

IN THE CIRCUIT COURT OF THE
2ND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO.: _____

ANGELS IN DISTRESS, INC.,
a Florida non-profit corporation,

Plaintiff,

vs.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,
an agency of the State of Florida,

Defendant.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, ANGELS IN DISTRESS, INC., a Florida non-profit corporation, brings this Complaint against the FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION, an agency of the State of Florida (hereinafter “FWCC”) and says:

VENUE, JURISDICTION AND PARTIES

1. This is an action seeking declaratory and injunctive relief against the FWCC as it relates to permits that allow cruelty to gopher tortoises.
2. Plaintiff ANGELS IN DISTRESS, INC. is a Florida non-profit corporation which is dedicated to the preservation and protection of wildlife. Plaintiff, as an organization and on behalf of its members, is concerned with and active in seeking to protect the gopher tortoise.
3. The Defendant FWCC is a state agency which is headquartered in Leon County.
4. This Court has jurisdiction over this matter pursuant to §86.011 and §120.73, Fla. Stat. (2005).

5. All conditions precedent to the filing of this action have been performed, satisfied, executed, or waived.

BACKGROUND FACTS

6. The FWCC is a constitutional entity established by the 1998 revision to the Florida Constitution and entrusted by Florida voters to exercise regulatory and executive powers with respect to wild animal life, fresh water aquatic life and marine life. *See* Art. IV, § 9; Art. XII, § 23, Fla. Const.

7. The FWCC's mission, as proclaimed on its website, is "managing fish and wildlife resources for their long-term well-being and the benefit of people."

8. Despite the mandate by the Florida voters and its clear mission statement, since 1991 the FWCC has authorized the direct killing of an estimated 70,000 gopher tortoises, among the creatures the FWCC is entrusted to protect and one of Florida's most treasured species.

9. The gopher tortoise (*Gopherus polyphemus*), the only tortoise indigenous to the southeastern United States, is a large terrestrial turtle with a carapace or shell length averaging 9 to 11 inches. Capable of weighing up to 15 pounds, the tortoise's life expectancy is estimated at 40 to 60 years.

10. In Florida, the gopher tortoise generally lives in sandy, well-drained uplands which allow easy burrowing. The burrows excavated by a gopher tortoise average 15 feet in length and 6 feet in depth. Several tortoises may use individual burrows at different times and, in some instances, tortoises may share individual burrows.

11. Gopher tortoise burrows not only protect tortoises from extreme temperatures, desiccation and predators, but also provide habitat or refuge for over 360 other species such as rabbits, frogs, snakes and mice. Additionally, evidence suggests that the mound of sand deposited

at the mouth of a burrow promotes high plant richness. Indeed, the gopher tortoise is an essential component of Florida's ecosystem.

12. A gopher tortoise primarily feeds on grasses and fruits such as blackberries. Still, the gopher tortoise will generally not travel more than 160 feet from its burrow in search for food.

13. As the population in the State of Florida continues to increase exponentially, the gopher tortoise population has decreased. The decreasing trend of gopher tortoise population is closely correlated with habitat loss, degradation and fragmentation. Not surprisingly, development at or near the habitat is one of the primary causes of the gopher tortoise population decline.

14. As such, the gopher tortoise is currently listed by the State of Florida as a Species of Special Concern, thereby making it illegal to take, harm, or harass this species, except through the issuance of an FWCC permit. *See Fla. Admin. Code R.68A-27.005.*

INCIDENTAL TAKE PERMITS

15. In an FWCC document titled "Available Options to Address the Presence of Gopher Tortoises on Lands Slated for Development" the agency recognizes that "[w]ithout proper management, this tortoise is likely to become a threatened or endangered species in the future." The FWCC similarly acknowledges that the "primary reason for the decline of this species is habitat destruction." Yet, incredulously, one of the options the FWCC makes available to individuals planning to develop on a gopher tortoise habitat is to "entomb or kill" the tortoises.

16. Specifically, the FWCC provides developers with 5 options to address the presence of tortoises on lands slated for development: (1) avoid development, (2) avoid destruction of tortoise burrows, (3) mitigate for incidental take of tortoises, (4) relocate the tortoises on-site, or (5) relocate the tortoises off-site. The first two options do not require permits or reporting requirements whereas the last three do.

17. Not surprisingly, very few developers opt for the first two options. And, considering relocation can be both labor-intensive and costly, it is equally not surprising that the third option has become a favorite among developers.

18. The FWCC mechanism for the third option, which allows developers to entomb or kill gopher tortoises, is the “Incidental Take Permit.” According to its website, the FWCC established the incidental take permit process in July, 1991 as “an alternative method of addressing potential impact to the gopher tortoise, a state-listed Species of Special Concern, within sites proposed for development.” This permit authorizes “the ‘taking,’ entombment or killing, of gopher tortoises incidental to development activities” provided that “adequate compensatory occupied tortoise habitat is preserved and managed in perpetuity.”

19. Through its Incidental Take Permit process, the FWCC allows gopher tortoises to be entombed or killed by developers in exchange for, *inter alia*, contributions made for an FWCC “mitigation park.” In essence, developers simply pay into a fund to, theoretically, help preserve habitat elsewhere. The amount a developer must pay is determined based on the size of the development site coupled with the number of tortoises within the site.

20. Once a developer makes the requisite contribution, the FWCC issues the Incidental Take Permit. At that point, there are no restrictions or guidelines on how a developer should kill the gopher tortoises within the development site.

21. Most developers opt to “entomb” the burrows used by the gopher tortoises. That is, the developers simply bury the gopher tortoises alive. Sadly, because of their slow metabolism, it normally takes months for entombed tortoises to die.

22. This cruel and inhumane killing has led to such a decline in the gopher tortoise population that it soon may become an endangered or threatened species, at which point developers

would not be able to bury the tortoises alive by simply paying into a fund. To wit, developers would need to, mercifully, establish that the taking would enhance the survival of the species or demonstrate some scientific or conservation purpose for the issuance of a permit to take an endangered or threatened species. See Fla. Admin. Code R.68A-27.003; R.68A-27.004.

23. With the possible elimination of this cruel and inhumane option looming, developers have rushed to obtain incidental take permits. The FWCC has responded in an alarming fashion, issuing what is believed to be nearly 3,000 incidental take permits in recent months.

**FWCC'S "INCIDENTAL TAKE PERMIT" PROCESS
IS IN DIRECT CONTRAVENTION OF FLORIDA LAW**

24. The animal cruelty statute, §828.02, et. seq., Fla. Stat. was enacted to provide for the protection of animals, including, of course, gopher tortoises. The statute expressly prohibits the “torture, torment and cruelty of animals . . . whereby unnecessary or unjustifiable pain or suffering is caused . . . permitted or allowed to continue *when there is a reasonable remedy or relief*” (Emphasis added).

25. Indeed, under §828.12, Fla. Stat., a person who “torments, deprives of necessary sustenance or shelter, or unnecessarily mutilates or kills any or causes the same to be done” is guilty of a misdemeanor of the first degree.

26. Certainly, authorizing - indeed encouraging - the entombment of gopher tortoises is an unconscionable exercise of animal cruelty, particularly when, as here, the FWCC knows its actions will cause the gopher tortoise to experience excruciating death by starvation, thirst, or lack of oxygen.

27. Moreover, by its own admission, the FWCC acknowledges the existence of multiple available remedies of relief, most of which do not even harm gopher tortoises. Only one - the Incidental Take permit - is specifically designed to torture and torment these harmless creatures.

28. By establishing this process, the FWCC not only abdicates its solemn responsibility to protect a species which it designates as one of special concern, but goes further, providing a “legal” mechanism for the destruction of the species, while succumbing to the mantra of “inevitable development.” Regardless of its motives, the FWCC’s “taking” process directly violates the plain language of Florida’s animal cruelty statute.

FWCC’S PERMIT IS NOT EVEN IN COMPLIANCE WITH ITS OWN RULES

29. Florida’s “wildlife” statute, §372 et. seq., Fla. Stat. was enacted for the express purpose of conserving, protecting, and managing Florida’s diverse and valuable array of wildlife.

30. Pursuant to §372.0725, Fla. Stat., it is unlawful for a person to “intentionally kill or wound any fish or wildlife species designated by the [FWCC] as endangered, threatened, or of special concern . . . except as provided for in the rules of the [FWCC].”

31. Under §372.021, Fla. Stat., by the authority granted by Art. IV, §9, Fla. Const., the FWCC is authorized to adopt rules, regulations, and orders *in accordance with* Chapter 120, Florida Statutes. Under Chapter 120, a rule that “fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency” constitutes an “invalid exercise of delegated legislative authority.” §120.52(8)(d), Fla. Stat.

32. In that regard, the FWCC adopted Fla. Admin. Code R.68A-27.005(1)(a), which provides that “[n]o person shall take, possess, transport, or sell any species of special concern included in this paragraph or parts thereof or their nests or eggs except as authorized by Commission regulations or by permit from the executive director or by statute or regulation of any other state agency, *permits being issued upon reasonable conclusion that the permitted activity will not be detrimental to the survival potential of the species.*” Fla. Admin. Code R.68A-27.005(1)(a). (Emphasis added).

33. The gopher tortoise is one such animal declared to be of special concern. Of the 49 species so designated, *only* the gopher tortoise meets the first three criteria for this designation: (1) it has a significant vulnerability to habitat modification, environmental alteration, human disturbance, or human exploitation which, in the foreseeable future, may result in its becoming a threatened species unless appropriate protective or management techniques are initiated or maintained; (2) it may already meet certain criteria for designation as a threatened species but for which conclusive data are limited or lacking; (3) it may occupy such an unusually vital or essential ecological niche that should it decline significantly in numbers or distribution other species would be adversely affected to a significant degree.

34. Certainly, “legally” authorizing approximately 70,000 gopher tortoises to be “entombed or killed” since 1991 has clearly been detrimental to the survival potential of the species, precisely the opposite result intended and required by this FWCC rule and by extension §372.0725, Fla. Stat.

35. Moreover, the FWCC rule regarding Species of Special Concern imposes absolutely no restriction on how a Species of Special Concern should be “taken” nor does it address how the FWCC determines if a permitted activity detrimentally affects the survival potential of a species. Quite simply, the rule “vests unbridled discretion” in the FWCC on this important issue.

36. Accordingly, this case seeks declaratory and injunctive relief against not only the issuance of any new incidental take permits by the FWCC but also against the FWCC’s recent issuance of nearly 3,000 incidental take permits; both actions by the FWCC will undoubtedly result in more cruel and inhumane killing of gopher tortoises in direct violation of Chapters 828, 120 and 372 of the Florida Statutes.

COUNT I: DECLARATORY JUDGMENT

37. Plaintiff realleges and incorporates by reference all preceding paragraphs.

38. An actual, justiciable controversy exists between Plaintiff and Defendant as to whether permits issued by Defendant are valid and enforceable under Chapter 828, Florida Statutes.

39. An actual, justiciable controversy exists between Plaintiff and Defendant as to whether permits issued by Defendant are valid and enforceable under Chapter 120, Florida Statutes.

40. An actual, justiciable controversy exists between Plaintiff and Defendant as to whether permits issued by Defendant are valid and enforceable under Chapter 372, Florida Statutes and Fla. Admin. Code R.68A-27.005(1)(a).

WHEREFORE, Plaintiff prays for relief as set forth later in this Complaint.

COUNT II: INJUNCTIVE RELIEF

41. Plaintiff realleges and incorporates by reference all preceding paragraphs.

42. Upon information and belief, Defendant has recently issued approximately 3,000 new Incidental Take permits.

43. Consequently, time is of the essence since recipients of these Incidental Take permits have the authority to entomb or otherwise kill gopher tortoises, without restriction, within their development sites. Therefore, there is likelihood of irreparable harm.

44. As detailed earlier in this Complaint, it is not only clear that the Incidental Take permits represent an unnecessary, cruel and inhumane method of killing gopher tortoises, in direct violation of Chapter 828, Florida Statutes, but there is also a substantial likelihood that Plaintiff will successfully establish such permits are violative of Chapters 120 and 372, Florida Statutes.

45. Lastly, the issuance of an injunction will not disserve the public interest. Quite the opposite, there is a prevailing public interest to prevent cruelty to animals and to similarly preserve a key ingredient of the state's ecosystem.

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

1. Order, declare and adjudge that Defendant's issuance of Incidental Take permits allowing gopher tortoises to be entombed or otherwise killed without restriction is and would be a violation of Chapter 828, Florida Statutes;
2. Order, declare and adjudge that Defendant's issuance of Incidental Take permits has been detrimental to the survival of the gopher tortoise and thus violates Chapter 372, Florida Statutes and Fla. Admin. Code R.68A-27.005(1)(a);
3. Order, declare and adjudge that Defendant's rule regarding Species of Special Concern fails to establish adequate standards for the FWCC's decisions, or vests unbridled discretion in the agency and, therefore, constitutes an invalid exercise of delegated legislative authority under Chapter 120, Florida Statutes;
4. Reverse and set aside Defendant's recent issuance of approximately 3,000 new Incidental Take permits, which would allow gopher tortoises to be entombed or otherwise killed without restriction, as being arbitrary, capricious, an abuse of discretion and contrary to law;
5. Issue temporary restraining order(s), preliminary injunction(s) and/or permanent injunctive relief as requested by Plaintiff to halt Defendant's killing activities, including by enjoining the issuance of any new Incidental Take permits; and
6. Grant such further and other relief as the Court deems just and proper.

DATED this _____ day of _____, 2006.

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