
IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Civ. No. 05-2334

ELEPHANT ADVOCATES

and

THE GANESH PROJECT,

Petitioners,

v.

UNITED STATES FISH & WILDLIFE SERVICE,

Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE STATE OF BLISS

BRIEF FOR RESPONDENT

Team 10
Concetta F. Grimm
Kelly A. Means
Paul M. Shipp

Counsel for Respondent

CLEVELAND-MARSHALL COLLEGE OF LAW
1801 Euclid Avenue
Cleveland, Ohio 44115

TABLE OF CONTENTS

	<u>Page</u>
<u>STATEMENT OF THE CASE</u>	1
<u>STATEMENT OF THE FACTS</u>	1
<u>ISSUES PRESENTED FOR REVIEW</u>	3
<u>STANDARD OF REVIEW</u>	3
<u>SUMMARY OF THE ARGUMENT</u>	3
<u>ARGUMENT</u>	4
<u>I. PETITIONERS DO NOT HAVE STANDING UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION BECAUSE THEY HAVE NOT DEMONSTRATED THE REQUIRED INJURY-IN-FACT.</u>	4
A. PETITIONER ELEPHANT ADVOCATES DOES NOT HAVE STANDING THROUGH MS. BARK AS SHE HAS NOT SUFFERED AN INJURY-IN-FACT BECAUSE SHE HAS NO RELATIONSHIP WITH THE ELEPHANTS AT ISSUE IN THIS CASE.	5
1. <u>Ms. Bark’s alleged injury is not concrete or particularized because she has no specific connection with the seven Asian elephants in this case.</u>	6
2. <u>Ms. Bark’s injury based on her inability to see these seven elephants in the wild is not actual or imminent because the injury will only be suffered if she chooses to expose herself to it and she does not plan to return to Corbett until next spring.</u>	7
3. <u>Ms. Bark’s claim that visiting the elephants in a zoo would diminish her aesthetic enjoyment of them is not a cognizable interest.</u>	8
B. PETITIONER GANESH PROJECT DOES NOT HAVE STANDING BECAUSE THE ORGANIZATION ITSELF HAS NOT SUFFERED ANY INJURY.	9

1.	<u>Petitioner Ganesh Project is attempting to assert a claim that would require the participation of individual members in the suit.</u>	10
2.	<u>Petitioner Ganesh Project’s patrons and members’ injuries are not presently suffered nor imminently threatened because they have no plans to return to Corbett.</u>	11
C.	MS. GAMBET HAS NOT SUFFERED A RECOGNIZED AESTHETIC INJURY-IN-FACT UNDER ARTICLE III.	11
1.	<u>The district court did not apply standing analysis to Ms. Gambet’s alleged injury-in-fact.</u>	12
2.	<u>The removal of seven elephants from an entire national park is not an injury-in-fact because the interest in seeing elephants generally is not injured.</u>	13
II.	<u>THE ISSUANCE OF WUMBA’S IMPORTATION PERMIT WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THE FISH AND WILDLIFE SERVICE REASONABLY DECIDED TO ISSUE THE PERMIT AFTER A CONSIDERATION OF ALL RELEVANT FACTORS UNDER THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA AND THE ENDANGERED SPECIES ACT.</u>	14
A.	A REASONABLE AGENCY DECISION THAT IS BASED ON A CONSIDERATION OF ALL RELEVANT FACTORS AND IS NOT THE RESULT OF A CLEAR ERROR IN JUDGMENT IS NOT ARBITRARY AND CAPRICIOUS UNDER THE ADMINSTRATIVE PROCEDURE ACT.	15
1.	<u>The Fish and Wildlife Service considered all relevant factors and reasonably determined that Wumba’s purpose in importing the elephants was not a primarily commercial one under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and therefore its determination was not arbitrary and capricious under the Administrative Procedure Act.</u>	18
a.	The FWS’s decision in this case is entitled to extreme deference because “primarily commercial purpose” is an ambiguous term.	18

b. The FWS considered the principles set forth in Conference Resolution 5.10 and reasonably concluded that Wumba’s purpose was not primarily commercial.....19

2. **The Fish and Wildlife Service considered all relevant factors and reasonably determined that Wumba’s importation of the elephants would enhance the propagation and survival of the species under the Endangered Species Act and therefore its determination was not arbitrary and capricious under the Administrative Procedure Act.**.....22

a. The FWS’s decision in this case is entitled to extreme deference because Congress purposely left the term “enhance the propagation or survival of the affected species” ambiguous so the FWS could apply its scientific expertise when deciding whether to issue an importation permit.....22

b. The FWS considered the issuance criteria set forth in its regulations and reasonably concluded that the elephants’ importation would enhance the propagation or survival of the affected species.....24

CONCLUSION25

APPENDIX A-1

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Page

Burlington Truck Lines, Inc. v. United States
371 U.S. 156 (1962)16

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.
467 U.S. 837 (1984) *passim*

Citizens to Preserve Overton Park, Inc. v. Volpe
401 U.S. 402 (1971) *passim*

Friends of the Earth v. Laidlaw
528 U.S. 167 (2000)4, 10

Hunt v. Wash. State Apple Adver. Comm'n
432 U.S. 333 (1977) *passim*

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992) *passim*

Motor Vehicle Mfrs. Assoc. of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.
463 U.S. 29 (1983)14, 16, 21

Sumitomo Shoji Am., Inc. v. Avagliano
457 U.S. 176 (1982)17

Univ. of Tex. v. Camenisch
451 U.S. 390 (1981)12

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.
435 U.S. 519 (1978)16, 20

Warth v. Seldin
422 U.S. 490 (1975)10

UNITED STATES APPELLATE COURT CASES:

*Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros.
& Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003)9

Animal Legal Def. Fund v. Espy
23 F.3d 496 (D.C. Cir. 1994)7, 8

<i>Animal Legal Def. Fund v. Glickman</i> 154 F.3d 426 (D.C. Cir. 1998)	6, 9
<i>City of Sausalito v. O’Neill</i> 386 F.3d 1186 (9 th Cir. 2004)	3
<i>Ecological Rights Found. v. Pac. Lumber Co.</i> 230 F.3d 1141 (9 th Cir. 2000)	6
<i>Humane Soc’y of the U.S. v. Babbitt</i> 46 F.3d 93 (D.C. Cir. 1995)	<i>passim</i>
<i>Iceland S.S. Co. v. U.S. Dep’t of the Army</i> 201 F.3d 451 (D.C. Cir. 2000)	16
<i>Katelnikoff v. U.S. Dept. of Commerce</i> 982 F.2d 1332 (9 th Cir. 1992)	6

UNITED STATES DISTRICT COURTS CASES:

<i>Born Free U.S.A. v. Norton</i> 278 F. Supp. 2d. 5 (D.D.C. 2003), <i>vacated as moot</i> , No. 03-5216, 2004 U.S. App. LEXIS 936 (D.C. Cir. Jan. 21, 2004)	18, 19, 20, 21
<i>Cayman Turtle Farm, Ltd. v. Andrus</i> 478 F. Supp. 125 (D.D.C. 1979)	17, 23, 24
<i>Fund for Animals v. Clark</i> 27 F.Supp.2d 8 (D.D.C. 1998)	12
<i>Fund for Animals v. Norton</i> 281 F. Supp.2d 209 (D.D.C. 2003)	12
<i>World Wildlife Fund v. Hodel</i> No. 88-1276, 1988 U.S. Dist. LEXIS 19409 (D.D.C. June 17, 1988)	15, 20, 24

STATUTORY PROVISIONS:

5 U.S.C. § 706 (2000)	3, 4, 14, 15
16 U.S.C. § 1537a (2000)	18
16 U.S.C. § 1538 (2000)	18, 22
16 U.S.C. § 1539 (2000)	15, 22, 23

50 C.F.R. § 17.11 (2005)	22
50 C.F.R. § 17.21 (2005)	22
50 C.F.R. § 17.22 (2005)	23
50 C.F.R. § 23.1 (2005)	18
50 C.F.R. § 23.12 (2005)	18
50 C.F.R. § 23.15 (2005)	18

MISCELLENEOUS:

Convention on International Trade in Endangered Species of Wild Fauna and Flora, <i>opened for signature</i> Mar. 1, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085 (1975).....	18
Conference of the Parties to CITES [Conf.] Res. 5.10 (1985), <i>available at</i> http://www.cites.org/eng/res/all/05/E05-10.pdf	14, 19, 20, 21
David S. Favre, <i>International Trade in Endangered Species:</i> <i>A Guide to CITES</i> 82 (1989)	18, 19
U.S. Fish & Wildlife Serv., Dep't of the Interior, <i>Endangered Species Glossary</i> (2005), <i>available at</i> http://www.fws.gov/ endangered/glossary.pdf	22

STATEMENT OF THE CASE

The United States District Court for the State of Bliss granted in part and denied in part Petitioners' and Respondent's Motions for Summary Judgment. (R. at 12.) The district court concluded that Petitioners had standing to bring the case at hand, granting their motion and denying Respondent's motion as to this argument. (R. at 8, 12.) The district court further determined that Respondent lawfully issued the importation permit, denying Petitioners' motion and granting Respondent's motion as to the merits of the case. (R. at 10, 12.) Petitioners appeal the denial of their Motion for Summary Judgment on the merits. Respondent cross-appeals the denial of its Motion for Summary Judgment challenging Petitioners' standing to bring this case.

STATEMENT OF THE FACTS

Wumba Amusement Park ("Wumba") sought to import seven juvenile female Asian elephants from Corbett National Park ("Corbett") in India. (R. at 5.) Wumba sought and obtained an import permit from the Fish and Wildlife Service ("FWS") for the elephants because Asian elephants are classified as endangered under both the Convention on International Trade in Endangered Species of Wild Fauna and Flora, ("CITES") and the Endangered Species Act ("ESA"). (R. at 4.) In granting the permit, the FWS considered Wumba's intent to make the elephants available for breeding in North America's only successful Asian elephant breeding program. (R. at 4, 9.) Further, the FWS considered Wumba's plan to use the elephants in a conservation education program that would make educational materials available to visitors and would present visitors with a lecture regarding the plight the elephants face in their homeland. (R. at 9-10.)

Petitioners claimed standing to challenge the FWS's grant of the import permit as arbitrary and capricious, in violation of the Administrative Procedure Act. Petitioner Elephant

Advocates is a non-profit organization that advocates for the protection and conservation of elephants in the wild and in captivity. (Order at 1.) Petitioner Elephant Advocates claims to have standing to challenge the FWS's permit issuance in this case through Sandra Bark, a resident of the United States who is a researcher and member of Elephant Advocates. (R. at 6.) However, Ms. Bark has not been to Corbett since she conducted general research on elephants there over two years ago. (R. at 6.) Further, Ms. Bark never studied the seven particular elephants at issue in this case, and she has no concrete plans to visit in the future, although she claims she will be visiting sometime next spring. (R. at 6.)

Petitioner Ganesh Project is a non-profit organization with the purpose of preserving elephant habitat and providing the public with an opportunity to view Asian elephants in the wild. (Order at 1.) Petitioner Ganesh Project claimed standing to challenge the FWS's issuance of the importation permit in this case as an organization and through Ms. Gambet. (R. at 7.) Ms. Gambet is head of Petitioner Ganesh Project's tour operations and acts as a tour guide, visiting Corbett a maximum of once per year. (R. at 7.) Ms. Gambet claims that Wumba's importation of the elephants at issue will diminish the number of elephants viewable at Corbett. (R. at 7.) As a result, Petitioner Ganesh Project claims standing because its members will have less elephants to look at when they tour Corbett in the future. (R. at 7.) However, other elephants will remain in Corbett that Ms. Gambet and Petitioner Ganesh Project's members will still be able to view. (R. at 7-8.)

Petitioners challenged the FWS's underlying conclusions that the elephant's importation was not for a primarily commercial purpose under CITES, and would enhance the propagation of the species under the ESA. Petitioners did not claim that the FWS failed to consider the evidence presented in conjunction with the relevant factors.

ISSUES PRESENTED FOR REVIEW

- I. Did the District Court err in concluding that Petitioners had standing to challenge the FWS's issuance of the importation permit in this case?
- II. Did the District Court err in determining that the FWS's issuance of the importation permit did not violate the Administrative Procedure Act because the FWS did not arbitrarily and capriciously conclude that the purpose of the importation was not primarily commercial under CITES, and that the importation would enhance the survival of the species under the ESA?

STANDARD OF REVIEW

An appellate court reviews a district court's summary judgment order de novo. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1196 (9th Cir. 2004). While the question of a party's standing is subject to de novo review by the appellate court, the merits of an agency decision are reviewed under the arbitrary and capricious standard of review. *See id.* at 1196-97, 1205-06; *see also* 5 U.S.C. §706(2)(A)(2000).

SUMMARY OF THE ARGUMENT

To satisfy the standing requirement of Article III of the United States Constitution, a plaintiff must show he has suffered an "injury-in-fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Petitioners failed to demonstrate an injury-in-fact required by Article III.

An organization has standing to bring suit when the organization itself is injured, or on behalf of its members when its members have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested require the participation of individual members in the suit. *Hunt v. Wash. State*

Apple Adver. Comm'n, 432 U.S. 333, 342, 343 (1977). Petitioner Elephant Advocates does not have organizational standing through Ms. Bark because she has not suffered an injury-in-fact and her alleged injury is not imminent. Further, in determining that Ms. Gambet and Petitioner Ganesh Project had standing, the district court incorrectly applied a preliminary injunction analysis; her alleged injury does not satisfy the injury-in-fact requirement for standing. Thus, neither she nor Petitioner Ganesh Project has standing to sue.

The FWS's decision in this case is reviewed under the extremely deferential arbitrary and capricious standard, and this Court is not empowered to substitute its judgment for that of the FWS. See 5 U.S.C. § 706(2)(A) (2000); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The FWS considered all relevant factors and reasonably concluded that it was appropriate to issue Wumba's importation permit; this decision was not a clear error of judgment. Therefore, the FWS's decision was not arbitrary and capricious. See *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416.

ARGUMENT

I. PETITIONERS DO NOT HAVE STANDING UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION BECAUSE THEY HAVE NOT DEMONSTRATED THE REQUIRED INJURY-IN-FACT.

To satisfy Article III's standing requirements, a plaintiff must show 1) it has suffered an "injury in fact" that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000), (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Neither Petitioner has shown a sufficient injury-in-fact for standing purposes.

An organization has standing to bring suit when the organization itself is injured, or on behalf of its members when its members have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the suit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977). The party invoking federal jurisdiction bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561. Petitioner Elephant Advocates erroneously claims standing on the basis of only one member, Sandra Bark. (R. at 6.) Likewise, Petitioner Ganesh Project has not established standing because it erroneously claims an injury to its organization and to one of its members, Ms. Gambet. (R.at 7, 8.)

A. PETITIONER ELEPHANT ADVOCATES DOES NOT HAVE STANDING THROUGH MS. BARK AS SHE HAS NOT SUFFERED AN INJURY-IN-FACT BECAUSE SHE HAS NO RELATIONSHIP WITH THE ELEPHANTS AT ISSUE IN THIS CASE.

The District Court erred in holding that Ms. Bark has suffered an “injury-in-fact” based on her “personal familiarity with, and aesthetic and research interests in, these particular elephants involved.” (R.at 6-7.) Nowhere in the record does Ms. Bark or Petitioner Elephant Advocates claim to have ever seen or been in contact with the specific seven Asian elephants at issue in this case. Instead, Ms. Bark merely claims that she has an emotional attachment to elephants from her time researching elephants in Corbett National Park (“Corbett”). “[G]eneral emotional harm, no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.” *Humane Soc’y of the U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995). Ms. Bark merely alleges a “general emotional harm” that is neither concrete and particularized nor actual or imminent as Article III requires.

1. Ms. Bark’s alleged injury is not concrete or particularized because she has no specific connection with the seven Asian elephants in this case.

The injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review himself be among the injured. *Lujan*, 504 U.S. at 562-63. In other words, the plaintiff must demonstrate that she is suffering her injury in a personal and individual way – for instance, by seeing with her own eyes the particular animals whose condition causes her aesthetic injury. *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 433 (D.C. Cir. 1998). Some kind of specific connection is required. *Katelnikoff v. U.S. Dept. of Commerce*, 982 F.2d 1332, 1340 (9th Cir. 1992) (citing *Lujan*, 504 U.S. at 566-67); *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141,1147 (9th Cir. 2000) (“The injury-in-fact requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a *particular place, or animal, or plant species* and that interest is impaired by the defendant’s conduct.”) (emphasis added).

Here, Ms. Bark’s desire to observe elephants in the wild has not been injured or impeded. Ms. Bark does not claim that she has ever seen the seven specific elephants at issue in this case. Thus, she cannot suffer an aesthetic injury from their absence in a personal and individual way because she has no relationship with them. In fact, she has never seen them with her own eyes. Rather, her injury is hypothetical and conjectural. Ms. Bark cannot suffer an injury from the absence of particular elephants that she has never seen.

Ms. Bark’s alleged injury is similar to the injury claimed by the plaintiffs that lacked standing in *Lujan*. In *Lujan*, the plaintiffs had traveled to Egypt and Sri Lanka where they observed endangered species in their natural habitat. 504 U.S. at 563-64. In an attempt to establish standing, the plaintiffs proffered an “animal nexus” approach that would give standing

to anyone who had an interest in studying or seeing endangered animals anywhere on the planet. *Id.* at 566-67. Plaintiffs also asserted a “vocational nexus” theory under which anyone with a professional interest in endangered animals would have standing. *Id.* at 566. In response to these theories, the Supreme Court wrote:

It is clear that the person who observes or works with a *particular animal* threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible – though it goes to the outermost limit of plausibility – to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. *It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.*

Id. at 566-67 (emphasis added) (citation omitted).

Ms. Bark is asserting the same “animal nexus” and “vocational nexus” interests that the *Lujan* court rejected. Like the plaintiffs in *Lujan*, Ms. Bark has no specific connection with the seven elephants at issue. Rather, she has merely observed elephants generally in Corbett in the past. This kind of non-specific injury is insufficient to demonstrate a concrete and particularized injury-in-fact for standing purposes.

2. **Ms. Bark’s injury based on her inability to see these seven elephants in the wild is not actual or imminent because the injury will only be suffered if she chooses to expose herself to it and she does not plan to return to Corbett until next spring.**

Ms. Bark’s alleged injury is not imminently threatened under *Animal Legal Def. Fund v. Espy*, 23 F.3d 496 (D.C. Cir. 1994). In *Espy*, the plaintiff, a psychobiologist, claimed that she

would be harmed by the continued inhumane treatment of laboratory animals when she returned to work researching animals in laboratories. *Id.* at 500-01. The court held that the imminence requirement “has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control.” *Id.* at 500. The court in *Espy* noted that the plaintiff had been out of the research field for several years and that her claim that she must suffer further aesthetic injury in order to further her career was dependent on her own affirmative decision to expose herself to such injury. *Id.* at 500-01. The court held such an injury failed to be of a certainly impending nature. *Id.* at 501.

Ms. Bark’s alleged injuries are exactly like those that were found insufficient in *Espy*. Like the plaintiff in *Espy*, Ms. Bark’s injury will only occur if she voluntarily chooses to expose herself to it. Under *Espy*, this type of voluntary exposure lacks imminence. Further, like the plaintiff in *Espy*, Ms. Bark has been absent from Corbett for over two years, during which time she has suffered no injury. (R. at 6.) In addition, Ms. Bark does not plan to return to Corbett, where she will hypothetically suffer her injury, until next spring. *Id.* Because Ms. Bark is not presently suffering any injury and her plans to return to Corbett “next spring” are many months away, her injury is not imminent.

3. Ms. Bark’s claim that visiting the elephants in a zoo would diminish her aesthetic enjoyment of them is not a cognizable interest.

There is no cognizable interest in viewing a particular animal in a particular setting. *See Babbitt*, 46 F.3d at 98 (“[N]o court has yet considered whether an emotional attachment to a particular animal (not owned by plaintiff) based upon the animal being housed in a particular location could form the predicate of a claim of injury.”). *But see Am. Soc’y for the Prevention of*

Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003) (finding injury to an aesthetic interest when plaintiff, a former elephant handler who had worked with the elephants at issue, could detect the effects of elephants being repeatedly beaten by employees when he visited the circus); *Glickman*, 154 F.3d 426 (finding an injury to an aesthetic interest when animals in exhibition were housed in inhumane living conditions and plaintiff repeatedly visited these animals).

Here, Ms. Bark claims that she will not be able to see these particular elephants in the wild and that if she is forced to visit them in a zoo, her aesthetic enjoyment of them will be diminished. (R. at 6). However, there is no recognized interest in preferring to see an animal in the wild rather than in a zoo. *See generally, Babbitt*, 46 F.3d at 98. As a result, Ms. Bark has not shown a recognized interest.

Ms. Bark, the only member of Petitioner Elephant Advocates alleging an injury, has not alleged a sufficient injury-in-fact that is concrete and particularized and actual or imminent. Thus, because Petitioner Elephant Advocates itself has not suffered an injury and its member Ms. Bark has suffered no injury-in-fact in her individual capacity, Elephant Advocates does not have organizational standing to sue. *See Hunt*, 432 U.S. 342-43.

B. PETITIONER GANESH PROJECT DOES NOT HAVE STANDING BECAUSE THE ORGANIZATION ITSELF HAS NOT SUFFERED ANY INJURY.

The district court found that Petitioner Ganesh Project had standing due to an aesthetic injury. (R. at 7.) The injury was alleged by Petitioner Ganesh Project's head of tour operations in India, Ms. Gambet, who claims an injury to members' and patrons' aesthetic interests if the seven juvenile elephants are removed from Corbett because the number of elephants available

for viewing during tours will be diminished. (R. at 7.) An organization has standing to bring suit when the organization itself is injured, or on behalf of its members, when its members have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the suit. *Hunt*, 432 U.S. at 342, 343. The party invoking federal jurisdiction bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561. Petitioner Ganesh Project has not claimed an injury to its organization; it has only asserted injuries to individual members and patrons.

1. Petitioner Ganesh Project is attempting to assert a claim that would require the participation of individual members in the suit.

An organization has standing to sue when the organization itself is injured by the challenged action. *Hunt*, 432 U.S. at 343. While the desire to observe animals can be a cognizable aesthetic interest, standing requires that the party seeking review himself be among the injured. *Lujan*, 504 U.S. at 562-63; *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Petitioner Ganesh Project, as an organization, has itself suffered no harm. Instead, one of its employees, Ms. Gambet, alleges that other members and patrons of their tour operation will suffer aesthetic injuries if the elephants are removed. (R. at 7.) Standing analysis requires any allegation of an injury to be accompanied by the pleading of facts that show an injury-in-fact that is concrete and particularized and actual or imminent. *Laidlaw*, 528 U.S. at 180-81. Petitioner Ganesh Project is not alleging an injury such as its organization losing money or its business being interfered with, but rather Petitioner Ganesh Project is alleging harm to the aesthetic interests of its members and patrons. (R. at 7.) This is not an organizational injury, but is an

injury to individuals who are not before this court. As a result, Petitioner Ganesh Project does not have organizational standing.

2. Petitioner Ganesh Project's patrons' and members' injuries are not presently suffered nor imminently threatened because they have no plans to return to Corbett.

The individuals whom Petitioner Ganesh Project claims would be injured by the removal of seven elephants from Corbett are not identified in this case. Such individuals are required to plead facts to demonstrate that their aesthetic injuries are imminent. *Lujan*, 504 U.S. at 560-61. There are no facts in the record stating that any of these unnamed members or patrons have ever been to Corbett or plan to go there in the future. For their injuries to be imminent, these members and patrons must allege concrete plans to return to Corbett. *Id.* at 564; *see also Babbitt*, 46 F.3d at 97 (concluding that the plaintiff's injury was not imminent because she failed to state that she intended to return to the zoo to observe elephants).

An organization cannot suffer an aesthetic injury-in-fact. Only an organization's individual members can suffer aesthetic injuries. Individual members must be a party to the action and plead facts sufficient to grant standing in a lawsuit. Because Petitioner Ganesh Project itself has not suffered an injury, it does not have organizational standing.

C. MS. GAMBET HAS NOT SUFFERED A RECOGNIZED AESTHETIC INJURY-IN-FACT UNDER ARTICLE III.

Ms. Gambet, as a member of Petitioner Ganesh Project, alleges the same injury as Petitioner Ganesh Project itself. Ms. Gambet alleges that, as a member of Petitioner Ganesh Project, her aesthetic interest in viewing Asian elephants in the wild at Corbett will be injured

because there will be fewer elephants to see if these seven juvenile elephants are removed. (R.at 7). This claim does not constitute an injury-in-fact under Article III or prior court decisions.

1. The district court did not apply standing analysis to Ms. Gambet's alleged injury-in-fact.

The district court erroneously applied a preliminary injunction analysis when holding that Ms. Gambet demonstrated an injury-in-fact. In finding that the removal of seven elephants from the entirety of Corbett National Park constituted a cognizable injury-in-fact, the district court cited *Fund for Animals v. Norton*, 281 F. Supp.2d 209, 221 (D.D.C. 2003) and *Fund for Animals v. Clark*, 27 F.Supp.2d 8 (D.D.C. 1998) for the proposition that removal of a small number of animals from a large group constitutes harm or an injury. (R.at 7.) The district court applied an incorrect legal analysis.

Neither *Norton* nor *Clark* contain constitutional standing analysis or discussion. To demonstrate standing, a plaintiff must show 1) it has suffered an “injury in fact” that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Furthermore, the doctrine of standing is derived from the requirements of Article III of the United States Constitution.

In contrast, to grant a preliminary injunction a court must decide whether a plaintiff has carried the burden of meeting a four part test by demonstrating that 1) they are likely to succeed on the merits, 2) they will suffer irreparable harm if the injunction is not granted, 3) other interested parties will not suffer substantial harm if the injunction is granted, and 4) injunctive relief is in the public interest. *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981). The district

court incorrectly substituted the *factor* of “irreparable harm” in a preliminary injunction analysis for the injury-in-fact *requirement* of standing analysis under Article III. The two tests are completely different, have no bearing on each other and do not share a common analysis. Subsequently, neither the district court nor Petitioners cited any legal authority to support a claim that removing a small number of animals from a large group constitutes an injury-in-fact that is sufficient to grant standing.

2. **The removal of seven elephants from an entire national park is not an injury-in-fact because the interest in seeing elephants generally is not injured.**

Ms. Gambet has not alleged that she has seen the seven juvenile elephants at issue in this case or that she has any specific relationship with them. Rather, Ms. Gambet alleges an interest in seeing Asian elephants in Corbett generally. This interest will not be injured by the removal of such a small number of elephants. Ms. Gambet does not allege that there will no longer be elephants left to see on her tours and does not explain how the removal of the elephants at issue in this case will diminish her opportunity to see Asian elephants in Corbett generally.

A similar claim was denied by the *Babbitt* court. In *Babbitt*, the plaintiff claimed that removal of one elephant of four from a zoo would threaten her ability to observe Asian elephants. The court rejected this argument and denied the plaintiff standing, stating “[plaintiff] does not actually explain how [one elephant’s] departure – which reduced the number of Asian elephants from four to three – threatened her opportunity to observe Asian elephants.” *Babbitt*, 46 F.3d at 97, 98. Similarly, Ms. Gambet has not shown how the removal of the specific elephants in this case threatens her opportunity to see elephants in Corbett generally. Thus, there is no injury to her interest in seeing Asian elephants.

Because Petitioner Ganesh Project has itself suffered no injury and its member Ms. Bark has suffered no injury-in-fact in her individual capacity, Petitioner Ganesh Project has no organizational standing to sue. *See Hunt*, 432 U.S. at 342-43. Therefore, the district court incorrectly decided that Petitioner Ganesh Project had standing. Accordingly, this Court should reverse the district court's decision on this issue.

II. THE ISSUANCE OF WUMBA'S IMPORTATION PERMIT WAS NOT ARBITRARY AND CAPRICIOUS BECAUSE THE FISH AND WILDLIFE SERVICE REASONABLY DECIDED TO ISSUE THE PERMIT AFTER A CONSIDERATION OF ALL RELEVANT FACTORS UNDER THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA AND THE ENDANGERED SPECIES ACT.

Under the Administrative Procedure Act, a discretionary agency decision is reviewed under the arbitrary and capricious standard. 5 U.S.C. § 706(2)(A) (2000). This standard review is extremely deferential and does not empower a court to substitute its judgment for that of the agency. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). In fact, as in this case, a court must afford even greater deference to an agency's application of an undefined standard. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In applying the arbitrary and capricious standard, a court need only find the agency's decision to have been reasonable. *See Motor Vehicle Mfrs. Assoc. of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Ultimately, a decision that is based on a consideration of the relevant factors that does not contain a clear error of judgment is not arbitrary and capricious. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416.

In its issuance of the importation permit under CITES, the FWS reviewed all relevant factors and reasonably determined that Wumba's purpose was not primarily commercial. The FWS's decision based on the principles set forth in Conference Resolution 5.10 is entitled to extreme deference because "primarily commercial purpose" is an ambiguous term. Thus, the

FWS made no clear error in judgment and its decision to issue Wumba the importation permit for the purposes of breeding and conservation education was not arbitrary and capricious under the Administrative Procedure Act.

Moreover, the FWS again considered all relevant factors when it reasonably determined that Wumba's importation of the elephants would enhance the propagation and survival of the species under the Endangered Species Act. Again, the FWS's decision is entitled to extreme deference because Congress purposely left the term "enhance the propagation or survival of the affected species" ambiguous, allowing the FWS to apply its scientific expertise when deciding whether to issue the permit. *See* 16 U.S.C. § 1539(a)(1)(A) (2000). Thus, because the FWS made no clear error in judgment, its decision to issue Wumba the importation permit under the ESA was not arbitrary and capricious under the Administrative Procedure Act.

A. A REASONABLE AGENCY DECISION THAT IS BASED ON A CONSIDERATION OF ALL RELEVANT FACTORS AND IS NOT THE RESULT OF A CLEAR ERROR IN JUDGMENT IS NOT ARBITRARY AND CAPRICIOUS UNDER THE ADMINSTRATIVE PROCEDURE ACT.

Under the Administrative Procedure Act, a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law . . ." 5 U.S.C. § 706(2)(A). Known as the arbitrary and capricious test, this standard of review is particularly narrow and limited, and "[a] court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc*, 401 U.S. at 416; *see also World Wildlife Fund v. Hodel*, No. 88-1276, 1988 U.S. Dist. LEXIS 19409, at *7 (D.D.C. June 17, 1988). Furthermore, the arbitrary and capricious test does not allow a court to conduct a de novo review of the correctness of an agency decision. *See World Wildlife Fund*, 1988 U.S. Dist. LEXIS 19409, at *9.

Under an arbitrary and capricious review, an agency's decision is entitled to a presumption of regularity. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415 (noting that while the Administrative Procedure Act requires a substantial inquiry, agency decisions are entitled to a presumption of regularity). In reviewing an agency decision under this standard, a court need only ensure that the agency examined the relevant data and articulated a satisfactory explanation for its decision. *See Motor Vehicle Mfrs. Assoc. of the U.S., Inc.*, 463 U.S. at 43. In making this determination, "[a] court must consider whether the decision was based on a consideration of the relevant factors. . . ." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416. So long as there is a "rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Assoc. of the U.S., Inc.* 463 U.S. at 43 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)), only a "clear error of judgment" will justify a court in setting aside an agency's decision. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416. In fact, an agency decision should not be overturned "simply because [a] court is unhappy with the result reached." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

Moreover, a court must afford even greater deference to an agency's application of an undefined standard. *See Chevron U.S.A., Inc.*, 467 U.S. at 843. In that instance, a court should defer to an agency's reasonable conclusions. *See id.* This highly deferential review applies to conclusions involving statutes and treaties an agency is charged with administering. *See id.* ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."); *see also Iceland S.S. Co. v. U.S. Dep't of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000) ("When interpreting a treaty . . . we are guided by principles similar to those governing statutory interpretation. . . . To

the extent that the meaning of treaty terms [is] not plain, we give ‘great weight’ to ‘the meaning attributed to treaty provisions by the Government agencies charged with their . . . enforcement.’” (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982))). Further, a court reviewing an agency’s application of an undefined standard should determine whether the agency based its decision on a permissible construction of the language at issue. *See Chevron U.S.A., Inc.*, 467 U.S. at 843. An agency’s interpretation of ambiguous language need only be reasonable; it need not be the only possible interpretation. *See id.* at 843 & n.11.

Additionally, a court must afford particular deference to agency considerations of scientific or technical data because administrative agencies possess the expertise required to assess disputed scientific facts. *See Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 131 (D.D.C. 1979); *see also Chevron U.S.A., Inc.* 467 U.S. at 837 (noting that when agency decisions involve conflicting policies requiring more than just “ordinary knowledge respecting the matters subjected to agency regulations,” the Court has been consistently deferential to the agency’s interpretation). Accordingly, a sufficiently supported agency determination based on scientific or technical data is reasonable and not arbitrary and capricious even if the evidence may support more than one conclusion. *See Cayman Turtle Farm, Ltd.*, 478 F. Supp. at 131.

Because the FWS considered all relevant factors and did not make a clear error of judgment in granting Wumba’s importation permit, this Court should affirm the lower court’s decision to defer to the FWS’s conclusions under both CITES and the ESA. As a result, the lower court was correct in granting the FWS’s Motion for Summary Judgment. Accordingly, this Court should affirm the district court’s decision.

1. The Fish and Wildlife Service considered all relevant factors and reasonably determined that Wumba’s purpose in importing the elephants was not a primarily commercial one under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and therefore its determination was not arbitrary and capricious under the Administrative Procedure Act.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora regulates international trade in endangered species. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 1, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085 (1975) (hereinafter CITES). The Endangered Species Act implements CITES, *see* 16 U.S.C. § 1537a (2000); 50 C.F.R. § 23.1 (2005), declaring it unlawful “to engage in any trade . . . contrary to the provisions of [CITES].” 16 U.S.C. § 1538(c)(1) (2000). As a result, the importation of animals listed in Appendix I of CITES is unlawful unless the importer first obtains a CITES importation permit from the Fish and Wildlife Service (“FWS”). *See* 50 C.F.R. § 23.12(a)(1) (2005); *see also* CITES art. III, para. 3(c). The FWS may grant a CITES importation permit for an Appendix I species when it determines that the animals will not be used for a primarily commercial purpose.¹ *See* CITES art. III, para. 3(c); 50 C.F.R. § 23.15(d)(7) (2005).

a. The FWS’s decision in this case is entitled to extreme deference because “primarily commercial purpose” is an ambiguous term.

CITES does not define what constitutes a primarily commercial purpose. *See Born Free U.S.A. v. Norton*, 278 F. Supp. 2d 5, 14 (D.D.C. 2003), *vacated as moot*, No. 03-5216, 2004 U.S. App. LEXIS 936, at *2-3 (D.C. Cir. Jan. 21, 2004); David S. Favre, *International Trade in Endangered Species: A Guide to CITES* 82 (1989). Thus, the term is ambiguous because “it is

¹ Although the FWS must make additional determinations before issuing a CITES importation permit for an Appendix I species, Petitioners did not challenge those determinations. As a result, Petitioners waived any claim regarding the other criteria. (R. at 9 n.4.)

not clear what a commercial purpose might be or how to determine if purposes are ‘primarily’ commercial.” *Born Free U.S.A.*, 278 F. Supp. 2d. at 14. As a result, the FWS is entitled to extreme deference by a court reviewing its application of that requirement in a particular case. *See Chevron U.S.A., Inc.*, 467 U.S. at 843; *Born Free U.S.A.*, 278 F. Supp. 2d. at 17 (noting that *Chevron* applied to the FWS’s interpretation of “primarily commercial purpose” under CITES making it unlikely that the FWS’s grant of an importation permit was arbitrary and capricious).

The parties to CITES recognized the ambiguity posed by the primarily commercial purpose factor and decided that “a case-by-case analysis with accepted general principles was the only feasible approach to the problem” of defining the term. Favre, *supra*, at 83. As a result, Conference Resolution 5.10 was adopted. *See id.*

b. The FWS considered the principles set forth in Conference Resolution 5.10 and reasonably concluded that Wumba’s purpose was not primarily commercial.

Conference Resolution 5.10 sets forth guiding principles for determining when it is appropriate to grant an importation permit for an Appendix I species. *See* Conference of the Parties to CITES [Conf.] Res. 5.10 (1985), *available at* <http://www.cites.org/eng/res/all/05/E05-10.pdf>; *see also Born Free U.S.A.*, 278 F. Supp. 2d. at 15. According to the Conference Resolution, the fact that a commercial transaction underlies the transfer of an Appendix I species does not necessarily mean that the importation is for a primarily commercial purpose. *See* Conf. Res. 5.10 para. 4; *see also* Favre, *supra*, at 82 (“The fact that money exchanges hands for the import[ation] of the animals does not, *per se*, make it a tainted commercial activity . . . It has been widely accepted by the Parties that the transfer of money in exchange for an Appendix I specimen does not violate the ‘primarily commercial purpose’ standard . . .”). Instead, the Conference Resolution requires the FWS to consider whether the importation “is directed toward

resale, exchange, provision of a service or other form of economic use or benefit.” Conf. Res. 5.10 para. 2. The Conference Resolution further requires consideration of the non-commercial aspects of the animals’ use. *See id* at para. 3.

Plaintiffs have not alleged that the FWS failed to consider the factors set fourth in the Conference Resolution. Rather, Plaintiffs disagree with the FWS’s issuance of Wumba’s permit and ask this Court to overturn that decision. Under the arbitrary and capricious standard, this Court is not free to conduct a de novo review of the FWS’s decision to grant the permit in this case. *See World Wildlife Fund*, 1988 U.S. Dist. LEXIS 19409, at *9 (“[A] [c]ourt’s function is not to conduct a de novo review and reach its own conclusions regarding the propriety of the issuance of the importation permit.”). Instead, this Court may only set aside the FWS’s decision as arbitrary and capricious if there was a “clear error of judgment.” *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416. It is not enough that this Court merely disagree with the FWS’s decision in this case. *See, e.g., Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 558.

In the case at hand, the FWS considered evidence of Wumba’s intent to breed the elephants in a successful breeding program and to utilize the elephants to educate the public on the dangers the elephants face in their homeland. (R. at 4, 9.) This evidence sufficiently supports and makes reasonable the FWS’s conclusion that the non-commercial aspects of the elephants’ importation prevail. Furthermore, this sufficiently supported and reasonable conclusion is not arbitrary and capricious even if this Court determines that the FWS could have reached a different conclusion. *See Chevron U.S.A., Inc.*, 467 U.S. at 843 & n.11 (noting that an agency’s construction of ambiguous terms need not be the only permissible construction so long as it is reasonable).

The District Court for the District of Columbia was presented with a similar situation in *Born Free U.S.A.* Like Plaintiffs here, the *Born Free U.S.A.* plaintiffs challenged the FWS's decision to issue importation permits for an Appendix I species. 278 F. Supp. 2d. at 9. The *Born Free U.S.A.* court determined that the plaintiffs were unlikely to succeed on their claim that the FWS acted arbitrarily in concluding that the purpose of the importation was not primarily commercial. *Id.* at 16. Like Wumba, the *Born Free U.S.A.* importers would realize additional revenue from an elephant exhibit. *See id.* However, like Wumba's plans in this case, the *Born Free U.S.A.* importers' plans to use the elephants for breeding and conservation education, among other factors, sufficiently supported the FWS's conclusion that the *Born Free U.S.A.* importers' purpose was not primarily commercial. *Id.* As a result, the *Born Free U.S.A.* court concluded that the FWS's decision was likely reasonable and not arbitrary and capricious. *Id.*

Here, the FWS considered the relevant evidence and the principles set forth in Conference Resolution 5.10. After these considerations, the FWS reasonably concluded that Wumba was not importing the elephants for a primarily commercial purpose. Therefore, the FWS's conclusion was not arbitrary and capricious. *See Motor Vehicle Mfrs. Assoc. of the U.S., Inc.*, 463 U.S. at 43 (noting that the arbitrary and capricious standard requires a reviewing court to ensure that the agency examined the relevant data); *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416 (“[A] court must consider whether the decision was based on a consideration of the relevant factors . . .”).

As shown, the FWS considered all relevant factors and made no clear error in judgment in concluding that Wumba's importation of the elephants was not for a primarily commercial purpose under CITES. Therefore, its decision to issue Wumba an importation permit was not arbitrary and capricious. As a result, the lower court was correct in deferring to the judgment of

the FWS in issuing the permit. Thus, this Court should affirm the district court's grant of the FWS's Motion for Summary Judgment.

2. The Fish and Wildlife Service considered all relevant factors and reasonably determined that Wumba's importation of the elephants would enhance the propagation and survival of the species under the Endangered Species Act and therefore its determination was not arbitrary and capricious under the Administrative Procedure Act.

Asian elephants are listed as endangered and therefore are protected by the Endangered Species Act ("ESA"). *See* 50 C.F.R. § 17.11 (2005); 50 C.F.R. § 17.21(b) (2005). Under the ESA, the importation of endangered species requires a permit from the FWS. *See* 16 U.S.C. § 1538(a)(1)(A). This permit is required in addition to any other permit the situation requires, including a permit under CITES. Under the ESA, the FWS may permit the importation of an endangered species when it determines that the importation will "enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A) (2000). This type of permit is known as an "enhancement of survival permit." *See* U.S. Fish & Wildlife Serv., Dep't of the Interior, *Endangered Species Glossary* (2005), available at <http://www.fws.gov/endangered/glossary.pdf>. Congress did not specify the circumstances justifying the issuance of an enhancement of survival permit. *See* 16 U.S.C. § 1539(a)(1)(A). Rather, Congress left this determination to the discretion of the FWS.

a. The FWS's decision in this case is entitled to extreme deference because Congress purposely left the term "enhance the propagation or survival of the affected species" ambiguous so the FWS could apply its scientific expertise when deciding whether to issue an importation permit.

In drafting the ESA, Congress did not define what situations "enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1)(A). Instead, Congress explicitly left it to the FWS to decide what circumstances would justify issuance of an enhancement of survival

importation permit. *See id.* (“The Secretary may [grant an enhancement of survival permit], under such terms and conditions as he shall prescribe . . .”). As the United States Supreme Court has noted, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.” *Chevron U.S.A., Inc.*, 467 U.S. at 844. As a result, the FWS is entitled to extreme deference in concluding that Wumba’s importation of the elephants satisfied this undefined, ambiguous standard. *See id.* at 843.

The FWS promulgated regulations governing the issuance of an enhancement of survival permit in response to Congress’s delegation of discretion in determining what constitutes propagation or enhancement of the survival of the affected species. *See* 50 C.F.R. § 17.22(a)(1)-(2) (2005). When deciding whether to issue this type of permit, the FWS must consider the issuance criteria set forth in its regulations. 50 C.F.R. § 17.22(a)(2)(i)-(vi). Because the FWS considered these criteria and made no clear error of judgment, its decision to grant the enhancement of survival permit was not arbitrary and capricious. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416.

Moreover, the determination of whether a specific importation will enhance the propagation or survival of the affected species requires the assessment of often disputed scientific facts and Congress specifically delegated this scientific determination to the FWS’s expertise. *See* 16 U.S.C. § 1539(a)(1)(A) (leaving the issuance of enhancement of survival permit explicitly within the province of the FWS through the Secretary of the Department of the Interior). Therefore this Court should afford the FWS great deference when reviewing of the issuance of Wumba’s enhancement of survival permit. *See Cayman Turtle Farm, Ltd*, 478 F. Supp. at 131 (“A reviewing court is to be particularly deferential where an agency has been delegated discretion to reach decisions based upon technical and scientific data . . . The expertise

required to assess disputed scientific facts properly lies within the province of the agency rather than the reviewing court.”).

b. The FWS considered the issuance criteria set forth in its regulations and reasonably concluded that the elephants’ importation would enhance the propagation or survival of the affected species.

Plaintiff’s do not claim that the FWS did not consider the issuance criteria. Rather, they urge this Court to overturn the FWS’s conclusion because they disagree with the decision to issue Wumba the importation permit. (R. at 9.) However, the arbitrary and capricious standard is narrow and does not empower this Court to conduct a de novo review nor to substitute its judgment for that of the FWS. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416; *see also World Wildlife Fund*, 1988 U.S. Dist. LEXIS 19409, at *7, *9. Since the FWS reached a rational decision based on the evidence, the lower court correctly deferred to the FWS’s conclusion. *See Cayman Turtle Farm, Ltd.*, 478 F. Supp. at 131 (“An agency’s reasoning from [the relevant] factors should be upheld if the conclusions reached are rationally supported.”).

In this case, the evidence supports the FWS’s conclusion that Wumba’s importation will enhance the propagation and survival of the Asian elephant for two reasons. First, the elephants will participate in the only successful captive breeding program in the country. (R. at 4, 9.) Accordingly, FWS reasonably concluded that Wumba’s importation would enhance the propagation of the species. Second, the elephants are essential to Wumba’s conservation education program. This program will enhance the survival of the species by educating the public about Asian elephants and the perils they face in their native land. Therefore, the FWS’s consideration of this evidence in conjunction with the issuance criteria supports its issuance of the enhancement of survival permit. Thus, this Court should uphold the decision as reasonable and not arbitrary and capricious.

According to the foregoing, because the FWS considered the relevant factors and there was no clear error of judgment; its decision to issue Wumba an enhancement of survival permit was not arbitrary and capricious. As a result, the lower court was correct in deferring to the judgment of the FWS in this case. Therefore, this Court should affirm the district court's grant of the FWS's Motion for Summary Judgment.

CONCLUSION

As a result of the foregoing, this Court should reverse the lower court's denial of Respondent's Motion for Summary Judgment as to standing, and affirm the lower court's grant of Respondent's Motion for Summary Judgment on the merits.

APPENDIX

US Const. art. III, § 2, cl. 2.

Jurisdiction of Supreme Court

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

5 U.S.C. § 706(2)(A) (2000).

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

...

16 U.S.C. § 1537a (2000).

Convention implementation

(a) Management Authority and Scientific Authority. The Secretary of the Interior (hereinafter in this section referred to as the "Secretary") is designated as the Management Authority and the Scientific Authority for purposes of the Convention and the respective functions of each such Authority shall be carried out through the United States Fish and Wildlife Service.

(b) Management Authority functions. The Secretary shall do all things necessary and appropriate to carry out the functions of the Management Authority under the Convention.

(c) Scientific Authority functions; determinations.

(1) The Secretary shall do all things necessary and appropriate to carry out the functions of the Scientific Authority under the Convention.

(2) The Secretary shall base the determinations and advice given by him under Article IV of the Convention with respect to wildlife upon the best available biological information derived from professionally accepted wildlife management practices; but is not required to make, or require any State to make, estimates of population size in making such determinations or giving such advice.

(d) Reservations by the United States under Convention. If the United States votes against including any species in Appendix I or II of the Convention and does not enter a reservation pursuant to paragraph (3) of Article XV of the Convention with respect to that species, the

Secretary of State, before the 90th day after the last day on which such a reservation could be entered, shall submit to the Committee on Merchant Marine and Fisheries of the House of Representatives, and to the Committee on the Environment and Public Works of the Senate, a written report setting forth the reasons why such a reservation was not entered.

(e) Wildlife preservation in Western Hemisphere.

(1) The Secretary of the Interior (hereinafter in this subsection referred to as the "Secretary"), in cooperation with the Secretary of State, shall act on behalf of, and represent, the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (♦ [56 Stat. 1354](#), T.S. 982, hereinafter in this subsection referred to as the "Western Convention"). In the discharge of these responsibilities, the Secretary and the Secretary of State shall consult with the Secretary of Agriculture, the Secretary of Commerce, and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary and the Secretary of State shall, in cooperation with the contracting parties to the Western Convention and, to the extent feasible and appropriate, with the participation of State agencies, take such steps as are necessary to implement the Western Convention. Such steps shall include, but not be limited to--

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened; and

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Convention which address the protection of wild plants.

(3) No later than September 30, 1985, the Secretary and the Secretary of State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Convention.

(4) The provisions of this subsection shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate resident fish or wildlife under State law or regulations.

50 C.F.R. § 23.1

16 U.S.C. § 1538(a)(1)(A) (2000).

Prohibited acts

(a) Generally.

(1) Except as provided in sections 6(g)(2) and 10 of this Act [16 USCS §§ 1535(g)(2), 1539], with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act [16 USCS § 1533] it is unlawful for any person subject to the jurisdiction of the United States to-

(A) import any such species into, or export any such species from the United States;

...

16 U.S.C. § 1538(c)(1) (2000).

...

(c) Violation of Convention.

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

...

16 U.S.C. § 1539(a)(1)(A) (2000).

Exceptions

(a) Permits.

(1) The Secretary may permit, under such terms and conditions as he shall prescribe--

(A) any act otherwise prohibited by section 9 [16 USCS § 1538] for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j); or

...

50 C.F.R. § 17.11 (2005).

ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Elephant, Asian

Elephas maximus

50 C.F.R. § 17.21(b) (2005).

Prohibitions.

(b) Import or export. It is unlawful to import or to export any endangered wildlife. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

50 C.F.R. § 17.22(a)(1)-(2) (2005).

Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, or for the incidental taking of endangered wildlife. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time. (See § 17.32 for permits for threatened species.) The Director shall publish notice in the Federal Register of each application for a

permit that is made under this section. Each notice shall invite the submission from interested parties, within 30 days after the date of the notice, of written data, views, or arguments with respect to the application. The 30-day period may be waived by the Director in an emergency situation where the life or health of an endangered animal is threatened and no reasonable alternative is available to the applicant. Notice of any such waiver shall be published in the Federal Register within 10 days following issuance of the permit.

(a)(1) Application requirements for permits for scientific purposes or for the enhancement of propagation or survival. A person wishing to get a permit for an activity prohibited by § 17.21 submits an application for activities under this paragraph. The Service provides Form 3-200 for the application to which all of the following must be attained:

- (i) The common and scientific names of the species sought to be covered by the permit, as well as the number, age, and sex of such species, and the activity sought to be authorized (such as taking, exporting, selling in interstate commerce);
- (ii) A statement as to whether, at the time of application, the wildlife sought to be covered by the permit (A) is still in the wild, (B) has already been removed from the wild, or (C) was born in captivity;
- (iii) A resume of the applicant's attempts to obtain the wildlife sought to be covered by the permit in a manner which would not cause the death or removal from the wild of such wildlife;
- (iv) If the wildlife sought to be covered by the permit has already been removed from the wild, the country and place where such removal occurred; if the wildlife sought to be covered by the permit was born in captivity, the country and place where such wildlife was born;
- (v) A complete description and address of the institution or other facility where the wildlife sought to be covered by the permit will be used, displayed, or maintained;
- (vi) If the applicant seeks to have live wildlife covered by the permit, a complete description, including photographs or diagrams, of the facilities to house and/or care for the wildlife and a resume of the experience of those person who will be caring for the wildlife;
- (vii) A full statement of the reasons why the applicant is justified in obtaining a permit including the details of the activities sought to be authorized by the permit;
- (viii) If the application is for the purpose of enhancement of propagation, a statement of the applicant's willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook;

(2) Issuance criteria. Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

- (i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;
- (ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;
- (iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;
- (iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;
- (v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and

(vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

...

50 C.F.R. § 23.1 (2005).

(a) The regulations in this part implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

(b) The regulations identify those species of wildlife and plants included in appendix I, II or III to the Convention.

50 C.F.R. § 23.12 (2005).

(a) Import--(1) Appendix I. (i) In order to import into the United States any wildlife or plant listed in Appendix I from any foreign country, a United States import permit, issued pursuant to § 23.15, and a valid foreign export permit issued by the country of origin or a valid foreign re-export certificate issued by the country of re-export must be obtained prior to such importation.

(ii) In order to import directly into the United States any wildlife or plant listed in appendix I taken from the sea beyond the jurisdiction of any country, a United States import permit issued pursuant to § 23.15 must be obtained prior to such importation.

(2) Appendix II. (i) In order to import into the United States any wildlife or plant listed in appendix II from any foreign country, a valid foreign export permit issued by the country of origin, or a valid foreign re-export certificate issued by the country of re-export, must be obtained prior to such importation.

(ii) In order to import directly into the United States any wildlife or plant listed in Appendix II taken from the sea beyond the jurisdiction of any country, a United States import permit issued pursuant to § 23.15, must be obtained prior to such importation.

(3) Appendix III. (i) In order to import into the United States any wildlife or plant listed in appendix III from a foreign country that has listed such animal or plant in appendix III, a valid foreign export permit or re-export certificate issued by such country must be obtained prior to such importation.

(ii) In order to import into the United States any wildlife or plant listed in appendix III from a foreign country that has not listed such wildlife or plant in appendix III, a valid foreign certificate of origin or foreign re-export certificate must be obtained prior to such importation.

(b) Export or re-export--(1) Appendices I and II. In order to export or re-export from the United States any wildlife or plant listed in appendix I or II, a United States export permit or re-export certificate, issued pursuant to § 23.15, must be obtained prior to such exportation or re-exportation.

(2) Appendix III. (i) In order to export or re-export from the United States any wildlife or plant listed in appendix III by the United States, a United States export permit or re-export certificate issued pursuant to § 23.15, must be obtained prior to such exportation or re-exportation.

(ii) In order to export or re-export from the United States any wildlife or plant listed in appendix III that has not been listed by the United States, a re-export certificate or certificate of origin, issued pursuant to § 23.15, must be obtained prior to such exportation or re-exportation.

50 C.F.R. § 23.15(d)(7) (2005).

...

(d) Issuance criteria. Upon receiving an application completed in accordance with paragraph (a), (b) or (c) of this section, the Director will decide whether or not a permit or certificate should be issued. In making his decision, the Director shall consider in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

...

(7) Whether any wildlife or plant listed in appendix I to be imported into the United States is to be used for primarily commercial activities; and

...

Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 1, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085 (1975).

ARTICLE III

Regulation of Trade in Specimens of Species included in Appendix I

...

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

...

(c) a Management Authority of the State of import is satisfied that the specimen is not to [*8] be used for primarily commercial purposes.

...

Conference of the Parties to CITES [Conf.] Res. 5.10 (1985), available at <http://www.cites.org/eng/res/all/05/E05-10.pdf>.

Definition of ‘primarily commercial purposes’:

...

2. An activity can generally be described as ‘commercial’ if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.

3. The term ‘commercial purposes’ should be defined by the country of import as broadly as possible so that any transaction which is not wholly ‘non-commercial’ will be regarded as ‘commercial’. In transposing this principle to the term ‘primarily commercial purposes’, it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature with the result that the importation of specimens of Appendix-I species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens.

4. Article III, paragraphs 3 (c) and 5 (c), of the Convention concern the intended use of the specimen of an Appendix-I species in the country of importation, not the nature of the transaction between the owner of the specimen in the country of export and the recipient in the country of import. It can be assumed that a commercial transaction underlies many of the transfers of specimens of Appendix-I species from the country of export to the country.

...

U.S. Fish & Wildlife Serv., Dep’t of the Interior: *Endangered Species Glossary* (2005), available at <http://www.fes.gov/endangered/glossary.pdf>.

Enhancement of survival permit:

A type of permit issued by the Service under the authority of section 10(a)(1)(A) of the Endangered Species Act. It allows an otherwise prohibited action that benefits the conservation of a listed species. These permits are issued as part of a Safe Harbor Agreement or Candidate Conservation Agreement with Assurances.