

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

Elephant Advocates,	)	
	)	
and	)	
	)	Civ. No. 05-2334
The Ganesh Project	)	
	)	
Appellants,	)	<b>APPELLANTS' MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
v.	)	
	)	
United States Fish & Wildlife Service,	)	
	)	
Appellee.	)	
	)	
	)	
	)	
_____	)	

**MEASURING BRIEF**

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## **STATEMENT OF THE CASE**

Wumba Amusement Park applied to the United States Fish & Wildlife Service (“FWS”) for a Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) permit to import seven wild Asian elephants for use in a new entertainment exhibit. (Mem. Op. at 3, 5.) The FWS issued the import permit. (Briefing Order at 1.)

Pursuant to the Endangered Species Act (“ESA”), the Administrative Procedure Act (“APA”), and the FWS’s permitting regulations, Elephant Advocates and The Ganesh Project filed suit against the FWS, challenging the permit. (Briefing Order at 1; Mem. Op. at 3.) The organizations assert that this import is for a primarily commercial purpose and will not enhance the survival of the species, thereby violating CITES and the ESA. (Briefing Order at 1; Mem. Op. at 3.) The parties then moved for summary judgment and the FWS agreed to hold the permits in abeyance until the case is resolved. (Mem. Op. at 3.)

The District Court granted in part and denied in part the parties’ cross-motions for summary judgment, finding that Elephant Advocates and The Ganesh Project had established Article III standing, but that the FWS’s determination to issue the import permit was not contrary to law. (Mem. Op. at 12.) The parties now appeal. The FWS claims that appellants lack standing; Elephant Advocates and The Ganesh Project assert that the court erred by failing to conclude that the FWS’s action was not arbitrary and capricious.

## **STATEMENT OF FACTS**

Elephants epitomize the gentle giant: despite their hulking statures, they display remarkable intelligence and communicative sensitivity, exceptional memories, and an endearing commitment to one another. (Mem. Op. at 4.) With large ears for cooling and delicately padded feet for sensing vibrations and communicating with each other, wild elephants are uniquely

suited to their native habitat and spend their entire lives in matriarchal family groups roaming throughout sizable home ranges—some as vast as 800 square kilometers. (*Id.*) Captive elephants, forced to stand on austere concrete floors for prolonged periods of time and to endure the harmful and destructive vibrations of urban environments, frequently succumb to arthritis and other sometimes-deadly foot ailments. (*Id.* at 5.) Zoos admit that their attempts to breed captive elephants have failed as a direct result of such confinement. (*Id.*)

Menaced by trade-related extinction, the endangered Asian elephant is listed on Appendix I of CITES, an international treaty aimed at preserving endangered flora and fauna through rigorous trade regulation. (*Id.* at 8-9.) Appendix I wildlife is extremely vulnerable to trade-related destruction and is thus guarded by the strictest trade prohibitions. (*Id.*) The ESA forbids trade of Appendix I species in violation of these stringent prohibitions and authorizes the FWS to grant permits only in exceptional circumstances. (*Id.*)

Despite rapidly diminishing numbers of Asian elephants in the wild, the FWS issued a permit to an amusement park for the import of seven Asian elephants from India's Corbett National Park. (Briefing Order at 1.) Wumba Amusement Park, a for-profit corporation, seeks to exploit the female juveniles—which it has named after Disney cartoon characters—as part of a business venture to increase shareholder profits and secure a competitive edge over Whitewater Fun Amusement Park. (Mem. Op. at 5.) By providing jaunts to amusement park visitors through a fabricated jungle, the wild Asian elephants will accessorize a tsunami ride and elaborate food court. (*Id.*) Wumba Amusement Park further intends to cage the female juveniles in a 2.5-acre concrete-floored enclosure surrounded by roller coasters and go-carts, and will occasionally loan them to the Bonanza Circus, an organization that has successfully inseminated captive elephants. (*Id.* at 4, 5, 9.) The amusement park also plans to scatter a few signs around the exhibit and

briefly mention the Asian elephants' endangered status. (*Id.* at 10.)

Elephant Advocates and The Ganesh Project are non-profit organizations devoted to the protection, conservation, and habitat-preservation of Asian elephants. (Briefing Order at 1.) The Ganesh Project also operates tours that promote humane-viewing of Asian elephants in their natural habitat in south India. (*Id.*) Concerned that the female juveniles will be beaten into submission pursuant to the amusement park's money-making scheme, these non-profit organizations assert that the import is for a primarily commercial purpose and will thwart rather than enhance the species' survival. (Briefing Order at 2; Mem. Op. at 3, 11.) They challenge the FWS's decision to issue an import permit for these endangered animals as the decision was arbitrary and capricious in violation of the APA. (Briefing Order at 2.)

Due to the standing of its member, Sandra Bark, Elephant Advocates affirms that it has organizational standing to bring this suit. (Mem. Op. at 6.) Ms. Bark, a wild Asian elephant researcher, cultivated an enduring relationship with the juveniles' herd after observing them in Corbett National Park for six years. (*Id.*) She intends to conduct follow-up research and attests that her enjoyment will be deeply and irreparably affected if she is forced to visit the juveniles in an artificial and life-threatening environment. (*Id.*) The Ganesh Project similarly affirms that it has standing to sue on the basis of a declaration made by Ms. Gambet, the head of its tour operations in India. (*Id.* at 7.) Ms. Gambet declares that she will suffer aesthetic injury because removal of the female juveniles from their natural environment and family groups will greatly diminish the number of wild Asian elephants available for viewing in Corbett National Park. (*Id.*) Elephant Advocates and The Ganesh Project seek to halt the seizure of these severely-endangered but internationally-protected animals by means of an injunction. (*Id.* at 3, 8-9.)

## **ISSUES PRESENTED FOR REVIEW**

To decide this appeal, the Court must address the following two issues:

1. To establish Article III standing, an appellant may demonstrate aesthetic injury-in-fact resulting from diminished opportunities to view or study wildlife. Ms. Bark is a wild elephant researcher who formed a six-year relationship with the herd from which the elephants will be seized and she will be unable to view the juveniles in their natural environments with their family groups. Ms. Gambet heads The Ganesh Project's tour operations in southern India and regularly visits the elephant herd whose numbers will decline. Have Ms. Bark and Ms. Gambet established sufficient injury-in-fact for Article III standing?
2. The ESA forbids the FWS from issuing a CITES import permit for an Appendix I endangered species where the import is for a primarily commercial purpose and will not enhance the survival of the species. The FWS issued a permit to Wumba Amusement Park for the import of seven female Asian elephants pursuant to the amusement park's corporate "master plan" to increase profits and steal customers from a neighboring amusement park even though the Asian elephant, a severely-threatened Appendix I species, often endures fatal ailments and suffers reproductive impairment in captivity. Was the FWS's determination arbitrary and capricious?

## **STANDARD OF REVIEW**

A grant of summary judgment requires *de novo* review. *Aguilera v. Pirelli*, 223 F.3d 1010, 1014 (9th Cir. 2000). Whether Article III standing has been established is a question of law that also warrants *de novo* review; however, the reviewing court must accept the factual determinations upon which the district court’s findings are based unless they are clearly erroneous. *Plotkin v. Ryan*, 239 F.3d 882, 884 (7th Cir. 2001).

The APA provides for judicial review of administrative decisions under the ESA and requires courts to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Administrative Procedure Act, 5 U.S.C. §§ 706 & 706(2)(A) (2005). The Supreme Court further emphasized that the APA mandates a “thorough, probing, in-depth review.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Thus, as “the final authority on issues of statutory construction,” the court must “reject administrative constructions which are contrary to clear congressional intent.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

## **SUMMARY OF THE ARGUMENT**

The two issues on appeal are whether Elephant Advocates and The Ganesh Project have standing to pursue this claim and whether the FWS’s permitting decision was arbitrary and capricious.

First, appellants have established Article III standing via affidavits submitted by their members. Ms. Bark is a wild Asian elephant researcher who has studied for six years the Corbett herd from which the elephants proposed for import will be taken. Ms. Gambet is head of The Ganesh Project’s tour operations and visits India almost yearly to conduct tours throughout the

Corbett habitat and provide humane viewing opportunities for the public. Both individuals will suffer aesthetic injury-in-fact due to a reduction in the number of Corbett Asian elephants available for viewing. Ms. Bark will also suffer an emotional injury—a component of aesthetic injury—because she has developed a relationship with the Corbett herd and will suffer should she view the seven juvenile elephants in an inhumane setting.

Second, the FWS’s decision to issue the import permit for seizure of the wild Asian elephants violates both CITES—because it serves a primarily commercial purpose—and the ESA—because it will not enhance the survival of the species. Commercial aspects predominate over non-commercial aspects in Wumba Amusement Park’s proposed endeavor because Wumba’s primary aim is to increase shareholder earnings and gain a competitive advantage over a rival. Even if Wumba provides educational signage and a brief recitation of the wild Asian elephants’ endangered status, the activity still falls squarely within the definition of “a primarily commercial purpose.” Similarly, the proposed import will not enhance the survival of the species because seizure of the female juveniles will diminish the herd’s reproductive capacity. Asian elephants are rarely able to reproduce in captivity because they are ill-suited for life in urban environments. Wumba’s plan to cage the female juveniles in potentially-deadly concrete enclosures and sporadically loan them to a circus that artificially inseminates elephants is insufficient to enhance their species’ survival.

## ARGUMENT

### **I. The District Court Correctly Held that Appellants Have Article III Standing.**

#### **A. Appellants Elephant Advocates and The Ganesh Project have satisfied the requirements for Article III standing: injury-in-fact, causation, and redressability.**

The District Court’s finding that Elephant Advocates and The Ganesh Project have Article III standing was correct because the organizations’ members properly alleged that they suffered (1) an injury-in-fact that is (2) fairly traceable to the defendant’s action and (3) redressable by a favorable court decision. *See Friends of the Earth v. Laidlaw Envtl. Serv.*, 528 U.S. 167, 180-81 (2000) (affirming organization’s Article III standing). Additionally, the appellants have alleged the injury-in-fact is (a) concrete and particularized, and (b) actual and imminent. *Id.*

Should the court find that at least one plaintiff has established Article III standing, it is not necessary to determine whether all plaintiffs have done so. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (declining to address standing of other plaintiffs where one had already established standing). Accordingly, if this Court finds that any of the plaintiffs—Elephant Advocates, The Ganesh Project, Ms. Bark, or Ms. Gambet—have Article III standing, the District Court’s decision was proper and must be upheld.

#### **B. The individual appellants have alleged sufficient aesthetic injury-in-fact to establish Article III standing.**

##### *1. Appellants Gambet and Bark have suffered aesthetic injury-in-fact.*

For decades, the Supreme Court has explicitly recognized that injury-in-fact resulting from environmental degradation is a cognizable harm. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972) (finding for the first time that harm to one’s environment constitutes an injury-in-fact). Indeed, “aesthetic and environmental well-being, like economic well-being, are important

ingredients of the quality of life in our society.” *Id.* at 734. Aesthetic injury includes interference with one’s ability to observe wild animals in their natural habitats and can provide a basis for Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). A decline in the number of wild animals available for viewing can contribute to this aesthetic injury. *Japan Whaling Ass’n. v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986).

In *Japan Whaling*, the Supreme Court held that wildlife conservation groups had Article III standing to challenge the Secretary of Interior’s refusal to sanction Japan for violating an international whale harvesting moratorium. *Id.* The Court consigned the defendant’s entire argument against standing to a mere footnote, noting that plaintiffs had a “clear” right to bring suit under the APA. *Id.* The Court further found that plaintiffs had “undoubtedly” claimed sufficient injury-in-fact because the challenged activity would affect their members’ interest in observing and studying whales. *Id.*

Similarly, Ms. Gambet and Ms. Bark have demonstrated sufficient injury-in-fact in the present matter because their aesthetic interests in observing the Corbett herd will be negatively affected by the “harvesting” of its members. Ms. Gambet is the head of tour operations for The Ganesh Project and leads tours through the Corbett National Park nearly every year. (Mem. Op. at 7.) Ms. Bark, a wild elephant researcher and member of Elephant Advocates, has studied the Corbett herd for six years and has definite plans to continue her studies next spring. (*Id.* at 6.) Should seven young female elephants be seized from the Corbett herd, Ms. Gambet and Ms. Bark will suffer fewer viewing opportunities during their visits, not only because of an immediate reduction in the herd’s numbers, but also because the herd’s long-term reproductive capacity will diminish.

Contrary to the FWS’s assertions, demonstrating a concrete and particularized aesthetic

injury does not require that plaintiffs establish a relationship with particular animals, nor that a minimum number of animals be harmed. In a series of bison-related NEPA cases, non-profit organizations obtained standing under the APA or a preliminary injunction where the government had planned destruction or removal of bison from herds regularly observed by plaintiffs. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1396 (9th Cir. 1992). In *Lujan*, the Ninth Circuit found that plaintiffs had standing regarding the Department of Interior’s bison management plan because of their “diminished opportunity ... to view the northern bison herd in Yellowstone.” *Id*; see also *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (finding plaintiffs had alleged sufficiently concrete injuries—and implicitly, standing to request court intervention—to warrant a preliminary injunction against a proposed bison hunt targeting 35-40 of 435 bison) and *Fund for Animals v. Espy*, 814 F. Supp. 142, 149 (D.D.C. 1993) (finding plaintiffs alleged sufficiently concrete injuries to warrant a preliminary injunction against the government for funding and assisting with a medical research experiment on approximately 60 of 2000 bison). In all of these cases, a relationship with specific cows or bulls was unnecessary to confer standing. See generally *Lujan*, 962 F.2d 1391; *Clark*, 27 F. Supp. 2d 8; *Espy*, 814 F. Supp. 142.

Indeed, directly contrary to the FWS’s assertion that appellants must establish relationships with the particular elephants slated for transplantation, an appellate court in *HSUS v. Babbitt* denied standing where plaintiff attempted to demonstrate such a relationship because the appropriate basis for this type of aesthetic injury is not the *relationship* itself, but diminished viewing opportunities for the overall population. 46 F.3d 93, 97-98 (D.C. Cir. 1995) (*citing Japan Whaling*, 478 U.S. at 231 n.4; *Defenders of Wildlife*, 504 U.S. at 561; and *Sierra Club*, 405 U.S. at 734). Plaintiff’s claim that she had suffered injury because of the lost opportunity to

view and “generally” learn about Asian elephants failed because she could continue to view the remaining captive elephants for this general knowledge and she had no actual plans to continue visiting the zoo. *Id.* at 97. Notably, the court contrasts this plaintiff with a hypothetical frequent visitor who systematically studies a species group and could claim injury from the removal of “some or even one” of the animals—a person remarkably similar to Ms. Bark. *See id.*

In the present matter, removing seven female elephants who will likely participate in future breeding seasons will cause an immediate and long-term decline in the number of Asian elephants available for observation within the Corbett herd, regardless of appellants’ relationship with those particular seven elephants.

In addition to being concrete and particularized, this aesthetic injury is also actual and imminent because both appellants have regularly observed the Corbett herd and have definite plans to do so again within the next year. In *Lujan v. Defenders of Wildlife*, the Supreme Court held that plaintiffs did not have standing to challenge agencies’ refusal to implement the ESA extraterritorially because the organization’s members had merely observed the habitat of an endangered species and hoped to visit again one day to observe the species. 504 U.S. at 563. The Court held that such “some-day” intentions lacking concrete plans were insufficient to support a finding of actual or imminent injury. *Id.* at 564.

Unlike plaintiffs in *Defenders of Wildlife*, Ms. Gambet and Ms. Bark regularly visit the Corbett herd and have concrete plans for future visits. (Mem. Op. at 6-7.) Citing *Japan Whaling*, Justice Scalia in *Defenders of Wildlife*, notes that “a person who observes or works with animals of a particular species in the very area of the world where that species is threatened” may suffer a perceptible harm “since some animals that may have been the subject of his interest will no longer exist.” 504 U.S. at 566-67. This is the exact perceptible harm that Appellants Gambet and

Bark have suffered.

In conclusion, Ms. Gambet and Ms. Bark will suffer aesthetic injury-in-fact due to diminishing numbers within the herd they regularly observe. Their injury is actual and particularized because they have observed and continue to observe the impacted elephant population; there is no need for Ms. Gambet and Ms. Bark to prove they have established relationships with the seven elephants in question, nor that there will be a substantial decline in the herd's numbers. Finally, Ms. Gambet and Ms. Bark's aesthetic injury is actual and imminent because they have definite plans to follow-up their past behavior by visiting the Corbett herd within the year.

2. *Ms. Bark has also suffered emotional injury-in-fact.*

The District Court correctly held that Ms. Bark has suffered injury to her aesthetic and research interests as a result of the threatened seizure. (Mem. Op. at 6.) Ms. Bark has also suffered emotional injury-in-fact, which is recognized as a legitimate component of aesthetic injury. *ASPCA v. Ringling Bros.*, 317 F.3d 334, 337 (D.C. Cir. 2003).

In *ASPCA v. Ringling Bros.*, the appellate court held that plaintiff elephant handler established emotional and aesthetic injury to bring an ESA suit against defendant circus for abusing its Asian elephants. 317 F.3d at 336. Plaintiff worked with the elephants as a handler and suffered when they were beaten and chained for long periods of time by his coworkers. *Id.* at 335. Although no longer employed by the circus, plaintiff continued to be injured because he wished to visit the elephants and was thereby required to witness their persistent mistreatment and abuse. *Id.* at 335-36; *see also ALDF v. Glickman*, 154 F.3d 426, 435 (D.C. Cir 1998) (holding plaintiff had standing because he regularly visited captive exotic animals and viewing them in inhumane conditions constituted an aesthetic injury).

As a member of Elephant Advocates and a wild Asian elephant researcher, Ms. Bark plans to return to Corbett for follow-up research next spring. (Mem. Op. at 6.) Ms. Bark developed an emotional attachment to the Corbett elephants after six years of research and immensely enjoys viewing them in their natural habitat with their family groups. (*Id.*) She will suffer emotional injury should she have to visit the seven wild elephants in a concrete enclosure at Wumba Amusement Park, where she will view them in an inhumane setting, separate from their family groups, and likely exhibiting signs of being beaten into submission. (*See* Mem. Op. 3 (citing plaintiffs' motion for preliminary injunction).)

Ms. Bark's emotional injury is concrete and particularized even though she has not developed individual relationships with the seven elephants in question. Instead, she has a strong emotional attachment to the Corbett herd as a whole and plans to revisit them in south India, as well as the seven juveniles in captivity. This is distinguishable from *HSUS v. Babbitt*, where the appellate court denied plaintiffs standing because their injury was insufficiently particularized. 46 F.3d 93, 98 (D.C. Cir. 1995). There plaintiff humane society submitted affidavits in which members protested the transfer of a dangerous elephant from a zoo to a commercial elephant breeder on the grounds that the members would suffer emotional distress. *Id.* They also preferred to view the elephant in a conservation setting such as a zoo. *Id.* However, the court emphasizes that the members who submitted these affidavits had not visited the elephant in question, and only three of the eighty-three members even mentioned that they had ever visited the zoo. *Id.* at 98-99. The court explicitly refused to consider whether emotional attachment is cognizable for purposes of standing, but states that if it were, these plaintiffs had not demonstrated it. *Id.* at 98. *But see Ringling Bros.*, 317 F.3d at 337 (now recognizing emotional injury). The present matter is a far cry from this form of non-particularized injury.

While the court in *Babbitt* denied standing to the affidavit authors because they had not sufficiently developed a relationship with the elephant or the zoo, thereby failing to establish an emotional injury, the court hypothesizes the existence of a plaintiff who regularly studies the species and who would suffer injury upon removal of an animal from the group. *Id.* The court further recognized emotional injury as a component of aesthetic injury in *Ringling Bros.*, 317 F.3d at 337-38. Therefore, because Ms. Bark fits the *Babbitt* systematic researcher scenario and has sustained a now-cognizable emotional injury, she has claimed sufficient standing both under *Ringling Bros.* and *Babbitt*.

**C. The individual appellants have alleged sufficient causation.**

The test to determine if plaintiffs have demonstrated sufficient causation to establish Article III standing is whether their injuries are “fairly traceable” to the defendant’s action at issue. *See Laidlaw*, 528 U.S. at 180. Ms. Bark and Ms. Gambet’s injuries satisfy this test. All of these injuries are the result of the FWS’s violations of its duties under ESA and CITES. If the FWS had not issued the import permit to Wumba Amusement Park, Wumba Amusement Park would not be able to import seven adolescent female elephants from the Corbett herd. If the seven elephants remain in their herd, plaintiffs would not suffer the aesthetic and emotional injury imminent upon the removal of these elephants.

**D. The individual appellants have alleged sufficient redressability.**

The test for determining whether plaintiffs have alleged sufficient redressability is, tautologically, “whether, if plaintiffs secured the relief they sought, it would redress their injury.” *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1233 (D.C. Cir. 1996) (citing *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989)); *see also Meese v. Keene*, 481 U.S. 465, 476 (1987) (requested relief need only “at least partially redress” plaintiff’s injury).

Ms. Bark and Ms. Gambet have demonstrated sufficient redressability to meet this test. They have both suffered aesthetic injury because the Asian elephant herd they scientifically study or recreationally visit (respectively) will be impacted by the FWS's decision to allow import of seven adolescent females, thereby reducing viability of the herd and viewing opportunities for appellants. Wumba Amusement Park is prohibited from importing wild Asian elephants without a CITES permit from the FWS. *See* 16 U.S.C. § 1589 (2005). Should this Court find that the FWS's decision to issue a permit is arbitrary and capricious under the APA, the FWS would be unable to issue the permit and Wumba Amusement Park would therefore be unable to import these seven adolescent elephants. Thus, Ms. Bark and Ms. Gambet's injuries, which directly result from the potential import, would be redressed.

The D.C. Circuit similarly found redressability where plaintiff would be able to view the animals in question in *Glickman*. 154 F.3d at 443. Here, plaintiff claimed aesthetic injury when he regularly visited exotic animals at a sanctuary who were suffering because the regulating agency was refusing to carry out its statutory duties under the Animal Welfare Act. *Id.* Because plaintiff would be able "to visit the animals..." if he prevailed, the court found the redressability element to be met. *See id.*

Should the Court set aside the import permit, as appellants request, the wild elephants will not be displaced from the Corbett herd to an amusement park in the United States. Ms. Bark and Ms. Gambet will continue to be able to visit and view the herd in its original state and will not suffer the aesthetic injury imminent upon Wumba Amusement Park's importation of seven members of the Corbett herd.

### **E. Organizational appellants have similarly alleged sufficient standing.**

Because individual appellants Ms. Bark and Ms. Gambet have sufficiently demonstrated Article III standing, this Court is not required to address the standing of any of the other plaintiffs. *Glickman*, 154 F.3d at 445. However, the organizational plaintiffs, Elephant Advocates and The Ganesh Project, have also alleged sufficient standing by virtue of the fact that Ms. Bark and Ms. Gambet are their members, respectively. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). An organization has standing to bring suit on behalf of its members when “its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Laidlaw*, 528 U.S. 167 at 180 (*citing Hunt*, 432 U.S. at 343).

As demonstrated above, Ms. Bark and Ms. Gambet have alleged sufficient injury-in-fact, causation, and redressability to bring suit on their own behalf. The interests at stake—that of protecting and preserving the endangered Asian elephant—are germane to the purposes of plaintiff organizations. Elephant Advocates is a non-profit organization incorporated specifically to advocate on behalf of and protect both captive and wild elephants. (Briefing Order at 1.) The Ganesh Project is a non-profit organization that is dedicated to preserving elephant habitat and operates tours in south India to provide opportunities for individuals to humanely view elephants in the wild. (*Id.*) Finally, the APA claim against the FWS requesting an injunction so that the FWS will not be able to permit the import of endangered wild elephants by Wumba Amusement Park does not require the participation of individual members. Under the *Hunt* test, Elephant Advocates and The Ganesh Project have sufficient organizational standing to bring this suit.

## **II. Because the Import Is for a Primarily Commercial Purpose and Will Not Enhance the Survival of the Species, the District Court Erred in Finding that the FWS's Determination to Issue a Permit Was Not Arbitrary and Capricious.**

Convinced of widespread and urgent commerce-related threats to the world's biodiversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") assembled in 1973 to shield endangered species from the destructive and over-exploitive consequences of international trade. CITES, March 1, 1973, 27 U.S.T. 1087, proclamation (1973). By cataloging endangered species in three Appendices based on the likelihood of trade-related extinction, CITES established firm criteria for the limited import or export of endangered species under exceptional circumstances. *Id.* at art. 3-7. Appendix I species are especially vulnerable to trade-related extinction and are thus subject to the strictest and most inflexible trade prohibitions. *Id.* at art. 3.

On September 13, 1973, the United States ratified CITES, proclaiming that it would vigorously protect all the "beautiful and varied forms" of wildlife because such ecological treasures are "irreplaceable." *Id.* at proclamation. The United States honors this firm commitment to the international community by implementing CITES through the ESA and charging the FWS with its execution. ESA, 16 U.S.C. § 1531 (2005). The ESA further forbids the taking and possession of endangered species during the course of a commercial activity, authorizing the FWS to make an exception only where the activity will enhance the survival of the species. *Id.* at §§ 1538(a) & 1589(a)(1)(A); 27 U.S.T. 1087, art. III; 50 C.F.R. § 23.12. However, the FWS's determination that the import will enhance the species' survival is subject to judicial review under the APA and must be held unlawful if it is arbitrary and capricious, an abuse of discretion, or contrary to law. *See* 5 U.S.C. § 706(2)(A).

Pursuant to CITES and the ESA, the wild Asian elephants threatened with transplantation

to Wumba Amusement Park must be afforded the most stringent trade restrictions as members of an Appendix I endangered species. 27 U.S.T. 1087, at art. II & App. 1. Wumba Amusement Park’s fiscal agenda—to employ the female juveniles as roller coaster accessories in order to increase shareholder profits and out-compete a rival—is precisely the trade-related over-exploitation that CITES intended to outlaw. *Id.* at proclamation. Moreover, removing wild female elephants from their native habitat as they are approaching breeding age and artificially sustaining them in the very environment that is responsible for widespread elephant death and reproductive failure will not enhance the survival of the species. (Mem. Op. at 4-5.) Rather, it will defeat the ESA’s objective by obliterating any chance that the species will flourish in the wild or in captivity. 16 U.S.C. § 1539(a)(1)(A). Thus, the FWS’s decision to issue the import permit to Wumba Amusement Park was arbitrary and capricious and must be set aside pursuant to the APA.

**A. The FWS’s issuance of the import permit violates the CITES prohibition on trade in Appendix I species because Wumba Amusement Park seeks to import endangered Asian elephants for a primarily commercial purpose.**

The FWS failed to shoulder its vital enforcement responsibility when it allowed the import of an Appendix I species for a primarily commercial purpose. *See* 16 U.S.C. § 1539(a)(1)(A). Conduct is primarily commercial if its goal is to secure economic gain. CITES, Resolution Conf. 5.10. The phrase “commercial purpose” must be broadly defined and includes any activity with commercial aspects. *Id.* Moreover, only an established program aimed at preserving endangered species may import for the purposes of captive breeding. *Born Free U.S.A. v. Norton*, 278 F. Supp. 2d 5, 15 (D.D.C. 2003); Resolution Conf. 5.10(e). Such an import is permitted only where the economic benefit will be wholly applied to enhancing the survival of the imperiled species. *Id.*

In *World Wildlife Fund v. Hodel*, the court prohibited a zoological garden from charging a higher entry fee for its 200-day exhibition of two Appendix I giant pandas imported from China. Civ. A. No. 88-1276, 1988 WL 66193, \*1, \*5 (D.D.C. June 17, 1988). The court stated that the imposition of an additional fee was critical to its analysis of the commercial nature of the venture even where the gardens promised China a minimum of \$300,000 in equipment and pledged to assist a Chinese panda reserve in a future venture. *Id.* at \*1, \*4. Plaintiffs moved for a preliminary injunction on the grounds that the FWS failed to determine that the import was not for a primarily commercial purpose. *Id.* In forbidding the additional fee, the court agreed that the public interest, which is exemplified by CITES, required an injunction. *Id.* at \*5. *Hodel* thus both exemplifies the notion that where any commercial aspect exists, determination that an import is not for a primarily commercial purpose is suspect. *See id.* at \*4 (“[t]his additional fee ... is also significant to a consideration of the CITES requirement that the import was not primarily for commercial purposes”).

Conversely, the court in *Born Free U.S.A. v. Norton* found that the import of eleven African elephants from Swaziland by two non-profit zoos did not serve a primarily commercial purpose and thus the FWS’s determination to issue a permit was not arbitrary and capricious. 278 F. Supp. 2d at 8, 14. The non-profit zoos sought to improve conservation education and to increase the genetic diversity of the captive elephant population. *Id.* at 9, 14. All additional revenue as a result of the import was to directly benefit the zoos’ conservation and breeding programs. *Id.* at 14. Moreover, Swaziland would use the sale proceeds to enhance anti-poaching protection and habitat expansion for the remaining elephants, thereby directly benefiting the wild elephant population. *Id.* at 9, 14. In denying plaintiffs’ motion for a preliminary injunction, the court found that the non-profit status of the zoos was significant to its analysis of whether the

import constituted a primarily commercial purpose. *See id.* at 14 (“given that the zoos are ‘non profit institution[s] ... [the import] is not for primarily commercial purposes’”). Thus, although the non-profit zoos would likely benefit financially, the court found that an permit was justified due to the zoos’ established roles as purveyors of conservation education and their plans to utilize the elephants in established breeding programs and not primarily for display. *Id.* at 16. Furthermore, the court was persuaded that because any extra revenue as a result of the import would be redirected back into the zoos’ conservation programs, the import fell outside the definition of “a primarily commercial purpose” advanced by Resolution Conf. 5.10(e). *Id.* Thus, the non-commercial aspects of the proposed activity predominated and the FWS’s determination to issue the permit was not arbitrary and capricious. *Id.*

In the present matter, Wumba Amusement Park stands to benefit financially from the import of wild Asian elephants and this increased profit is critical to the required “commercial purpose” analysis. *See Hodel*, 1988 WL 66193, at \*4. Thus, as in *Hodel*, an injunction is proper; however, the overwhelmingly commercial nature of Wumba’s corporate “master plan” requires forbidding the import of the female juveniles altogether. In *Hodel*, even though the import would further conservation efforts in China, thereby directly benefiting preservation of an Appendix I species in the wild, the court found that the temporary exhibit was likely to be commercial and that the commercial aspects should be enjoined. *Id.* Conversely, Wumba Amusement Park’s proposed activity, which involves permanent detention of the wild Asian elephants in a concrete enclosure surrounded by roller coasters, a tsunami ride, and a food court will directly and primarily benefit shareholders, not the imperiled species.

The present situation involves a *for-profit* corporation implementing a money-making “master plan” distinct from the non-profit zoos in *Born Free U.S.A.* who sought to advance

conservation education. (Mem. Op. at 5.) Wumba has not attempted to hide the fact that economic gain is its chief focus and the only motive behind their request; any inadvertent advantage to wild Asian elephants resulting from the amusement park's promise to include educational signage and to sporadically loan the female juveniles to a breeding circus is secondary at best. The other features of Wumba's competitive venture—namely a tsunami ride and a food court—are no more educative of urgent conservation or environmental preservation efforts in Asia. The for-profit amusement park's profitable revamp also falls squarely within the definition of a primarily commercial purpose under Resolution Conf. 5.10(e). Wumba Amusement Park's peripheral promise to include limited signage and a brief explanation of the Asian elephants' endangered status is not enough to trump the plainly commercial focus of the import.

Permitting a for-profit amusement park to import an Appendix I endangered species for a money-making enterprise simply because it advances tangential benefits for the species opens the door to a looser interpretation of "primarily commercial purpose" under CITES. Such a flexible and amorphous standard is inconsistent with CITES's urgent push to protect the world's precious biodiversity from trade-related destruction, would encourage other for-profit corporations to emulate Wumba Amusement Park's behavior, and would be hazardous to the survival of endangered species worldwide.

**B. Because importation of the juvenile Asian elephants will jeopardize rather than enhance the survival of the species, the FWS's issuance of the import permit violates the ESA's prohibition against trade in Appendix I species.**

The Endangered Species Act, which was passed in 1973 to facilitate the enforcement of CITES in the United States, prohibits import of Appendix I species unless the import will enhance its survival. 16 U.S.C. 1539(a)(1)(A). However, the objective of ESA prohibitions on

trade in endangered species is to promote not merely species survival but complete recovery from endangered status. *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 52 (5th Cir. 2001). Pursuant to the ESA, federal agencies are required to take “affirmative steps” to preserve, advance, and restore the viability of endangered species so as to facilitate an end to their endangerment. *Cabinet Mountains Wilderness v. Peterson*, 510 F. Supp. 1186, 1187 (D.D.C. 1981). It thus follows that the ESA standard for issuance of a permit—active enhancement of a species’ survival—is more stringent than the CITES standard that the import merely avoid detriment to survival. Enhancing the survival of a species requires would-be importers to be proactive and affirmative whereas avoiding detriment requires mere vigilance.

In *Born Free U.S.A.*, when the court held that the FWS did not act arbitrarily and capriciously by concluding that the import of the African elephants would not be detrimental to the survival of the species, it was satisfying the lesser of the two standards. 278 F. Supp. 2d at 10. Wumba Amusement Park’s proposed import fails to clear even this hurdle. In *Born Free U.S.A.*, the court relied on the affidavit of Terence E. Reilly, the government official charged with overseeing Swaziland’s endangered game. *Id.* Reilly’s affidavit expressed concern about the growing elephant population’s impact on local biodiversity, namely its competition with the endangered black rhinoceros—a species more severely threatened with extinction—as well as destruction of an aviary nesting site. *Id.* at 9-10. Mr. Reilly declared that the elephants must be removed from the reserves in order to preserve a biologically diverse ecosystem and that fewer elephants would be optimal for vegetation regeneration and breeding capacity, thereby enhancing the elephant population’s own likelihood of survival. *Id.* This meant that eleven elephants would be killed if they were not exported immediately to the non-profit zoos where they would not only escape death but contribute to conservation education. *Id.* Regardless of whether the eleven

elephants were translocated or destroyed, the effect on the remaining population would be the same.

This is clearly not the case in the present matter. Removing seven females nearing reproductive age from an already dwindling wild population will only decrease the species' chances of survival. (Mem. Op. at 4-5.) There is no evidence suggesting that a smaller population in south India would actually be optimal for wild Asian elephant survival. Thus, seizing the female juveniles from their family groups and native environments will diminish the herd rather than support it.

Furthermore, captive breeding of these elephants is not a viable justification because captive breeding efforts in North America have repeatedly failed. Moreover, wild Asian elephants are particularly suited for their native environments and the enclosure in which Wumba Amusement Park intends to house the elephants is precisely the setting known to lead to widespread death of captive elephants—whose feet are extremely sensitive to vibrations—because the enclosure is concrete and surrounded by harmful vibrations caused by nearby thrill rides and amusement-park-goers. *Id.* at 5. The female juveniles will be more likely to increase the elephant population in India when they reach breeding age, than if they are confined in a 2.5-acre concrete enclosure at Wumba Amusement Park, even if they are occasionally loaned to a breeding circus.

Seizure of the wild Asian elephants will jeopardize rather than enhance the species' survival and thus violates the prohibition against trade in the course of a commercial activity under the ESA. The FWS's determination that Wumba Amusement Park's corporate "master plan" will enhance the survival of the wild Asian elephants is arbitrary and capricious.

## CONCLUSION

The court should grant appellants' motion for summary judgment because Elephant Advocates and The Ganesh Project have established Article III standing through their members for two reasons:

1. Ms. Bark and Ms. Gambet have both suffered injury to their aesthetic interest in viewing the wild Asian elephants due to the threatened reduction of population.
2. Ms. Bark has suffered emotional injury, as a component of aesthetic injury, because she cultivated an attachment to the Corbett elephant herd.

The court should also grant appellants' motion for summary judgment because the FWS's decision to issue an import permit to Wumba Amusement Park was arbitrary and capricious for two reasons:

1. The amusement park seeks to import the wild Asian elephants for a primarily commercial purpose; the elephants are a central feature of the amusement park's corporate "master plan."
2. Seizure of the wild Asian elephants from their natural habitat and translocation to an amusement park will jeopardize rather than enhance the species' survival.

For the these reasons, the court should grant summary judgment in full to Elephant Advocates and The Ganesh Project.