
IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH DISTRICT

ELEPHANT ADVOCATES,

and

THE GANESH PROJECT,

Appellants

v.

UNITED STATES FISH & WILDLIFE SERVICE

Respondent

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

BRIEF FOR APPELLANTS

**BROOKE NOWAK-NEELY
SIMONE SEILER
Team #15
Counsel for Appellants**

University of New Mexico
School of Law

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE..... 1

I. PROCEEDINGS AND DISPOSITION OF THE LOWER COURT..... 1

II. STATEMENT OF FACTS..... 1

ISSUES PRESENTED FOR REVIEW..... 2

STANDARD OF REVIEW 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT..... 4

I. IN FINDING THAT THE APPELLANTS HAVE STANDING WITH RESPECT TO THE APA, THE DISTRICT COURT CORRECTLY DETERMINED THAT THE APPELLANTS FULFILLED THE REQUIREMENTS OF BOTH CONSTITUTIONAL STANDING AND PRUDENTIAL STANDING..... 4

A. Several clear requirements must be met by a would-be plaintiff to show standing 4

B. Ms. Bark, a member of Elephant Advocates, will suffer injury in fact if the elephants are imported 6

C. Ms. Gambet, an employee of the Ganesh Project, and the members of the Ganesh Project will suffer injury in fact if FWS’ import permits are upheld..... 7

D. The FWS’ issuance of import permits to the Wumba Amusement Park has a direct causal link to Appellants’ potential injuries 8

E. Overturning the FWS’ issuance of Wumba’s import permits would redress Appellants’ injuries 8

F. The Appellants are within the zone of interests to be protected by the APA 9

G. Elephant Advocates and the Ganesh Project have standing to sue on behalf of their respective members	10
II. THE DISTRICT COURT ERRED IN FINDING THAT THE RESPONDENT DID NOT VIOLATE CITES, THE ESA, AND THE APA	11
A. The FWS’ issuance of import permits violated the APA because the finding that the importation was not for commercial purposes was arbitrary and capricious and clearly violated the CITES ban on importation of Appendix I species for commercial purposes	14
1. The importation of the seven juvenile Asian Elephants is prohibited by CITES	12
2. Wumba is importing the elephants for a primarily commercial purpose and should be denied the permits	14
a. The Bonanza Circus’ captive breeding program is not oriented toward the recovery of the Asian elephant and is a commercial use of the elephants	14
b. The educational purposes cited by Wumba are peripheral and commercial in nature	16
c. The purpose of importation of the elephants is primarily commercial and even if it were not, the importation remains impermissible under CITES	17
B. The FWS’ issuance of the import permits violated the APA because the finding that the importation would enhance the survival of the species was arbitrary and capricious in violation of the ESA requirements regarding endangered species importation	18
1. Importation of the seven juvenile Asian Elephants is not excepted under requirements to import endangered species into the U.S.	19
2. The FWS failed to consider the endangered species importation permit issuance criteria under 50 C.F.R. 17.22(A)(2), which when appropriately analyzed must lead to denial of the import permits	20
CONCLUSION	23
APPENDIX I	a

TABLE OF AUTHORITIES

United States Supreme Court Cases

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)5, 9

Bennett v. Spear, 520 U.S. 154 (1997)4

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)11

Citizens to Preserve Overton Park v. Volpe 401 U.S. 402 (1971)3

Clarke v. Securities Industry Ass’n, 479 U.S. 388 (1987)9

Elder v. Holloway, 510 U.S. 510 (1994).....2

Hunt v. Wash. St. Apple Advertising, 432 US 333 (1977)5

Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986).....7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)4

National Credit Union Admin. v. First National Bank & Trust Co., 522 U.S. 479 (1998).5, 9

District of D.C. Cases

Born Free USA v. Norton, 278 F.Supp.2d 5 (D.D.C. 2003).....11

Fund for Animals v. Norton, 281 F.Supp.2d 209 (D.D.C. 2003).....7

D. C. Circuit Court Cases

American Society of the Prevention of Cruelty to Animals v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003) 6-7

Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998).....5

Autolog Corp. v. Regan, 731 F.2d 25 (D.C. Cir. 1984)5

Iceland S.S. Co. v. U.S. Dep’t of Army, 201 F.3d 451 (D.C.Cir.2000)11

Mountain Legal States Found. v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996).....5

Statutes

50 C.F.R. §17.21(g)	19
50 C.F.R. §17.22(a).....	19-21
Administrative Procedure Act, 5 U.S.C.A § 701 <i>et. seq</i>	passim
Endangered Species Act, 16 U.S.C. § 1531 <i>et. seq.</i>	passim
Asian Elephant Conservation Act, 16 U.S.C. § 4261 <i>et. seq.</i>	21-22

International Treaties

Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087.....	passim
Conf. Res. 5.10, CITES Resolutions	passim, Appendix I

Other Sources

American Zoo and Aquarium Association, <i>Species Survival Plan Fact Sheet</i> , available at http://www.aza.org/ConScience/ConScienceSSPFact/	15
Honolulu Zoo, <i>Indian Elephant</i> , http://www.honoluluzoo.org/ indian-elephant.htm	20
International Elephant Foundation, <i>Conservation Project</i> , available at http://www.elephantconservation.org	22
International Fund for Animal Welfare, <i>Asian Elephants</i> , available at http://www.ifaw.org/ifaw/general/default.aspx?oid=12998	20
Irven O. Buss, <i>Elephant Life, Fifteen Years of High Population Density</i> , (Iowa State University Press 1990)	1, 6
University of Michigan, <i>Museum of Zoology Animal Diversity, ADW: Elephas Maximus</i> , available at http://animaldiversity.ummz.umich.edu/ site/accounts/information/Elephas_maximus.html	23
World Land Trust, <i>Elephant Conservation: Save the Indian Elephant</i> , http://www.worldlandtrust.org/news/india.htm	22
World Wildlife Fund, <i>2000 WWF Species Status Report for the Asian Elephant</i> , available at http://www.wwf.at/downloads/elefantzwei.pdf	21

STATEMENT OF THE CASE

I. Proceedings and Disposition of the Lower Court

This is an appeal from the United States District Court for the State of Bliss. The Appellants brought this action to challenge the District Court's decision allowing FWS' issuance of import permits in violation of the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.* and Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") (entered into force July 1, 1975), 27 U.S.T. 1087.

II. Statement of Facts

At the heart of this case are seven small female Asian elephants at their home in the South of India. [R. 5] These seven elephants are juveniles who were born in the wild and live in the wild in Corbett National Park ("Corbett"). [R. 5] While they are very young now, these elephants will grow into highly intelligent, family-oriented matriarchs perfectly adapted to their natural environment. [R. 4] It is within this natural environment that they are designed to spend the rest of their lives as contributing members of a close family group. [R. 4] These female elephants bond very strongly to the two generations preceding them and the two generations subsequent to them. Irven O. Buss, *Elephant Life: Fifteen Years of High Population Density*, 25 (Iowa State University Press 1990)

Wumba Amusement Park ("Wumba") seeks to import these seven elephants for use as amusement park rides as part of its plan to increase shareholder profits and out compete another amusement park. [R. 5]

Asian elephants are listed as an endangered species under the Endangered Species Act ("ESA") and in Appendix I of CITES. A permit is required for their importation to the United States. [R. 4] The FWS is charged with the responsibility of issuing such permits. [R. 10]

Wumba alleges that the elephants will eventually be loaned to Bonanza Circus for captive breeding purposes. [R. 9] Bonanza Circus is the only entity in the U.S. that breeds Asian elephants specifically for use in captivity by artificially inseminating females. [R. 4] Generally, captive breeding efforts for elephants are unsuccessful, leading to a decrease in the number of elephants bred for captive use. *Id.* Another reason for the decrease in captive elephants is health problems and death resulting from foot problems associated with being held in captivity. [R. 5] Elephant feet are extremely sensitive to vibrations; they use this sensory perception as a communication tool. [R. 4] The urban environments in which captive elephants are typically confined are replete with vibrations and concrete which overwhelm the feet and cause often fatal foot problems. [R. 5] The FWS claims that this decrease in the captive population justifies importation of the seven wild elephants at issue in this case. [R. 11]

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

The District Court's determination that the Appellants have standing to sue constitutes a finding of law. Upon appellate review of a lower court's findings of law, no deference is given to the lower court's decision, and trial is *de novo*. See e.g. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

The District Court's standard of review under the APA was whether the agency findings and conclusions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A § 706(2)(a) (2005). The District Court's finding that granting the import permits was not arbitrary and capricious is reviewable. The reviewing court must consider whether the lower court's decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402 (1971).

SUMMARY OF THE ARGUMENT

The District Court properly found that the Plaintiffs have standing to bring suit against the United States Fish and Wildlife Service ("FWS") under the provisions of the Administrative Procedure Act ("APA"). Its ruling should be affirmed. The Plaintiffs meet the constitutional and prudential requirements because the Plaintiffs will suffer a cognizable harm; that harm is fairly traceable to the agency's action; a favorable verdict would likely redress the harm; and the Plaintiffs are within the zone of interests protected by the APA. Further, the Plaintiff associations have standing to challenge the FWS's action on behalf of association members because at least one member of each organization has independent standing, the claims in this case are relevant to the purposes of the organizations, and neither the relief requested nor the claims asserted require the participation of individual members.

The District Court erred in not finding the FWS' conclusions arbitrary and capricious where the agency found that the importation of seven Asian elephants was not for a primarily commercial purpose and would contribute to the enhancement of the survival of the species. In determining whether the importation was for primarily commercial purposes, the FWS, in

violation of CITES and the APA, arbitrarily ignored the germane resolution of the parties to CITES wherein the parties specifically defined the term “primarily commercial purpose.” Further, the FWS failed to consider six salient issuance criteria before it granted permits to import the endangered elephants under the auspice of “enhancing the propagation of the species.” Consideration of these criteria mandates that the permits be denied. The FWS violated CITES, the ESA, and the APA because its actions were arbitrary and capricious and the District Court was clearly erroneous in upholding the FWS’ findings.

ARGUMENT

I. IN FINDING THAT THE APPELLANTS HAVE STANDING WITH RESPECT TO THE APA, THE DISTRICT COURT CORRECTLY DETERMINED THAT THE APPELLANTS FULFILLED THE REQUIREMENTS OF BOTH CONSTITUTIONAL STANDING AND PRUDENTIAL STANDING.

A. Several clear requirements must be met by a would-be plaintiff to show standing.

The court must consider constitutional and prudential standing requirements when determining a potential plaintiff’s ability to bring suit. For an organization, rather than an individual, to have standing, the court must evaluate the standing of at least one of its members in light of that organization’s purpose.

Article III of the U.S. Constitution sets forth the subject matter jurisdiction of the federal courts by limiting their powers to justiciable cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish a case or controversy, the potential plaintiff must sustain an actual injury caused by the defendant. The U.S. Supreme Court has turned this requirement into a three-pronged test that each plaintiff must meet to have constitutional standing. First, did the plaintiff suffer an injury in fact to a judicially cognizable interest that is: a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical?

Second, is there a causal connection between the injury and the conduct complained of, and was that injury fairly traceable to actions of the FWS and not the result of independent action of some third party not before the court? Finally, is it likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision? *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

Prudential standing is a judicially created standing doctrine. For a plaintiff to have prudential standing under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute ... in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). In this case, the Appellants have prudential standing if their injuries fall within the zone of interests protected or regulated by the APA. Prudential standing does not require congressional intent to benefit the plaintiff or that the legislative history show any consideration of the plaintiff's interest. *National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479, 489 (1998). Prudential standing was created to expand the number of potential plaintiffs with standing to sue. *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 444 (D.C. Cir. 1998) (en banc) (citing *Autolog Corp. v. Regan*, 731 F.2d 25, 29 (D.C. Cir. 1984)). It does not have rigorous requirements, especially under a statute that protects a broad scope of interests, such as the APA.

Associations can challenge agency action on behalf of their members. In order for an association to have standing to bring suit on behalf of its members, three requirements must be met: 1) at least one of its members has standing to sue individually; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Wash. St. Apple Advertising*, 432 US 333, 342 (1977).

Furthermore, the D.C. Circuit court has held that “if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.” *Animal Legal Defense Fund* at 429 (citing *Mountain Legal States Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)). The holding promotes judicial efficiency. If one plaintiff has standing, the claim in question must be considered by the court regardless of how many plaintiffs can raise the issue.

B. Ms. Bark, a member of Elephant Advocates, will suffer injury in fact if the elephants are imported.

Ms. Bark, an Asian Elephant researcher and member of Elephant Advocates, spent six years researching the wild elephants within Corbett National Park in India. Although she has not seen the Corbett elephants in two years, she has concrete plans to return to Corbett for follow-up research in the spring.

These wild elephant herds are the same herds from which Wumba seeks to acquire its seven juvenile elephants pursuant to the FWS’ import permits. Wild elephants live in closely bonded matriarchal herds. Removal of juveniles from those herds could cause a substantial level of trauma to the remaining herd members. *Elephant Life* at 27. Such a disruption may lead to the elephants’ future avoidance of humans, making viewing for Ms. Bark’s research considerably more difficult. *Id.* at 44. The removal of seven females from the same generation will change future population patterns and genetic characteristics of herds in Corbett from what they would be without human interference. These changes could have significant negative impacts on Ms. Bark’s future research, including its relevance to other wild elephant herds that have not suffered similar interference. Ms. Bark has a substantive interest in the outcome of this case because issuance of the import permits could hinder her ability to further research the Corbett elephants

in their normal herd structure. The removal of the juvenile elephants constitutes a significant, imminent and concrete injury to Ms. Bark's career and her elephant research.

Ms. Bark will also suffer aesthetic injury if the elephants are imported to the United States. *American Society of the Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334, 336 (D.C. Cir. 2003) (harm to aesthetic interests may be a sufficient injury in fact). During her years of research, Ms. Bark formed emotional bonds to the Corbett elephants. It is likely that some of the elephants she saw born and bonded to at Corbett include the seven baby elephants slated for captivity. As a wild elephant researcher who is deeply concerned for the well-being of these particular animals, Ms. Bark would suffer intense distress to see them used for children's rides at an amusement park. This imminent injury is also sufficient to give Ms. Bark standing. *Id.* at 337.

C. Ms. Gambet, an employee of the Ganesh Project, and the members of the Ganesh Project will suffer injury in fact if FWS' import permits are upheld.

Ms. Gambet is the Ganesh Project's head of tour operations in India. Every one to two years, she leads a tour of the Ganesh Project members and patrons to see the elephant herds at Corbett in their wild state. In *Japan Whaling Association v. American Cetacean Society*, the U.S. Supreme Court found that the plaintiffs "undoubtedly have alleged a sufficient 'injury in fact' in that the whale watching and studying of their members will be adversely affected by continued whale harvesting." 478 U.S. 221, 230 (1986). The whale watchers in that case are closely analogous to Ms. Gambet and the members of the Ganesh Project, who travel to India to see the wild Asian elephants at Corbett.

Aesthetic injury occurs when a defendant adversely affects a plaintiff's enjoyment of flora and fauna. *American Society of the Prevention of Cruelty to Animals v. Ringling Bros.* at 337. Ms. Gambet has a pattern of visiting the elephants at Corbett on a regular basis and has not

evinced any plans to stop conducting tours for the Ganesh Project if the seven baby elephants are removed. She is familiar with the elephants at the park and has watched them grow and change during the years she has been visiting Corbett. There is no requirement that she observe the particular juveniles named in the import permits in order to sustain irreparable injury from their removal. *Fund for Animals v. Norton*, 281 F.Supp.2d 209, 221 (D.D.C. 2003). However, it is likely that the particular juveniles slated for captivity are among the elephants Ms. Gambet and the participants in her tours have observed.

The traumatic experience of losing young herd members to humans may cause the remaining herd members to avoid humans in the future. Such avoidance would create an economic injury to Ms. Gambet. Changes in the accessibility of the wild elephants in Corbett could lessen public participation in Ms. Gambet's tours and endanger her livelihood. Decreased public interest could also stem from the smaller population of elephants at Corbett, the smaller number of baby elephants for the participants to view and public outrage over the removal of the juveniles to captivity. All of these possibilities compound the injuries Ms. Gambet is facing.

D. The FWS' issuance of import permits to the Wumba Amusement Park has a direct causal link to Appellants' potential injuries.

In order to import Asian Elephants from a foreign country, Wumba must comply with CITES by obtaining import permits from FWS.¹ Without those permits, the elephants from Corbett can not be brought into the United States. There is no reason for the elephants to be removed from the wild without import permits from FWS. The permits, if allowed to stand, are the proximate cause of the Appellants' injuries, all of which arise from removal of the seven juvenile elephants from their wild herds for export to Wumba.

¹ For a discussion of CITES requirements, see *infra* n. 3 and accompanying text.

E. Overturning the FWS' issuance of Wumba's import permits would redress Appellants' injuries.

The lack of import permits would nullify the injuries to the Appellants by preventing Wumba from removing the seven baby elephants from their families for use in a captive environment. The elephants would be available for research by Ms. Bark and for viewing by Ms. Gambet and the members of the Ganesh Project in a natural, undisturbed state.

F. The Appellants are within the zone of interests to be protected by the APA.

Prudential standing requirements must be met in addition to constitutional standing requirements of redressable injury arising from an administrative action. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). The U.S. Supreme Court has adopted a broad interpretation of prudential standing under the APA. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The values sought to be protected under the APA can be economic, aesthetic, conservational and recreational. *Id.* at 154.

The APA specifies that “final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.” 5 U.S.C.A. § 704 (2005). Persons who can avail themselves of the review provided by the APA include persons who are “aggrieved by [an] agency action.” 5 U.S.C.A § 702 (2005).

Congressional intent to provide a remedy for potential plaintiffs is not required to meet the zone of interests test. *National Credit Union Admin. v. First National Bank & Trust Co.*, at 489. “Although the ‘zone of interests’ test ‘denies a right of review if the plaintiff’s interests are ... marginally related to or inconsistent with the purposes implicit in the statute ... there need be no indication of congressional purpose to benefit the would-be plaintiff.’” *Id.* at 491 (quoting *Clarke v. Securities Industry Assn.*, at 399-400. According to the U.S. Supreme Court, “we first discern the interests ‘arguably ... to be protected’ by the statutory provision at issue; we then

inquire whether the plaintiff's interests affected by the agency action in question are among them." *Id.* at 492.

Under this broad analytical framework, it is clear that the Appellants have prudential standing. The concrete injuries that will be suffered by the Appellants have been laid out to find their constitutional standing. There is direct causation between the import of the juvenile elephants into the United States and the irreparable injuries that will be suffered by the Appellants. Since the FWS' grant of the import permits is the instrument that creates the injury to the Appellants, the associations are firmly within the zone of interests Congress sought to protect by making judicial review available under the APA.

G. Elephant Advocates and the Ganesh Project have standing to sue on behalf of their respective members.

Both associations have members with individual standing in satisfaction of the first requirement for an organization to bring suit on behalf of its members. Elephant Advocates' purpose is to advocate for the protection and conservation of elephants in the wild and in captivity. This goal is firmly in keeping with the issues the court is addressing in the instant case. The aesthetic injuries that will be sustained by Ms. Bark are similar to the aesthetic injuries that will be sustained by other members of Elephant Advocates if the FWS' import permits are allowed to stand.

Ms. Gambet runs the tours in India that the Ganesh Project has created to allow members of the public to see wild Asian elephants roaming free in their natural habitat. While Ms. Gambet has a more direct connection to the particular elephants at issue, the Ganesh Project and its members will sustain similar aesthetic injuries if the elephants are imported. The Ganesh Project's purpose of protecting elephant habitat and providing humane viewing opportunities is furthered by Ms. Gambet's standing in the instant case.

The associations' participation in the lawsuit is sufficient to address the harm that will befall the associations' members if the import permits are allowed to stand. No members are entitled to additional remedies that can not be accessed by Elephant Advocates and the Ganesh Project.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE RESPONDENT DID NOT VIOLATE CITES, THE ESA, AND THE APA.

The District Court erroneously concluded that the FWS' decision to issue import permits for the seven juvenile elephants was not arbitrary and capricious. This Court should therefore reverse the District Court's finding on the grounds that: 1) the FWS' issuance of import permits violated the APA because the finding that the importation was not for commercial purposes was arbitrary and capricious and clearly violated the CITES ban on importation of Appendix I species for commercial purposes; and 2) the FWS' issuance of the import permits violated the APA because the finding that the importation would enhance the survival of the species was arbitrary and capricious in violation of the ESA requirements regarding endangered species importation.

A. The FWS' issuance of import permits violated the APA because the finding that the importation was not for commercial purposes was arbitrary and capricious and clearly violated the CITES ban on importation of Appendix I species for commercial purposes.

The District Court erred in finding that the defendant's issuance of import permits for the elephants did not violate the CITES ban on import for commercial purposes. CITES specifically bars importation of endangered animals such as the Asian elephant when the purpose for importation is for a primarily commercial purpose. The FWS arbitrarily and capriciously misinterpreted the germane resolution of the parties to CITES that clarified the term "primarily

commercial purpose.”² Conf. Res. 5.10, CITES Resolutions, *Definition of ‘Primary Commercial Purposes,’* <http://www.cites.org/eng/res/05/05-10.shtml> (accessed January 23, 2006) (Appendix A). The grant of the permits was arbitrary, capricious, and a violation of CITES, and the District Court should have stricken the permits as unlawful under the APA, 5 U.S.C. § 706(2)(a) (2005).

1. The importation of the seven Asian elephants is prohibited by CITES.

CITES is an international treaty that governs trade in endangered and threatened species of plants and animals. Species are classified into three appendices to the treaty according to the level of danger faced by the species. Of specific interest to this case are the Appendix I species in which the Asian elephant is classified. Appendix I species are plants and animals “threatened with extinction which are or may be affected by trade.” CITES, Art. II, ¶ 1.

The United States has ratified CITES and has given effect to the treaty through the ESA’s enforcement measures. 16 U.S.C. § 1538(c)(1) (2005) (“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 [CITES]. ...”). Article IX of CITES requires that signatory countries designate management and scientific authorities. The ESA has charged the FWS with the task of serving as both the management and scientific authorities. 16 U.S.C. § 1537a (a)³. Under CITES, a permit is required to import an Asian elephant, which can only be granted when the FWS finds that the import purpose is “not detrimental to the survival of the species,” the recipient is suitably

² Treaty interpretations of agencies charged with enforcement of a treaty shall be given deference upon review where the plain meaning of the treaty terms is not known. *Born Free USA v. Norton*, 278 F.Supp.2d 5 (D.D.C. 2003) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Iceland S.S. Co. v. U.S. Dep’t of Army*, 201 F.3d 451, 458 (D.C.Cir.2000)). In this case, the plain meaning of “primarily commercial purpose” has been given in a resolution of the parties to CITES.

³ 16 U.S.C. § 1537a (a) provides: “The Secretary of the Interior 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 [U.S.] Fish and Wildlife Service.”

equipped to care for the elephant, and the elephant is “not to be used for primarily commercial purposes.” CITES Art. III, ¶ 3. The District Court erred in its consideration of the last permit requirement that the import is not to be used for primarily commercial purposes. The FWS’ finding that the import was not for primarily commercial purposes was arbitrary and capricious.

“An import permit shall only be granted when... Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.” CITES, Art. III, ¶ 3. Parties to the convention recognized ambiguity in the term “primarily commercial purpose” and addressed it in a resolution aptly entitled “Definition of ‘Primarily Commercial Purposes.’” Conf. Res. 5.10. The Resolution lays a framework of general principles for determination of what uses of Appendix I species constitute primarily commercial purposes. It should be noted that the first principle which Conference Resolution 5.10 (“the Resolution”) puts forth is, “[t]rade in Appendix I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.” *Id.* The District Court recognized the Resolution’s second principle that an activity is commercial when it is “to obtain economic benefit, including profit (whether in cash or kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.” *Id.* The District Court erroneously limited its analysis of the Resolution. Had the District Court read the next resolution provision, it would have found that “the term ‘commercial purpose’ should be defined as broadly as possible by the country of import so that *any transaction which is not wholly ‘non-commercial’ will be regarded as ‘commercial.’*” *Id.* (emphasis added). The resolution then expands this idea to what is meant by “primarily commercial purpose” and makes it clear that a balancing test must be applied to determine whether the non-commercial purposes are outweighed by the commercial purposes. “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 Appendix I species should not be permitted.*” Conf. Res.5.10 Gen. Principle 3 (emphasis added). Furthermore, the burden of proof for showing that the importation is for non-commercial use rests with the importers. *Id.*

2. Wumba is importing the elephants for a primarily commercial purpose and should be denied the permits.

Wumba is focused on increasing profits for its shareholders and out competing another amusement park. They are seeking to import the seven Asian elephants to achieve that end by using the elephants as new amusement park rides and as attractions to the park’s new “Asia Exhibit.” In light of this purely commercial purpose, Wumba presented two rationalizations for the issuance of the permits to show the FWS that importation is for not for primarily commercial purposes: 1) Wumba “will contribute to the captive breeding of Asian elephants by loaning [the] elephants for participation in Bonanza Circus’s breeding program,” and 2) Wumba will contribute to the conservation of the Asian elephant through “conservation education” by posting signs around the exhibit and giving a quick lecture about the endangered status of the elephants. [R. at 9] The FWS accepted both rationalizations as justification for the importation without correctly applying the prohibitions of CITES.

a. The Bonanza Circus’ captive breeding program is not oriented toward the recovery of the Asian elephant and is a commercial use of the elephants.

“Any importation of [Appendix I species] for captive-breeding purposes must be aimed as a priority at the long term protection of the affected species” in order for the importation to be found not to be for primarily commercial purposes. Conf. Res. 5.10. Wumba’s argument that loaning the elephants to Bonanza Circus’ breeding program justifies issuing the permits is unconvincing in light of the Resolution language. The language is clear: there must be a long

term goal of protection of that “affected species.” The affected species here is the Asian elephant and it is not being protected by the captive breeding program considered in this case.

Wumba wants to loan these seven young elephants to Bonanza Circus, a captive breeding program which boasts that it regularly produces captive bred Asian elephants *for use in captivity*. [R. at 4.] (emphasis added). Given that the elephants bred by Bonanza Circus are bred to supply offspring for use in captivity, a common sense inference arises that they will ultimately be sold by Bonanza Circus for captive commercial use in industries like amusement parks, circuses, and traveling zoos. These potential commercial implications make Wumba’s loan of the elephants to Bonanza Circus a commercial use of the elephants because “any transaction which is not wholly ‘non-commercial’ will be regarded as ‘commercial.’” Conf. Res. 5.10.

Further still, the Resolution notes that “as a general rule importations must be part of general program[s] aimed at the recovery of species and be undertaken with the help of the Parties in whose territory the species originate.” *Id.* There is no indication that Bonanza Circus is part of a general plan or that it works with India in its captive breeding pursuits. The resolution goes on to say that the profit gained from captive breeding programs should be used to promote recovery of Appendix I species. *Id.* Bonanza Circus seeks not to promote recovery of Asian elephants, but to promote their use in captivity despite uncontested facts that the number of captive elephants is declining due to foot problems resulting from being held captive in urban environments where standing on concrete results in “arthritis and other, *often fatal*, foot problems.” [R. at 4] (emphasis added). Rather than alleviating the health problems facing captive Asian elephants, Wumba and Bonanza Circus want to compound them by contributing to an alleged, unrecognized North American captive elephant population. Because Bonanza Circus

is not a bona fide captive breeding program, it cannot mitigate the commercial purposes of Wumba.⁴

The importation of wild Asian elephants for captive breeding purposes must be aimed at protection of Asian elephants, not to enhance Wumba's profits. The prospect that the elephants will be loaned to Bonanza Circus to supply a captive lot of elephants is itself a commercial purpose under the Resolution and therefore does not offset the primarily commercial purpose of Wumba's importation of the elephants. The FWS took Wumba at its word without holding it to its burden of satisfying the requirements under CITES. It was clear error for the District Court not to find that the actions of the FWS were arbitrary and capricious.

b. The educational purposes cited by Wumba are peripheral and commercial in nature

CITES Resolution 5.10 does not consider importation of Appendix I species by government agencies or non-profit institutions to be a primarily commercial purpose where the animals are used for purposes of conservation, education or training. While Wumba does not meet this exception as a for-profit entity, it contends that there is an educational component to personally observing the elephants while being educated about the dangers that the elephants face. However, the full context of the use of the seven elephants in this case must be considered:

⁴ The American Zoo and Aquarium Association (AZA) has a specialized conservation program for endangered species like Asian elephants. This plan is known as the Species Survival Plan and it manages the breeding of the species in order to maintain a healthy and self-sustaining population that is both genetically diverse and demographically stable. While the animals are in captivity for breeding purposes, the end goal is to reintroduce animals into the wild to promote viability of wild populations. This program is a bona fide captive breeding program under CITES because of its commitment to recovery of species like the Asian elephant and its adherence to strict ethical codes. Bonanza Circus is not among the institutions listed under AZA because Bonanza Circus is in the industry of supplying captive elephants and does not reintroduce animals into the wild. American Zoo and Aquarium Association, *Species Survival Plan Fact Sheet* <http://www.aza.org/ConScience/ConScienceSSPFact/> (accessed January 24, 2006).

these elephants will be used as amusement park rides. The fact that Asian elephants are endangered will create a larger draw to the elephants and thus more money for the amusement park.

Wumba is neither a government agency nor a non-profit organization; it is a for-profit amusement park and these seven elephants are pawns in Wumba's self-described master plan "to increase profits for its shareholders and out compete [another] amusement park." [R. at 5] The educational exception for commercial use under the Resolution does not apply to this case because the peripheral educational component is not sufficient to allow this laissez-faire system to exploit seven wild Asian elephants; to allow such is antithetical to the "exceptional circumstances" required by CITES to import Appendix I species. Further, the Resolution states that Conf. Res. 5.10 (any transaction which is not wholly non-commercial is deemed commercial).

3. The purpose of importation of the elephants is primarily commercial and even if it were not, the importation remains impermissible under CITES.

In considering the two reasons relied upon by the District Court to justify the decision by the FWS, it is clear that neither of the reasons fit as non-commercial activities. Both are aimed at increasing profitability of private entities: 1) Bonanza Circus' captive breeding program supplies elephants to entities who wish to use the animals in captivity rather than reintroducing them into the wild; and 2) the educational component of the amusement park ride is commercial because the park can use the endangered status as an incentive for people to patronize the park. Given

that these two activities are commercial in nature, they cannot negate the primarily commercial nature of importing the elephants for use as amusement park rides.⁵

Finally, and most damaging to the FWS' findings, the Resolution requires that even if the importation is found not to be for primarily commercial purposes, *importation should not be allowed unless*: “a) [the party seeking importation] has been unable to obtain suitable captive-bred specimens of the same species; b) another species not listed in Appendix I could not be utilized for the proposed purpose; and c) the proposed purpose could not be achieved through alternative means.” Conf. Res. 5.10. (emphasis added). There is not a scintilla of support in the record that the FWS and the District Court even considered these questions. In light of the above arguments, the FWS' finding that Wumba's importation of wild Asian elephants for use as for-profit amusement park rides was not a primarily commercial purpose was arbitrary and capricious.

Aside from the revolting irony of removing wild animals from their natural habitat and placing them in captivity in an amusement park's “Asia Exhibit,” the Resolution of the parties to CITES mandates that these seven elephants cannot be imported. A finding contrary to this mandate violates the APA because it is arbitrary, capricious, and not in accordance with law. 5 U.S.C. § 706(2)(a) (2005). Under the APA the District Court should have held that the permits were unlawful, and it was clear error to find otherwise. While the FWS' interpretations of ambiguous terms within CITES are to be given deference upon review, the treaty term “primarily commercial purpose” has been clarified by the Resolution. The specific examples that the FWS erroneously relied upon in issuing the permits for these seven elephants are prohibited under this

⁵ “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 Appendix I species should not be permitted.*” Conf. Res. 5.10. (emphasis added).

clarification. It was clear error for the District Court to effectively set aside the Resolution defining “primarily commercial purpose” and give complete deference to the FWS in arriving at its decision to uphold the grant of the permits.

B. The FWS’ issuance of the import permits violated the APA because the finding that the importation would enhance the survival of the species was arbitrary and capricious in violation of the ESA requirements regarding endangered species importation.

The ESA protects endangered species such as the Asian elephant and their habitats in accordance with various treaties including CITES. The ESA prohibits the importation of endangered species during the course of a commercial activity or contrary to the provisions of CITES. 16 U.S.C. §§1538 (a), (c)(1) (2005). However, the ESA allows an exception to these prohibitions where the importation of the species will enhance the propagation or survival of the affected species.⁶ § 1539 (a)(1)(A) (2005). An example of such an exception is given in the statute’s language: “The Secretary may permit ... acts necessary for the establishment and maintenance of experimental populations.” *Id.* An experimental population is a population of a species authorized by the Secretary of the Interior for release outside the current range of that species where that release will further conservation of that species. 16 U.S.C. §§ 1539(j)(1)-(2) (2005).⁷ Pursuant to its authority, FWS is responsible for implementing ESA regulations in issuing permits for importation of endangered species.

1. Importation of the seven juvenile Asian Elephants is not excepted under requirements to import endangered species into the U.S.

⁶ While outside the scope of this appeal, it should be noted that there are other circumstances as set forth in § 1539 wherein trade contrary to CITES may be permitted.

⁷ The “North American captive elephant population” referred to by Respondents does not fit within the experimental population definition because the captive elephants are not released pursuant to 16 U.S.C. §§ 1539(j)(1-2) (2005).

To import Asian elephants into the U.S. for commercial purposes contrary to the ESA, Wumba must meet both the general requirements applicable to all FWS permits and the permit requirements that apply to the import of endangered wildlife. 50 C.F.R. §17.22(a) (2005). While it is permissible to receive endangered wildlife for the purpose of captive breeding programs, the endangered wildlife must be “bred in captivity in the United States.” 50 C.F.R. §17.21(g) (2005). The captive breeding exception does not apply to Bonanza Circus’ program because Sleepy, Sneezzy, Grumpy, Bashful, Doc, Dopey, and Happy are wild Asian elephants who were born wild and whose natural habitat is in Southern India. The FWS was not limited to this exception, however.

Of specific concern is whether the FWS considered the required factors before finding that the importation of these Asian elephants would enhance the survival of the species. 50 C.F.R. §17.22(a)(2) (2005). The FWS’ decision that the importation is for enhancement of propagation of the species is clearly arbitrary and capricious when the facts are considered in light of these factors.

2. The FWS failed to consider the endangered species importation permit issuance criteria under 50 C.F.R. 17.22(A)(2), which when appropriately analyzed must lead to denial of the import permits.

The FWS must consider all six permit issuance criteria when determining whether or not to issue a permit under the auspices of “enhancement of the propagation of the species.” 50 C.F.R. §17.22(a)(2) (2005). Even though all six criteria must weigh in favor of enhancement of propagation of the species, the permits in this case do not meet even one of the six criterion.

The first consideration is “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.” *Id.* In this case the only evidence presented was that the

elephants will be used as amusement park rides, may be loaned for use in a captive breeding program to increase the number of elephants in captivity, and will be used to educate the public. As was considered above, the Bonanza Circus is in the business of making sure that elephants are available for captive uses. Supplying wild animals for captive use is not a justification for removing seven juvenile females from the wild. The elephants in consideration may be years from being able to breed.⁸ Further, the argument that the elephants will be used to educate the public is disingenuous because the amusement park's educational presentation is only available to payers of a fee to enter the exhibit. The myriad of public zoos are the proper venues for education about wildlife. Citizens pay a fee at a zoo knowing that the money will go to the maintenance of the zoo exhibits. The general public does not visit amusement parks for educational purposes; such places are for amusement. Therefore, the purposes for which the permits are sought do not justify removing these seven baby elephants from the wild.

The second consideration is “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.” *Id.* Both the U.S. Congress and the World Wildlife Fund have found that the Asian elephant is a “flagship” species, meaning that conservation action for elephants has the potential to help maintain biological diversity and ecological integrity on a large scale. 16 U.S.C. § 4261 (2005); *and* World Wildlife Fund, Germany, 2000 *WWF Species Status Report for the Asian Elephant*, <http://www.wwf.at/downloads/elefantzwei.pdf> (accessed January 22, 2006). Given that nearly 30 percent of the remaining Asian elephants are in captivity, the capture of wild elephants for

⁸ The life cycle of Asian elephants is similar to that of humans. The seven elephants that are in contention here will not be sexually mature until about 10 years of age, while the ability to successfully bear young may not come until the age of 16. International Fund for Animal Welfare, *Asian Elephants*, <http://www.ifaw.org/ifaw/general/default.aspx?oid=12998> (accessed January 23, 2006); *and* Honolulu Zoo, *Indian Elephant*, <http://www.honolulu zoo.org/indian-elephant.htm> (accessed January 23, 2006).

domestic use has become a threat to wild populations where numbers have been seriously reduced. *Id.* Considering the Asian elephants' status as an endangered species, it is clear that their status in the wild is precarious.

The third and fourth considerations are “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” and “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.” 50 C.F.R. §17.22(a)(2) (2005). These two considerations go hand-in-hand for the purposes of this appeal. The programs intended to enhance the survival of Asia elephants have the ultimate effect of reducing threats of extinction. The purpose of importing these elephants conflicts with such conservation programs and negates their efforts, thus failing to meet the requirement that the importation reduce the threat of extinction. The U.S. Congress, through FWS' findings, has recognized that “the long-term survival of the [Asian elephant] in the wild is in serious jeopardy” in passing and funding the Asian Elephant Conservation Act (“AECA”) 16 U.S.C. §4261 (2005). “Population fragmentation” and “capture for domestication” are major threats to the survival of the Asian elephant. *Id.* Taking seven females out of their highly social, matriarchal society for use as captive amusement park rides is both population fragmentation and capture for domestication—the very threats sought to be avoided. Further still, the AECA, recognizing the need for recovery of the Asian elephant in the wild, specifically limited the use of Asian elephants for captive breeding to programs that release the elephants into the wild. 16 U.S.C. § 4264 (2005). Bonanza Circus does not release elephants into the wild. The importation of these elephants conflicts with an array of other conservation efforts throughout the world in addition to

AECA's conservation efforts.⁹ The very acts of keeping these seven animals in captivity and loaning them to Bonanza Circus will not only prevent elephants from being released into the wild, but will also result in greater death rates in Asian elephants because the urban environment causes debilitating and fatal foot problems.

The final two considerations, the opinions or views of experts on the species and whether the applicant can successfully accomplish the objectives of enhancing the propagation of the species were simply not considered by the FWS or the District Court on review. Both of these considerations weigh in favor of denying the permits for the reasons articulated in consideration of the first four factors: importation of wild animals for captive purposes is contrary to the efforts to increase survival of the species. Not only are these seven elephants being torn from their herds and their natural environment, all of the offspring they could produce in the duration of their 70 year lives will not enhance the remaining wild populations of Asian elephants.¹⁰

The FWS did not consider the factors it was obligated to consider and, had it done so, it could not have granted the permits. Accordingly the grant of the permits was arbitrary and capricious and the District Court's finding to the contrary was clearly erroneous.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request this Court affirm the Lower Court's decision regarding the Plaintiffs' standing in this case.

⁹ International Elephant Foundation, *Conservation Project*, <http://www.elephantconservation.org> (accessed January 22, 2006). World Land Trust, *Elephant Conservation: Save the Indian Elephant*, <http://www.worldlandtrust.org/news/india.htm> (accessed January 22, 2006).

¹⁰ Asian elephants have a life span of about 70 years. University of Michigan, *Museum of Zoology Animal Diversity, ADW: Elephas Maximus*, http://animaldiversity.ummz.umich.edu/site/accounts/information/Elephas_maximus.html (accessed January 22, 2006).

For the reasons herein mentioned, the Plaintiffs respectfully ask this Court to reverse the Lower Court's ruling in regard to the Defendants' issuance of Wumba Amusement Park's import permits.

APPENDIX A

Convention on International Trade in Endangered Species of Wild Fauna and Flora,
Conference Resolution 5.10, CITES Resolutions, *Definition of 'Primary Commercial Purposes,*

Conf. 5.10 Definition of ‘primarily commercial purposes’

OBSERVING that under Article III, paragraphs 3 (c) and 5 (c), of the Convention, a permit for the import or a certificate for the introduction from the sea of specimens of Appendix-I species may be issued only if certain conditions are met, including that the Management Authority of the State of import (or introduction from the sea) is satisfied that the specimens are not to be used for primarily commercial purposes;

RECOGNIZING that because the Convention does not define the terms ‘primarily commercial purposes’, ‘commercial purposes’ in paragraph 4 of Article VII, or ‘non-commercial’ in paragraph 6 of Article VII, the term ‘primarily commercial purposes’ (as well as the other terms mentioned above) may be interpreted by the Parties in different ways;

ACKNOWLEDGING that the Parties' differing 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 purposes’;

RECOGNIZING that lack of specific definitions for terms involving ‘commercial’ and the importance of the facts concerning each proposed transaction create a need for consensus by the Parties regarding general principles and examples to guide the Parties in assessing the commerciality of the intended use of those specimens of Appendix-I species to be imported;

AWARE that agreement on interpreting the term ‘primarily commercial purposes’ is important because of the fundamental principle in Article II, paragraph 1, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;

THE CONFERENCE OF THE PARTIES TO THE CONVENTION

RECOMMENDS that for the purposes of Article III, paragraphs 3 (c) and 5 (c), of the Convention, the following general principles and the examples in the Annex attached to the present Resolution be used by the Parties in assessing whether the importation of a specimen of an Appendix-I species would result in its use for ‘primarily commercial purposes’:

General principles

1. Trade in Appendix-I species must be subject to particularly strict regulation and authorized only in exceptional circumstances.
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 of import. This does not automatically mean, however, that the specimen is to be used for ‘primarily commercial purposes’.

Annex Examples

The following examples recognize categories of transactions in which the non-commercial aspects may or may not be predominant, depending upon the facts of each situation. The discussions that follow each example provide further guidance in, and criteria for, assessing the actual degree of commerciality on a case-by-case basis. The list is not intended to be exhaustive of situations where an importation of specimens of Appendix-I species could be found to be not “for primarily commercial purposes”:

a) Purely private use: Article VII, paragraph 3, of the Convention contains special rules for specimens “that are personal or household effects”. The exceptions mentioned do not apply when specimens of Appendix-I species are acquired by the new owner outside of his or her country of usual residence and are imported into that country. It can, however, be deduced from these provisions that specimens imported for purely private use should not be considered to be for ‘primarily commercial purposes’.

b) Scientific purposes: Article VII, paragraph 6, of the Convention uses the term “noncommercial loan, donation or exchange between scientists or scientific institutions”. Thus, the Convention acknowledges that scientific purposes may justify a special departure from the Convention's general procedure. The import of specimens of an Appendix-I species may be permitted in those situations where the scientific purpose for such importation is clearly predominant, the importer is a scientist or a scientific institution registered or otherwise acknowledged by the Management Authority of the country of import, and the resale, commercial exchange or exhibit for economic benefit of the specimens is not the primary intended use.

c) Education or training: Specimens of Appendix-I species may also be imported by government agencies or non-profit institutions acknowledged by the Management Authority of the country of import for purposes of conservation, education or training. For example, a specimen could be imported primarily to train Customs staff in effective CITES control. Imports of this type would thus be considered permissible.

d) Biomedical industry: Close scrutiny must be applied to imports of specimens of Appendix-I species in connection with the biomedical industry with an initial presumption that such importation is commercial. The purpose of the import here would

1 Amended at the ninth meeting of the Conference of the Parties and replaced by Resolution Conf. 10.16 (Rev.) adopted at the 10th meeting and amended at the 11th meeting.

be twofold: to develop products to promote public health and to sell such products, i.e. to make a profit. The latter aspect in this case would usually be considered to be predominant and as a result, imports of this type will most often not be acceptable. However, where the importer makes a clear showing to the Management Authority of the country of import that the sale of products is only incidental to public health research and not for the primary purpose of economic benefit or profit, then such imports could fall within group b) above.

e) Captive-breeding programmes: Importation of specimens of Appendix-I species for captive breeding purposes raises special problems. Any importation of such specimens for captive-breeding purposes must be aimed as a priority at the long term protection of the affected species as required in Resolution Conf. 2.121. Some captive-breeding operations sell surplus specimens to underwrite the cost of the captive-breeding programme. Importations under these circumstances could be allowed if any profit made would not inure to the personal economic benefit of a private individual or share-holder. Rather, any profit gained would be used to support the continuation of the captive-breeding programme to the benefit of the Appendix-I species. It should not, therefore, be assumed that importation under such circumstances is inappropriate. As for imports of captive-bred specimens for captive-breeding programmes for commercial purposes, Article VII, paragraphs 4 and 5, eliminate the need to address the 'primarily commercial purposes' standard in Article III, paragraph 3 (c). In connection with captive-breeding purposes, it should be noted that as a general rule importations must be part of general programmes aimed at the recovery of species and be undertaken with the help of the Parties in whose territory the species originate. The profit gained that might result should be used to support the continuation of the programme aimed at the recovery of the Appendix-I species.

f) Importation via professional dealers: A problem occurs with examples b) through e) above if the import is via a professional dealer. In such situations, the import initially serves a commercial purpose and in principle, therefore, should be prohibited under Article III, paragraph 3 (c), of the Convention. The fact that the dealer states a general intention to eventually sell the imported specimen to an undetermined zoo or scientific institution should not change this overall conclusion. In practice, living specimens are generally imported commercially with just this aim in mind. However, importations through a professional dealer by a qualified scientific, educational, zoological or other non-profit organization may be considered acceptable if the ultimate intended use would be for one of the purposes set out in examples b), c), and e) above, and where a binding contract (including a contract conditioned on the granting of permits) for the importation and sale of a particular specimen of an Appendix-I species has already been concluded between the professional dealer and the purchasing institution and is presented to the Management Authority of the country of import with the import permit application. The same should apply to example d) if sale is incidental to public health and not for the primary purpose of economic benefit or profit. If a proposed importation of a specimen of an Appendix-I species fits within one of the above examples, all other applicable provisions of the Convention must still be satisfied in order for the importation to be

acceptable. For example, where the primary purpose for importation is scientific study or zoological exhibition, the remaining conditions under Article III, paragraph 3 or 5, as applicable, must still be met. Thus, it is possible for an importation for scientific or zoological exhibition purposes to be inappropriate where such importation is found to be detrimental to the survival of the species or where, in the case of live specimens, it is found that the ultimate recipient of the specimens lacks facilities suitably equipped to house and properly care for the specimens.

Moreover, in keeping with the provisions of Article II, paragraph 1, the importation of specimens of Appendix-I species removed from the wild for one of the purposes set forth above should, as a general rule, not be allowed unless the importer has first demonstrated that:

- a) he has been unable to obtain suitable captive-bred specimens of the same species;
- b) another species not listed in Appendix I could not be utilized for the proposed purpose;
- and
- c) the proposed purpose could not be achieved through alternative means.