

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

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CIV. NO. 05-2334

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ELEPHANT ADVOCATES,  
and  
GANESH PROJECT,  
Plaintiffs/Appellants,

vs.

UNITED STATES FISH AND WILDLIFE SERVICE,  
Defendant/Respondent.

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Opposition to Plaintiff's Standing from the United States  
District Court For the State of Bliss  
Civ. No. 05-2334

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**Brief for Respondents**

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endangered elephants will serve to propagate their species and enhance survival while educating the public and spreading awareness.

## **II. THE FACTS**

The Appellants in this case are two non-profit organizations, Elephant Advocates and The Ganesh Project. Elephant Advocates was established to advocate for the protection and conservation of elephants in the wild and in captivity. (Opinion, ¶ 2, p. 1). The Ganesh Project is located in San Harmonica, Bliss, and has a tour operation in southern India which is dedicated to preserving elephant habitat and providing the public with humane opportunities to view wild Asian elephants. (*Id.*, at ¶ 2, p. 1). Appellants first filed suit seeking an injunction against the U.S. Fish and Wildlife Service (“FWS”) to halt the import of seven Asian elephants by the Wumba Amusement Park, (“Wumba”). FWS follows careful procedures in issuing such a permit because Asian elephants are a listed endangered species on Appendix I of CITES and the ESA. Elephants live in matriarchal herds in which the mothers, grandmothers, sisters and aunts remain together throughout their lives (*Id.*, at ¶ 2, p. 4). Elephant herds have a home range between 200 and 800 square kilometers in size. They are highly intelligent mammals with excellent memories (*Id.*, at ¶ 2, p.4). Elephants have uniquely designed native habitats with big ears for cooling and padded feet that sense vibrations. Research reveals that elephants can communicate by sending vibrations that are felt by other elephants through their footpads (*Id.*, ¶ 2, p. 4).

The North American captive elephant population is currently believed to be in crisis by the captive elephant industry in the U.S. (*Id.*, ¶ 3, p. 4). Captive breeding efforts for elephants have largely failed. Only the Bonanza circus has a breeding program that

regularly produces Asian elephants for use in captivity in the U.S. through the use of artificial insemination. (*Id.*, ¶ 3, p. 4). A contributing factor to the decline of elephants in captivity in the U.S. is due to foot problems in captive elephants. The elephants pick up vibrations with their feet in urban environments and concrete has been found to cause arthritis and other, sometimes fatal, foot problems (*Id.*, ¶ 1, p. 5).

In 2002 Wumba decided to increase their Bliss facilities by including an exhibit for live animals with an international theme to accompany the Park's other attractions, such as roller coasters, go-carts, and other rides. (*Id.*, ¶ 3, p. 5) To house the elephants, Wumba is building a state of the art 2.5 acre elephant exhibit designed to mimic the elephant's critical habitat of the Southeast Asian jungle. Visitors will have an opportunity to interact with the elephants through elephant rides on a path through the jungle exhibit (*Id.*, ¶ 3, p.5). The Asian Exhibit will house the animals in heated barns with concrete floors only in the enclosures (*Id.*, ¶ 3, p. 5).

## **I. PROCEDURAL HISTORY**

Appellants appeal the District Court judgment upholding the import permit. The Appellants claim that FWS' decision to grant an importing permit is arbitrary and capricious and contrary to law under the Administrative Procedural Act ("APA"), 5 U.S.C. § 706 (LEXIS 2005). Appellants argue the import is to serve only a primarily commercial purpose. The District Court found FWS' decision to issue an import permit was not arbitrary and capricious, and does not violate the APA, 5 U.S.C. § 522 *et seq.*, or the legal requirements set forth under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, the Convention on International Trade of Endangered Species of Wild Fauna and Flora ("CITES"), T.I.A.S. No. 8249 (1973) and the FWS's permitting

regulations, 50 C.F.R. §§ 23.11, *et. seq.*; 17.22. (*Id.*, p. 3-4). The District Court specifically found that the primary purpose of the import is to increase the propagation of endangered Asian elephants. FWS appeals the District Court finding that Appellants have standing. Plaintiffs have not demonstrated a sufficient “injury in fact” that is redressable by a court of law.

### III. ANALYSIS

#### **THE PLAINTIFF’S SO DO NOT HAVE ARTICLE III STANDING TO RAISE THESE CLAMS**

Article III of the United States Constitution limits the province of the federal courts to “cases and controversies.” Requiring a plaintiff to demonstrate that they have Article III standing to bring a claim gives effect to this Constitutional mandate and prevents the courts from unnecessarily presiding over abstract injuries. An individual has Article III standing where there is (1) an injury in fact that can (2) be traced to the Defendant’s conduct, and (3) redressed by judicial action.

#### **A. The Plaintiffs Have Not Demonstrated That They Will Suffer an Injury In Fact As a Result of the Importation of the Elephants.**

##### **1. Elephant Advocates**

An injury in fact is defined as “an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Bennett v. Spear*, 520 U.S. 154 at 167 (1997). Elephant Advocates claim they have standing based on the likelihood that one member will suffer an injury as a result of the importation of the elephants. Elephant Advocate’s member Sandra Bark claims that, as a researcher of elephants in Corbett National Park, her interests will be

harmful if the elephants are imported to the United States. Ms. Bark's injury is neither imminent nor concrete and particular and thus the organization lacks Article III standing to prevent the importation of the elephants.

Ms. Bark does have a legitimate interest in the aesthetic and educational enjoyment of the elephants living in Corbett National Park. She has not, however, demonstrated that this interest will be compromised by the importation of the elephants. In fact, Ms. Bark has not asserted that she has any personal relationship with the elephants that will be imported. Unlike the Plaintiff in *American Society for the Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334 (D.C. Cir. 2003) ("ASPCA"), Ms. Bark has not asserted that she had any direct contact with the elephants and she has not formed the personal attachment that was present in that case.

Ms. Bark has not seen any elephants from Corbett National Park for over two years. She has only alleged that she observes some elephants who live within the 1200 square kilometer (approximately 750 square miles). Without more specific information, it is not clear that Ms. Bark's enjoyment of the elephant population will be affected at all. Ms. Bark's injury is hypothetical and conjectural. It relies on the premise that on her upcoming trip to a 1200 square kilometer park she will see an elephant herd that is diminished by seven members. Given the large area, this conclusion does not necessarily follow from the information provided by Ms. Bark. Similarly, Ms. Bark's previous visits are irrelevant because she has not developed any personal relationship with any elephant, much less these specific seven, while on these trips. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) ("Defenders of Wildlife"), the Court found the fact that "the

women ‘had visited’ the areas of the projects before the projects commenced proves nothing.”

Furthermore, Ms. Bark claims that she observes elephants in Corbett National Park. This park is approximately 1200 square kilometers and Ms. Bark cannot possibly cover the entire area during her trips. In failing to specify where she interacts with the elephants and whether she will actually travel to the area where the elephants are, Ms. Bark has failed to articulate an injury in fact. In *National Wildlife Federation*, the Court held that the Defendant’s motion for summary judgment should be granted where the Plaintiff only asserts “averments which state only that one of [the organizations] members uses unspecified portions of an immense tract of territory” *Laidlaw* 528 US 167, 183. In *Laidlaw*, the Court reiterated this point and noted that a summary judgment motion will succeed where the Plaintiff fails to provide anything except these general averments. Ms. Bark has not provided specific information about where she observes that elephants nor has she specified which elephant herds she has observed. In fact, the only specific information she has provided is the fact that she has not seen the elephants for two years.

Ms. Bark also has an interest in seeing that the elephants are not mistreated. However, she fails to assert that the mistreatment of the elephants is certain or imminent. At this point, mistreatment is merely speculative and uncertain, thus the potential injury to Ms. Bark is not imminent and lacks particularity. Her generalized statement about abuse the elephants may suffer is not concrete or particularized, nor is it imminent since it is uncertain if it will happen at all. Ms. Bark has provided no information that is relevant to the way the elephants will be treated. In *Animal Legal Defense Fund v. Glickman*, 154

F.3d 426, 434 (D.C. Cir. 1998) (en banc) (“ALDF”) and *Humane Society v. Babbitt*, 46 F.3d 93, 99 n.7 (D.C. Cir. 1995) (“Humane Society”) the courts recognized that an individual can be aesthetically injured when they see animals mistreated. In both of those cases the plaintiffs had direct, personal relationships with the specific animals in question. The facts of this case are dramatically different. This is not an animal mistreatment case and no facts of mistreatment have been alleged or are in issue. Ms. Bark has not developed a personal connection to the animals and she does not assert facts that indicate any form of inhumane treatment of the elephants is imminent or even likely to occur. Consequently, her aesthetic interest in seeing the elephants unharmed is not compromised or injured by the act of bringing the elephants to the United States.

## **2. Ganesh Project**

Like Elephant Advocates, Ganesh Project asserts their members will suffer an aesthetic injury because the importation of the elephants will decrease the number of elephants available for viewing in Corbett National Park. Ms. Gambet is a member of the Ganesh Project and is also the head of tour operations. Like Ms. Bark, Ms. Gambet asserts only that she uses the land of Corbett National Park. She claims enjoyment and interest in the entire 1200 square mile park. She also claims to have an interest in all of the elephants in that vast area. Ms. Gambet has not articulated a concrete and particular injury in fact. On the contrary, Ms. Gambet put forth no information to indicate she will actually see any less elephants as a result of this action. In *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), the Court explained that an injury in fact “must be concrete in both a qualitative and temporal sense.” In this case, whether the population of elephants in

Corbett National Park will be negatively affected is uncertain and speculative. The focus of the inquiry is whether Ms. Gambet's interest in viewing the elephants will be negatively impacted by the removal of the seven elephants. Ms. Gambet has not demonstrated that her experience in viewing the elephants will be altered at all. Given the size of the park and the speculative nature of estimates as to whether Ms. Gambet's viewing of the elephants will be affected, her injury is neither concrete nor imminent.

**B. Elephant Advocates and Ganesh Project's Assertion that the Population of Elephants Available For Viewing in Corbett National Park will be Diminished is not Fairly Traceable to the Actions of the Defendant.**

Elephant Advocates and Ganesh Project assert that their aesthetic enjoyment will be diminished because less elephants will be available for viewing. Due to the proximity of development to Corbett National Park, animals are increasingly coming into contact with humans on the outskirts of the park. Industrialization is destroying the elephants' critical habitat. There is no evidence that there will be any diminution in the number of animals available for viewing due to this specific import. There is no evidence of any causal connection between removal of these seven elephants and the speculative injury of a diminished pleasure of viewing. To satisfy the causation requirement, "there [must] be a causal connection between the injury and the conduct complained of--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." *Bennett* 520 at 167. In this case rapid development cannot be ruled out as a cause of any potential diminution in the number of elephants. It is unclear that the elephants that will be imported to the United States would even survive if left in the park.

**C. The Aesthetic and Recreational Interest Asserted by Elephant Advocates And Ganesh Project Can not be Judicially Redressed**

Elephant Advocates and the Ganesh Project assert an interest in seeing the elephant population in their natural environment, located in Corbett National Park. In this case, the Court's remedy is to prevent the importation of the elephants. The Court cannot ensure the preservation of the elephants' habitat or the preservation of their lives. In *Defenders of Wildlife* 504 at 561, the Court explained that judicial action must be likely to remedy the alleged injury. In this case the court has no control over the treatment or preservation of the Asian elephant in Corbett National Park. Furthermore, the Court has not been provided any information indicating that the elephants will be able to flourish if left in a park surrounded by industrialization.

**D. Elephant Advocates Do Not Have Organizational Standing to Bring This Claim**

An organization has standing to bring a claim where "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 at 181 (2000).

Even if Ms. Bark is found to have standing, Elephant Advocates has failed to meet the burden of organizational standing. Ms. Bark's interest in viewing the elephants in Corbett National Park is not germane to Elephant Advocates purpose of protecting and conserving both wild and captive elephants. The stated purpose of the importation of the seven female elephants is to preserve and further the Asian elephant species. Bringing the elephants to the United States may improve captive breeding in this country while

protecting the elephants from the development that is encroaching on the outskirts of Corbett National Park.

**E. The Importation of the Elephants is Consistent with the Purposes of CITES and the ESA Thus Judicial Restraint is Appropriate**

The purposes of the ESA include “conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.” 16 U.S.C.S. § 1531 (Bender 2005). CITES, (March 3, 1973) 27 U.S.T. 1087 grants the ESA the authority to issue permits in cases where the importation of the animals will promote or further the survival of the species. As the managing authority, FWS is granted the authority to issue permits under the ESA and Corps Permitting Regulations. By granting standing in this case, the Court would be exceeding its authority and encroaching on that of Congress. Congress’ intent to promote the survival of endangered and threatened species is given effect by granting FWS the authority to issue permits where the survival of the species can be promoted. If the Court grants standing in cases such as the one at hand Congressional intent is frustrated, thus threatening the principles of separation of powers.

**F. FWS Acted Within the Scope of Authority Granted by CITIES and Thus the Discretion to Issue the Permit is Not Arbitrary, Capricious, or an Abuse of Discretion**

CITES, (March 3, 1973) 27 U.S.T. 1087, is an international treaty created to protect wildlife by regulating international trade in certain endangered and threatened animals and plants (Opinion, ¶3, p. 8). CITES seeks to preserve wildlife for intrinsic, aesthetic qualities, and imposes a duty on the parties to protect endangered species both as a national government and people as a whole. (*CITES, supra*, at Proclamation).

CITES is adopted and incorporated into U.S. law through the ESA, 16 U.S.C. § 138(c)(1), (LEXIS 2005) Under the ESA, it is unlawful to “engage in any trade in any specimens contrary to the provisions of” CITES”.

CITES contains procedural requirements to ensure all wildlife trade is regulated. After the exporting country has granted their permit, the importing country must satisfy three requirements in order to issue a permit. The U.S. grants “Managing Authority” in FWS to make the administrative permit decisions required under CITES for Appendix I species. First, the Managing Authority must be satisfied that the import will not be detrimental to the survival of the species. Next, the Managing Authority must be satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it. Finally, the management authority must be satisfied the specimen is not being used for “primarily commercial purposes”. (*CITES, supra* at Art. III).

Only the third requirement is at issue in this case. Appellants allege that FWS’ decision in granting the permit is arbitrary and capricious because FWS determined this import is not serving a primarily commercial purpose. The District Court correctly held this decision is not arbitrary or capricious. FWS has explicitly listed specific reasons for their determination in the record. (Opinion, ¶ 3, p. 9) Thus, the District Court properly found that the primary purpose of the import is to increase the North American Asian Elephant population and to increase education and awareness. FWS was not unreasonable or overstepping the bounds of the law in making this determination.

Administrative decisions are governed under the Administrative Procedural Act, 5 U.S.C. § 522, *et seq.* (LEXIS 2005). “Administration agency action only will be set aside if a review of the record below reveals that the challenged conduct is so lacking in

evidentiary support that the action is arbitrary, capricious or an abuse of discretion” (*Cayman Turtle Farm v. Environmental Defense Fund*, 478 F. Supp. 125 (D.C. Dist. Ct 1979) citing 5 U.S.C. § 706(2)(A) (1976)). The reviewing court must determine whether the agency decision was arbitrary, capricious, or contrary to law. This standard looks to whether the agency decision was reasonable under the circumstances, giving deference to that agency’s discretionary power. In the present case, FWS’ expertise in handling environmental affairs as the Managing Authority must be recognized. “If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court outlined how administrative agency decisions are to be reviewed under the arbitrary, capricious, and abuse of discretion standard. The Supreme Court held that EPA’s construction of the statutory term “stationary source” was reasonable. “If Congress explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation”. (*Id.*, at 841). If there is no specific Congressional intent then the agency authority is intended to make rules with the force of the law in the exercise of that authority.

The reviewing court does not look to the agency decision to determine if the agency decision was the same answer the court would have given; but rather to determine whether the agency decision is reasonable and within the bounds of the law and the agency’s power. “A reviewing court is to be particularly deferential where an agency has been delegated discretion to reach decisions based upon technical and scientific data”

*Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.*, 435 U.S. 519, 98 S. Ct. 1197 (1978) , In that case the Supreme Court held that if there is no clear congressional intent, then as long as the agency determination is reasonable, it is permissible. Sufficient reasons must exist in the record for the agency decision.

According to CITES, what is to be considered a “primarily commercial purpose” must be determined under the circumstance of each case. In this case, the District Court properly found that FWS evidenced reasonable reasons for issuing the import permit which do not serve a ‘primarily commercial purpose’. Thus, allowing the import is not arbitrary, capricious, or an abuse of discretion.

Asian elephants are a listed Appendix I endangered species under CITES. (*CITES, supra* at Art. II(1)). CITES prohibits trading in Appendix I species for “primarily commercial purposes”. (*Id.* at Art. III). However, the phrase, “primarily commercial purpose” is nowhere defined in CITES or subsequent resolutions. Appellants note that Conf. Resolution 5.10 states in the General Principles of the Resolution that 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”. (*CITES, Conf. Resolution 5.10 (Date)* <http://www.CITES/org/eng/5.10=com>) This statement is not a definition as Appellants contend but merely a description as the principle clearly states. The purpose of Conf. Resolution 5.10 is to recognize the definition of “primarily commercial purpose” is ambiguous and will be subject to different interpretations under the specific circumstances of each case. Conf. Resolution 5.10 recognizes that the term “commercial” will be viewed differently by the various countries and acknowledges that

the parties “internal legislation and legal traditions will make it difficult to reach agreement on a simple ‘objective’ interpretation of the term and that the facts concerning each importation will determine whether a proposed use would be for ‘primarily commercial purpose’”. The resolution then outlines guidelines with specific examples. An objective definition for ‘primarily commercial purpose’ or exhaustive list can not be specifically defined due to the nature of an international treaty and the varying circumstances of each case and country.

The Annex of Conf. Resolution 5.10 then goes on to cite examples of allowable trade in Appendix I species. Among the five or six examples given, this import can reasonably fall under the education and training or captive-breeding programs categories. The Annex clearly states these examples are “not intended to be exhaustive of situations where an importation of specimens of Appendix-I species could be found not ‘for primarily commercial purposes’”. Under CITES, a biomedical facility is clearly commercial; whereas household pets are clearly private. On zoos and circuses, however, the appendix is silent. Whether a zoo or exhibit is considered purely commercial or serves a broader purpose is not clearly stated and is subject to each country’s individual interpretation under the circumstances of each case.

CITES requires each country to determine what constitutes trade for a primarily commercial purpose. FWS is given Managing Authority to fulfill the obligations of CITES through the ESA and the Corps permitting regulations. 16 U.S.C. § 1538(c)(1) and 50 C.F.R. § 23.11. The ESA grants FWS as the managing authority broad latitude to determine what constitutes a “primarily commercial purpose”. The ESA does provide some guidance by defining “commercial activity” as “all activities of industry and trade,

including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, *that does not include exhibition of commodities by museums or similar cultural or historical organizations*". (16 USCS §1532(2) (LEXIS 2005) (Italics added). Therefore, it is not an abuse of discretion to find that zoos and exhibits can be considered cultural organizations. Wild animal exhibits introduce and educate the public. Furthermore, the introduction of these seven female elephants will help to propagate the species through a breeding program specifically contingent upon their arrival. Thus, FWS was not unreasonable in finding this import serves primarily non-commercial purposes under CITES or the definitions of the ESA.

In *WorldWideWildlife Fund v. Hodel*, 1988 U.S. Dist. LEXIS 19409, the D.C. District Court granted a preliminary injunction on the import of two giant pandas because FWS did not provide any explanation for its decision in the record. The instant case is markedly different; and clearly does not rise to the level of arbitrary, capricious, or abuse of discretion. The agency's decision to grant this permit is supported by a record that explicitly states the requisite findings. FWS clearly stated alternative, non-commercial purposes for this import. The scientific and technical information that FWS relied upon in deciding to allow the permit are not at issue. Therefore, it not unreasonable that FWS found these elephants are needed to increase the North American Asian Elephant population. (Opinion, ¶ 3, p. 9) In addition, FWS found that these elephants, through exhibitions in the Wumba Amusement Park will serve to educate the public and spread awareness of this endangered species. (*Id.* at ¶ 3, p. 9).

Destruction of critical habitat from industrialization is the greatest threat to the Asian elephants. Bringing these elephants to the United States in order to propagate the species and educate the public acts only in furtherance of these interests and thus the agency's conclusion does not constitute an abuse of discretion. There is no evidence this import being undertaken for solely economic gain. There is no allegation that Wumba will be charging extra or special admission to view the elephants. The exhibit is simply part of the theme park. Plaintiffs have failed to introduce any evidence of abuse of discretion. FWS is following the mandate of CITES by actively conserving through increasing the Asian elephant population and educating the public. (*CITES, supra*, at Proclamation).

**G. FWS Decision to Issue the Permit Was Not in Violation of the ESA and the APA Because the Permit Will Enhance the Survival of the Species**

The ESA pledges the United States “as a sovereign state in the international community to conserve to the extent practicable the various species of fish and wildlife and plants facing extinction,” and provides that “all Federal department and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act].” 16 U.S.C. § 1531(c). The ESA defines and “endangered species” as “any species which is in danger of extinction” 16 U.S.C. § 1532(6). Once a species is listed as endangered, the prohibitions contained in section 9 of the Act automatically apply (Opinion, ¶2, p. 10). Section 9 prohibits the “taking” of any endangered species, as well as the possession, sale, delivery, transport, or shipment of any members of the species (1) that are unlawfully take or (2) during the course of a commercial activity. 16 U.S.C. § 1538(a).

Before a permit for the importation of Asian elephants could be issued, the FWS was required to determine that the importation met the requirements of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 27 U.S.T. 1087, T.I.A.S. No. 8249, and the Endangered Species Act (ESA), 16 U.S.C.S. §1532 et seq. The ESA, 16, U.S.C.S. §1531 et seq., forbids the importation of endangered species except where the Secretary of the Interior has determined that the importation is for scientific purposes or will enhance the propagation or survival of the affected species. 16 U.S.C.S. §1539(1)(A).

Pursuant to this authority, the FWS has established a “Captive-Bred Wildlife Program” that permits facilities that keep certain endangered species in captivity to register to participate in the program- if they have adequate expertise, facilities or other resources available to enhance the propagation or survival of the species- and conduct normal husbandry activities with their animals without violating section 9 of the ESA. 50 C.F.R. § 17.21(g). Appellants argue that the Captive-Bred Wildlife Program does not apply to the removal of elephants from the wild (Opinion ¶2, p. 10). Appellants correctly make this assertion. However, this fact fails to prove anything in this case. FWS has not claimed that this permit is allowed because of The Captive Bred Program, which is an exemption created for captive bred animals. This is not the only exemption that FWS can make. In this case, FWS determined that this import will enhance species survival and thus, should be allowed. This determination has nothing really to do with the Captive Bred Program.

While the requirements of CITES, 27 U.S.T. 1087, T.I.A.S. No. 8249, and the ESA, 16 U.S.C.S. §1531 et seq., must both be satisfied prior to the issuance of an import

permit for an endangered species, only one permit need be issued as long as the requirements of both statutes are met. See 50 C.F.R. §23.15(a).

Judicial review of administrative actions, including those involving the ESA, is governed by §706 of the Administrative Procedure Act (“APA”), 5 U.S.C. §701 et seq. See *Animal Funds v. Rice*, 85 F.3d 535, 541-42 (11<sup>th</sup> Cir. 1996). The APA authorizes a court to set aside agency action found to be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.” See 5 U.C.S. §702(6)(A); see also *Motor Vehicle Mfrs. Ass’n v. state Farm Mut. Ins. Co.*, 463 U.S. 29, 41, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Appellants argue that the FWS’s finding that the import of seven wild Asian elephants to the Amusement Park will “enhance the survival of the species” is arbitrary and capricious (Opinion, ¶2, p. 11). They argue that removing these animals from the wild is antithetical to the enhancement of the survival of the species, because the elephants are all females who, when they reach breeding age, will play an integral role in contributing to the growth of the elephant population in their natural habitat in southern India, and thus, the survival of elephants in the wild (*Id.* at ¶2, p. 11) . For this reason appellants argue the FWS cannot lawfully issue an ESA permit for the removal of these elephants from the wild and their transport into the United States (*Id.* at ¶2, p. 11). Appellants also argue that, in any event, respondent has not demonstrated that the exhibition of the elephants and use of the animals for rides will “enhance the survival of the species,” even in the United States (*Id.* at ¶2, p. 11).

The scope of review under the arbitrary and capricious standard of the Administrative Procedure Act (APA) is narrow, and a court may not substitute its

judgment for that of the agency. See *Motor Vehicle Mfrs. Assn's*, 463 U.S. at 43, 103 S.Ct. 2856. To this end, a reviewing court may not set aside an agency rule that is rational, based on consideration of relevant factors, and within the scope of the authority delegated to the agency by the statute. *Id.* at 42-43, 103 S.Ct. 2856. The Court's only task is to determine whether the agency has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

In an APA case, the fact-finding capacity of the district court is typically unnecessary. The Court must decide, on the basis of the record the agency provides, whether the actions pass muster under the appropriate APA standard of review. See *Preserve Endangered Areas of Cobb's History, Inc ("PEACH") v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1246 (11<sup>th</sup> Cir. 1996).

When an agency is required to make a finding, it may not do so implicitly, but must provide, in the record, some "explanation [of its decision] sufficient to allow [the Court] to properly carry out our review." *Getty v. Federal Saving and Loan Ins. Corp.*, 256 U.S. App. D.C. 346, 805 F.2d 1050, 1055 (D.C. Cir. 1986).

FWS asserts that the import and exhibition of the elephants will enhance the survival of the species in the wild in two ways (Opinion, ¶3, p. 11). First, FWS claims that because the Amusement Park will use the elephants in a successful captive-breeding program to produce more elephants for the North American elephant population, the Amusement Park is contributing to the enhancement of the survival of the species (*Id.* at ¶3, p. 11). Second, FWS asserts that the Amusement Park's conservation education

efforts also contribute to the enhancement of the survival of Asian elephants by educating the public about these animals and the perils they face in their native countries (Opinion, ¶3, p. 11, ¶1, p. 12). FWS argues that captive-breeding and conservation education justifies the importation of the seven elephants and the Amusement Park's maintenance of these animals in captivity (Opinion, ¶1, p. 12).

Thus, the District Court considered these relevant factors articulated by FWS and is not substituting its judgment for that of the agency. The District Court found FWS articulated a rational connection between these facts and the choice it made. Based on the facts, FWS found that a permit should be issued to the Amusement Park because the Park will be contributing to the enhancement of the survival of the species by breeding Asian elephants and by educating the public about Asian Elephants.

In applying the arbitrary and capricious standard, a reviewing court must give the agency action substantial deference. See *Fund for Animals*, 85 f.3d at 541-42. In addition, the Secretary's choices are entitled to a presumption of "regularity." *Citizens to Preserve Overton Park*, 401 U.S. at 415, 91 S.Ct. 814. In reviewing the action of the FWS, the Court must be thorough and probing, but if the Court finds support for the agency action, it must step back and refrain from assessing the wisdom of the decision unless there has been a "clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989). In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors. *Marsh v. Oregon Natural*

*Resources Council*, 490 U.S. at 378, 109 S.Ct. at 1861. Here the Court found that FWS did not make an error in judgment, acted within the scope of its authority, explained its decision relying on facts in the record, and FWS considered the relevant factors.

Thus, the FWS has clearly provided the Court with an explanation of its decision sufficient to allow the court to carry out its review. The Court should find that the FWS has considered the relevant factors and articulated a rational connection between the facts found and the choice made.

#### **IV. Conclusion**

The Court of Appeals should find that Appellants, Elephant Advocates and Ganesh Project, do not have standing to litigate these claims. Appellants have failed to demonstrate a concrete and particularized injury from the import of these seven elephants. Furthermore, the injury they claim is not traceable to the actions of the Respondent and cannot be redressed by judicial action. Even if the Court of Appeals finds Appellants have standing, the Court should affirm the District Court holding that Respondents acted within the proper scope of authority granted by CITES and the ESA in finding this permit serves primarily noncommercial purposes. The import of these endangered elephants will serve to propagate their species and enhance survival while educating the public and spreading awareness. Thus, Respondents are actively fulfilling the mandates of CITES and the ESA through this import.

