

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

ELEPHANT ADVOCATES,

and

THE GANESH PROJECT,

Appellants,

v.

Civ. No. 05-2334

UNITED STATES FISH & WILDLIFE  
SERVICE,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE STATE OF NEBRASKA

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BRIEF FOR APPELLANTS

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## **OPINION BELOW**

The final judgment of the United States District Court for the State of Bliss is unreported and appears on pages 3-12 of the record. The briefing order of the United States Court of Appeals for the Twelfth Circuit is unreported and appears on pages 1-2 of the record.

## **JURISDICTION**

The United States District Courts have jurisdiction over any actions arising under the Endangered Species Act. 16 U.S.C. § 1540(c) (1973).

## **QUESTIONS PRESENTED**

- I. Whether the District Court erred in finding that plaintiffs had standing to bring the case.
- II. Whether the District Court erred in finding that the defendant's issuance of import permits for the elephants did not violate the prohibition on trade in Appendix I species for a commercial purpose and the Administrative Procedures Act (hereinafter "APA"), and did not violate the Endangered Species Act (hereinafter "ESA") and the APA because it will enhance the survival of the species.

## STATEMENT OF THE CASE AND FACTS

The appellants, Elephant Advocates and The Ganesh Project (hereinafter “Ganesh”) are non-profit organizations whose goals are, collectively, the protection and conservation of elephants both in the wild and in captivity, and to preserve the elephants’ natural habitat while offering the public opportunities to humanely observe elephants in that habitat. (R.1.)

Specifically, both Elephant Advocates and Ganesh are based in San Harmonica, Bliss, while Ganesh also has four operations located in India. (R.1.)

Asian elephants are an endangered species and are listed under the ESA, 16 U.S.C. §§ 1531-1544 (1973) and Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter “CITES”), T.I.A.S. No. 8249 (1973), to which the United States has been a party since its enactment. Asian elephants live in matriarchal groups, or female herds, where all members spend their lives together within a home range between 200 and 800 kilometers in size. (R.4.) These highly intelligent animals are uniquely designed for their natural habitat. (R.4.) They have padded feet which are used to sense vibrations and with which they are able to communicate. (R.4.) Zoos in the United States have found that captive elephants have developed severe foot problems due to the excessive vibrations caused by their urban environments. (R.5.) In captivity elephants often spend long hours standing on concrete, which is not natural to their native environment. (R.5.) This long exposure to concrete has been found to cause arthritis and other problems, many of which are fatal. (R.5.)

The Appellee, the United States Fish & Wildlife Service (hereinafter “FWS”), recently granted an import permit allowing for the importation of seven young, female Asian elephants from the Corbett National Park (hereinafter “Corbett”) in southern India to the Wumba Amusement Park (hereinafter “Wumba”) in the State of Bliss in the United States. (R.1.)

Further, the captive elephant industry, which includes zoos and circuses in the United States, claims that there is a “crisis” with regard to the population of Asian elephants in captivity in North America. (R.4.) This “crisis” is the result of small numbers of elephants in North America, coupled with failed breeding programs and the health problems inherent in the maintenance of captive elephants. To date, only Bonanza Circus has had any measure of success in breeding Asian elephants for use in captivity. (R.4-5.)

It is undisputed that in 2002, Wumba began the implementation of their master plan for their Bliss facilities, calling for an increase in profits for shareholders. (R.5.) Their goal was to out-compete another, nearby amusement park. (R.5.) One way that Wumba planned to increase profits and attract customers from their competition was to incorporate an internationally-themed exhibit in which Asian elephants would provide rides for customers much like the already existing mechanical rides. (R.5.) This “state of the art facility” is approximately two and a half acres and has concrete floors in the elephant enclosures, where the elephants would spend the majority of their time. (R.5.)

Wumba applied for, and was granted, a permit by the FWS that exempted them from the ESA and CITES ban on importation of endangered species. The Appellants challenged the validity of the permit under the ESA and the FWS’s permitting regulations, 50 C.F.R. §§ 23.11 – 23.15 (2005); 17.22 (2004), claiming that the decision was arbitrary and capricious, and pointing out that permits were not available to persons who sought to import endangered species for commercial activity and noting that importation would certainly cause harm to the elephants, if not death. (R.1-2.) Specifically, the Appellants filed a motion for preliminary injunction to prevent the Asian elephants from being imported, thus, causing the separation of several female elephants from the herd and subjecting them to beatings until the imported elephants submitted

and adjusted to life at the amusement park. (R.3.) In response, the FWS agreed to hold the challenged import in abeyance until expedited motions for summary judgments from both sides were decided. (R.3.)

The United States District Court for the State of Bliss found that Elephant Advocates and Ganesh had Article III standing to bring the claim, but found that the import permit from FWS was not arbitrary and capricious and was thus valid. (R.12.) Elephant Advocates and Ganesh now appeal the decision of the United States District Court for the State of Bliss.

### **STANDARD OF REVIEW**

Summary judgment is reviewed *de novo*. See Fort Sumter Tours v. Babbitt, 202 F.3d 349, 354 (D.C. Cir. 2000). “Summary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave *no room for controversy and that the other party is not entitled to recover under any discernible circumstances.*” Paulson v. Paul Revere Life Ins. Co., 323 F. Supp. 2d 919, 930 (D. Iowa 2004) (emphasis added). “The purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try, but to avoid useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried.” Id. (citations omitted); see also Poller v. Columbia Broad. Sys., 368 U.S. 464, 467 (1962). Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). In other words, “[s]ummary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party.” Rogers v. City of Chicago, 320 F.3d 748, 752 (7th Cir. 2003). “The question to be decided on a motion for summary judgment is ‘whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.’” Hunter-Boykin v. George

Wash. Univ., 132 F.3d 77, 79 (D.C. Cir. 1998) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, (1986)).

A “court will overturn any agency decision if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” Fund for Animals v. Clark, 27 F. Supp. 2d 8, 11 (D.D.C. 1998) (hereinafter “Fund for Animals I”); see also 5 U.S.C. § 706(2) (2000). Further, whether a decision is arbitrary and capricious turns on whether the agency “considered the relevant factors and articulated a rational connection between the facts and the choice made.” Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 105 (1983) (citations omitted).

### **SUMMARY OF THE ARGUMENT**

The trial court was correct in finding that the Appellants, Elephant Advocates and Ganesh, have Article III standing to bring the instant case through their members, Bark and Gambet. Both will suffer individual and direct, cognizable injuries in fact if the import permit is granted to Wumba for the importation of the seven Asian elephants found in Corbett. Bark will suffer educational, professional, aesthetic, and emotional injuries through her attachment to the Corbett elephants and the inability to continue her six year research project if the permit is granted. The matriarchal herd will be separated, resulting in fewer elephants to view and destroying the subject of her study. Gambet will also suffer educational, aesthetic, and emotional injuries because she will have fewer elephants to see when she visits the park and leads her annual and bi-annual tours, through which she has grown an emotional attachment and professional interest in the animals. Furthermore, both will know that the elephants with which they have spent so much time have been transferred to a destructive environment where their health is in danger.

These injuries to both Bark and Gambet are individual, cognizable and fully evidenced. Furthermore, they are not compensable with monetary damages and will have a long-term impact on the endangered Asian elephant population. While the Appellee asserts that one benefit of importing the elephants would be to increase the North American elephant “population,” this is speculative at best and only secondary to their real, economic and commercial interests in out-competing the local Whitewater Fun Amusement Park.

The injuries to both Bark and Gambet are fairly traceable to the FWS’s decision to grant the import permit to Wumba and a favorable judicial ruling will redress those injuries asserted by both Bark and Gambet. If the permit is denied, they could continue their research and tours and their aesthetic and emotional injuries will cease to exist.

Second, the trial court erred in granting summary judgment to Appellee FWS with regards to the issuance of a permit to Wumba for importation of seven juvenile female elephants from Corbett. FWS’s decision to grant the permit is arbitrary and capricious by its own standards. FWS failed to provide a statement of reasons with which the court could review the decision, merely offering the assertions of Wumba as justification for the permit. Furthermore, the decision to grant the permit runs afoul of the purpose of the statute, to prevent importation of endangered species for commercial gain, and violates FWS’s own internal regulations. It is thus *per se* contrary to law, regardless of whether the decision was arbitrary and capricious. Finally, any claims on the part of the Appellee that it should be afforded deference under the Chevron analysis is grasping because deference is not justified under these facts.

## **ARGUMENT**

- I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE APPELLANTS HAD ARTICLE III STANDING. THE APPELLANTS DEMONSTRATED THAT THEY SUFFERED INJURY IN FACT, THAT THE INJURY IS FAIRLY TRACEABLE TO THE APPELLEE’S ACTIONS, AND**

**THAT A FAVORABLE JUDICIAL RULING WILL LIKELY REDRESS THE APPELLANTS' INJURY. ADDITIONALLY, THE APPELLANTS DEMONSTRATED THAT THEIR GRIEVANCE FALLS WITHIN THE ZONE OF INTERESTS PROTECTED AND REGULATED BY THE STATUTE.**

This court should affirm the finding of the trial court holding that the Appellants meet the “case in controversy” requirements of Article III standing. To be a “case in controversy,”

[f]irst, the plaintiff must have suffered injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized [meaning that the injury must affect the plaintiff in a personal and individual way], and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a casual connection between the injury and the conduct complained of—the injury has to be fairly...traceable to the challenged action of the defendant, and not the result of the independent action of some third party before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable judicial decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted); See also Animal Legal Def. Fund v. Glickman, 154 F.3d 426, 431 (D.C. Cir. 1998). “In addition, the Supreme Court has recognized prudential requirements for standing, including ‘that a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.’” Animal Legal Def. Fund, 154 F.3d at 431 (citing Bennet v. Spear, 520 U.S. 154, 162 (1997)).

The Appellee was granted summary judgment by the trial court, allowing for the issuance of an import permit to Wumba for seven young, female Asian elephants currently located in Corbett. However, in this appeal, the Appellee asserts that even though the trial court found in their favor, the court erred in initially finding that the Appellants have standing to bring this case. Yet, it is without question that both Elephant Advocates and Ganesh have Article III standing through members Sandra Bark, a member of Elephant Advocates and a wild Asian elephant

researcher at Corbett and Ms. Gambet, a member of Ganesh and the head of their tour operations in India. Bark and Gambet clearly fulfill the requirements of Article III standing.

A. **Both Ms. Bark and Ms. Gambet will suffer an “injury in fact” which is otherwise without judicial relief.**

Both Bark and Gambet will suffer injury in fact if the import permit is granted. In Defenders of Wildlife, a case in which Article III standing was denied to individuals who had previously traveled to areas of the world to observe the habitat of endangered species, but whom had no intent of returning, the court noted that “the injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” 504 U.S. at 563 (citations omitted). Additionally, “[t]o survive [a] summary judgment motion, [the Appellants have] to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened..., but also that one or more of [the] members would thereby be ‘directly’ affected apart from their ‘special interest’ in the subject.” Id. (citing Hunt v. Wash. State Apple Adver. Comm’n., 432 U.S. 333, 343 (1977)). Furthermore, the injury in fact asserted by both Bark and Gambet must be concrete and particularized, meaning that the injury must affect them in a personal and individual way and it must be actual or imminent, rather than just conjectural or hypothetical. Defenders of Wildlife, 504 U.S. at 560.

Bark’s injuries are both concrete, particularized, and four-fold: educational, professional, aesthetic, and emotional. To begin, Bark’s injuries are both professional and educational as she will no longer be able to study or research the elephants in Corbett as a complete matriarchal herd in their natural environment if the import permit is granted because several elephants will become separated and sent to Wumba, halfway across the world. In Defenders of Wildlife, the Court recognized the ability for an individual to sue under an “animal nexus” approach or a

“vocational nexus” approach, if they either had an interest in studying or seeing the animals or if they had a professional interest in an endangered species, as long as there was a reasonable geographic limitation enforced. 504 U.S. at 555. For example, if Bark studied Asian elephants in another part of the world, she may not have standing. However, Bark specifically studies the elephants at Corbett and her definite plans to continue to study and research the elephant herd in its entirety this spring will be diminished, if not terminated, if these specific elephants are imported. Bark’s only option to visit the imported elephants would be at Wumba, in a highly artificial and damaging environment and a location outside of the scope of her research.

The import permit affects Bark’s professional and educational interests in an imminent and actual manner. In no way are the effects hypothetical or conjectural. Bark has been studying the elephants for six years. While she has not been to Corbett in a couple of years, this is irrelevant because she has plans to return for a follow-up study in the spring. In losing a portion of the herd, not only will she be forced to view fewer elephants, but her research will be affected as the herd will be smaller with seven female elephants missing, significantly altering her project of six years. This is distinguishable from the plaintiffs in Defenders of Wildlife. In that case, summary judgment was granted because the plaintiffs could not show injury in fact as the plaintiffs did not have current plans to visit the locations in question. 504 U.S. at 563. The Court stated that the fact “[t]hat the women ‘had visited’ the areas proves nothing. As we have said in a related context, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...*if* unaccompanied by any continuing present adverse effects.” Id. (emphasis added). In the instant case, not only has Bark been to Corbett numerous times, but she has concrete and actual plans to visit and further study the elephant herd in the very near future.

In Humane Soc’y of the U.S. v. Babbitt, the court noted, in *dicta*, that a plaintiff’s “asserted injury because of the challenged conduct threatened to diminish or deplete the *overall* supply of endangered animals available for observation and study *may* not be sufficient for an injury in fact.” 46 F.3d 93, 97 (D.C. Cir. 1995) (emphasis in original and emphasis added). However, the court made their ruling based on the fact that the plaintiff did not intend to return to the zoo and, therefore, injury was not imminent. Id. However, in the instant case, not only does Bark have an educational injury in the loss of a portion of the Asian elephant herd, but her claim is not one for general study, but one for the study of a specific herd of Asian elephants at a specific location, Corbett National Park in southern India.

Next, it is well-settled that injury in fact can be established through injury to aesthetic interests. See Animal Legal Def. Fund, 154 F.3d at 431-438 (finding plaintiff demonstrated injury in fact through the observation of animals living under inhumane conditions); see also Defenders of Wildlife, 504 U.S. at 562-563 (finding that an aesthetic interest is undeniably a cognizable interest for purpose of standing). After years of researching the Asian elephants in Corbett and with plans to continue her research, Bark has developed a cognizable interest in observing the elephant herd living under humane conditions. See, e.g., Animal Legal Def. Fund, 154 F.3d at 431. Just as the plaintiff in Animal Legal Def. Fund, Bark has regularly visited Corbett in southern India to research these animals and has plans to follow-up her research and to visit and view them in the near future. Therefore, it is obvious that both Bark’s aesthetic and research interests will be injured.

Finally, she will suffer an injury in fact because she has developed an emotional attachment to this herd of elephants. See e.g., Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum and Bailey Circus, 317 F.3d 334 (D.C. Cir. 2003). In Am.

Soc’y for the Prevention of Cruelty to Animals, the court held that an emotional attachment to a particular animal can predicate a claim of injury. Id. In fact, as an analogous case, the court specifically found that an emotional injury existed after the plaintiff worked with a group of elephants for many years. See id. Therefore, Bark has standing under a theory of emotional injury as well.

Gambet has also demonstrated clear, cognizable interests which in no way are conjectural or hypothetical. Evidence was submitted showing Gambet’s aesthetic interests in the elephants in Corbett and the effects on her if they are removed. As a member of Ganesh and as head of tour operations, she will no longer be able to view those elephants in their natural habitat or during the annual and bi-annual tours which she leads. Also, unlike the plaintiffs in Defenders of Wildlife, Gambet has definite, imminent future plans on visiting the park, not only for her own personal pleasure, but also to lead tours, a longtime professional and undoubtedly emotional interest. “It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing a perceptible harm, since the very subject of his interest will no longer exist.” 504 U.S. at 655. Not only is it well-settled that aesthetic injuries are sufficient, but the court in Fund for Animals I, 27 F. Supp. 2d at 8, found that either personally viewing or even the mere contemplation of an injury to the animals in their new environment is sufficient. 27 F. Supp. 2d at 14. Even though there will be other elephants in the park, the contemplated decrease in the herd is sufficient, as is Bark’s and Gambet’s knowledge of their presence in Wumba in a highly-altered, destructive environment.

Additionally, neither Bark’s nor Gambet’s aesthetic injuries are compensable in monetary damages. See e.g., Fund for Animals I, 27 F. Supp. 2d at 8 (finding that a decrease of a bison herd of 435 by approximately 35 to 40 caused the plaintiffs to suffer aesthetic injuries not

compensable in monetary damages). In addition to being non-compensable for aesthetic purposes, monetary damages will not compensate for the loss of a six year research study, or the emotional injuries in losing animals to which the Appellants have grown attached and knowing that the animals will be in an environment suffering beatings and other health problems.

The Appellee argues that Ganesh's injuries are actually of the "non-specific" type instead of a particularized interest. (R.8.) However, as the trial court correctly notes, this rationale was rejected in Fund for Animals v. Frizzell, 530 F.2d 130 (D.C. Cir. 1975) (hereinafter "Fund for Animals II"). But, even if this were not the case, the facts of Fund for Animals II, are distinguishable. In that case, the appellants were concerned with temporary hunting permits during a limited season. The overall effect of the snow geese hunting regulations were only temporary, not long-term, reductions of waterfowl populations with the purpose of allowing the populations to be "capable of responding to habitat conditions during the following breeding season." Id., 530 F.2d at 986. The court noted that the plaintiffs made no attempt to show that irreparable harm would result from the hunting regulations. Id., 530 F.2d at 987. Additionally, it is important to note that the issue was found practically moot since the hunting season was over by the time the case came to court. In this case, there is real evidence that moving the elephants would almost assuredly result in a reduction of the population as the likelihood of successful reproduction is highly unlikely. Furthermore, elephants are a different creature altogether than a snow goose. A loss of seven young, female elephants and their reproduction capabilities is much more significant because the overall elephant population is much smaller and has slower reproduction rates than would be true in losing a small percentage in a flock with a population of approximately 100,000. See id., 530 F.2d at 982. In the case of the snow geese, environmental assessments were completed finding that there would be no irreparable damage caused by the

predicted harvest from the season's hunting permits. Id. The evidence on the captive elephant "population" only shows the improbability of reproduction.

In contrast, the decrease of the protected Asian elephant population in Corbett will not only be felt immediately, but in the long-term as well. These seven female elephants, if taken from Corbett, will not be able to reproduce as they would in the wild. It is uncontested that reproduction efforts in captivity have largely failed. (R.4.) Yet, the Appellee asserts that reproduction is one of the main purposes of the import permit. This is highly unpersuasive. While the FWS points that Wumba will loan the elephants for participation in Bonanza Circus' breeding program, given the statistics of captive reproduction efforts, it is unlikely to be successful because of the urban environment, transportation of the elephants, concrete enclosures, and the high probability that the elephants will develop foot problems and may die. Plus, more importantly, the breeding program is only secondary to the commercial interest that Wumba has in the elephants. Thus, the import permit actually has the overwhelming likelihood of negating the intent of CITES and the ESA as, instead of increasing the number of elephants through natural breeding, at Wumba, the elephants will most likely be unable to breed.

It is clear that both Bark and Gambet have demonstrated injury in fact. Both individuals have individual and cognizable interests in the elephant herd at Corbett and have submitted evidence of the effects of the decrease in the herd and their inability to view the elephants in the near future if the import permit is granted. In addition, as researchers and professionals in the area of Asian elephants, the knowledge of the fact that a portion of the herd will be living at an amusement park, with a tiny fraction of the space available to them now and with inadequate facilities, is sufficient for an injury in fact. This evidence is ample to overcome the requirements of the first element of Article III standing for purposes of summary judgment.

**B. Ms. Bark and Ms. Gambet’s injuries are “fairly traceable” to the Appellee’s actions in granting an import permit for the importation of the seven Asian elephants from Corbett National Park to Wumba Amusement Park.**

It is without question that both Bark’s and Gambet’s injuries are “fairly traceable” to the decision of FWS to grant an import permit to Wumba for the seven Asian elephants currently located in Corbett. “[F]air traceability turns on the causal nexus between the agency and the asserted inquiry.” Humane Soc’y of the U.S., 46 F.3d at 100. Without the granting of the permit, neither Bark nor Gambet would have injuries in fact. The Asian elephants have not yet left Corbett and, if the permit were denied, Bark could continue the Asian elephant research that she has begun on the herd in Corbett and Gambet would be able to continue to view the full elephant herd on her annual tours and visits to the park. Thus, neither Bark nor Gambet would suffer educational, professional, aesthetic, or emotional injuries if the permit was refused.

**C. A favorable judicial ruling by this court is “likely” to redress the injuries asserted by Ms. Bark and Ms. Gambet.**

If this court were to reverse the decision of the trial court and find summary judgment inappropriate, the case could proceed with a ruling finding that the Appellants have standing and allowing for a decision prohibiting the importation of the Asian elephants from Corbett to Wumba. This is more than “likely” to redress the educational, aesthetic, and emotional injuries asserted by both Bark and Gambet.

In Defenders of Wildlife, the Court found that the plaintiffs’ claim was not redressable because the “agencies funding the projects were not parties to the case.” 504 U.S. at 568. However, in that case, it was the government’s inaction that was challenged when FWS failed to act regarding certain activities abroad that were increasing the rate of extinction of endangered and threatened species. Id., 504 U.S. at 562. This is distinguishable from the present case. While Wumba is not a party to the instant action, it is only through the import permit of the

Appellee, FWS, that Wumba is legally allowed to import the Asian elephants. Without the permit granted by FWS, there would be no way for the elephants to be taken from their natural environment in Corbett. Instead, it is the action of the FWS that is threatening an endangered species, not the inaction. Therefore, the injuries caused by the permit are redressable through a favorable judicial ruling.

**D. Both Ms. Bark's and Ms. Gambet's grievances fall within the zone of interests protected or regulated by the Endangered Species Act.**

Both Bark's and Gambet's interests clearly fall within the zone of interests protected by the ESA. "[T]he Supreme Court has recently affirmed [that] the zone of interests test is generous and relatively undemanding. There need be no indication of congressional purpose to benefit the would-be plaintiff." Animal Legal Def. Fund, 154 F.3d at 444 (citations omitted). "Instead, the test...asks only whether the interest sought to be protected by the complainant is arguably within the zone of interests protected by the statute." Id. (citations omitted) (emphasis in original). Furthermore, "[c]ourts should give broad compass to a statute's zone of interests in recognition that this test was originally intended to expand the number of litigants able to assert their rights in court." Id. (citations omitted). Applying this generous test to both Bark and Gambet, both fall within the zone of interests protected under the ESA. The purpose of the ESA is clear, it is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this action." 16 U.S.C. § 1531. Subsection (a) includes CITES as well as several other conservation and preservation treaties. The Government's responsibility under the ESA "is to insure that the government does not authorize, fund, or carry out any activity that is likely to jeopardize continued existence of

[endangered species] and to take affirmative steps to protect, conserve, and restore [the endangered species] to the level that would permit removal from the Endangered Species list.”

Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186, 1187 (D.D.C. 1981).

Therefore, the structure and substance of the ESA makes clear that Bark’s and Gambet’s interests in the endangered Asian elephants fall within the zone of interests of the ESA. The elephants are listed as an endangered species and they are challenging an authorization of the government of an activity which will jeopardize their existence.

**II. THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLEE’S ISSUANCE OF PERMITS FOR THE IMPORTATION OF SEVEN JUVENILE ELEPHANTS BY WUMBA AMUSEMENT PARK DID NOT VIOLATE THE PROHIBITION ON TRADE IN ENDANGERED SPECIES UNDER THE ESA, CITES, AND THE APA.**

In addition to finding that the Appellant’s have Article III standing, this court should reverse the finding of the United States District Court of the state of Bliss with regards to the validity of the issuance of permits to Wumba by the FWS. Under both CITES and the ESA, import permits for endangered species are not to be granted to persons who seek such importation for primarily commercial purposes or activities. 16 U.S.C. §§ 1531-1546; T.I.A.S. No. 8249. The objective of CITES is to “establish an effective system for regulating the international trade in specimens of species which are or may be in danger of becoming extinct as a result of that trade.” Senate Asked to Approve Convention on Trade in Endangered Species, 12 I.L.M. 1085 (1973). Likewise, as previously discussed, the stated purposes of the ESA are “to provide a means whereby the ecosystems upon which endangered species...depend may be conserved, to provide a program for the conservation of such endangered species..., and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.” 16 U.S.C. § 1531(b). Subsection (a), the Congressional

findings, pledges the United States to work to conserve endangered species pursuant to, among other international instruments, the Convention. 16 U.S.C. § 1531(a)(4)(F).

The FWS's grant of an import permit to Wumba is invalid for two reasons. First, the FWS's failure to acknowledge that the express purpose of Wumba's importation of the seven juvenile female elephants is the furtherance of a commercial activity rather than for any benefit to the Asian elephants renders the decision arbitrary and capricious. Second, the removal of seven juvenile female elephants from their herd in southern India to further the commercial goals of Wumba has serious consequences for the success of the Asian elephant population in their native habitat and contravenes the stated purposes of both CITES and the ESA and is, thus, contrary to laws governing the importation of endangered species. Therefore, the decision of the District Court for the State of Bliss must be reversed as to the validity of the permit issuance.

A. **The decision of the Fish and Wildlife Services to grant the permit to Wumba Amusement Park is arbitrary and capricious.**

Review of the decision of the FWS is governed by 5 U.S.C. § 706 (2000), which sets out the requirements that must be met for the court to hold that the issuance of a permit to Wumba was unlawful. Relevant to the case at hand is 5 U.S.C. § 706(2)(A), which states that the court shall set aside the agency action if it is found to be "arbitrary and capricious." Specifically, an agency's action is arbitrary and capricious when the agency "fails to consider the relevant matters and there is a clear 'error of judgment'." Cermak v. Norton, 322 F. Supp. 2d 1009, 1014 (D. Minn. 2004) (citations omitted). The court's role is not to substitute its own judgment for that of the agency but to determine whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Baltimore Gas & Elec. Co., 462 U.S. at 105 (emphasis added).

The limitations on judicial review of agency action necessitate that the agency furnish the court, at the very least, with a statement of reasons for its decision.

[T]o enable the reviewing court intelligently to review the [agency's] determination, the [agency] must provide the court and the complaining witness with copies of a statement of reasons supporting his determination. [W]hen action is taken...it must be such as to enable a reviewing Court to determine with some measure of confidence whether or not the discretion...has been exercised in a manner that is neither arbitrary or capricious... [I]t is necessary for [the agency] to delineate and make explicit the basis upon which discretionary action is taken...

Dunlop v. Bachowski, 421 U.S. 560, 571 (1975) (citations omitted). In the instant case, the FWS has never explicitly articulated its reasoning to the court or to the Appellants for granting the permit beyond restating the claims made by Wumba in its permit application that it will contribute to the conservation of the captive Asian elephant population by loaning their elephants to the Bonanza Circus captive breeding program. This rationale is faulty and insufficient to justify the issuance of an importation permit to Wumba.

By definition, animals in captivity cannot be considered a population unto themselves. The FWS' regulations define "population" as a group of animals "in common spatial arrangement that interbreed when mature." 50 C.F.R. § 17.3. Although several animals may be held in captivity together, the totality of Asian elephants in captivity in North America are certainly not within common spatial arrangement, nor are they able to interbreed without extensive human intervention. The herd from which Wumba seeks to take seven females does, however, constitute a population of endangered wildlife whose survival will be significantly impacted by the removal of seven of its female members.

Furthermore, the issuance of a permit to Wumba by the FWS overlooks the environment in which the elephants will be kept. Wumba intends to keep the elephants in a two and a half acre exhibit with concrete floors in the elephant enclosures, despite the fact that concrete floors

are one of the many factors contributing to the decline of captive elephant “populations.” (R.5.) The FWS regulations clearly state that in deciding whether to issue a permit, the director must take into consideration whether the “expertise, facilities or other resources available to the applicant” are sufficient to accomplish the stated purpose of the importation. 50 C.F.R. § 17.22(A)(2)(vi). Less than three acres of land with concrete-floored enclosures simply is not sufficient for one juvenile elephant, let alone seven juvenile elephant.

The FWS has failed to provide the court with its reasoning behind the issue of the permit, has granted the permit in the face of evidence that Wumba’s use of the elephants is for primarily commercial purposes, and seems to have overlooked the fact that the conditions in which the elephants will be kept is antithetical to the purpose of the permit exception. When viewed in a light most flattering to FWS, it appears likely that it merely took Wumba’s claims at face value without further investigation into the appropriateness of granting the permit. Clearly, FWS failed to fully consider all of the relevant factors when making the decision to grant Wumba an importation permit and this absolutely renders its decision arbitrary and capricious. This court must overrule the lower court’s grant of summary judgment to defendants and set aside Wumba’s permit for importation.

**B. The decision of the Fish and Wildlife Services to grant the permit to Wumba Amusement Park is contrary to the law.**

The Convention on International Trade in Endangered Species was instigated by the United States in 1961. In a message to Congress on April 13, 1973, President Richard Nixon stated that CITES “is designed to establish a system by which States may strictly control the international trade in specimens of species in danger of becoming extinct and monitor the trade in specimens of species which...might be expected to become endangered.” 12 I.L.M. 1085. The text of CITES mandates that “trade in specimens of [endangered] species must be subject to

particularly strict regulation in order not to endanger further their survival and *must only be authorized in exceptional circumstances.*” Art. II, 12 I.L.M. at 1088 (emphasis added). CITES further states that the import of endangered species is subject to the approval of the state’s designated scientific and management authorities, who must be satisfied that the importation is not detrimental to the survival of the species, that the recipient of the specimens are suitably equipped to house and care for them, and that the specimens are not to be used for “primarily commercial purposes.” Art. III § (3), 12 I.L.M. at 1089. It is apparent from the text of the CITES that these enumerated factors do not constitute the minimum criteria required of permit applicants, but are mandatory factors which must be taken in conjunction with the requirement of exceptional circumstances.

The ESA is the United States’ implementation of the CITES as domestic law, and states as much in the Congressional findings. Specifically, 5 U.S.C. § 1531(a)(4) of the ESA states that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to...The Convention on International Trade in Endangered Species of Wild Fauna and Flora...” 16 U.S.C. § 1531. Furthermore, the statutory purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species...depend may be conserved, to provide a program for the conservation of such endangered species...and to take such steps as may be appropriate *to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.*” 16 U.S.C. § 1531(b) (emphasis added). Thus, agency decisions must not only meet the threshold requirements of the ESA, but must also satisfy the requirements of CITES.

To this end, the ESA, like CITES, prohibits the trade in endangered species for primarily commercial purposes, and defines “commercial activity” as “all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling.” 16 U.S.C. § 1532(2). The FWS further defines “industry and trade” in its regulations as “the actual or intended transfer of wildlife...from one person to another person in the pursuit of gain or profit.” 50 C.F.R. § 17.3. Additionally, FWS regulations explicitly make it unlawful to “deliver, receive, carry transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.” 50 C.F.R. § 17.21(e). In common parlance, these regulations prohibit the importation of endangered species when the purpose of the importation is primarily for profit-making and make no exceptions for commercial exploitation whose incidental effects might be marginally beneficial to a captive “population.”

It is clear that the purpose of CITES and the ESA is to prevent the commercial exploitation of endangered species and it is undisputed that Wumba seeks to import seven juvenile female elephants primarily for use as rides in its amusement park so that they may increase their profit margin and out-compete the Whitewater Fun Amusement Park. (R.5.) Any involvement in the breeding program run by Bonanza Circus is incidental and secondary to Wumba’s primary goal of profit-making. In granting the permit, the FWS is not only condoning profiteering, but aiding Wumba in its exploitation of an endangered species for financial gain is in direct contradiction to the stated purposes of both ESA and CITES.

Contravention of the stated purpose of the statutes is in and of itself enough to render the issuance of the permit unlawful under the APA, 5 U.S.C. §§ 551-559; 701-706 (2000). In granting the permit on the face of what is clearly evidence of a primarily commercial purpose,

however, FWS also violated its own regulations. While an agency's internal regulations may not have the force of law against the general public, they bind the agency's action as surely as if they were legislation. "Failure on the part of the agency to act in compliance with its own regulations" renders an agency decision contrary to the law and is a *per se* violation of 5 U.S.C. § 706. This standard is applicable regardless of whether the decision can be said to be arbitrary and capricious. Frisby v. U.S. Dep't of Hous. and Urban Dev., 755 F.2d 1052, 1055 (3rd Cir. 1985); see also Kelly v. R.R. Ret. Bd., 625 F.2d 486 (3rd Cir. 1980); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1980).

Thus, the issuance of a permit to Wumba for importation of these elephants unlawful both because it is contrary to international and national law and because it explicitly violates the regulations set forth by the FWS itself. On this fact alone, the court must overrule the summary judgment granted to the Appellees and aside the decision to issue a permit to Wumba. Clearly, there is a genuine issue of material fact which makes summary judgment inappropriate.

**C. "Chevron Deference" is inapplicable to the instant case and should not be considered by the court.**

In Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), the Supreme Court held that if a statute is ambiguous or silent with respect to a particular issue, the only question for a reviewing court is whether the agency's action is based on a permissible construction of the statute. If the agency's construction of the statute in question is permissible, then the court will defer to the judgment of the agency and uphold its action as lawful. See 467 U.S. at 837. However, the so-called "Chevron deference" is only a general rule and courts have since identified several circumstances in which deference to the agency's decision is inappropriate and should not be granted. The instant case is just such a circumstance.

The first and most obvious exception to “Chevron deference” is when the Congressional intent of a statute is clear. When Congress clearly communicates its intent in the statutory language, as it did in both CITES and the ESA, an administrative agency entrusted with the enforcement of the statute may not substitute its own judgment for that of Congress. FWS has done just that, by issuing a permit for Wumba in the face of specific language barring importation permits for primarily commercial purposes. FWS, thus, cannot invoke “Chevron deference” in defense of their actions.

A second exception to “Chevron deference” occurs when Congress expressly intends to leave a particular issue to the discretion of the agency and the agency’s resulting decision is arbitrary, capricious or contrary to the statute. See Nat’l R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. 407 (1992); U.S. v. Haggard Apparel Co., 526 U.S. 380 (1999). Although Congress’ intent in enacting the ESA appears to be fairly clear, the Appellee will likely argue that it was intentionally entrusted with the discretion to interpret “commercial activity” as it sees fit. Even if this were true, it would not bring the permit issuance under the scope of “Chevron deference” for two reasons. First, it would merely give FWS the authority to promulgate regulations which interpret the issues on which Congress has remained silent in a manner consistent with the language and intent of the statute. FWS has exercised any authority delegated to it by Congress in enacting its permit regulations. The instant claim does not challenge the appropriateness of the regulations in and of themselves, but challenges the FWS’s issuance of a permit in violation of these regulations. Second, the agency’s construction of an otherwise ambiguous or silent statute is not entitled to deference if its interpretation, in this case, the interpretation of its own regulations is arbitrary and capricious or otherwise contrary to the plain language or congressional intent or purpose of the statute. Here, the intent of the statute is

clear: the ESA is the adoption of CITES as national law, and both the ESA and CITES prohibit the importation of endangered species for commercial activities. FWS's decision is arbitrary, capricious, and contrary to law and is not entitled to deference under the Chevron analysis.

### **CONCLUSION**

For the foregoing reasons, we respectfully submit that the lower court's decision be affirmed with regard to Article III standing of Elephant Advocates and The Ganesh Project, and be reversed with respect to the issuance of an import permit to Wumba Amusement Park.

Respectfully submitted,

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Counsel for Appellant  
Team 6

**APPENDIX A:**  
**Relevant Sections of United States Code**

**5 U.S.C. § 706. Scope of Review.**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

- (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**16 U.S.C. § 1531. Congressional Findings and declaration of purposes and policy.**

- (a) Findings. The Congress finds and declares that –
  - a. various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
  - b. other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
  - c. these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;
  - d. the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to –
    - A. migratory bird treaties with Canada and Mexico;
    - B. the Migratory and Endangered Bird Treaty with Japan;
    - C. the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
    - D. the International Convention for the Northwest Atlantic Fisheries;
    - E. the International Convention for the High Seas Fisheries of the North Pacific Ocean;
    - F. the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
    - G. other international agreements; and
  - e. encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.
- (a) Purposes. The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

**16 U.S.C. § 1532(2). Definitions.**

The term “commercial activity” means all activities of industry and trade, including, but not limited to the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

**16 U.S.C. § 1540(c). District court jurisdiction.**

The several district courts of the United States, including the courts enumerated in Section 460 of Title 28, United States Code [28 U.S.C. § 460], shall have jurisdiction over any actions arising under this Act. For the purpose of this Act, American Samoa shall be included within the judicial district of the District Court of the United States for the District of Hawaii.

**APPENDIX B:**  
**Relevant Sections of the Code of Federal Regulations**

**50 C.F.R. § 17.3. Definitions.**

Industry or trade in the definition of “commercial activity” in the Act means the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit;

Population means a group of fish or wildlife in the same taxon below the subspecific level, in common spatial arrangement a that interbreed when mature.

**50 C.F.R. § 17.21(e). Interstate or foreign commerce.**

It is unlawful to deliver, receive, carry transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.

**50 C.F.R. § 17.22(A)(2)(vi). Permit issuance criteria.**

(A)(2) Upon receiving an application completed in accordance with paragraph (a)(1) of this section, the Director will decide whether or not a permit should be issued. In making this decision, the Director shall consider, in addition to the general criteria in § 13.21(b) of this subchapter, the following factors:

- (vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

**APPENDIX C:**  
**Relevant Sections of CITES**

**Art. II. Fundamental Principles.**

Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

**CITES, Art. III § 3. Regulation of Trade in Specimens of Species included in Appendix I**

The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

- A. a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;
- B. a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and
- C. a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

**APPENDIX D:**  
**Federal Rules of Civil Procedure**

**Fed. R. Civ. P. 56(c). Motion and Proceedings Thereon.**

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**APPENDIX E**  
**U.S. Constitutional Provisions**

**U.S. Const. Art. III, § 2, Cal. 1**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.