

**UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

Civ. No. 05-2334

Elephant Advocates

and

The Ganesh Project

PLAINTIFFS-APPELLANTS

v.

United States Fish and Wildlife Service,

DEFENDANT-APPELLEE

ON APPEAL FROM

THE UNITED STATES DISTRICT COURT OF THE STATE OF BLISS

MEASURING BRIEF

FOR THE APPELLANTS

January 25, 2006

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STATEMENT OF THE CASE

The plaintiffs, Elephant Advocates and The Ganesh Project, appeal from a judgment of the United States District Court for the State of Bliss entered on November 30, 2005, that denied their request for equitable relief.¹ The lower court considered the plaintiffs' motion for a preliminary injunction against the United States Fish and Wildlife Service ("FWS") from allowing seven wild Asian elephants to be imported into the United States to a private amusement park.² Plaintiffs brought their motion pursuant to the Administrative Procedure Act ("APA"),³ asking the court to determine that the FWS granting of the import permit ("Permit") constituted an "arbitrary and capricious" agency action⁴ in violation of requirements of the Endangered Species Act of 1973 ("ESA")⁵ and the Convention on the International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),⁶ that Appendix I endangered species imported from the wild are not used for primarily commercial purposes and that such importation will enhance the survival of the species.⁷

The FWS volunteered to hold the Permit in abeyance until the District Court rendered a decision on the FWS expedited motions for summary judgment.⁸ The District Court denied the motion for summary judgment against the plaintiffs as to their standing to bring the suit, but granted the motion for summary judgment against the plaintiffs on the merits of the claims.⁹

¹ R. at 1-2.

² R. at 3.

³ 5 U.S.C. §§ 552, *et. seq.* (2005).

⁴ R. at 3-4.

⁵ 16 U.S.C. §§ 1531 *et. seq.* (2005).

⁶ Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 [hereinafter CITES Convention].

⁷ R. at 4.

⁸ R. at 3, 5.

⁹ R. at 12.

STATEMENT OF FACTS

The Ganesh Project (“Ganesh”) and Elephants Advocates (collectively, “Appellants”) seek to enjoin FWS from granting a permit (“Permit”) to the Wumba Amusement Park (“Wumba”) to import seven wild Asian elephants (“Elephants”) from the Corbett National Park (“Corbett”) in southern India to Wumba’s amusement park the state of Bliss.¹⁰ FWS is a government entity responsible for issuing import/export permits pursuant to CITES and ESA.¹¹

Elephant Advocates is a non-profit organization established to protect and preserve wild and captive elephants.¹² Elephant Advocates’ membership consists of advocates, including Sandra Bark (“Ms. Bark”), a United States resident and wild Asian elephant researcher who has studied elephants in the Corbett for six years. Over the course of her research, Ms. Bark has become emotionally attached to the Elephants and to visiting them in their natural environment.¹³

Ganesh is a non-profit organization created to preserve the elephant habitat and give tours of the Asian elephants in their natural environments in southern India.¹⁴ Its membership includes persons such as Ms. Gambet who heads its Indian tour operation and visits Corbett at least once every two years to see the Asian elephants.¹⁵

Wumba, the party seeking the Permit, is a private, for-profit amusement park that offers various attractions, including roller coasters, go-carts and other rides. Wumba recently devised a new business plan to increase shareholder wealth and gain a competitive edge over rival amusement parks. As a part of its plan, Wumba intends to use all of the imported Elephants as the center of its new “Asia Exhibit” that will feature a tsunami ride, Asian-themed eateries, and

¹⁰ R. at 3.

¹¹ R. at 1.

¹² *Id.*

¹³ R. at 6.

¹⁴ R. at 1.

¹⁵ R. at 7.

opportunities for patrons to ride the imported Elephants on a path through an area designed as an “Asian jungle” sitting on a 2.5-acre lot with concrete floors and heated barns in the elephant enclosures.¹⁶

The Elephants subject to this Permit are categorized as “endangered species” under both the ESA and CITES.¹⁷ They are all juvenile females born in the wild and still living in Corbett.¹⁸ Asian elephants roam a “home range” of 200 to 800 square kilometers as part of one matriarchal group that remains together for life. Elephants are anatomically designed to best fit their natural habitat and have large ears that aid in cooling. Their padded feet are a distinguishing feature and essential to their method of communication of picking up the vibrations sent by one another.¹⁹

The United States captive elephant industry claims crisis exists regarding a declining “North American elephant population,” citing the main causes as the frequency of fatal foot problems caused by standing on their feet on concrete for long hours and an insufficient number of captive elephants hampering breeding efforts.²⁰ Appellants contest the claim about a “North American elephant population” since the FWS definition of “population” excludes elephants in zoos and circuses.²¹

FWS asserts that the Permit is justified because Wumba plans to loan the Elephants to the Bonanza Circus (“Bonanza”) breeding program²² and provide conversation education.²³

¹⁶ R. at 5.

¹⁷ R. at 4.

¹⁸ R. at 5.

¹⁹ R. at 4.

²⁰ R. at 5.

²¹ R. at 4, n 3.

²² R. at 9. Bonanza is the only elephant-breeding program, using artificial insemination, in the United States that successfully produces captive Asian elephants on a regular basis.

²³ R. at 9.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in finding that the Appellants have standing to assert their claims against FWS in a federal court?

2. Did the District Court err in finding that the FWS action to grant an import permit for the Elephants failed to violate the prohibition on trade in CITES Appendix I species for a “commercial purpose” and the ESA requirement that the import enhance the survival of the species as reviewed under the APA?

STANDARD OF REVIEW

I. *Standing.* With regards to Article III standing, the standard of review is de novo.²⁴

II. *Judicial Review of Agency Action That Is “Arbitrary and Capricious.”* In evaluating FWS’s issuance of an import permit for an endangered species, the Court must look to whether FWS’s actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁵

SUMMARY OF THE ARGUMENT

The District Court correctly held that Appellants have standing to bring a claim against FWS in an Article III court. Each Appellant is able to obtain standing on behalf of one or more of its respective members in a manner consistent with Supreme Court precedent. Appellants, through their members, satisfy the requirements the Supreme Court has put into place regarding obtaining standing to bring a claim in a federal court. Appellants will suffer an injury in fact without judicial relief, the injury is fairly traceable to the actions of the FWS, and there is a

²⁴ *Am. Fed’n of Gov’t Employees, AFL-CIO v. Rumsfeld*, 321 F.3d 139, 142 (D.C. Cir. 2003).

²⁵ 5 U.S.C. § 706(2)(A). See, *Philadelphia Council of Neighborhood Org. v. Coleman*, 437 F. Supp. 1341, 1347 (D.C. Pa. 1977); see also, *Friends of Endangered Species, Inc. v. Jantzen*, 596 F. Supp. 518, 522 (D.C. Cal. 1984).

substantial likelihood on the part of each Appellant that a favorable judicial ruling would redress the injury.

Viewing the FWS decision to grant an import permit under the “arbitrary and capricious” standard of review, the District Court erred in finding that the permit did not violate two key requirements of the CITES—as implemented in the United States through the ESA. First, the District erred by finding that the importing of specimens from an Appendix I listed endangered species would lack a primarily “commercial purpose” given the fact that the FWS granted the permit to a private, for-profit amusement park that planned to predominantly use the imported elephants as a featured ride at the amusement park. The District Court further erred by determining that the import would enhance the survival of the species, as required by CITES and ESA, in that there is no evidence in the record that the FWS made any investigation and determination that the Elephants would ever be reintroduced into the wild or somehow benefit the wild population, thereby enhancing the species’ survival.

ARGUMENT

I. BOTH APPELLANTS HAVE STANDING TO ASSERT THE CLAIM AT ISSUE IN A FEDERAL COURT.

The District Court correctly identified the requirement of standing in order for Appellants to assert a claim in a federal court. Article III of the U.S. Constitution limits the jurisdiction of federal courts to cases and controversies.²⁶ The standing requirement is encompassed in the case or controversy requirement of Article III.²⁷ The Supreme Court has interpreted this provision of the Constitution as an irreducible constitutional minimum to assert a claim in federal court.²⁸

²⁶ U.S. Const. art. 3, sec. 2, cl. 1.

²⁷ *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

²⁸ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In order to show that a case or controversy exists, the Supreme Court has held that the Appellant must satisfy three elements: 1) the Appellant, without judicial relief, will suffer injury in fact; 2) the injury of the Appellant is fairly traceable to the actions of the FWS; and, 3) it is likely that a favorable decision will redress the Appellant's injury.²⁹ Further, as the District Court stated, the Supreme Court has also held that organizations obtain standing on behalf of their members once any one of an organization's members is able to assert standing.³⁰

A. The District Court correctly held that Appellant Elephant Advocates has satisfied the three elements of the Supreme Court requirements for standing.

1. Appellant Elephant Advocates will suffer an injury in fact without judicial relief.

The first of the Supreme Court's requirements for standing--that the Appellant will suffer an injury in fact without judicial relief--has been satisfied by Elephant Advocates. The Court has clarified this requirement by breaking it into two parts. First, the injury in fact must be concrete and particularized. Second, it must be actual or imminent, not hypothetical.³¹ Both of these requirements have been met by Elephant Advocates.

The injury in fact applies to Elephant Advocates member, Ms. Bark. Elephant Advocates can obtain standing as long as one of its members has standing.³² Ms. Bark--and through her, Elephant Advocates--has satisfied both requirements of the injury prong of the Supreme Court's standing test.

First, the injury that Ms. Bark will suffer if judicial relief is not granted would be concrete and particularized. As the District Court pointed out, Ms. Bark has researched the elephants in Corbett for six years. As a result, Ms. Bark has developed an emotional attachment

²⁹ *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81 (2000).

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

³¹ *See, Lujan*, 504 U.S. at 560.

³² *See, Hunt*, 432 U.S. at 343.

with the elephants at the park³³ such that the removal of the Elephants from Corbett would inhibit Ms. Bark's aesthetic enjoyment of them. Courts have long considered interference with aesthetic enjoyment a sufficient injury to provide a basis for standing in the context of animal law.³⁴ The injury, then, is particular to Ms. Bark because it affects her in a personalized and individual way.³⁵ The first requirement of the injury prong is satisfied.

Secondly, the injury is not simply hypothetical. Ms. Bark has plans to visit the elephants at Corbett next spring;³⁶ therefore, her injury is not premised on the illusion that she may hypothetically at some point in the fluid future once again visit the Elephants at Corbett but on specific plans to visit these Elephants at a specific point in the very near future. The injury that Ms. Bark will suffer is concrete, not merely hypothetical, and the second part of the injury prong is satisfied.

The District Court rightly refuted the FWS argument that the injury prong is not satisfied because "Ms. Bark has not conducted research on these particular elephants or even seen them for over two years."³⁷ FWS cites *Humane Soc'y of the U.S. v. Babbitt*³⁸ in support of this argument. In that case, the D.C. Circuit found that a party whose aesthetic enjoyment was harmed by the removal of specific elephants from a zoo did not satisfy the injury prong of the standing test. The court's opinion on that issue rested on the plaintiff still being able to study other elephants that would remain at the facility and that the reduction of the number of elephants did not impede her general ability to observe and study elephants at the zoo.³⁹

³³ R. at 6.

³⁴ See, *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 432 (D.C. Cir. 1998) (en banc).

³⁵ See, *Lujan*, 504 U.S. at 560.

³⁶ R. at 6.

³⁷ *Id.*

³⁸ *Humane Soc'y of the U.S. v. Babbitt*, 46 F.3d 93 (D.C. Cir. 1995).

³⁹ See, *Babbitt*, 46 F.3d at 97.

FWS overlooks two important points about this case. First, the D.C. Circuit does qualify its ruling by stating that even if the removal of the elephants impeded the plaintiff's ability to observe them, she still would fail to meet the injury requirement of standing due to her lack of plans to return to observe them in the future.⁴⁰ The court points to plans to return to observe the elephants in the future as a stronger argument in favor of the satisfaction of the injury prong of the standing test.⁴¹ Unlike that plaintiff, here, Ms. Bark does have concrete plans to visit the elephants at Corbett next spring. Additionally, the plaintiff in *Babbitt* had simply visited the elephants in a zoo. Since she had not interacted on any personal level with the elephants, she had difficulty establishing injury based on the loss of any specific elephants. Here, though, Ms. Bark has researched the Elephants at Corbett in a national park setting.⁴² This setting allows for greater interaction with each specific elephant than does observation at a zoo by a layperson, and the loss of any specific elephant could impede Ms. Bark's research, leading to a far stronger argument that an injury has occurred than in *Babbitt*.

As the District Court properly analogized, the instant case is far more similar to another D.C. Circuit case, *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros.*⁴³ There the plaintiff, a Ringling Bros. employee, had worked with the elephants at issue and also attempted to establish injury based on harm to aesthetic interests. The court found that the plaintiff had developed a "strong, personal attachment" to the elephants and found that the injury requirement had been satisfied.⁴⁴ The court found that this fell within the purview of previous

⁴⁰ *Id.*

⁴¹ *See also, Animal Prot. Inst. of Am. v. Mosbacher*, 799 F. Supp. 173, 177 (D.D.C. 1992).

⁴² *R.* at 6.

⁴³ *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334 (D.C. Cir. 2003).

⁴⁴ *See, Ringling Bros.*, 317 F.3d at 335-336.

judicial rulings allowing the injury prong of standing to be satisfied when the harm concerns the aesthetic observation of animals.⁴⁵

Similar to the plaintiff in *Ringling Bros.*, Ms. Bark has developed a strong emotional attachment to the Elephants at Corbett that she has observed on a more personal level than the plaintiff in *Babbitt*. Unlike the plaintiff in *Babbitt*, Ms. Bark has specific plans to return to observe the elephants at Corbett. The injury Ms. Bark will suffer if judicial action is foregone is concrete and personalized and not hypothetical; thus, satisfying the injury prong of standing on behalf of Ms. Bark and Elephant Advocates.

2. Appellant Elephant Advocates' injury is traceable to FWS's actions and would be redressed by a favorable decision.

The District Court is also correct that the second prong of the standing test, that the Appellant's injury be fairly traceable to FWS's actions, is also satisfied with respect to Elephant Advocates. The injury to Elephant Advocates in this case would be lacking absent the issuance by FWS of the import permit.⁴⁶ Absent this action, the Elephants would remain in Corbett and Ms. Bark would suffer no injury, as her aesthetic enjoyment of these animals would be unobstructed. Any injury to Elephant Advocates is, then, the result of the FWS action.

The third prong of the Supreme Court's standing test, that a favorable judicial decision would redress the Appellant's injury, is also satisfied. As the District Court pointed out, the injury to Ms. Bark, and thus, to Elephant Advocates, would be redressed by a favorable decision because if the challenged import permit is struck down, the elephants will remain in Corbett and

⁴⁵ *Id.* at 336.

⁴⁶ *R.* at 7.

no injury to Ms. Bark's aesthetic enjoyment of them will occur.⁴⁷ Thus, the third prong is satisfied and Elephant Advocates has standing to bring this action in a federal court.

B. The District Court correctly held that Appellant Ganesh has satisfied the three elements of the Supreme Court requirements for standing.

1. Appellant Ganesh will suffer an injury in fact without judicial relief.

Like Elephant Advocates, Ganesh also satisfies the first prong of the Supreme Court's standing test --- that Ganesh will suffer an injury in fact without judicial relief.⁴⁸ Ganesh acquires this standing on behalf of its members.⁴⁹ The District Court correctly found that Ganesh's members, including Ms. Gambet, have established injury.

Ms. Gambet and the other members of Ganesh satisfy the requirements of the injury prong.⁵⁰ The injury to these Ganesh members is particular and concrete because it is personal to each of them; that is, if the Elephants are removed from Corbett, it will deprive the Ganesh members of their ability to view them during the tours and each member will suffer a loss of aesthetic enjoyment. The injury is not merely hypothetical because Ms. Gambet, as heading tours for Ganesh, visits Corbett once every year or two.⁵¹ Since her observation of these animals in the future is not hypothetical, but is regular based on her work, the injury she would suffer is not a mere possibility but very likely to occur if the Elephants are removed. Ganesh, then, satisfies the injury prong of the Supreme Court's standing test through its member Ms. Gambet.

The District Court correctly turns back the FWS argument based on *Fund for Animals v. Frizzell*,⁵² in which the D.C. Circuit found that a non-specific interest in the loss of wildlife

⁴⁷ *Id.*

⁴⁸ *See, Friends of the Earth*, 528 U.S. at 180-181.

⁴⁹ *See, Hunt*, 432 U.S. at 343.

⁵⁰ *See, Lujan*, 504 U.S. at 560.

⁵¹ *R.* at 7.

⁵² *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975).

cannot be viewed as a particularized injury.⁵³ This ruling is inapplicable here for two reasons. First, the injury being asserted by plaintiffs in *Frizzell* depended on a non-specific claim regarding the destruction of wildlife;⁵⁴ where as here, Ganesh members, such as Ms. Gambet, are claiming a particularized, specific injury to their personal aesthetic enjoyment. Far from simply a generalized interest in the loss of wildlife, these specific members of Ganesh will be denied the enjoyment of observing these specific Elephants should judicial relief not be granted. Secondly, FWS argues that, as in *Frizzell*, the elephant population at Corbett will not be jeopardized in the long run by the removal of these seven female Elephants.⁵⁵ But in *Frizzell*, the issue centered on the death of a “small percentage of a reasonably abundant game species.”⁵⁶ At issue before this court are Asian elephants, an endangered species, and, more specifically, seven young female members of an endangered species that have the potential to yield multiple future generations. With the Elephants’ removal comes the result that fewer female elephants will remain to reproduce in the wild, leaving fewer elephants present at Corbett in the long-run--a fact that would inhibit the aesthetic enjoyment of Ganesh’s members who tour the facility in the years ahead, including Ms. Gambet.

Finally, the satisfaction of the injury prong of the Supreme Court’s standing test is strengthened by case law cited by the District Court showing the trends in court rulings regarding when to recognize injury based on inhibition of aesthetic enjoyment in the context of the observation of animals.⁵⁷ The court cites *Fund for Animals v. Clark*⁵⁸ and *Fund for Animals v.*

⁵³ R. at 8.

⁵⁴ See, *Frizzell*, 530 F.2d at 987.

⁵⁵ R. at 8.

⁵⁶ See, *Frizzell*, 530 F.2d at 987.

⁵⁷ R. at 7.

⁵⁸ *Fund for Animals v. Clark*, 27 F. Supp.2d 8 (D.D.C 1998).

Norton.⁵⁹ In each of these cases, both of which are far more recent than *Frizzell*, the court held that actions by the defendant leading to an eight percent and a 14 percent reduction, respectively, in the animal populations at issue in each case would be sufficient for the plaintiff to satisfy the injury requirement of standing due to irreparable harm to the plaintiff's interests.⁶⁰ Following this lead, the District Court correctly found that Ganesh members such as Ms. Gambet would also suffer an irreparable harm based on the consequences of the removal of the Elephants from the population at Corbett, a harm that satisfies the injury requirement of standing.

2. Appellant Ganesh's injury is traceable to FWS's actions and would be redressed by a favorable decision.

Akin to *Elephant Advocates*, Ganesh satisfies the second prong of the standing requirement. The injury to Ganesh's members would not occur absent FWS's import permit because the seven female elephants would otherwise remain and the wild elephant population would avoid reduction.⁶¹ Any injury to Ganesh's members results from the fairly traceable actions of FWS.

Ganesh's members also satisfy the third prong of the standing test in that any injury would likely be redressed by a favorable decision because striking down the import permit would avoid the result of the Elephants' removal and the accompanying reduction in the wild population.⁶² With all prongs of the Supreme Court's standing test satisfied, Ganesh has standing to bring this action in a federal court.

II. THE FWS ISSUANCE OF IMPORT PERMITS FOR THE ELEPHANTS VIOLATED THE PROHIBITION ON TRADE IN APPENDIX 1 SPECIES FOR A COMMERCIAL PURPOSE AND THE ESA REQUIREMENT THAT THE

⁵⁹ *Fund for Animals v. Norton*, 281 F. Supp.2d 209 (D.D.C. 2003).

⁶⁰ *See, Norton*, 281 F. Supp. 2d at 220-221.

⁶¹ R. at 8.

⁶² *Id.*

IMPORT ENHANCE THE SURVIVAL OF THE SPECIES, AS REVIEWED IN ACCORDANCE WITH THE APA.

A. Under the APA, the decision by the FWS to issue the import permit is “arbitrary and capricious.”

1. The review and potential set aside of this ruling is appropriate when viewed under the “arbitrary and capricious” standard of the APA.

The APA directs reviewing courts to “hold unlawful and set aside agency action, findings, and conclusion”⁶³ that the court finds are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶⁴ Courts generally examine four factors under the “arbitrary and capricious” standard of review: (1) Congressional intent; (2) the absence of consideration of a critical issue; (3) an decision that “runs counter to the evidence before the agency;” and, (4) when the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁶⁵

Here, the ruling pertains to a decision by a federal agency, the FWS, to grant an import permit to a private amusement park to take seven Asian elephants from their wild habitat in India.⁶⁶ It is therefore appropriate and incumbent upon this reviewing court to examine the decision made by the FWS, and if necessary, set aside its decision to grant the permit if this court finds that the agency made the decision in an “arbitrary” or “capricious” manner as determined after examining the factors already described.

2. There is a presumption in favor of granting preliminary injunctive relief in environmental litigation, particularly claims arising under the ESA.

⁶³ 5 U.S.C. § 706(2).

⁶⁴ 5 U.S.C. § 706(2)(A).

⁶⁵ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁶⁶ R. at 5.

The traditional bases for a court to grant preliminary injunctive relief are the finding of “irreparable harm” and an “inadequacy of legal remedies,” such that the competing claims and the public interest are all considered.⁶⁷ In *Natl. Res. Def. Council v. Evans*, the U.S. Supreme Court, however, lowered the burden of proof of a plaintiff seeking preliminary injunctive relief under the ESA, finding that: “Congress ... had foreclosed the traditional discretion possessed by an equity court and had required the District Court to [issue an injunction]... to preserve ... an endangered species.”⁶⁸ The Court found that the text of the ESA and the intent of Congress in enacting the ESA together require that the “balance of hardships and the public interest tips heavily in favor of protected species.”⁶⁹ Ultimately, plaintiffs seeking equitable relief under the *ESA* must show that a violation of the *ESA* is “at least likely to occur.”⁷⁰

The court in *Evans* granted preliminary injunctive relief to plaintiff environmental organizations against the United States Navy’s use of “Low Frequency Active Sonar” (“LFA”) after applying the Marine Mammal Protection Act of 1972 (“MMPA”), the *ESA*, the *APA*, and the National Environmental Policy Act (“NEPA”) and finding that damage to a variety of species, some of whom are “endangered,” would likely occur without immediate equitable relief. In examining the harm potentially sustained by the mammals, the court considered data about the sensitivity of mammals hearing senses and how they “depend on sensitive hearing for essential activities like finding food and mates and avoiding predators.”⁷¹

⁶⁷ *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 553-554 (1987).

⁶⁸ *Natl. Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003, 1052-1053 (N.D. Cal. 2002) (*quoting Amoco Prod. Co.*, 480 U.S. at 543 n.9.)

⁶⁹ *Id.* at 1053.

⁷⁰ *Id.*

⁷¹ *Id.*

The *Evans* case is an appropriate and compelling parallel case to the case at bar because the species at issue here are Asian elephants that are listed as an endangered species under CITES Appendix I. Similar to the sensitivity and importance of the hearing of mammals, elephants have unique sensitivity in their feet to send and receiving communications amongst one another through vibrations felt in the ground.⁷² The permit at issue here involves wild, endangered elephants that will be kept in captivity in quarters made of concrete which has been found to impair the elephants' sensitivity in their feet and sometime cause fatal foot disorders.⁷³ Given this and other reasons discussed below, it is proper for this Court to determine that an ESA violation is "likely" to occur in the absence of immediate injunctive relief.

B. The FWS violated the prohibition on trade in CITES Appendix I species for a "commercial purpose" and the APA through the issuance of an import permit for seven Asian elephants from India.

1. Under CITES and the ESA, FWS may not issue an import permit allowing trade in endangered species in violation of the prohibition on trade in CITES Appendix I species unless exceptional circumstances exist.

The purpose of CITES is to facilitate the preservation and strict regulation of international trade in endangered wildlife and plants.⁷⁴ The United States enacted the ESA⁷⁵ to execute its responsibilities under CITES with respect to endangered species. The provisions of the ESA prohibit "any person subject to the jurisdiction of the United States to engage in any trade in any [species] contrary to the provisions of [CITES]."⁷⁶ As parties subject to the jurisdiction of the U.S., federal agencies must also comply with the provisions of CITES. Therefore, as the U.S. agency responsible for issuing import/export permits for affected wildlife,

⁷² R. at 4.

⁷³ R. at 4-5.

⁷⁴ See, CITES Convention, art. II.

⁷⁵ 16 U.S.C. § 1531 *et seq.*

⁷⁶ 16 U.S.C. § 1538(c)(1).

FWS must issue all permits in accordance with the requirements of both CITES and the ESA.

CITES classifies species in three appendices (Appendix I, II and III) denoting the level of protection according to the level of threat of extinction for each group.,⁷⁷ with Appendix I species designated as endangered due to the highest threat of extinction and Appendix III species considered to have the comparably lowest risk of extinction.⁷⁸ Appendix I endangered species are protected by the most stringent trade restrictions, as “species threatened with extinction, which are or may be affected by trade.”⁷⁹ An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.”⁸⁰ CITES strictly prohibits import of endangered species, unless authorized by a permit in the existence of exceptional circumstances.⁸¹

The Asian elephant is currently listed as an endangered species under Appendix I of CITES.⁸² There is no dispute as to whether the Elephants in question enjoy protection as endangered species under CITES and the ESA.⁸³ As endangered species, Asian elephants may only be legally imported in limited circumstances when in compliance with the provisions of CITES.⁸⁴ Unless exceptional circumstances sufficient to defeat the endangered species import prohibition exist, the FWS issued a permit contrary to CITES and the ESA allowing the import of endangered elephants.⁸⁵ If the Court finds that FWS failed to issue the Permit in accordance with CITES and the ESA, it may hold the Permit unlawful and in violation of APA § 706.

⁷⁷ See, CITES Convention, art. II, para. 4.

⁷⁸ See, CITES Convention, art. II.

⁷⁹ CITES Convention, art. II, para 1.

⁸⁰ 16 U.S.C. § 1532(6).

⁸¹ See, CITES Convention, art. II, para. 1, 3.

⁸² CITES Convention, app. I.

⁸³ R. at 4.

⁸⁴ See, CITES Convention, art. II, para. 4; *see also*, 16 U.S.C. § 1539.

⁸⁵ See, 16 U.S.C. § 1538(c)(2), CITES Convention, art. II, para. 1.

2. Import of Appendix I endangered species for a “Primarily Commercial Purpose” is prohibited under CITES and the ESA.

Although CITES provides a general prohibition against the importing of endangered species, a limited number of exceptions are available if certain conditions are met. It also provides that FWS may issue an import permit if certain conditions are met. Among these conditions is the opportunity for such an import permit if a “primarily commercial purpose” is lacking.⁸⁶ Under the ESA, generally a valid import permit for a species is available if: (i) the species is not endangered; (ii) the taking and export of the species does not violate CITES provisions; (iii) all other ESA requirements are met; and, (iv) the import “is not made in the course of a commercial activity.”⁸⁷ Therefore, if the FWS issues a permit allowing import made in the course of commercial activity, the FWS both violates CITES, and the ESA.⁸⁸

While there is no dispute between the parties here as to whether the Elephants are endangered species under the ESA and CITES, there is dispute over whether the import violates the CITES “primarily commercial purpose” ban. The determination as to whether FWS issuance of the Permit can be viewed as permissible under CITES and the ESA turns on whether the import is in the course of “commercial activity” or for a primarily “commercial purpose.” The crux of this issue lies in the proper interpretation of “commercial activity” and examination of whether the “commercial purpose,” if any, is outweighed by a permissible non-commercial purpose.

CITES Resolution Conference 5.10 states that an activity is “commercial” in purpose if its function is to “obtain economic benefit, including profit (whether in cash or in kind) and is

⁸⁶ See, CITES Convention art. III, para 3(c).

⁸⁷ 16 U.S.C. § 1538(c)(2).

⁸⁸ See, CITES Convention, art. III, para. 3(c).

directed toward [...] provision of a service or other form of economic use or benefit.”⁸⁹ This resolution also requires that “commercial purpose” be defined broadly enough to find that any activity that is not completely non-commercial should be considered “commercial.”⁹⁰ Applying the requirements of CITES, the ESA defines “commercial activity” as “all activities of industry and trade [but does not include] exhibition [...] by museums or similar cultural or historical organizations.”⁹¹ Due to its breadth, this definition of commercial activity, which includes “all activities of industry and trade,” lends itself to interpretation. This issue is specifically addressed in *Born Free USA v. Norton*⁹² and *Humane Soc. of the U.S. v. Lujan*.⁹³

In *Norton*,⁹⁴ the Court considered whether FWS should be enjoined from issuing a permit allowing a U.S. zoo to import African elephants for use in an exhibit. Plaintiffs contested the FWS permit under CITES, art. III, para. 3, arguing that the elephants would be imported for a “primarily commercial purpose” because the zoo would benefit from increased admission fees and from sales of the captive-bred elephants. The Court ultimately declined to grant injunction, holding that the plaintiff’s claim seemed unlikely to succeed on the merits. The Court could not reasonably find the use to have a “primarily commercial purpose,” because of the zoo’s status as a non-profit organization and its use of the elephants as both an educational exhibit and for captive breeding.⁹⁵ However, in reaching its decision, the Court engaged in a lengthy analysis attempting to interpret the meaning of “commercial purpose” under CITES and examining whether the importing of endangered species for use as a zoo attraction constitutes a

⁸⁹ CITES Convention, Resolution Conference 5.10.

⁹⁰ *Id.*

⁹¹ 16 U.S.C. § 1532(2).

⁹² *Born Free USA v. Norton*, 278 F. Supp. 2d 5 (D.D.C. 2003).

⁹³ *Humane Soc’y of the U.S. v. Lujan*, 1992 U.S. Dist. LEXIS 16140 (D.D.C. 1992).

⁹⁴ *Norton*, 278 F. Supp. 2d 5.

⁹⁵ *See, Norton*, 278 F. Supp. 2d at 14,16.

“commercial purpose.”⁹⁶

Looking to Resolution Conference 5.10, the Court found that “commercial purpose examination concerns only ‘the intended use of the specimen ... in the country of importation, not the nature of the transition between the owner of the specimen in the country or export and the recipient in the country of import.’”⁹⁷ The Court concluded the term “commercial purpose” was ambiguous⁹⁸ and noted the FWS interpretation of “commercial purpose” should be given deference as the U.S. agency charged with enforcing CITES.⁹⁹

In *Lujan*,¹⁰⁰ the Court examined whether interstate and international import/export of an Asian elephant is in the course of commercial activity and prohibited under the ESA. Since the Court found that neither the language nor the legislative history of the ESA provided a clear definition of “commercial activity,” it instead deferred to the Department of the Interior’s (“Department”) definition of “commercial activity,” as interpreted by regulations implementing the ESA.¹⁰¹ The Department defines “commercial activity” to mean “the actual or intended transfer of wildlife or plants from one person to another person in pursuit of gain or profit.”¹⁰² In applying this definition, for trade to be in the course of “commercial activity,” “the financial gain must be attributable to the trade of the animal itself.”¹⁰³

Here, as in *Norton* and *Lujan*, Appellants argue that an import permit would be unlawful under the CITES because Wumba intends to import the Elephants from India for a “primarily commercial purpose.” Wumba, a for-profit amusement park, recently devised a plan to increase

⁹⁶ *See, Id.* at 14-17.

⁹⁷ *Id.* at 14. (citations omitted).

⁹⁸ *See, Id.* at 14.

⁹⁹ *See, Id.* at 17.

¹⁰⁰ *Lujan*, 1992 U.S. Dist. LEXIS 16140.

¹⁰¹ *Id.* at 7-14.

¹⁰² 50 C.F.R. § 17.3(c) (1991).

¹⁰³ *Lujan*, 1992 U.S. Dist. LEXIS 16140 at 19.

shareholder wealth and to compete with neighboring amusement parks.¹⁰⁴ As a part of its new business plan, Wumba intends to use the elephants as an amusement park attraction in its “Asia Exhibit” where patrons will ride the Elephants.¹⁰⁵

Though FWS contends that the Elephants will not be used for a “primarily commercial purpose,” and argues that the Permit is justified because Wumba will contribute to the conservation of the species by loaning the Elephants to the Bonanza breeding program and providing conversation education to its patrons,¹⁰⁶ Appellants assert FWS’s reasoning to be flawed and lacks a showing in the record as to how FWS arrived at that determination.

Applying the FWS definition of “commercial activity” prescribed in *Lujan*, Wumba’s import would qualify as a “transfer of wildlife [...] from one person to another person in pursuit of gain or profit.”¹⁰⁷ Wumba intends to transfer the Elephants to the amusement park for the purpose of exhibiting the Elephants as a profitable park attraction.¹⁰⁸ Although the appeal of *Norton* ultimately resulted in the ruling being vacated out of mootness after the import occurred, the closeness in facts between *Norton* and the instant allows for a compelling distinguishing of the cases on the basis that a non-profit nature of the zoo and its plan for using the revenue resulting from the import.

In finding that the zoos’ importing did not occur in the course of commercial activity, *Norton* looked to: (i) the fact that the zoo was a non-profit organization; and, (ii) that the zoo planned to invest all profit gained from the elephant exhibit into conservation education and

¹⁰⁴ R. at 5.

¹⁰⁵ *Id.*

¹⁰⁶ R. at 9.

¹⁰⁷ 50 C.F.R. § 17.3(c).

¹⁰⁸ R. at 5.

preservation of the species through a captive breeding program.¹⁰⁹ The zoo's non-commercial purpose, as demonstrated by a lack of net profits being kept by the zoos, overshadowed any commercial purpose that might be involved, and therefore the Court found that the permits to be lawful.

Here, Wumba is a private, for-profit amusement park that lacks a demonstrable intention to reinvest profit(s) gained from the Elephant exhibit in the preservation of the species. Rather, Wumba plans to use the financial gain it derives from the Elephant exhibit to increase shareholder wealth, and "loan" the Elephants to the Bonanza breeding program.¹¹⁰ Furthermore, CITES Resolution Conference 5.10 clearly states that an activity is "commercial" in purpose if it functions to gain economic benefit for a service.¹¹¹ Broadly applying this definition as required under the resolution, Wumba's activities are commercial in nature because they will produce an economic benefit as a direct result of the Elephant rides provided in its "Asia Exhibit" with no clear and direct benefit to the wild population.¹¹²

C. The FWS issuance of an import permit for the Elephants in India violates the ESA, as reviewed under the APA, for failing to demonstrate that the importation would enhance the survival of the species.

1. The FWS has an affirmative duty to find the granting of this Permit will avoid detriment to the endangered species.

One primary purpose of the ESA, is to implement the obligations of the United States as a party to the CITES,¹¹³ which binds its parties to the prohibition against importing an Appendix I listed endangered species without an import permit.¹¹⁴ CITES only allows an import permit to

¹⁰⁹ See, *Norton*, 278 F. Supp. 2d at 16.

¹¹⁰ R. at 5.

¹¹¹ See, CITES Convention, Resolution Conference 5.10.

¹¹² *Id.*

¹¹³ 16 U.S.C. § 1531(a)(4)(F).

¹¹⁴ CITES Convention, art. III, para. 3.

be granted when three conditions are fulfilled, the first being that the import will be “for purposes which are not detrimental to the survival of the species involved.”¹¹⁵

The ESA implements these provisions of CITES by providing a mirror prohibition against importing endangered species into the United States.¹¹⁶ A few exceptions are available to the FWS, as the delegated Scientific and Management Authority of the United States for purposes of CITES,¹¹⁷ to grant permits for such importing, including when it will “enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant subsection (j).”¹¹⁸

In the instant case, the FWS has granted a permit to import seven juvenile, female Asian elephants from the wild in India,¹¹⁹ a species protected under the general ban against importing by virtue of its listed under Appendix I of CITES.¹²⁰ The FWS argues that this “survival” exception to the general prohibition against importing an endangered species is met by the Wumba’s claim that the seven imported elephants will be used in a captive-breeding program to increase the “North American elephant population” and that the Amusement Park will educate the public about the species.¹²¹ The decision by the FWS to accept these two reasons as the sole support for claiming enhancement of the survival of the Asian elephant population is arbitrary and capricious because it: (1) fails to demonstrate if the FWS analyzed whether a “North American elephant population” is necessary for the survival of the Asian elephant species; and,

¹¹⁵ CITES Convention, art. III, para. 3(a).

¹¹⁶ 16 U.S.C. § 1538(a)(1)(A).

¹¹⁷ 16 U.S.C. § 1537a(a).

¹¹⁸ 16 U.S.C. § 1539(a)(1)(A).

¹¹⁹ R. at 5.

¹²⁰ CITES Convention, app. I.

¹²¹ R. at 11-12.

(2) lacks consideration of any connection between the public education efforts on the wild species in India.

2. The Permit fails to enhance the survival of the species because of the lack of support showing how the wild population of Asian elephants would benefit from this importing.

Though the “survival” exception to the general ban against importing endangered species includes the example of setting up an experimental population of an endangered species, there are certain requirements imposed upon the FWS before it can approve such action. For example, prior to granting the permit, the FWS: “shall by regulation identify the population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species...”¹²² The lower court record lacks any discussion of what extent, if any, the FWS analyzed whether an experimental population would enhance the wild Asian elephant population in its natural geographic range, e.g., India. Nor does the record reflect what information the FWS may have relied upon in determining that such an experimental population would enhance the species and that the experimental population should be located in the United States under the auspices of this private, for-profit amusement park.

Furthermore, record states that the FWS definition of “population” excludes elephants kept in North American zoos and circuses.¹²³ It also appears that Wumba lacks any plan or intention of exporting some or all of the elephants back to the wild or that potential offspring of these elephants will be sent to live with the wild population. Therefore, no clear connection has been made as to how taking these wild elephants to create this population in the United States will at positively affect the survival of the remaining wild elephants in India.

¹²² 16 U.S.C. § 1539(j)(2)(B).

¹²³ R. at 4.

The record also omits any reference to how the steps to educate the public that attends the amusement park in the United States will positively affect the survival of the wild species in India. No assertion has been made that the public that attends the amusement park will ever visit or live in India. Since the primary reason for Wumba is to entertain the public by providing themes rides, food, and souvenirs,¹²⁴ there is also a lack of any apparent connection as to how the people who attend this park will ever become involved with the wild species in India—either directly or remotely.

The only case construing the ESA import requirements on facts bearing any resemblance to the case at bar is the *Norton* case discussed above which ultimately became vacated on appeal for mootness,¹²⁵ and concerned the FWS' granting of a permit to import 11 African elephants to two U.S. zoos, as previously discussed.¹²⁶ Another case, though, examined the granting of permits to import false killer whales and beluga whales for public display purposes.¹²⁷ In *Animal Protection Institute of America v. Mosbacher*, the court examined the moratorium on importing marine mammals under the MMPA. The court ultimately allowed the permit to stand because it pertained to whales already kept in captivity, such that “their removal from the current inventory of Japanese oceanaria to the United States will thus have no direct effect on the wild population.”¹²⁸ The court also notes that the permits were issued prior to either species having been listed as either “threatened” or “endangered.”¹²⁹

¹²⁴ R. at 5.

¹²⁵ *Norton*, 278 F. Supp. 2d at 5.

¹²⁶ See generally, *Born Free USA v. Norton*, 2004 U.S. App. LEXIS 936, 2 (D.C. Cir. 2004).

¹²⁷ See, *Mosbacher*, 799 F. Supp. at 173.

¹²⁸ *Id.* at 180.

¹²⁹ *Id.*

Unlike *Mosbacher*, here the Elephants subject to the import permit are endangered and presently located in the wild, and as such, there arises a legal presumption that removal of these elephants would have some detrimental effect on the species.¹³⁰ This presumption is bolstered by the fact that the entire group selected to be imported is comprised entirely of young, female elephants who fill a critical role in a matriarchal species,¹³¹ and how their removal would reduce the gene pool of the wild population left in India. The Permit has only been shown to have deleterious effects on the species and a showing is lacking of any direct benefit on the wild population.

CONCLUSION

The District Court correctly held that the Appellants have standing, through the Appellant's members, to bring the suit requesting a preliminary injunction against the FWS because they suffer an injury in fact without judicial relief that is fairly traceable to the actions of the FWS and there is a substantial likelihood a favorable judicial ruling would redress the injury. The record lacks evidence regarding to what extent, if any, the FWS investigated how the importing of the endangered Elephants to a private, for-profit amusement park from the wild primarily for use as a theme park ride would avoid violating the commercial purpose prohibition and the enhancement to the survival of the species in the wild requirements of CITES and ESA. For the foregoing reason, Appellants respectfully request this Court reverse the District Court judgment granting the FWS motion for summary judgment on the merits and remand with instructions, or in the alternative, vacate and remand case for further proceedings in accordance with the arguments set forth herein.

¹³⁰ David S. Favre, *International Trade in Endangered Species: A Guide to CITES* 70 (Martinus Nijhoff Publishers 1989).

¹³¹ R. at 4.

Respectfully submitted,

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