UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S RESPONSE TO THE COURT'S INQUIRY OF FEBRUARY 6, 2009

Defendant Feld Entertainment, Inc. ("FEI") hereby submits the statutory and regulatory authority governing claims of abuse or mistreatment of Asian elephants in the United States.

I. THE ANIMAL WELFARE ACT

At the federal level, the Animal Welfare Act ("AWA"), 7 U.S.C. § 2131 *et seq.*, governs the humane care and treatment of warm-blooded animals exhibited to the public. Originating in 1966 as the Federal Laboratory Animal Welfare Act, the statute was amended in 1970 "to enlarge the class of protected animals" and to "'bring into the regulatory framework of the Act for the first time exhibitors (such as circuses, zoos, carnivals and road shows).'" *Haviland v. Butz*, 543 F.2d 169, 172, 174 (D.C. Cir. 1976) (citation omitted). The AWA's stated purposes are, *inter alia*, "to insure that animals intended for ... exhibition purposes ... are provided humane care and treatment" and "to assure the humane treatment of animals during transportation." 7 U.S.C. § 2131(1), (2). The AWA defines "animal" as any "warm-blooded animal" (excluding horses and certain livestock and poultry) and defines "exhibitor" as "any person (public or private) exhibiting any animal ... include[ing] circuses ...." *Id.* § 2132(g)-(h).

It is unlawful under the AWA for any exhibitor to transport animals for exhibition without a license issued by the Secretary of Agriculture. 7 U.S.C. § 2134. Such license may be

issued only upon demonstration that the licensee's facilities comply with the standards "promulgated by the Secretary under section 13 of this Act." *Id.* § 2133. Section 13, in turn directs the Secretary to "promulgate standards to govern the humane handling, care, treatment and transportation of animals by … exhibitors." *Id.* § 2143(a)(1). Such standards shall include minimum requirements

> for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals.

Id. § 2143(a)(2). Section 13 likewise requires "standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith … of animals …." *Id.* § 2143(a)(4).

Section 17 empowers the Secretary to conduct inspections and investigations of any exhibitor who has violated the statute or a regulation and makes it unlawful to impede or interfere with any such investigation or inspection. 7 U.S.C. § 2146(a)-(b). An exhibitor's violations of the statute or the regulations can result in license suspension or revocation, civil penalties and criminal sanctions. *Id.* § 2149. Further, the agency can confiscate any animal found to be suffering due to an exhibitor's failure to comply with AWA standards. 9 C.F.R. § 2.129(a) (2005). However, there is no private cause of action under the AWA. *E.g., Int'l Primate Protection League v. Inst. for Behavioral Res.*, 799 F.2d 934, 940 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987).

Section 21 gants the Secretary broad rulemaking authority which has been delegated to the Department of Agriculture's ("USDA's") Animal and Plant Health Inspection Service ("APHIS"). 7 U.S.C. § 2151; APHIS Animal Care Factsheet (Ex. 1 hereto, p. 1). APHIS has issued comprehensive regulations that govern every aspect of any covered animal's life. 9

C.F.R., Parts 1-3. These include, but are not limited to, regulations governing the feeding, watering, veterinary care, transportation, ventilation, enclosure size and ambient temperature parameters for all AWA-covered species. *Id.* For example, section 2.131 prescribes standards for handling animals, including exotics, and provides, *inter alia*:

> (b)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.
>
> (2)(i) ***Physical abuse shall not be used to train, work, or otherwise handle animals.***

9 C.F.R. § 2.131(b) (emphasis added).

APHIS's comprehensive EXHIBITOR INSPECTION GUIDE (2005) governs its inspections and investigations of licensed exhibitors. Many of the standards and protocols in the GUIDE are tailored specifically for elephants. *E.g., id.*, pp. 11.4.23 (space for elephants); 11.5.5 (elephant electric fencing); 12.4.3 (elephant handling); 15.1.5 (elephant veterinary care); 15.3.5 (elephant health records); 15.4.3 (elephant necropsies); 17.1.3, 7 (Protocol for Inspecting Traveling Exhibitors with Elephants); 17.5.1 (space and exercise requirements for elephants generally and while tethered) (excerpts attached as Ex. 2 hereto). Ironically, in the Court-ordered inspection in this case, plaintiffs' own experts used the same elephant forms that APHIS inspectors use to evaluate an elephant's ears, feet and body. *Compare id.*, pp. 14-16 *with* Def. Tr. Ex. 185, pp. 10-12.

Applying the above-described AWA standards, APHIS has inspected and investigated all aspects of the care and handling of FEI's Asian elephants countless times. APHIS has never found FEI to be in violation of the AWA as to use of the guide and tethers in managing its Asian elephants. *See* Def. Tr. Ex. 71. In particular, APHIS has investigated and rejected claims of

abuse based upon the same evidence that plaintiffs already have or intend to introduce through Archele Hundley, Robert Tom, Lanette Williams, Pat Cuviello, Tom Rider and others. *Id.* USDA also has ruled, in a case not involving FEI, that striking an Asian elephant with a guide and creating a bloody wound is not a violation of the AWA. *See In re John F. Cuneo, et al.*, AWA Docket No. 03-0023, Decision and Order as to James G. Zajicek (May 2, 2006), *affirming* Chief ALJ Decision as to James G. Zajicek (Aug. 17, 2005) (Ex. 3 hereto).

This is not to say, as plaintiffs' claim, that USDA turns a "blind eye" to elephant abuse. All exhibitors of elephants must by licensed by USDA which requires showing compliance with AWA standards. 7 U.S.C. § 2134. Moreover, USDA has imposed severe sanctions upon exhibitors who have mistreated elephants in violation of the AWA. *In re John D. Davenport d/b/a King Royal Circus*, 57 Agr. Dec. 189, 1998 USDA LEXIS 166 (1998) ($200,000 civil penalty and permanent license revocation for, *inter alia*, inadequate elephant foot care, failure to provide urgent veterinary care for elephant and transportation of elephant in inhumane conditions) (Ex. 4 hereto); *In re James Michael LaTorres*, 57 Agr. Dec. 53, 1997 USDA LEXIS 9 (1997) ($5000 civil penalty and 5-year license suspension for numerous AWA violations in the care and maintenance of the elephant "Stony") (Ex. 5 hereto); *In re Volpe Vito, Inc. d/b/a Four Bears Water Park*, 56 Agr. Dec. 166, 1997 USDA LEXIS 35 (1997) ($26,000 civil penalty and license revocation for AWA violations, including inadequate foot and other veterinary care for the elephant "Twiggy"), *aff'd*, *Volpe Vito, Inc. v. USDA*, 1999 U.S. App. LEXIS 241 (6th Cir. 1999) (Ex. 6 hereto); http://www.elephants.com/pr/11_8_08_PressRelease.htm (elephant "Ned" confiscated by USDA and sent to Carole Buckley's facility). Indeed, rigorous USDA enforcement for elephant abuse is demonstrated by the very authorities supplied to the Court by plaintiffs on February 6, 2009 which involved confiscation of Asian elephants for AWA

noncompliance. *Leahy v. USDA*, No. 05-1135, TRO Ruling (D.D.C. June 21, 2005); *In re John F. Cuneo, Jr.*, AWA Docket No. 03-0023, Consent Decree (USDA Mar. 2, 2004).[1]

II. THE ENDANGERED SPECIES ACT

Congress passed the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, in 1973, three years ***after*** FEI's Asian elephants became subject to the AWA. The stated purposes of the ESA are to preserve the ecosystems of endangered and threatened wildlife ***in the United States,*** to conserve such species, and to implement the United States' commitments under certain international wildlife conventions and treaties. 16 U.S.C. § 1531(b). As the Supreme Court observed in the famous "snail darter" case, *TVA v. Hill*, 437 U.S. 153 (1978), "'[t]he dominant theme pervading all Congressional discussion of the proposed [statute] was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources.'" *Id.* at 177 (citation omitted). The law therefore was aimed at preventing extinction. "In shaping legislation to deal with the problem thus presented, Congress started from the finding that '[the] two major causes of extinction are hunting and destruction of natural habitat.' S. Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats ...." *Id.* at 179 (citation omitted). Thus, the law's primary focus was animals found in the wild in the United States and the destruction of their habitats. 16 U.S.C. § 1531(a)(1) (decrying the extinction of "fish, plants and wildlife in the United States").

Addressing the larger threat, destruction of habitat, Congress enacted sections 5 and 7 of

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[1] The plaintiff in *Leahy*, Debbie Leahy, is the same PETA employee who marshaled Archele Hundley and Robert Tom through their affidavits and other activities in this case. Trial Tr. (PM Session) at 10-11, 94 (Feb. 5, 2009). Interestingly, Leahy had no Article III standing in *Leahy*. She claimed a "personal relationship" with the elephants in question, which Judge Friedman found "hard to see," since the elephants had not been on display publicly for 3 years. *Leahy*, p. 17. Similarly, the evidence will show that 4 of the 6 elephants at issue here, Jewell, Lutzi, Mysore and Susan (and Zina), have all been at the CEC since 2006 or earlier and not on public display.

the ESA which, respectively, provide for land acquisition by the federal government to conserve species and for interagency cooperation in the administration of federal and state programs in order to conserve critical habitat. 16 U.S.C. §§ 1534, 1536. The focus of these provisions is entirely upon wild species native to the United States. It was against this background that Congress addressed the secondary threat, hunting, and prohibited the "taking" of any endangered species within the United states. 16 U.S.C. § 1538(a)(1)(B). As broad as this proscription and its definitional components may be, *id.* § 1532(19) (definition of "take"), the statutory focus was on endangered species in the wild, not endangered species in captivity. By its ordinary meaning, "take" means to seize or capture an animal in the wild. WEBSTER'S NEW WORLD DICTIONARY. It is impossible to "take" a captive animal because it either has already been removed from the wild or was born in captivity and has never lived in the wild. Either way it cannot be "taken."

As noted in *TVA v. Hill*, prior federal anti-"taking" statutes had been limited either to certain species or to hunting on federal land. 437 U.S. at 175. However, none of these laws was applicable to captive animals. There is no evidence in the legislative history of the ESA that, when Congress used the verb "take" in section 9(a)(1)(B), it intended that word to have a focus that it had never before had, *i.e.,* as a standard of welfare for captive endangered species. Plaintiffs' suggestion that this was in fact the result of the ESA is extraordinary because it would have been a wholesale repeal of the AWA as to any endangered species held by an exhibitor. However, the ESA itself makes clear that the statute did not in fact repeal the AWA. Section 11(h) of the ESA provides that "[n]othing in this Act … shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to … possession of animals …." 16 U.S.C. § 1540(h). Plaintiffs' position in this case renders this provision, and, consequently the statute's plain language, meaningless.

While captive endangered species like Asian elephants, which are exotic and not found in the United States, are not subject to the "taking" prohibition, they are subject to other provisions of the ESA. As noted above, the third purpose of the ESA was to implement the United States' agreement to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), 27 U.S.T. 1087 (July 1, 1975). 16 U.S.C. § 1531(a)(4). CITES is an international convention against trafficking in endangered species. Thus, section 9 of the ESA also prohibits import, export, purchase and sale of any endangered species or their transportation in the course of a commercial activity. 16 U.S.C. § 1538(a)(1)(A), (E) & (F).

Shortly after the ESA's enactment, the issue arose whether exhibiting endangered species in a zoo or circus was "commercial activity" prohibited by section 9, thereby requiring a permit. The Department of Interior's Fish and Wildlife Service ("FWS"), the agency charged with administration and enforcement of the ESA, found that such activity did not constitute "commercial activity." 50 C.F.R. § 17.3, 40 Fed. Reg. 44411, 44416 (Sept. 26, 1975) (regulatory definition of "industry and trade").[2] This result parallels CITES which permits the Managing Authority of any party (FWS for the United States) to waive the trafficking prohibitions for "specimens which are part of a traveling zoo, circus, menagerie, plant exhibition or other traveling exhibition." CITES, Art. VII.7. FWS also advised FEI in 1975 that no permit was needed to exhibit endangered species in the circus. Def. Tr. Ex. 5.

No comparable post-enactment issues arose as to whether captive endangered species in a circus could be "taken." When FWS advised FEI that it needed no permit to exhibit endangered species in a traveling circus, it did not suggest that FEI would nonetheless need a permit due to

[2] FWS' rule, which was ratified by Congress, is valid. *ASPCA v. Ringling Bros.*, 233 F.R.D. 209, 214 (D.D.C. 2006); *PETA v. Babbitt*, No. 93-1836 (D.D.C. 1995); *Humane Soc'y of the U.S. v. Lujan*, 1992 U.S. Dist. Lexis 16410 (D.D.C. 1992), *vacated on other grounds*, 46 F.3d 93 (D.C. Cir. 1995). The appellate result in *Humane Soc'y* was due to the determination, on appeal, that the plaintiff had no Article III standing.

the "taking" prohibition. Indeed, to our knowledge, no court since the passage of the ESA in 1973 has applied the "taking" prohibition to a captive animal. Nor has FWS apparently ever brought an enforcement action claiming that a captive animal's captive conditions are a "taking."

Despite their litigation strategy against FEI here, certain of the plaintiffs have recognized that the true relevance of endangered exotic species under the ESA is under the importation and other trafficking provisions. In 2003, plaintiffs API and AWI, along with PETA, Carole Buckley's Elephant Sanctuary and others, all represented by plaintiffs' current counsel, filed suit in this Court against the Secretary of Interior and FWS to enjoin the importation of eleven threatened African elephants (destined for culling) from Swaziland to certain zoos in the United States. *Born Free USA, et al. v. Norton, et al.*, No. 1:03-cv-01497-JDB (D.D.C.), Amended Complaint for Declaratory and Injunctive Relief (July 31, 2003) (Ex. 7 hereto). Plaintiffs argued that the elephants "will be better off ... if the elephants are killed rather than imported and placed in the zoos." *Born Free USA v. Norton*, 278 F. Supp.2d 5, 26 & n.4 (D.D.C. 2003), *order vacated as moot*, 2004 WL 180263 (D.C. Cir. 2004). Judge Bates denied the injunction and the importation proceeded. 278 F. Supp. 2d at 27. Notably, even though the zoos had intervened as defendants and even though plaintiffs alleged that the elephants would be "'chained, caged, "trained" with bull hooks and hot wires,'" plaintiffs did not contend that the zoos would be "taking" these elephants in violation of the ESA. (Ex. 7 hereto, ¶¶ 155, 183-87).[3]

As plaintiffs have pointed out, FWS has opined that the "taking" prohibition of the ESA does apply, to some extent, to captive animals. FEI believes that this issue is governed by step one of the analysis in *Chevron USA, Inc. v. NRDC,* 467 U.S. 837, 842-4 (1984) ("if the intent of

[3] As they do in the present case, AWI and API alleged "informational injury" standing in *Born Free*. 278 F. Supp. 2d at 11. Judge Bates noted that "defendants have raised substantial unanswered questions about the plaintiffs' standing to pursue some of their claims ... [which] somewhat undermines [plaintiffs'] likelihood of ultimately succeeding on the merits." *Id.* But it became moot since the court denied the injunction.

Congress is clear, then that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). Congress' intent could not be clearer. The plain meaning of "take" has no application to an animal already in captivity. Nonetheless, even if the FWS path is followed, it leads to the same place: the AWA as administered by USDA. FWS has determined that whether a captive endangered species is being "taken" is assessed by whether the conditions in which it is being held comply with AWA standards, as administered by USDA.

FWS' position in this regard is the result of rulemaking proceedings that began in 1977 and concluded in 1998, finding its expression in two regulations. ***First***, in 1979, FWS adopted the Captive Bred Wildlife ("CBW") registration regulation which exempts from the "taking" and other prohibitions in section 9 of the ESA exotic endangered species bred in captivity in the United States. 50 C.F.R. § 17.21(g), 44 Fed. Reg. 54001, 54007 (Sept. 17, 1979). FWS determined that "activities involving captive wildlife should be regulated only to the extent necessary to conserve the species, with emphasis on wild populations." 44 Fed. Reg. 30044, 30046 (May 23, 1979). Thus, animals, such as FEI's captive-bred Asian elephants are held under CBW registration requirements which, as FWS determined, "would be based on standards set by the U.S. Department of Agriculture under the animal [sic] Welfare Act [9 CFR Parts 2 and 3]. These standards, which apply to all warmblooded animals [mammals and birds], are generally adequate to insure proper care of wildlife." *Id.* at 30047. In order to obtain a CBW permit, an applicant such as FEI must have a valid USDA license which, as discussed above, requires a demonstration that the licensee's facilities comply with the AWA. 7 U.S.C. § 2133; 50 C.F.R. § 17.21(g)(2)(iv). Thus, FEI's CBW permit (Def. Tr. Ex. 193), which has just been renewed, authorizes it to "take" its Asian elephants for "normal husbandry practices," but those

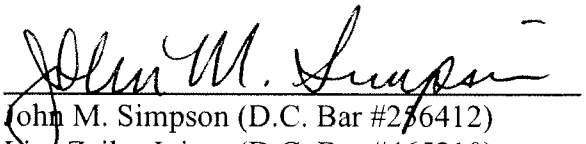
"normal husbandry practices" must comply with the AWA. In that renewal process, FWS consults with USDA as to whether the permittee (here FEI) is incompliance with the AWA. As APHIS has observed:

> The use, transport, importation and exportation of endangered species such as Asian … elephants are governed by several laws, including the … ESA … and the … AWA. APHIS … interacts with … FWS to communicate and coordinate oversight over endangered species when used for regulated purposes under the AWA. This cooperation includes providing recent inspection reports and recommendations in FWS permit and registration protocols, as well as evaluating transportation plans for imports and exports.

Ex. 8 hereto.

Second, with respect to captive endangered species not bred in the United States (such as the six elephants at issue here (and Zina)), FWS amended the regulatory definition of "harass" in 1998 to exclude from the "taking" prohibition any "generally accepted … [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act." 50 C.F.R. § 17.3, 63 Fed. Reg. 48634, 48639 (Sept. 11, 1998). As to the conditions in which captive endangered species are held, FWS saw no reason to reinvent the wheel with "husbandry manuals for each species." *Id.* at 48636. Instead, to evaluate facilities and care, "the Service will continue to consult with experts such as the Department of Agriculture's Animal and Plant Health Inspection Service, which is charged with administering the Animal Welfare Act …." *Id.* Thus, where the handling of an Asian elephant with the guide, tethers or otherwise complies with the AWA as administered by USDA, it is not a "taking" under the ESA. The welfare of captive Asian elephants in American circuses (as well as zoos and wildlife parks) is governed by the AWA, not the "taking" prohibition of the ESA.

Respectfully submitted,



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