

FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

2011 AUG -31 A 9:40

PEOPLE FOR THE ETHICAL TREATMENT)
OF ANIMALS, INC., a Virginia corporation,)

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

Plaintiff,)

v.)

Civil No. 1:11cv809
CMH/IDD

UNITED STATES FISH AND WILDLIFE SERVICE;)
ROWAN GOULD, in his official capacity as Acting)
Director, United States Fish and Wildlife Service; and)
KEN SALAZAR, in his official capacity as Secretary,)
United States Department of the Interior,)

Defendants.)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. Plaintiff challenges U.S. Fish and Wildlife Service's ("FWS") decision to issue a Captive Bred Wildlife ("CBW") permit to Curtis and Berni Shepperson as violative of the Endangered Species Act ("ESA").

2. FWS's issuance of this permit allows activities that are expressly prohibited by Section 9 of the ESA, 16 U.S.C. § 1538. The agency approved the permit application in violation of the plain language of the ESA, which authorizes the FWS to permit otherwise prohibited activities only on a case-by-case basis, after public notice of each application, public access to each application, public opportunity to comment on each such application, and after the agency makes and publishes specific findings, including that the permit was "applied for in good faith," and that issuance of the permit will "not operate to the disadvantage of" the subject endangered species and "will be consistent with the purposes and policy set forth" in the ESA. 16 U.S.C. § 1539(a), (c), (d). The FWS's approval of the Sheppersons' permit application is not in

accordance with the ESA, arbitrary, capricious, an abuse of discretion, in excess of FWS's statutory authority, and without observance of procedure required by the ESA; accordingly, the approval violates the Administrative Procedure Act. 7 U.S.C. § 706(2)(a), (c), (d).

Jurisdiction and Venue

3. This Court has federal question jurisdiction over this case pursuant to 28 U.S.C. § 1331.

4. This Court may grant the relief requested under 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief) and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e) because, on knowledge and belief, the unlawfully issued permit that is the subject of this lawsuit was issued from the U.S. Fish and Wildlife Service's Division of Management and Authority office in Arlington, Virginia, which lies within the Alexandria Division of the Eastern District of Virginia.

Parties

6. Plaintiff People for the Ethical Treatment of Animals, Inc. ("PETA"), is a Virginia nonprofit corporation headquartered at 501 Front St., Norfolk, Virginia 23510.

7. PETA gathers information about captive animals, including captive endangered animals, and provides this information to its members through its website, magazine, action alerts, blog, and other materials that it disseminates. PETA also disseminates this information to the news media and uses it in preparing comments to legislative and administrative bodies. Because PETA is unable to obtain information through the Section 10 permitting process, PETA is hindered in its ability to provide its informational services.

8. The FWS's unlawful approval of the Sheppersons' CBW permit application injures PETA. By failing to comply with the process mandated by section 10 of the ESA, defendants have violated PETA's statutory right to obtain the information mandated for "each" application for a section 10 permit. As a result, PETA is unable to keep its members fully informed concerning the take of captive bred wildlife through its website, magazine, action alerts, blog, and other materials that it disseminates. PETA's injuries will be redressed if it prevails, because, as a result, the FWS will be required under section 10 of the ESA to publish notice of any application by the Sheppersons in the Federal Register, and PETA will receive such notice and will have access to all application materials as a matter of public record. FWS will further be required, if it decides to issue the Sheppersons a CBW permit, to publish findings in the Federal Register, and PETA will thereby have access to these findings.

9. Defendant ROWAN GOULD is sued in his official capacity as the Acting Director of the Fish and Wildlife Service, the federal agency to which the Secretary of the Interior has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species. Mr. Gould is charged with administering the ESA.

10. Defendant KEN SALAZAR is sued in his official capacity as the Secretary of the Interior ("Secretary"). The Secretary is the federal official who bears ultimate responsibility for implementation of the ESA.

11. Defendant UNITED STATES FISH AND WILDLIFE SERVICES is the federal agency to which the Secretary of the Interior has delegated the responsibility of implementing the ESA and its regulations with respect to terrestrial species.

Statutory Framework and Facts Giving Rise to Plaintiff's Claim for Relief

A. *Statutory and Regulatory Framework*

12. Section 9 of the ESA prohibits the “taking” of any endangered species. 16 U.S.C. § 1538(a). The ESA defines the term “take” to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

13. Section 9 further provides that it is unlawful to “possess, sell, deliver, carry, transport, or ship” any endangered species that is unlawfully taken. *Id.* § 1538(a). Section 9 also makes it unlawful to “deliver, receive, carry, transport, or ship in interstate commerce . . . in the course of a commercial activity” any endangered species. *Id.*

14. These prohibitions apply to endangered animals bred in captivity, as well as to those in the wild, unless a lawful section 10 permit has been issued by the FWS.

15. Section 10(a)(1)(A) of the ESA authorizes the FWS to issue a “permit” for any act that is otherwise prohibited by section 9, but only if such act is “for scientific purposes or to enhance the propagation or survival of the affected species.” *Id.* § 1539(a)(1)(A).

16. Section 10 further provides that the FWS “shall publish notice in the Federal Register of each application for an exemption or permit which is made under [section 10],” *id.* § 1539(c), and requires that “[e]ach notice shall invite the submission from interested persons, within thirty days after the date of the notice, of written data, views or arguments with respect to the application” *Id.* Section 10 also mandates that “[i]nformation received by the [FWS] as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.” *Id.*

17. The FWS may grant exceptions under section 10(a) “only if [it] finds and publishes . . . in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy” of the Act. *Id.* § 1539(d).

B. *Facts Giving Rise to Plaintiff's Claim*

18. On information and belief, in or around February, 2010, the FWS’s Arlington, Virginia-based Division of Management Authority issued a captive bred wildlife permit to Curtis and Berni Shepperson, authorizing them to take captive-bred endangered species. Prior to issuing this permit, FWS did not provide notice of the permit application in the Federal Register; did not invite the submission from interested parties of written data, views, or arguments with respect to the application; and did not publish findings in the Federal Register that the permit was applied for in good faith, would not operate to the disadvantage of the subject endangered species, and would be consistent with the purposes and policy set forth in the ESA. In addition, FWS has not made the information received as a part of this permit application available to the public as a matter of public record.

Plaintiff's Claim for Relief

Violations of the APA and Section 10 of the ESA

19. Each allegation set forth in the Complaint is incorporated herein by reference.

20. In approving the Sheppersons’ application for a captive bred wildlife permit defendants have violated the procedural requirements of section 10(c) of the ESA that they “shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section;” that “[e]ach notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to

the application;” and that “[i]nformation received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.” 16 U.S.C. § 1539(c). Defendants also violated section 10(d) of the ESA by failing to find and publish findings “in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in section 1531 of this title.” *Id.* § 1539(d).

21. In so violating the mandates of section 10 of the Act, defendants have acted arbitrarily and capriciously, abused their discretion, acted contrary to law, acted in excess of their statutory authority, and acted without observance of procedure required by the ESA in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

22. This violation of law has caused and continues to cause, plaintiff’s injuries as described in ¶¶ 6-8.

REQUEST FOR RELIEF

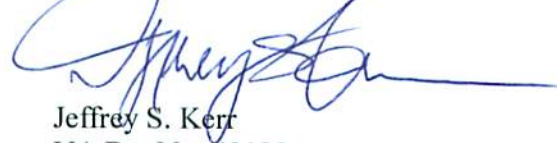
WHEREFORE, plaintiff requests that the Court issue an order:

- (1) declaring that defendants have violated the Endangered Species Act and the Administrative Procedure Act;
- (2) setting aside defendants’ approval of the Sheppersons’ CBW permit application and enjoining implementation of the permit;
- (3) enjoining defendants from allowing the Sheppersons to engage in any activities with respect to any captive bred endangered species that are prohibited by section 9 of the ESA to occur without first issuing a permit in accordance with all of the substantive and procedural requirements of section 10 of the ESA;

- (4) awarding plaintiff its costs and reasonable attorneys' fees; and
- (5) awarding plaintiff any other relief that the Court may deem just and proper.

Dated: August 3, 2011

Respectfully submitted,



Jeffrey S. Kerr
VA Bar No. 42122
Attorney for Plaintiff
PETA Foundation
1536 16th Street, N.W.
Washington, DC 20036
(202) 540-2171
(202) 540-2208 (facsimile)
jeffk@petaf.org

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS People for the Ethical Treatment of Animals, Inc.</p> <p>(b) County of Residence of First Listed Plaintiff <u>Norfolk, VA</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) Jeffrey S. Kerr, PETA Foundation 1536 16th Street, N.W., Washington, DC 20036 (202) 540-2171</p>	<p style="text-align: right; color: blue; font-weight: bold; font-size: 1.2em;">RECEIVED</p> <p>DEFENDANTS U.S. Fish and Wildlife Service; Rowan Gould, in his official capacity as Acting Director, U.S. Fish and Wildlife Service; and Ken Salazar, in his official capacity as Secretary, U.S. Dep't of Interior. County of Residence of First Listed Defendant <u>Arlington County, VA</u></p> <p style="text-align: center; color: blue; font-weight: bold; font-size: 0.8em;">(IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED</p> <p style="text-align: center; color: blue; font-weight: bold; font-size: 0.8em;">2011 AUG 3 11A 9:40 CLERK US DISTRICT COURT ALEXANDRIA, VIRGINIA</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES(Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <p>(For Diversity Cases Only)</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:30%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:40%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align: center; border: 1px solid black; font-weight: bold; font-size: 0.8em;">PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <p style="text-align: center; border: 1px solid black; font-weight: bold; font-size: 0.8em;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p style="text-align: center; border: 1px solid black; font-weight: bold; font-size: 0.8em;">FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<p style="border: 1px solid black; font-weight: bold; font-size: 0.8em;">REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p style="border: 1px solid black; font-weight: bold; font-size: 0.8em;">CIVIL RIGHTS</p> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<p style="border: 1px solid black; font-weight: bold; font-size: 0.8em;">PRISONER PETITIONS</p> <input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<p style="border: 1px solid black; font-weight: bold; font-size: 0.8em;">LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p style="border: 1px solid black; font-weight: bold; font-size: 0.8em;">IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
7 U.S.C. §§ 701-706

Brief description of cause:
Violation of the Administrative Procedure Act in approving Endangered Species Act permit

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE: 08/03/2011

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Court Name: United States District Court
Division: 1
Receipt Number: 14683023252
Cashier ID: rbroaden
Transaction Date: 08/03/2011
Payer Name: PEOPLE FOR ETHICAL TREAT

CIVIL FILING FEE
For: PEOPLE FOR ETHICAL TREAT
Amount: \$350.00

CASH
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

FILING FEE
111CV809