UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	**Case No. 1:03-CV-02006 (EGS)**
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT FELD ENTERTAINMENT INC.'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b)

Defendant Feld Entertainment, Inc. ("FEI") hereby respectfully requests that the Court reconsider that part of its August 23, 2007, decision on FEI's motion for summary judgment in which the Court determined that thirty-two (32) of FEI's Asian elephants were subject to the "taking" prohibition in section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538. *See* Memorandum Opinion (Aug. 23, 2007) (Docket No. 173). As shown below, the Court's Memorandum Opinion did not address, and therefore seems to have overlooked, certain points that FEI raised in the summary judgment briefing that either are potentially dispositive in this case or could serve to narrow significantly the issues potentially to be tried in this case. In the event that the Court declines to reconsider its ruling on the pre-Act exclusion issue, FEI respectfully requests that the Court modify its summary judgment order to include the certification specified by 28 U.S.C. § 1292(b).

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(B)

The Court granted FEI partial summary judgment for 21 of its Asian elephants on the ground that they are subject to a permit issued to FEI pursuant to the Fish and Wildlife Service's ("FWS's") captive-bred wildlife ("CBW") regulation, 50 C.F.R. § 17.21(g), and, that the Court has no jurisdiction, in a citizen suit under section 11(g) of the ESA, 16 U.S.C. § 1540(g), to determine whether FEI is in compliance with the CBW permit. Memorandum Opinion at 17-18. As to the remaining 32 Asian elephants, the Court rejected FEI's argument that these animals are exempt from the "taking" prohibition as "pre-Act" species. The Court ruled that the FWS regulation that would exempt these animals, 50 C.F.R. § 17.4, conflicts with the language of the statutory exemption, 16 U.S.C. § 1538(b). *See* Memorandum Opinion at 12-15. FEI made two points in the summary judgment briefing that the Memorandum Opinion does not address, that bear materially on the Court's decision on the pre-Act exclusion issue and that FEI respectfully requests that the Court reconsider.

1. ***Bennett v. Spear*, 520 U.S. 154 (1997), precludes plaintiffs' challenge to the FWS pre-Act exemption regulation.** The Memorandum Opinion states that "[n]either *Bennett* nor any other case cited by defendant addresses the issue of whether plaintiffs can raise a *Chevron* [*USA, Inc. v. NRDC,* 467 U.S. 837 (1984)] challenge to a regulation that appears to contradict a statute." Memorandum Opinion at 11. However, *Bennett* did not turn on the particular theory being utilized to challenge actions by the Secretary of the Interior. Instead, *Bennett* holds that a challenge to the validity of an action by the Secretary implementing the ESA cannot be made in a case brought by a private party under the citizen suit provision of ESA §

11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A).[1]. The Memorandum does not address that aspect of *Bennett*.

The *Bennett* plaintiffs challenged a Biological Opinion issued by the Secretary of the Interior pursuant to ESA § 7, 16 U.S.C. § 1536, on the ground that the Secretary's action conflicted with the ESA. 520 U.S. at 160. While the particular challenge in *Bennett* was not *Chevron* based, the Supreme Court unequivocally accepted the government's argument that the citizen suit provision in ESA § 11(g)(1)(A) "is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties -- both private entities and Government agencies -- ***but is not an alternative avenue for judicial review of the Secretary's implementation of the statute. We agree.***" 520 U.S. at 173 (emphasis added).

The Supreme Court looked to the plain language of section 11(g)(1). Because subparagraph (C) of section 11(g)(1) permits private challenges to a ***certain*** type of action by the Secretary under the ESA, construing subparagraph (A) to permit private challenges to ***other*** actions by the Secretary (when they are not mentioned at all in that provision) would improperly nullify part of the statute. Allowing a private party to challenge an agency action under subparagraph (A)

> is simply incompatible with the existence of § 1540(g)(1)(C), which expressly authorizes suit against the Secretary, but only to compel him to perform a nondiscretionary duty under § 1533. That provision would be superfluous -- and, worse still, its careful limitation to § 1533 would be nullified -- if § 1540(g)(1)(A) permitted suit against the Secretary for any "violation" of the ESA. It is the "'cardinal principle of statutory construction' . . . [that] it is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *United*

[1] Section 11(g)(1)(A) of the ESA provides: "(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf -- (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . ." 16 U.S.C. § 1540(g)(1)(A).

> *States v. Menasche*, 348 U.S. 528, 538 . . . (1955) (*quoting NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, . . . (1937), and *Montclair v. Ramsdell*, 107 U.S. 147, 152 . . . (1883)).

520 U.S. at 173.

The Supreme Court also observed that permitting private parties to challenge actions of the Secretary in citizen suits pursuant to section 11(g)(1)(A) would be contrary to the provisions for judicial review of agency action under the Administrative Procedure Act, 5 U.S.C. § 702, 704:

> [I]nterpreting the term "violation" to include any errors on the part of the Secretary in administering the ESA would effect a wholesale abrogation of the APA's "final agency action" requirement. Any procedural default, even one that had not yet resulted in a final disposition of the matter at issue, would form the basis for a lawsuit. We are loathe to produce such an extraordinary regime without the clearest of statutory direction, which is hardly present here. Viewed in the context of the entire statute, § 1540(g)(1)(A)'s reference to any "violation" of the ESA cannot be interpreted to include the Secretary's maladministration of the Act. Petitioners' claims are not subject to judicial review under § 1540(g)(1)(A).

520 U.S. at 174.

There is no material difference between the challenge to Secretarial action in *Bennett*, and the challenge that plaintiffs made to the regulation here: both are claims that the Secretary's actions in implementing the ESA are invalid because they are contrary to the statute. In the words of *Bennett*, both actions are asserted to be "maladministrations" of the ESA by the Secretary. *Id.* But *Bennett* explicitly holds that such "maladministrations" "are not subject to judicial review under § 1540(g)(1)(A)." *Id.* *Bennett* therefore forecloses plaintiffs from challenging the FWS pre-Act exemption regulation in this action which is brought solely under ESA § 11(g)(1)(A).

FEI respectfully requests that the Court reconsider its ruling in light of the holding in *Bennett*. As FEI has shown, applying the FWS pre-Act exception regulation would narrow this case essentially to one elephant -- Nicole -- which is the only animal in the pre-Act category that plaintiffs have standing to sue over (*see* section 2 *infra*) and as to which plaintiffs arguably have created an issue of fact as to her pre-Act status. *See* Reply in Support of Defendant's Motion for Summary Judgment at 16-17 (Oct. 27, 2006) ("SJ Reply") (Docket No. 100).[2]

2. Only elephants as to which Tom Rider claims an "emotional attachment" should be at issue in this lawsuit. FEI pointed out in its summary judgment reply that, even if there were a question of fact or law about whether a given elephant is covered by the pre-Act exclusion, plaintiffs have standing to sue (at this point in the proceedings) only as to the elephants for which plaintiff Tom Rider claims an "emotional attachment." SJ Reply at 16. The Memorandum Opinion does not address this point.

The Court of Appeals reinstated this case in 2003 solely on the basis of "the injury that Rider allegedly suffers from the mistreatment of ***the elephants to which he became emotionally attached.***" *ASPCA v. Ringling Bros.*, 317 F.3d 334, 337 (D.C. Cir. 2003) (emphasis added). The elephants as to which Rider claims the "emotional attachment" are the elephants that he worked with when he was employed at FEI. Complaint ¶ 18 (Sept. 26, 2003) (Docket No. 1). Rider has identified these elephants under oath. Deposition of Tom Rider at 10-11 (Oct. 12, 2006) (Exhibit DX 26 to SJ Reply). Of the elephants identified by Rider, only Susan, Lutzi, Jewell, Karen, Mysore and Nicole are in the pre-Act category and are still in the possession or control of FEI. *See* Exhibit DX 1 at 19-22, 25-26, 28-30, 41-42 to Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (Sept. 5, 2006) ("SJ Mem.") (Docket

[2] Issues of fact also arguably arose as to Icky II and Siam II, but plaintiffs have no standing as to either of those elephants. *See* section 2 *infra*.

No. 82). The remainder of the elephants with which Rider worked either are deceased, no longer in the possession or control of FEI or are CBW. *Id.* at 21, 34-35, 37-38; Exhibit DX 6 at 46, 64, 67 to SJ Mem.

Therefore, even if the Court declines to reconsider its ruling on the applicability of the pre-Act exclusion, the case nonetheless should be limited to the six elephants listed above because those are the only elephants still at issue as to which plaintiffs have standing. The Court of Appeals decided the injury-in-fact question on the pleadings as a matter of standing to sue under Article III of the Constitution. *ASPCA*, 317 F.3d at 335. That the case can proceed only as to the elephants as to which Rider claims an "emotional attachment" therefore is jurisdictional because it goes to the constitutional case-or-controversy "limitation on federal judicial authority." *Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 180 (2000). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury in fact is one of the three elements of the "irreducible constitutional minimum" of standing under Article III).

3. **In the alternative, the Court should modify its order on FEI's motion for summary judgment to include the certification required by 28 U.S.C. § 1292(b).** Section 1292(b) permits appellate review of an otherwise interlocutory decision where the district court is "of the opinion that such order involves a controlling issue of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). In the event that the Court declines to reconsider its ruling on the pre-Act issue, FEI respectfully requests that the Court modify its order on FEI's motion for summary judgment to include the section 1292(b) certification.

Whether any of the remaining elephants in this case is excluded from the "taking" prohibition by virtue of the pre-Act exclusion set forth in the FWS regulation is a controlling issue of law. If the elephants are not subject to the "taking" prohibition, then plaintiffs have no "taking" claim. Given the discussion in the Memorandum Opinion and the discussion above concerning the effect of *Bennett*, as well as the arguments of the parties in the summary judgment briefing, there is a substantial ground for a difference of opinion on whether plaintiffs can challenge section 17.4 in this "citizen suit" under ESA § 11(g)(1)(A) and, even if such a challenge were appropriate, whether section 17.4 is invalid. If FEI is correct on either issue, the litigation will either be terminated in its entirety or narrowed to a single elephant. An interlocutory appeal of these issues at this point therefore could materially advance the ultimate termination of the litigation.

CONCLUSION

Accordingly, for the reasons stated herein, defendant's motion should be granted. The Court should reconsider its ruling on the pre-Act exclusion issue and narrow this case down to the elephant Nicole. In the alternative, the Court should narrow the case down to the only elephants in the pre-Act category as to which plaintiffs (at this point in the proceedings) have standing to sue: Susan, Lutzi, Jewell, Karen, Mysore and Nicole. In the further alternative, the Court should modify that part of the summary judgment order addressing the pre-Act issue to include the certification pursuant to 28 U.S.C. § 1292(b).

Dated this 5th day of September, 2007.

Respectfully submitted,

/s/

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Michelle C. Pardo (D.C. Bar #456004)
George A. Gasper (D.C. Bar #488988)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.