

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

Elephant Advocates,)
)
 and)
) Civ. No. 05-2334
The Ganesh Project,)
)
 Appellants,)
v.)
)
United States Fish & Wildlife Service)
)
 Respondent)

BRIEF ON BEHALF OF THE APPELLANTS

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Team 4

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Table of Authorities

Administrative Procedure Act 5 U.S.C. § 552, et seq.

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

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

Born Free v. Norton 278 F. Supp. 2d 5, 14-16 (2003).

Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”),
27 U.S.T. § 1087 (March 3, 1973)

Defenders of Wildlife, 112 S. Ct. at 2138

Endangered Species Act 16 USC § 1531, et seq.

Federal Wildlife Services’s (“FSA”) permitting regulations 50 C.F.R. §17.01 et seq.

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

Fund for Animals v. Frizzell, 530 F.2d. 982, 986 (D.C. Cir. 1975)

Fund for Animals v. Norton, 281 F. Supp. 2d 209, 221 (D.D.C. 2003)

Friends of the Earth, Inc. v. Laidlaw Env'tl. Services, 528 U.S. 167, 180-81 (2000.)

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

Humane Society of the United States v. Babbitt, 46 F. 3d 93, 96-97 (D.C. Cir. 1995)

Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

Statement of Case

Appellants, Elephant Advocates and The Ganesh Project (“Ganesh”), bring this action against Respondent, United States Fish & Wildlife Service, to halt the importation of seven young Asian elephants from Southern India to the Wumba Amusement Park in the State of Bliss, in the United States. Appellants filed a motion for a preliminary injunction in federal district court to halt the importation of these Asian elephants claiming that the issuance of the permit was arbitrary and capricious. In response to Appellants’ and Respondent’s motion for summary judgment, Judge Hyne, on behalf of the district court, ruled that (1) Appellants have standing to bring this case, but (2) that the import permit was not arbitrary and capricious and, therefore, did not violate the Administrative Procedure Act¹ (“APA”), or the legal requirements set forth under the Endangered Species Act² (“ESA”), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), T.I.A.S. No. 8249 (1973) and the Federal Wildlife Services’s (“FSA”) permitting regulations.^{3 4} Appellants have filed a motion to appeal the district court’s judgment. The government has agreed to continue to hold the challenged permits in abeyance pending resolution of this appeal.

Statement of Facts

All facts are uncontested and as stated in the District Court opinion on pages 4 and 5. Elephant Advocates is a non-profit organization established for the purpose of advocating for the protection and conservation of elephants in the wild and in captivity. Ganesh is a non-profit organization based in San Harmonica, Bliss, with a tour operation based in southern India,

¹ 5 U.S.C. § 552, et seq.

² 16 U.S.C. § 1531, et seq.

³ 50 C.F.R. §§ 23.11, 17.22 et seq.

⁴ Plaintiffs’ ability to bring a challenge under the APA based on the ESA and CITES is not in dispute.

dedicated to preserving elephant habitats and providing the public with opportunities to humanely view Asian elephants in the wild.

Elephants live in matriarchal family groups in which mothers, grandmothers, sisters, and aunts all remain together throughout their lives. Each elephant group lives within an area usually between 200 and 800 square kilometers in size. They are uniquely designed for their native habitats with big ears for cooling and padded feet that sense vibrations.

Asian elephants are listed as “endangered” under the ESA and on Appendix I of CITES. Therefore, if someone wants to import Asian elephants into the United States they must obtain a permit. These permits are issued if the importation is for a non-commercial purpose and if the goal of the import is for scientific study or to further the propagation of the species.

Only one entity – the Bonanza Circus – has a breeding program that regularly produces Asian elephants for use in captivity by means of artificial insemination. However, the number of captive elephants in the United States is declining. The environment and captivity itself is leading to this phenomenon. A key factor contributing to the decreasing number of captive elephants is foot problems. The elephants pick up vibrations with their feet in urban environments and spend long hours standing on concrete causing arthritis and other, often fatal, foot problems.

Starting in 2002, Wumba Amusement Park began implementing renovations for its Bliss facilities in order to increase profits for its shareholders and out-compete Whitewater Fun Amusement Park. The renovation plan includes elephant rides in its new “Asia Exhibit.” This attraction would include a tsunami ride, food booths designed to look like a street market, and a 2.5 acre elephant exhibit designed to look like a Southeast Asian jungle. This exhibit would

include concrete floors in the elephant enclosures, heated barns to house the animals, and a path through the jungle for the elephant rides.

To procure elephants for this exhibit, Wumba Amusement Park has obtained an importation permit from the Respondent for seven juvenile female elephants presently residing in Corbett National Park in southern Asia. The appellants allege that once the elephants are removed from their herds in the wild, they would be beaten into submission to adjust to life in captivity at the Amusement Park and forced to live in inferior, potentially deadly, conditions. (District Court Opinion, page 3.)

Issues Presented for Review

The issues presented for review are twofold. The first issue is whether the district court erred in finding that the appellants have standing to bring this case. The second issue is whether the respondent's issuance of import permits for the elephants was arbitrary and capricious because it violated the prohibition on trade in Appendix 1 species for a commercial purpose and the purpose of the permit will not enhance the survival of the species.

Standard of Review

a. Standing

An organization has standing to sue by virtue of its members having standing to sue, or when the organization itself is injured by the challenged action.⁵

To satisfy the standing requirements of Article III, appellants must demonstrate that (1) they will suffer "injury in fact" without judicial relief; (2) the injury is "fairly traceable" to the respondent's actions; and (3) a favorable judicial ruling will "likely" redress appellants' injury.⁶

⁵ *Hunt v. Wa. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

This “injury for standing purposes implies the invasion of a legally-protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical.”⁷ “Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”⁸ “[T]his type of harm may amount to an “injury in fact” sufficient to lay the basis for standing.”⁹

The actual or imminent clause may be satisfied with the presence of actual plans to view an aesthetically damaged area or population. “Without any description of concrete plans, or indeed even any specification of *when* the [day of return] will be,” the affidavits “do not support a finding of the ‘actual or imminent’ injury that our cases require.”¹⁰ Justice Stevens, in the concurring opinion to this case states “[i]n my opinion, a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction.”¹¹

b. Legal Challenge

To win, opposing counsel must demonstrate that the import was properly issued under one of three sections: a) the captive-bred program described in 50 C.F.R. 17.21; b) for scientific

⁶ *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services*, 528 U.S. 167, 180-81 (2000).

⁷ *Humane Society of the United States v. Babbitt*, 310 U.S. App. D.C. 228, 235 (1995).

⁸ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

⁹ *Id.*

¹⁰ *Defenders of Wildlife*, 112 S. Ct. at 2138.

¹¹ *Id.* at 2147.

purposes or to enhance the propagation and survival of the species as per 50 C.F.R. 17.22; or c) not for any primarily commercial purpose as per CITES.

CITES passed resolution Conf. 5.10¹² to address the difficulty in arriving at a uniformly accepted meaning of "commercial purpose." It clarifies that the commercial purposes examination concerns only "the intended use of the specimen... 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."¹³ The resolution further states that

“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.”¹⁴

Section 1539 a (1)(A) of the Endangered Species Act, however, states that an exception permit may be granted for "scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j)."¹⁵ Section 1539(d) states that the Secretary may grant such exceptions "only if he finds and publishes his finding in the Federal Register that (1) such exceptions were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such endangered species, and (3) will be

¹² See *Born Free v. Norton* 278 F. Supp. 2d 5, 14-16 (2003). See also resolution text at CITES official website, <http://www.cites.org/eng/res/05/05-10.shtml>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 16 USCS § 1539a(1)(A)

consistent with the purposes and policy set forth in section 2 of this Act"¹⁶ which are "to provide a program for the conservation of...endangered species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in... this section."¹⁷

"It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."¹⁸

Pursuant to this authority, the FWS has established two relevant exceptions. The first is a captive-bred wildlife program that permits facilities that keep certain endangered species in captivity to register to import captive-bred wildlife.¹⁹ The definition of "captive bred wildlife" refers to wildlife, including eggs, born or otherwise produced in captivity. Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.²⁰

The second exception is a program which allows the importation of endangered wildlife for scientific purposes or to enhance the propagation or survival of the affected species. Such permits may be granted based on six factors specified in 50 CFR § 17.22. These factors include: (i) whether the purpose for the permit is sufficient to justify removing an endangered species from the wild; (ii) the probable effects, direct and indirect, which the permit would have on the

¹⁶ 16 USCS § 1539(d)

¹⁷ 16 USCS § 1531

¹⁸ *Id.*

¹⁹ 50 CFR 1721(g).

²⁰ 50 CFR 17.3.

wild populations of the species covered by the permit; (iii) whether the permit would directly or indirectly conflict, in any way, with any known program intended to enhance the survival probabilities of the population from which the animal covered by the permit would be removed; (iv) whether the purpose for the permit would be likely to reduce the threat of extinction facing the species covered by the permit; (v) the opinions or views of scientists or other persons or organizations having expertise concerning the endangered species or other matters relevant to the permit application; and (vi) whether the expertise, facilities, or other resources available to the applicant appear to be sufficient to successfully accomplish the objectives stated in the application.²¹

²¹ 50 CFR §17.22

Summary of Argument

a. Standing

1. Elephant Advocates

Elephant Advocates have demonstrated their standing to bring this case based on the standing of its member, Sandra Bark, a wild Asian elephant researcher who has researched the elephants in Corbett National Park for six years. As recently as two years ago, Ms. Bark's research included the particular elephants in question. Ms. Bark intends to return to her research of Asian elephants in this National Park next spring.

As a result of researching these elephants, Ms. Bark has developed an emotional attachment to the elephants. Not only will Ms. Bark never be able to see these particular elephants again in their natural environment with their families, but if forced to visit them in a zoo, her aesthetic enjoyment of them will be severely diminished. In this way, Ms. Bark has a sufficient injury in fact.

2. Ganesh Project

The District Court ruled that “[t]he Ganesh Project also satisfies the “case or controversy” requirements of Article III, Friends of the Earth, 528 U.S. at 180-81, and also has standing to sue due to an aesthetic injury.” “An organization has standing to sue by virtue of its members having standing to sue, or when the organization itself is injured by the challenged action.”²²

Ms. Gambett is a member of the Ganesh project and head of its tour operations in India. Ms. Gambett stated that “if the seven elephants are removed from Corbett, Ganesh’s members and patrons’ aesthetic interests will be injured because the number of elephants available for viewing

²² Hunt v. Wa. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

during Ganesh's tours will be greatly diminished now and in the future." Ms. Gambett will also be injured for the same reason. She visits the preserve at least once a year.

b. Legal challenge

The permit must be granted for one of three reasons. It must permit the importation of captive-bred elephants, importation for scientific purposes or to enhance the propagation or survival of the species, or it must not be imported for a primarily commercial purpose. The elephants in question are not captive bred elephants. The elephants in question are to be imported from a national park, not a zoo.

The importation is not for scientific enrollment, nor is it to enhance the propagation of the species. The importation of the elephants will in fact be detrimental to the propagation of the species. It will cause these animals to be less healthy in general with a lower average lifespan. It will also preclude natural breeding efforts and will require these elephants to only birth resulting from artificial insemination. Furthermore, it cannot enhance the North American population of Asian elephants as these animals do not occupy a common spatial arrangement, and they do not interbreed when mature. Thus, by definition, there can be no North American population of Asian elephants.

At least one purpose of the importation is primarily commercial in nature. These animals are being imported in order to increase the profits of Wumba Amusement Park. The majority of the elephants' time will be spent in pursuit of this use. There can be no doubt that Wumba Amusement Park would not import these animals without this use. Thus, it is also Wumba's primary purpose for importation. Even if this is not the case, Wumba's purpose of importation substantially includes at least one primarily commercial purpose for importation and consequently, the permit may not be granted.

Argument

a. Standing

To satisfy the standing requirements of Article III, appellants must demonstrate that (1) they will suffer “injury in fact” without judicial relief; (2) the injury is “fairly traceable” to the respondent’s actions; and (3) a favorable judicial ruling will “likely” redress appellants’ injury.²³

Such “injury for standing purposes implies the invasion of a legally-protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical.”²⁴ “Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”²⁵ “[T]his type of harm may amount to an “injury in fact” sufficient to lay the basis for standing.”²⁶

The actual or imminent clause may be satisfied with the presence of actual plans to view an aesthetically damaged area or population. “Without any description of concrete plans, or indeed even any specification of *when* the [day of return] will be,” the affidavits “do not support a finding of the ‘actual or imminent’ injury that our cases require.”²⁷ Justice Stevens, in the concurring opinion to this case states “In my opinion, a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and

²³ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167, 180-81 (2000).

²⁴ *Humane Society of the United States v. Babbitt*, 310 U.S. App. D.C. 228, 235 (1995).

²⁵ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

²⁶ *Id.*

²⁷ *Defenders of Wildlife*, 112 S. Ct. at 2138.

intends to revisit them in the future has standing to challenge agency action that threatens their destruction."²⁸

1. Elephant Advocates

Elephant Advocates have demonstrated their standing to bring this case based on the standing of its member, Sandra Bark, a wild Asian elephant researcher. Ms. Bark resides in the US and researched the elephants in Corbett National Park for six years. Ms. Bark has spent a substantial period of these six years of study on the particular elephants in question, as recently as two years ago. Ms. Bark has plans to continue her research next spring.

As a result of researching these elephants, Ms. Bark has developed an emotional attachment to the elephants. Not only will Ms. Bark never be able to see these elephants again in their natural environment with their families, but if forced to visit them in a zoo, her aesthetic enjoyment of them will be severely diminished. Similar aesthetic harms have been repeatedly ruled as sufficient to confer standing.

The Respondent use Humane Soc'y of the United States v. Babbitt²⁹, to contradict the presence of such an injury and distinguish the case from the hundreds conferring standing based on such an aesthetic harm. However, this case is about an elephant being transferred to a circus and a zoo visitor only having three Asian elephants instead of four available for her general study. According to the court, the appellant "does not actually explain how [the elephant's] departure ... threatened her opportunity to observe Asian elephants."³⁰ Babbitt in fact states that "we can imagine a situation where a frequent zoo visitor's systematic observation of an animal species might be sufficiently threatened by the removal of some or even one animal from the zoo

²⁸ *Id.*, at 2147 (emphasis added).

²⁹ 46 F.3d 93, 97 (D.C. Cir. 1995)

³⁰ *Id.*

to make a cognizable claim for standing purposes.”³¹ Babbitt continues to say that the distinction between itself and cases conferring standing based on such an aesthetic injury is that in those cases conferring standing, the appellants asserted injury because the challenged conduct threatened to diminish or deplete the overall supply of endangered animals available for observation and study.

Ms. Bark is a frequent visitor to Corbett National Park. She does conduct systematic observations of the Asian elephant species within the park, and has made such observations of the particular elephants in question. Also, unlike the appellant in Babbitt, Ms. Bark has concrete plans to continue such observations of the Asian elephant population inside Corbett National Park next Spring. A “description of concrete plans, or a specification of when the day of return will be can support the finding of an actual or imminent injury.”³² Ms. Bark has such plans to continue her research next spring. Even if Ms. Bark did not intend to study these particular seven elephants next spring, the loss of these elephants would have a concrete effect on the behaviors of the remaining elephants. This aesthetic harm is caused by respondent's decision to issue the challenged import permit, because without this permit these elephants would not be sent to the United States. It follows that allowing these elephants to remain in Corbett will redress Ms. Bark’s injury. Thus, Elephant Advocates has standing to sue by virtue of its member, Ms Bark, and her standing to sue.

2. Ganesh Project

The District Court ruled that “[t]he Ganesh Project also satisfies the “case or controversy” requirements of Article III, Friends of the Earth, 528 U.S. at 180-81, and also has standing to sue due to an aesthetic injury.” “An organization has standing to sue by virtue of its

³¹ *Id.*

³² *But See Defenders of Wildlife*, at 2138.

members having standing to sue, or when the organization itself is injured by the challenged action.”³³

Ms. Gambett is a member of the Ganesh project and head of its tour operations in India. Ms. Gambett submitted an affidavit as part of the record stating that “if the seven elephants are removed from Corbett, Ganesh’s members and patrons’ aesthetic interests will be injured because the number of elephants available for viewing during Ganesh’s tours will be greatly diminished now and in the future.” Ms. Gambett will also be injured for the same reason. She visits the preserve at least once a year.

Appellee argues that this is a “non-specific” interest in the “loss of wildlife,” rather than a particularized interest in viewing the animals, and that this type of interest was rejected in The Fund for Animals v. Frizzell³⁴. However, Ganesh has demonstrated an immediate impact upon the population of elephants available for viewing. In addition this impact will increase as time goes on because all seven elephants are female and will not be available for the normal breeding cycle. This will have the effect of diminishing the population beyond the initial impact of the removal of seven elephants.

Appellant has demonstrated a direct impact upon its member, Ms. Gambett and therefore an injury to itself as an organization. It has also demonstrated an aesthetic impact upon itself directly as an organization as well as upon itself derivatively through its member Ms. Gambett. Because Ganesh has demonstrated an injury in fact to itself it has standing to bring this suit.

3. Legal Challenge

³³ Hunt v. Wa. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

³⁴ 530 F.2d 982, 986 (D.C. Cir. 1975).

There are a number of questions that must be addressed in analyzing the petition for a permit to import animals that are endangered and listed on Appendix I of CITES. There is a general exception to CITES and the ESA that allows importation and interstate commerce dealing with animals that were born in captivity.

“Captivity means that living wildlife is held in a controlled environment that is intensively manipulated by man for the purpose of producing wildlife of the selected species, and that has boundaries designed to prevent animal, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include but are not limited to artificial housing, waste removal, health care, protection from predators, and artificially supplied food.”³⁵

The elephants in question were not born or bred in captivity. All seven elephants were born on a Nature Preserve, Corbett Park, in South India. This nature preserve does not fit any of the general characteristics set out in the definition of captivity. It does not provide “artificial housing, waste removal, health care, protection from predators, or artificially supplied food.” *Id.* The nature preserve merely protects animals from hunting and prevents their habitat from being destroyed. Therefore, it cannot be viewed as “captivity” as per the definition in 50 C.F.R. 17.3.

If the animals are not captive-bred animals then their importation must be for the purpose of scientific enrichment or for the enhancement of the propagation of the species. It is undisputed that the purpose of the importation is not scientific in nature and cannot satisfy the first prong of the exception. The appellee does, however, suggest that the elephants will be used in an artificial insemination breeding project and will thus enhance the propagation or survival of the species.

The Respondent argues that such a permit would enhance the survival of the struggling North American population of Asian elephants. However, no such population exists. The number of elephants living in North America cannot be considered to be a population according to the

³⁵ 50 C.F.R. 17.3.

definition in 50 CFR 17.3. According to this definition³⁶ the animals must live in common spatial arrangement and interbreed when mature. North American Asian elephants do not live in a common spatial arrangement. These elephants are spread out over the entirety of the United States. They are locked into specific, isolated cages. Most Asian elephants in North America never have the opportunity to see any other members of the North American Asian elephant population that is spaced across the continent. In terms of locality, the North American population of Asian elephants is in fact a series of populations including, for example, the Bliss Zoo population of Asian elephants, or the Metropolitan Zoo population of Asian elephants. Wumba Amusement Park does not currently house any Asian elephants and thus cannot enhance the propagation of their population.

Even if the North America group of Asian elephants meets the first requirement of living in a common spatial arrangement, they do not meet the second requirement of interbreeding when mature. The simple fact that artificial insemination exists for Asian elephants living in North America means that the animals are not interbreeding when mature. It is undisputed that captive breeding efforts for elephants have largely been unsuccessful. The only method by which Asian elephants reliably reproduce in North America is that of artificial insemination. This requires, by definition, that the male and female elephants never interact, and therefore cannot satisfy the requirement that a population of elephants interbreed when mature.

Assuming for the sake of argument that there is a North American group of Asian elephants that coexist in common spatial arrangement and interbreed when mature, such a population is not the primary consideration of the ESA and the requested permit. The purpose of this permit must be to enhance the propagation and survival of the species as a whole. In fact, this permit would

³⁶ “Population means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement that interbreed when mature.” 50 C.F.R 17.3.

be contrary to that intended goal. It has been agreed upon that elephants in captivity have a reduced overall health and life expectancy from frequent, often fatal foot problems. These problems occur from elephants picking up vibrations with their feet in urban environments, such as amusement parks, and from standing on concrete floors, such as those designed to be included in the amusement park's elephant enclosures. The resulting foot problems are "a key factor contributing to the decline in the number of elephants in captivity...." (District Court Opinion, page 5.) Even with the availability of veterinary care in North America, these elephants will not produce any more offspring than they would in the wild. They will in fact lead a less healthy, shorter life with a greatly reduced standard of living isolated from their matriarchal family groups. As such, the overall Asian elephant species will be harmed from the issuance of this permit. The removal of seven female elephants nearing maturity will have a definite impact on the wild population of Asian elephants from which they originate and will not reduce the threat of extinction facing the species as a whole. The opinions and views of scientists is that these animals will have a far inferior standard of life and a far greater likelihood of health problems if taken into captivity. The facilities that will house these elephants are likely to increase the incidence of these health problems and will in fact reduce conservation awareness by suggesting that wild elephants should be protected only so that they can be used as entertainment and work animals. Under such circumstances, there is no way that this permit can be justified simply by a mere promise that these elephants will someday be the subject of artificial insemination.

Without the possibility of a permit based on increasing the propagation of the species, a permit may only be granted if the imported elephants will not be used for a primarily commercial purpose. According to Resolution 5.10 to CITES, any use whose "non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature." This is the

case with regards to Wumba Amusement Park. Unlike most Zoos, Wumba Amusement Park is not a non-profit organization. Also, unlike most Zoos, Wumba Amusement Park has stated that it intends to use these elephants to provide rides to tourists. It has also stated that it hoped that the presence of these animals will be at least partly responsible for an increase in profits to shareholders. These uses are primarily commercial in nature. Without the availability of these uses, Wumba Amusement Park would not have applied for a permit to import these animals in the first place. In fact, it never considered the possible importation of any mature elephants that would not be as easily trained as juvenile elephants. Likewise, it never considered the importation of any “problem” or “aggressive” elephants which would otherwise be in danger of being culled. It never considered the importation of elephants from Zoos in North America or Europe. It is apparent that Wumba Amusement Park is only interested in non-aggressive, trainable, low-cost elephants.

The appellee may argue that the purpose of the importation of non-aggressive, trainable, low-cost elephants is to increase the number of mature female elephants in North America for reproduction and to contribute to the conservation of the Asian elephant through “conservation education.” Even if these purposes are a main reason for Wumba Amusement Park’s importing these elephants, the fact is that the use of these animals for a primarily commercial purpose is the reason for Wumba’s attempt at importation. CITES does not protect endangered species simply from importation when the primary purpose of importation is commercial, but also from importation for any use which is a “primarily commercial purpose.” Clearly the greatest percentage of these elephants' lives will be spent increasing profits for the company. The greatest benefit these animals will provide will be an improvement in shareholder dividends. Therefore the actual use of these animals is predominately commercial.

CONCLUSION

Appellants, the Ganesh Project and Elephant Advocates have both demonstrated an aesthetic injury from the removal of the seven elephants. This aesthetic injury will be due to the impact on the population of elephants caused by the removal of seven female elephants. They have also demonstrated an emotional injury based on the removal of these particular elephants. Their concrete plans to visit this “aesthetically damaged population” are sufficient to result in an injury in fact.

Appellants have also demonstrated the validity of their legal challenge. The seven elephants in question are not captive bred and the permit must therefore fall under the regulations of CITES and the ESA. The purpose of their importation must be non-commercial in nature. This is not the case. The initial decision to apply for the import permit was motivated by commercial goals. Wumba Amusement Park was installing a new exhibit, including an elephant ride, and attempting to boost shareholder profits. In addition the claims by respondent that the elephants would be used to further the propagation of the population are also false.

The existence of a North American population of Asian elephants is highly dubious. The smattering of elephants that are kept isolated, both physically and geographically, from each other cannot meet the definition of a population. In addition the breeding process in captive elephants is artificial. The lives of elephants in captivity are short and plagued with serious, often fatal health problems.

The importation of these elephants will take seven females of an endangered species from a nature preserve and place them in captivity. In the wild, protected from poachers and habitat destruction, these elephants have the potential to live full, healthy lives. More importantly, upon reaching maturity, they add seven breeding females to a population that is still perilously low in

numbers. Allowing the removal of these elephants to pad the pockets of investors is at worst heinous and at best arbitrary and capricious. Appellants respectfully move that this court grant their motion to reinstate the injunction.