to make them perform circus tricks and engage in other desired behaviors, and FEI's own documents and other medical records reflect that this practice routinely results in "puncture wounds," "hook boils" – infections caused by bull hook wounds – lacerations, abrasions, and other wounds. PPF at ¶¶ 135-36, 154, 168-71. In addition, the elephants' medical records repeatedly refer to abrasions and lesions on the elephants in locations on the left side of the elephants bodies, *i.e.*, the side of the elephants in which the bull hook is used to "cue"

⁵ As indicated in the attached materials, Dr. Ensley's exhaustive review was based on FEI's own medical records as well as standard treatises on elephant foot care and other pertinent materials, which are hereby incorporated by reference.

the elephants to perform particular behaviors. *Id.* at ¶ 169.⁶

* * * * *

In light of the abundant evidence precluding the FWS from finding that the renewal of FEI's application is consistent with the Service's own regulations, the Service should either deny the application or condition it in order to significantly ameliorate the adverse effects of the practices enumerated above. At minimum, the Service should require FEI to significantly lessen the amount of time that the elephants are chained on hard surfaces, both at the CEC and on the road. In addition, the Service should condition any permit on a requirement that FEI not employ the bullhook in such a manner as to cause routine puncture wounds, lacerations, and related wounds.

Sincerely,



Eric R. Glitzenstein
President

cc: Michael Bean

⁶ Additional evidence that the elephants are not being maintained under "humane and healthful conditions" is set forth in an extensive investigative story recently published by *Mother Jones* magazine. A copy of that article is attached as an exhibit.