

No. 05-2334

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ELEPHANT ADVOCATES,

and

THE GANESH PROJECT,

Appellants,

v.

UNITED STATES FISH & WILDLIFE SERVICE,

Respondent.

On Appeal from the
District Court of the State of Bliss

MEASURING BRIEF OF APPELLANTS

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Statement of the Case

Appellants Elephant Advocates and The Ganesh Project (“Ganesh”) brought this action under the Administrative Procedure Act (“APA”) against respondent, the United States Fish and Wildlife Service (“FWS”), in order to challenge the agency’s decision to issue a permit allowing the Wumba Amusement Park (“Wumba”) to import seven Asian elephants from India. Appellants contend that the issuance of the permit violates the Convention on International Trade of Wild Flora and Fauna (“CITES”) as well as the Endangered Species Act (“ESA”). Specifically, they argue that the permit allows Wumba to import the elephants for a “primarily commercial purpose” in violation of CITES, and that the import will not “enhance the propagation or survival of the species” as required by the ESA.

On cross motions for summary judgment, the US District Court for the State of Bliss granted each party’s motion in part and denied each party’s motion in part.¹ The plaintiffs’ motion was granted as to standing but denied on the merits, while the defendant’s motion was denied as to standing and granted on the merits.² Thus, the court determined that although the plaintiffs had standing to sue, the FWS did not violate CITES or the ESA by granting the import permit.³

Appellants appear before this court in Case No. 05-2334 on appeal of the decision rendered by the District Court. Appellants respectfully request that this court affirm the District Court’s decision that they have standing to sue, and reverse its decision on the merits so that Wumba cannot import the elephants.

¹ R. at 12.

² *Id.*

³ R. at 3-4.

Statement of the Facts

Appellant Elephant Advocates is a non-profit organization that actively promotes the protection and conservation of elephants in both the wild and captivity.⁴ One of its members, Sandra Bark, is a wild Asian elephant researcher.⁵ She has spent six years studying elephants in Corbett National Park (“Corbett”), the location from which the elephants will be taken if the permit is approved.⁶ Ms. Bark has developed an emotional attachment to the elephants as a result of her research, and will never again see the elephants in their natural habitat if they are imported to Wumba.⁷ Although she has not performed research on or seen recently the particular elephants at issue, Ms. Bark has made plans to visit them next spring in order to conduct follow-up research.⁸

The second appellant, Ganesh, is also a non-profit organization based in the US.⁹ Ganesh runs a southern Indian tour operation aimed at preserving elephants’ natural habitat and offering the general public opportunities to humanely observe Asian elephants in the wild.¹⁰ Ms. Gambet, the organization’s head of tour operations (who is also a member), visits Corbett once a year, or at least every other year to lead a tour.¹¹ Ganesh is concerned that if the animals are removed from Corbett, the number of elephants available for observation by both its patrons and Ms. Gambet will be significantly diminished now and in the future.¹²

⁴ R. at 1.

⁵ R. at 6.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ R. at 1.

¹⁰ *Id.*

¹¹ R. at 7.

¹² *Id.*

Because they are threatened by extinction, Asian elephants are listed as Appendix I species under CITES and as endangered species under the ESA.¹³ In the wild, these elephants form close-knit family groups which typically roam within a home range between 200 and 800 square kilometers in size.¹⁴ Uniquely designed for their native environment, Asian elephants have padded feet which they use to communicate with each other by driving vibrations into the ground that will be picked up by others.¹⁵

In the US, the captive elephant industry asserts that there is a “crisis” in the national elephant population which is primarily attributed to two causes.¹⁶ First, attempts at breeding Asian elephants in captivity have been largely unsuccessful; only the Bonanza Circus can claim that its captive breeding program has been a success.¹⁷ Second, the number of elephants in captivity has been steadily declining due to serious, often fatal foot problems that develop when elephants stand on concrete for long hours picking up vibrations from the urban environment in which they live.¹⁸

The seven elephants at issue in this appeal were born in India and are considered wild.¹⁹ All of the elephants are young females. Their proposed importation is the fruit of a plan that Wumba began to implement in 2002.²⁰ The plan is designed to boost profits for its shareholders, as well as enable it to out-compete another nearby amusement park.²¹ A key component of the plan includes a live animal exhibit to accompany the park’s other rides, which include roller-

¹³ R. at 4.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ R. at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

coasters and go-carts.²² The elephants, as part of an Asian exhibit also containing a tsunami ride and signs to encourage conservation of the species, would provide rides for customers accompanied by a brief speech regarding the plight of Asian elephants.²³ Although designed to look like an Asian jungle, the 2.5 acre exhibit has concrete floors.²⁴ Wumba also plans to lend the elephants to Bonanza Circus for use in its captive breeding program.²⁵

Issues Presented for Review

- I. Did the District Court err in finding that the plaintiffs have standing to bring this case?
- II. Did the District Court err in finding that the defendant's issuance of import permits for the elephants did not violate the prohibition on trade in Appendix I species for a commercial purpose and the APA, and did not violate the ESA and the APA because it will enhance the survival of the species?

Standard of Review

In order for plaintiffs to prevail on appeal, the court must assess the defendant's conduct against the arbitrary and capricious standard established in the Administrative Procedure Act. Under this standard, the court will overturn any agency decision that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."²⁶

Summary of the Argument

This court should affirm the district court's decision that Elephant Advocates and Ganesh have standing to sue, and reverse the court's decision that the FWS did not violate CITES or the ESA by arbitrarily and capriciously deciding to issue an import permit to Wumba.

²² *Id.*

²³ R. at 5, 9-10.

²⁴ R. at 5.

²⁵ R. at 9.

²⁶ Administrative Procedure Act, 5 U.S.C. § 706(2) (2000).

Elephant Advocates and Ganesh have constitutional standing to bring suit because they satisfy the case or controversy requirement of Article III, § 2 based on the experiences of their respective members, Ms. Bark and Ms. Gambet. First, they each have suffered an “injury in fact” that is concrete, particularized, and imminent, directly affecting their aesthetic, recreational, and economic interests. Second, the injury to Elephant Advocates and Ganesh is fairly traceable to the FWS’s issuance of the import permit. Finally, Elephant Advocates and Ganesh’s injuries are likely to be redressed by a favorable decision.

The FWS’s issuance of the import permit was arbitrary and capricious because it violated the CITES prohibition against trade in Appendix I species for a primarily commercial purpose. Because Wumba is a for-profit amusement park, its shareholders will receive an economic benefit from increased gate sales if the elephants are exhibited at the park. In light of the guidelines set forth in Conference Resolution 5.10, the importation at issue is clearly commercial in nature. Additionally, the economic benefit that Wumba will receive as a result of this transaction is not overcome by the park’s plan for public education and captive breeding programs.

Even if this Court finds that the proposed importation is not for a primarily commercial purpose, because the import will be detrimental to both wild and captive elephant populations it will not enhance the propagation or survival of the species. Consequently, issuance of the permit violates the ESA’s prohibition against importation of an endangered species.

Argument

- I. THE DISTRICT COURT WAS CORRECT IN FINDING THAT ELEPHANT ADVOCATES AND THE GANESH PROJECT HAVE CONSTITUTIONAL STANDING TO BRING THIS CASE BECAUSE THEY SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III.

The question of standing involves both constitutional limitations on federal jurisdiction and judicially self-imposed prudential limitations.²⁷ In order to satisfy the “case” or “controversy” requirement of Article III, § 2,²⁸ a plaintiff must demonstrate that he or she “(1) 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.”²⁹ An organization has standing to sue when one or more of its members have standing to sue.³⁰ In addition to the constitutional requirements of Article III, the Supreme Court has recognized prudential requirements “that a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.” However, the ESA’s citizen-suit provision, which reads that “any person may commence a law suit,” is so broad that the literal interpretation negates the zone-of-interests test.³¹

A. Importation of the elephants at issue would result in injury in fact to the appellants.

In determining a sufficient “injury in fact,” the appellants “must have suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.”³² For purposes of Article III standing, the pertinent showing is

²⁷ *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249, 255-256 (1953)).

²⁸ *See App.* U.S.C. Const. Art. III, § 2.

²⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

³⁰ *Hunt v. Wa. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

³¹ *Bennett v. Spear*, 520 U.S. 154, 164-165 (1997) (only using this case to demonstrate that the prudential requirements are satisfied).

³² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

injury to the plaintiff, not injury to the environment.³³ The plaintiff must demonstrate “specific facts” by affidavit or other evidence in order to meet the requirement.³⁴

An injury in fact is adequately documented when the challenged activity directly affects the plaintiff’s recreational, aesthetic, or economic interests.³⁵ In *Laidlaw*, a permit authorized the defendant to discharge treated water into a river, however the defendant discharged various pollutants into the waterway.³⁶ The plaintiffs who fished, camped, hiked, swam, bird-watched, picnicked and waded in and near the river, were directly affected by the pollutant discharges because their recreational, aesthetic, and economic interests were injured.³⁷ In addition, the plaintiffs’ conditional statements about visiting the river again demonstrated that their injury was imminent and more than mere allegations.³⁸

Not only can a plaintiff claim an injury to an aesthetic interest of enjoying waterways, but the Supreme Court has consistently held that injury to an aesthetic interest of observing animals is sufficient for Article III standing.³⁹ The party claiming injury in fact visited the habitats of various endangered species before the project was commenced and stated that some day they may return to visit and observe the endangered species directly.⁴⁰ The Court explicitly stated that an individual’s “desire to use or observe an animal species, even for purely esthetic

³³ *Laidlaw*, 528 U.S. at 181.

³⁴ *Defenders of Wildlife*, 504 U.S. at 561; *See also Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (the Court recognized that injuries other than economic harm such as aesthetic, conservational, and recreational injuries are sufficient for standing purposes).

³⁵ *Laidlaw*, 528 U.S. at 184.

³⁶ *Id.* at 176.

³⁷ *Id.* at 182-183.

³⁸ *Id.* at 184.

³⁹ *Defenders of Wildlife*, 504 U.S. at 562-563. *See also Japan Whaling Ass. v. American Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986) (The Court held that the plaintiffs had “undoubtedly ... alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting”).

⁴⁰ *Id.* at 563-564.

purposes, is undeniably a cognizable interest for purposes of standing.”⁴¹ However, in this case, because the individuals had visited the endangered species’ habitat before the project began, their past exposure did not demonstrate a present case or controversy.⁴² In addition, the individuals did not have any definite plans to return to the habitat and such “some day” intentions did not satisfy the “actual or imminent” injury requirement.⁴³ For these reasons, the Court held that the individuals did not have standing to sue, but acknowledged that “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 [or her] interest will no longer exist.”⁴⁴

For the interest to be particularized the plaintiff must be affected in a personal and individual way.⁴⁵ A plaintiff, who made regular visits to the zoo and observed inhumane conditions, challenged the regulations of the United States Department of Agriculture concerning the treatment of nonhuman primates on grounds of violating the Animal Welfare Act. The court held that the plaintiff had an aesthetic interest because he repeatedly visited and saw with his own eyes the particular conditions as well as planned to visit the zoo in the future.⁴⁶

Relying on the above cases, the District of Columbia Circuit found that “an injury in fact can be found when a defendant adversely affects a plaintiff’s enjoyment of flora or fauna, which the plaintiff wishes to enjoy again upon the cessation of the defendant’s actions.”⁴⁷ A former elephant handler sued a circus owner under the citizen-suit provision of the ESA for the

⁴¹ *Id.* at 562-563.

⁴² *Id.* at 564.

⁴³ *Id.*

⁴⁴ *Id.* at 566.

⁴⁵ *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 433 (D.D.C. 1998).

⁴⁶ *Id.* at 432.

⁴⁷ *American Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.D.C. 2003).

mistreatment of Asian elephants.⁴⁸ The court held that the former elephant handler demonstrated present or imminent injury because he had a strong emotional attachment to particular elephants, enjoyed visiting them, and desired and planned to visit them again.⁴⁹

Some courts have recognized irreparable injury “even though plaintiffs did not establish that the exact animals they regularly observed would be directly affected by the proposed action.”⁵⁰ A wildlife protection organization, on behalf of their members who regularly view, photograph, and study mute swans, brought action to enjoin the State of Maryland from killing 525 mute swans.⁵¹ Even though the plaintiffs did not have a person relationship with any of the individual swans, they still established an irreparable harm to their aesthetic interest in observing the animals in the area.

Another case found that the plaintiff lacked standing and did not establish an injury in fact because she did not assert an emotional attachment with the particular elephant nor did she intend to return to the zoo to study the elephants.⁵² One zoo elephant began to exhibit aggressive behavior toward the other elephants, and therefore the zoo decided to donate the elephant, which led an organization to challenge this decision under the ESA.⁵³ Without an emotional attachment to the particular elephant, the plaintiff’s opportunity to observe the species would not be threatened by the removal of one elephant when three others were still at the zoo.⁵⁴ In addition,

⁴⁸ *Id.* at 335.

⁴⁹ *Id.* at 337.

⁵⁰ *Fund for Animals v. Norton*, 281 F.Supp.2d 209, 221 (D.D.C. 2003); *See also Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (The court held that hunting 35 to 40 bison out of 435 would cause the plaintiffs “to suffer an aesthetic injury that is not compensable in money damages”).

⁵¹ *Id.* at 213.

⁵² *Humane Soc’y of the US v. Babbitt*, 46 F.3d 93, 97 (D.D.C. 1995).

⁵³ *Id.* at 95.

⁵⁴ *Id.* at 97.

without any concrete plans to return to the zoo, the plaintiff also lacked the imminent requirement to satisfy injury in fact.⁵⁵

Therefore, an injury in fact is present when the challenged action directly affects one or more plaintiffs' recreational, aesthetic or economic interests, causing an injury that is concrete, particularized and imminent.

Elephant Advocates and Ganesh have standing to sue based on the experiences of their respective members, Ms. Bark and Ms. Gambet. The FWS's issuance of the permit directly affects their recreational, aesthetic and economic interests. Ms. Bark, who has researched Asian elephants for the past six years at Corbett, suffers a direct injury in fact that is concrete, particularized and imminent. Similar to the plaintiffs in *Laidlaw* who fished, camped, hiked, swam, bird-watched, picnicked and waded in and near the river, Ms. Bark's aesthetic enjoyment of observing and researching the seven elephants is greatly diminished and injured by the removal of these animals from their natural habitat.⁵⁶ Ms. Bark's aesthetic enjoyment will be diminished if she is forced to visit the elephants at the zoo in a 2.5 acre exhibit as opposed to visiting them at Corbett where the elephants could roam in their natural home range. If the elephants are removed from Corbett, Ms. Bark will never see or research the elephants in their natural environment with their families. The removal of the seven elephants means that the very subject of Ms. Bark's interest will no longer exist. Unlike the individuals in *Defenders of Wildlife* who did not have concrete plans to revisit the animals, Ms. Bark plans to visit the elephants for follow-up research.⁵⁷ She has seen with her own eyes the particular elephants in

⁵⁵ *Id.*

⁵⁶ *See* 528 U.S. at 182-183.

⁵⁷ *See* 504 U.S. at 564.

question and therefore will be affected in a personal way like the plaintiff in *Glickman* who had an aesthetic interest because he repeatedly visited the animals.⁵⁸

Furthermore, the personal familiarity and emotional attachment that Ms. Bark has with the elephants demonstrates that Ms. Bark's enjoyment of visiting the animals would be adversely affected like the elephant handler in *Ringling Brothers*.⁵⁹ Although the seven female elephants are not being killed, the removal of them from their families in Corbett will prevent the elephants from breeding in their natural habitat, therefore affecting the wild Asian elephant population. As the court explained in *Norton* when 525 swans were going to be killed, the removal of these female elephants creates an irreparable harm that cannot be replaced by money.⁶⁰ Finally, in contrast to *Babbitt* where the plaintiffs did not exhibit an emotional attachment or plan to return to the zoo, Ms. Bark has demonstrated that she has an aesthetic interest in observing and researching the elephants, a particularized relationship with the animals, and a concrete and imminent plan to revisit Corbett for follow-up research.⁶¹

In the alternative, if the court finds that Elephant Advocates does not have standing to sue, Ganesh does have standing based on the experiences of Ms. Gambet. She has a recreational interest in giving tours to the public, an aesthetic interest in observing the elephants in their natural habitat, and an economic interest in leading tours for patrons to observe the elephants. By removing seven female elephants from their natural habitat, the number of elephants viewable at Corbett will be greatly diminished and it will be more difficult for Ganesh to achieve its goal of allowing the public to view the animals in the wild. Even though Ms. Gambet did not have a person relationship with any of the individual elephants, she still establishes an

⁵⁸ See 154 F.3d at 432.

⁵⁹ See 317 F.3d at 337.

⁶⁰ See 281 F.Supp.2d at 221.

⁶¹ See 46 F.3d at 95, 97.

irreparable harm to her aesthetic interest in observing the animals in the area.⁶² Most importantly, the Court in *Defenders of Wildlife* has established that plans to revisit is a key component in satisfying the injury in fact requirement, and Ms. Gambet's injury is clearly imminent because she has concrete plans to revisit Corbett once a year or every other year to lead a tour.⁶³

Thus, based on the experiences of Ms. Bark and Ms. Gambet, Elephant Advocates and Ganesh have suffered an injury in fact.

B. The injury to Elephant Advocates and Ganesh is fairly traceable to the FWS's issuance of import permit.

To satisfy the "case" or "controversy" requirement of Article III, § 2, the second part of the test must also be established. The injury must be fairly traceable to the challenged action of the defendant and "not the result of the independent action of some third party not before the court."⁶⁴ A causal connection must exist between the injury and the conduct in question.⁶⁵ The injury to Elephant Advocates is caused by the FWS's issuance of an import permit because without this permit the elephants would remain in India, and Ms. Bark could continue to enjoy her aesthetic interest in researching and observing the elephants in their natural habitat. Similarly, Ganesh's injury is fairly traceable to the FWS's issuance of an import permit because without this permit the present number of elephants available for observation would remain the same. Additionally, this generation of elephants will have the opportunity to breed and produce more elephants for viewing by Ganesh's members and patrons in the future.

⁶² See *Norton*, 281 F.Supp.2d at 221

⁶³ See 504 U.S. at 564.

⁶⁴ *Defenders of Wildlife*, 504 U.S. at 560-561; See also *Ringling Bros.*, 317 F.3d at 338; *Glickman*, 154 F.3d at 441.

⁶⁵ *Id.*

C. *Elephant Advocates' and Ganesh's injuries are likely to be redressed by a favorable decision.*

Finally, to satisfy the “case” or “controversy” requirement of Article III, § 2, the third part of the test must also be established. The appellant must demonstrate that “it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”⁶⁶ The redressability requirement may often “meld into that of causation ... in cases where the relief sought is merely the cessation of illegal conduct.”⁶⁷ Just as the appellants’ injury was “fairly traceable” to the FWS’s action, the injury suffered by the appellants will likely be redressed by a favorable decision here. If the importation permit is not issued, then the elephants will remain in Corbett. Consequently, when Ms. Bark and Ms. Gambet return, they will not suffer an injury as a result of the elephants’ absence.

In conclusion, both Elephant Advocates and Ganesh satisfy the “case” or “controversy” requirement of Article III, § 2, and therefore have standing to sue.

II. THE FWS’S ISSUANCE OF AN IMPORT PERMIT TO THE WUMBA AMUSEMENT PARK IS ARBITRARY AND CAPRICIOUS BECAUSE IT VIOLATES CITES AND THE ESA.

Asian elephants, classified as an Appendix I species under CITES and an Endangered Species under the ESA, receive the highest level of protection available under these two acts.⁶⁸ In order for the FWS to legally issue a permit for the importation of such a species, the agency must meet the requirements of both CITES and the ESA.⁶⁹ Consequently, if the FWS violated

⁶⁶ *Laidlaw*, 528 U.S. at 180-181 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). See also *Ringling Bros.*, 317 F.3d at 338; *Glickman*, 154 F.3d at 443.

⁶⁷ *Babbitt*, 46 F.3d at 100 (citing *Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 51 n.5 (D.C.C. 1998)).

⁶⁸ 50 C.F.R. § 23.3(f) (2005); 50 C.F.R. 17.11(h) (2005)

⁶⁹ 50 C.F.R. 23.15(a) (2005).

the regulations implementing either CITES or the ESA when it approved the permit requested by Wumba, the elephants cannot lawfully be imported.

A. The District Court's decision should be reversed because the FWS's issuance of an import permit violated the CITES prohibition against trade in Appendix I species for a primarily commercial purpose.

CITES is an international treaty designed to ensure that worldwide trade does not endanger the survival of plants and wildlife.⁷⁰ As a party to the treaty, the United States must observe the treaty's constraints on traffic of wildlife; it is against the law in this country to engage in trade "contrary to the provisions" of CITES.⁷¹ Because Asian Elephants are listed in the treaty as an Appendix I species they may only be subject to trade in "exceptional circumstances."⁷² As a result, numerous restrictions apply to their import and export.⁷³ One such restriction requires that before an Appendix I species is imported into the US, the FWS must ensure that the animal is not to be used for "primarily commercial purposes."⁷⁴

Case law is largely silent regarding the interpretation of the term "primarily commercial purpose" as it relates to CITES. However, the parties to CITES issued a Resolution to provide guidance to the meaning of "primarily commercial purpose" because of the term's importance in ensuring strict regulation of trade in Appendix I species."⁷⁵ CITES Resolutions are meant to aid interpretation of the treaty and guide its implementation over a period of many years.⁷⁶ The

⁷⁰ Convention on International Trade of Wild Flora and Fauna, 27 U.S.T. 1087 (1973).

⁷¹ Endangered Species Act, 16 U.S.C. § 1538(c)(1) (2000).

⁷² 27 U.S.T 1087.

⁷³ *Id.*

⁷⁴ *Id.* at Art. III, ¶ 3(c).

⁷⁵ Conf. Resolution 5.10.

⁷⁶ CITES Res. Intro.

Resolution pertaining to the term “primarily commercial purpose” contains both general principles and examples to be used when assessing the validity of a potential importation.⁷⁷

The Resolution defines a “commercial purpose” as one designed 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.”⁷⁸ Additionally, the term should be interpreted as “broadly as possible” by the country of import to ensure that any “wholly non-commercial” trade in Appendix I species be deemed “commercial.”⁷⁹ Under these principles, “non-commercial aspects [of the trade]... must clearly predominate” or the transaction will be considered primarily for a commercial purpose and therefore a violation of the terms of the treaty.⁸⁰

The Resolution also sets forth several examples of wildlife transactions that may qualify as non-commercial depending on the facts of the individual case.⁸¹ For instance, one example applies to government agencies or non-profit institutions that import Appendix I species for “purposes of conservation, education or training.” Thus, an animal could be imported to educate Customs staff in CITES control.⁸²

Another example addresses importation for captive breeding purposes, which raises “special problems.”⁸³ Although CITES includes a captive-bred exception that obviates the need to fulfill the “not for primarily commercial purposes” requirement, this exception applies only if

⁷⁷ Conf. Resolution 5.10

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

the animal to be imported was born in captivity.⁸⁴ If the animal was born in the wild, the Resolution requires that such importation “be aimed as a priority at the long term protection of the affected species.”⁸⁵ Additionally, any profit gained as a result must be utilized to continue the captive-breeding program, rather than for the benefit of a private individual or share-holder.⁸⁶

Thus, a primarily commercial purpose exists when an activity is designed to obtain any form of economic benefit and does not comport with the examples set forth in the Resolution.

The FWS claims that the transaction at issue is non-commercial for two reasons. First, the agency claims that the importation will benefit elephants by educating the public about conservation of the species.⁸⁷ Second, the agency claims that the species will benefit because Wumba plans to allow a captive breeding program to use the elephants in an attempt to increase the elephant population in North America.⁸⁸ Despite this reasoning, the agency’s determination must be overturned because it is arbitrary and capricious in light of CITES’ guidelines.

Applying the guidelines in the Resolution to the facts of this case demonstrates that the import of the Asian Elephants is for a primarily commercial purpose. Wumba is a for-profit amusement park. The defense concedes in the Administrative Record that the proposal to import the elephants stemmed from a master plan developed by Wumba to increase profits for its shareholders and out-compete a nearby amusement park.⁸⁹ Similar to roller-coasters and go-carts, the elephants will serve as rides for customers, and will increase gate sales like any new attraction in the park.⁹⁰ Thus, the importation qualifies as a commercial purpose under the

⁸⁴ 27 U.S.T. 1087, Art. VII ¶ 4, 5 (1973).

⁸⁵ Conf. Res. 5.10.

⁸⁶ *Id.*

⁸⁷ R. at 9

⁸⁸ *Id.*

⁸⁹ R. at 5.

⁹⁰ *Id.*

definition found in the Resolution because Wumba will increase profits and receive an economic benefit by exhibiting the elephants.⁹¹ If the FWS had followed the provisions of the Resolution and interpreted the term “commercial purpose” as broadly as possible, the import permit would not have been issued because the importation is not “wholly non-commercial.”⁹²

The economic benefit that Wumba will receive as a result of this transaction is not overcome, as the FWS purports, by the park’s plan for public education and captive breeding programs. The examples set forth in the Resolution are not meant to be an exhaustive list of scenarios in which importation of an Appendix I species could be deemed non-commercial.⁹³ However, they are meant to “recognize categories of transactions,” which may or may not qualify as commercial depending on the facts of the individual case.⁹⁴ Since both education and captive breeding programs are specifically addressed by examples in the Resolution, parties to CITES have considerable guidance for deciding what factors are important to overcome the restriction on commercial trade. In light of the examples provided by the Resolution, the education and captive breeding programs proposed by Wumba will not be adequate to ensure that the transaction is “wholly non-commercial.”⁹⁵

For instance, parties to CITES deliberately chose to limit the example pertaining to educational programming by only naming “government agencies or non-profit organizations” as entities which may import animals for purposes of conservation education.⁹⁶ Wumba, unlike most zoos, is a for-profit amusement park, and therefore does not fit into either category. While it is conceivable that some for-profit organization could overcome this limitation, Wumba’s plan

⁹¹ *See* Conf. Res. 5.10.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.*

for signage and a brief conservation speech before elephant rides is not likely to do so. Behavioral research has not found a correlation between viewing animals in captivity and an increase in knowledge about conserving the animals because the average zoo visitor spends roughly three minutes at each exhibit and does not read educational signs.⁹⁷ Consequently, it is not likely that Wumba's education plan will be an effective method for informing the public about the plight of Asian Elephants. Because the parties to CITES clearly wanted to limit importation of Appendix I species for educational purposes to government agencies and non-profit organizations, Wumba's conservation education plan is inadequate to ensure that the elephants are not being imported for a primarily commercial purpose.

The FWS's contention that the importation is non-commercial because Wumba intends to loan the elephants for participation in a captive breeding program also fails in the face of the Resolution. Wumba has not demonstrated that the importation is designed to aid the long-term protection of the elephants, or that profit gained from exhibiting and breeding the animals will be used to support the continuation of the breeding program.⁹⁸ In fact, the Administrative Record indicates that individual shareholders will profit from the importation. Additionally, nothing suggests that these same shareholders will not profit from any success that the breeding program might achieve.⁹⁹ In order for the proposed importation to be for a primarily non-commercial purpose, Wumba must include more details regarding the long-term plans for the breeding program and any profits which might inure as a result.

Also worth noting is that the "captive bred" wildlife exception, which excuses the country of import from making a determination on the issue of whether a commercial purpose

⁹⁷ Croke, Vicki, *The Modern Ark: The story of zoo: Past, present, and future* (Scribner, 1997).

⁹⁸ Conf. Res. 5.10.

⁹⁹ R. at 5.

exists, does not apply in this case because the elephants were born in the wild.¹⁰⁰ Consequently, because Wumba has not planned to use profits from the elephants to support the continuation of the breeding program, and does not qualify for the “captive bred” exception, the park’s plans to use the elephants in a breeding program are not adequate to demonstrate that the importation is primarily non-commercial.

In light of the general principles and examples set forth in the Resolution, Wumba’s proposed importation of the seven Asian elephants is for a primarily commercial purpose. Wumba is a for-profit amusement park that is posed to make a large profit from the transaction, and the park’s plans for conservation education and captive breeding programs are inadequate to make the transaction “wholly non-commercial.” Thus, the FWS’s decision to allow the importation of the Asian elephants was arbitrary and capricious, and a violation of CITES.

B. The District Court’s decision should be reversed because the importation at issue will not enhance the propagation or survival of the species, and therefore violates the ESA’s prohibition against importation of endangered species.

The ESA is designed “to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction,” and requires that all federal agencies use their authority in furtherance of this goal.¹⁰¹ Asian elephants are considered an “endangered” species under the ESA, and therefore receive the highest level of protection afforded under the Act.¹⁰² As a result, Asian elephants may not be imported into the United States.¹⁰³ However, the FWS may grant an exception to this rule if the importation will “enhance the propagation or survival of the affected species.”¹⁰⁴

¹⁰⁰ See 27 U.S.T. 1087, Art. VII ¶ 4, 5.

¹⁰¹ 16 U.S.C. § 1531(a)(4),(c)(1) (2000).

¹⁰² 50 C.F.R. § 17.11(h) (2005).

¹⁰³ 16 U.S.C. § 1538(a)(1)(A).

¹⁰⁴ 16 U.S.C. § 1539(a)(1)(A).

The term “enhance the propagation or survival of the species” can refer to several activities.¹⁰⁵ These include normal animal husbandry (which encompasses captive breeding) and exhibition for public education.¹⁰⁶ However, in order for an import permit to be granted, these activities cannot be detrimental to the “survival of wild or captive populations of the affected species.”¹⁰⁷

The FWS’s decision to allow the importation of the seven Asian elephants to Wumba is arbitrary and capricious because rather than enhance the propagation or survival of the species, it will operate to the disadvantage of both wild and captive elephant populations. The wild elephant population will suffer as a result of the importation because the females will never have the opportunity to breed in their natural habitat. If allowed to remain in India, the elephants could significantly contribute to the growth of the wild elephant population, particularly since they and their offspring would reside in a national park, safe from many of the dangers which plague wild elephants. On the other hand, if the elephants are imported to the US their chances of propagation are far slimmer, as many efforts at captive breeding fail.¹⁰⁸ Additionally, even if the artificial insemination is successful, both the elephants and their offspring will remain in captivity and the wild population will be disadvantaged by the lost female elephants.

Not only will the importation at issue harm the wild elephant population in India, it is likely to disadvantage the captive elephant population in the United States as well. As noted in the Record, the captive elephant population is in “crisis.”¹⁰⁹ While it may initially appear that bringing more elephants into the US will help remedy the situation, the environment at Wumba

¹⁰⁵ 50 C.F.R. § 17.3 (2005).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; *See also* 16 U.S.C. § 1539(d) (the text of the ESA prevents activities under this exception from causing detriment to the species).

¹⁰⁸ R. at 4

¹⁰⁹ *Id.*

will prevent this from holding true. As noted in the record, foot problems which result from ground vibration and standing on concrete floors are one of the main reasons for the decline of the captive elephant population.¹¹⁰ If the importation is permitted, the elephants will be placed in an exhibit with concrete floors, near a tsunami ride, and in the vicinity of roller coasters.¹¹¹ Thus, the elephants will likely be subject to levels of vibration even greater than those that cause serious problems in zoo elephants. Consequently, the elephants will fall victim to the same phenomena that has landed the captive population in crisis, which could easily prevent them from breeding successfully.

Not only will the high probability of health problems likely prevent the elephants at Wumba from contributing to the growth of the captive population, placing the elephants in such an environment could indirectly hasten the decline of the US captive elephant population as a whole. In recent years, both zoo officials and members of the public have become increasingly concerned with the welfare of captive elephants, much because of the foot problems which systematically result in the death of these animals. As a result of public outcry, numerous institutions, such as the Detroit Zoo, have shut down their elephant exhibits.¹¹² If the importation at issue is permitted, health problems that the elephants will develop from standing on concrete floors and picking up extremely high levels of vibration could result in their illness or even death. Consequently, the park could receive a great deal of negative publicity, and individuals advocating for the release of captive elephants would have more ammunition to fuel their campaign. The resulting increase in public awareness of the problem might not only force Wumba to shut down its elephant exhibit, but could lead to other zoos following in its footsteps

¹¹⁰ R. at 5

¹¹¹ R. at 5

¹¹² Les Schobert, *Let the Zoo's Elephants Go*, Wash. Post, Oct. 16, 2005, at B08.

in the face of public outcry. Thus, the importation could ultimately result in extreme detriment to the number of captive elephants in the US.

In conclusion, rather than enhance the propagation or survival of the species, the importation at issue will be detrimental to both the wild and captive elephant populations. Therefore, the FWS's issuance of the import permit was arbitrary and capricious, and in violation of the ESA.

Conclusion

In conclusion, Elephant Advocates and Ganesh satisfy the case or controversy requirement of Article III, § 2 based on the experiences of their respective members, Ms. Bark and Ms. Gambet. Ms. Bark's emotional attachment and plans to revisit with the elephants demonstrates that her aesthetic enjoyment of observing and researching the elephants will be adversely affected with the issuance of the import permit. Similarly, Ms. Gambet, who plans to revisit the area, has a recreational interest in giving tours to the public, an aesthetic interest in observing the elephants in their natural habitat, and an economic interest in leading tours for patrons to observe the elephants. If the importation permit is issued, then the elephants will no longer remain in Corbett. Consequently, when Ms. Bark and Ms. Gambet return, they will suffer an injury as a result of the elephants' absence. Therefore, Ms. Bark and Ms. Gambet's injuries will likely be redressed by a favorable decision here.

The FWS's issuance of the import permit was arbitrary and capricious because it violated the CITES prohibition against trade in Appendix I species for a primarily commercial purpose. Because Wumba is a for-profit amusement park, its shareholders will receive an economic benefit from increased gate sales if the elephants are exhibited at the park. In light of the guidelines set forth in Conference Resolution 5.10, the importation at issue is clearly commercial

in nature. Additionally, the economic benefit that Wumba will receive as a result of this transaction is not overcome by the park's plan for public education and captive breeding programs.

Even if this Court finds that the proposed importation is not for a primarily commercial purpose, because the import will be detrimental to both wild and captive elephant populations it will not enhance the propagation or survival of the species. Consequently, issuance of the permit violates the ESA's prohibition against importation of an endangered species.

For these reasons, the Appellants respectfully request that this court affirm the District Court's decision that Elephant Advocates and Ganesh have standing to sue, and reverse the court's decision that the FWS did not violate CITES or the ESA by arbitrarily and capriciously deciding to issue an import permit to Wumba.

Appendix

Constitutional Provision:

U.S.C. CONST. Art. III § 2

“The judicial power shall extend to all *cases*, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to *controversies* to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.”