

**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)	
)	
Respondent)	
)	

On Appeal from the United States District Court for the State of Bliss

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Appellants Elephant Advocates and The Ganesh Project filed suit challenging Respondent United States Fish and Wildlife Service's ("FWS") issuance of an import permit under Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), the Endangered Species Act ("ESA"), and the FWS's permitting regulations, for the importation of seven juvenile female Asian elephants from India to the Wumba Amusement Park ("WAP"). Appellants specifically challenged the permit issuance as arbitrary and capricious under the Administrative Procedure Act ("APA"). Appellants moved for a preliminary injunction, and FWS held the import permit in abeyance pending resolution of each party's expedited motion for summary judgment. While the lower court ruled that appellants had standing to sue, it concluded that the permit issuance was neither arbitrary nor capricious. Appellants timely appealed.

STATEMENT OF FACTS

FWS issued an import permit to the Wumba Amusement Park ("WAP") in the state of Bliss for seven juvenile female Asian elephants from Corbett National Park ("Corbett") in India under CITES, the ESA, and its permitting regulations. R. at 3. Asian elephants are classified as Appendix I endangered species under CITES and endangered species under the ESA. CITES, App. I; 23 C.F.R. § 23.23 (2005); 15 C.F.R. § 17.11 (2005). These elephants are intended to help revive a suffering North American captive elephant population through breeding efforts in conjunction with the Bonanza Circus, which currently has the only breeding program producing Asian elephants in captivity through artificial insemination. R. at 4-5. WAP plans to loan these elephants to Bonanza for breeding purposes. R. at 9. In addition, WAP will display the elephants as part of its new "Asia Exhibit," featuring educational information and exposure to an

international environment. R. at 5. The 2.5-acre elephant exhibit will resemble a Southeast Asian jungle, with heated barns to house the elephants, concrete floors, and a path through the jungle area for elephant rides. R. at 5. This exhibit will alert park-goers to conservation efforts for elephants and provide educational information. R. at 5. WAP's Asia Exhibit will accompany the park's other attractions, and will also feature food booths resembling an Asian street market and a tsunami ride. R. at 5.

The North American captive elephant population is also in danger because of chronic foot problems such as arthritis. R. at 5. The seven elephants may also contribute to the FWS's Captive-Bred Wildlife Program through their use for breeding purposes. R. at 10-11.

Respondent, the FWS, is the federal agency charged under the ESA with rulemaking and regulating authority to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. R. at 1. Appellant Elephant Advocates is a non-profit organization dedicated to protecting and conserving elephants in the wild and captivity. R. at 1. Appellant Ganesh Project is a non-profit organization based in the state of Bliss with guided tour operations in India, including in Corbett. R. at 1. Ganesh promotes the preservation of elephants through its tour operations. R. at 1.

ISSUES PRESENTED FOR REVIEW

The following two issues were presented for review on appeal:

1. Did the District Court err in finding that the plaintiffs have standing to sue?
2. Did the District Court err in finding that FWS's issuance of the import permit was neither arbitrary nor capricious under the APA because of its non-commercial purpose under CITES, and did not violate the ESA because it will enhance the preservation and propagation of the North American captive elephant population?

STANDARD OF REVIEW

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, 422 U.S. 490, 498 (1975). Because the issue of standing is a question of law, it is reviewed de novo. See generally Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Appellants challenge FWS’s issuance of an import permit under the APA because the permits cannot be challenged under the ESA’s citizen-suit provision. Section 706 of the APA requires the Court to determine whether an agency action - here, issuance of the import permits - is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) (2005). The “scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.” Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Moreover, the court’s review of the merits is confined to the administrative record. See Camp v. Pitts, 411 U.S. 138, 142 (1973) (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

SUMMARY OF THE ARGUMENT

Elephants Advocates and Ganesh do not have standing here because their members, Ms. Bark and Ms. Gambet, respectively, do not have standing to sue in their own right. Specifically, neither member has a sufficient relationship with these seven elephants to satisfy Article III’s injury in fact requirement, nor future plans to return to Corbett National Park that are actual or imminent. Because appellants’ claims are vague and generalized, prior cases in which standing was found are distinguishable on numerous grounds and therefore inapplicable.

The District Court did not err in finding that the FWS did not violate the APA, CITES, ESA, or its regulations, in issuing the import permit for the seven juvenile Asian elephants because the FWS reasonably and rationally found that the purpose of the import is neither detrimental to the survival of the species nor primarily commercial and that the import will enhance the survival of the species.

ARGUMENT

- I. Elephant Advocates and The Ganesh Project do not have standing to sue because they cannot demonstrate a sufficient injury in fact.

Elephant Advocates and Ganesh, through their members, Ms. Bark and Ms. Gambet, fail to demonstrate an injury in fact required to confer standing under Article III. Specifically, Ms. Bark's general observations of Corbett National Park's elephant population do not create a special relationship with the seven elephants at issue, because Ms. Bark is unable to show that the challenged conduct harms the overall supply of elephants available for observation in the park. Moreover, Ms. Bark does not have a special relationship with these elephants under the District of Columbia Circuit's analysis in ASPCA v. Ringling Bros., and does not claim any similar harm. Important procedural differences in ASPCA also highlight the lack of an injury in fact asserted by Ms. Bark and Ganesh.

Both Ms. Bark and Ms. Gambet fail to establish an injury in fact for standing purposes because they have no actual or imminent plans to return to the park in the future. In addition, important procedural and factual differences in the district court opinions in Fund for Animals v. Clark and Fund for Animals v. Norton make appellants' reliance on these cases unpersuasive. Rather, appellants' claims are similar to Fund for Animals v. Frizzell, because they assert only nonspecific claims of a general loss of wildlife that is insufficient to confer standing. Finally,

appellants' stated concerns about the long-term viability of the park's elephant population are unfounded and therefore fail to meet Article III's standing requirement of an injury in fact.

- a. Elephant Advocates lacks standing because its member, Sandra Bark, has not suffered a sufficient injury in fact as required by Article III.

Although Elephant Advocates relies on the status of one member, Sandra Bark, to meet Article III's requirements for standing, Ms. Bark cannot demonstrate a sufficient injury in fact. Article III requires appellants to show that (1) it has suffered a concrete and particularized "injury in fact" that is actual or imminent, rather than conjectural or hypothetical; (2) the injury is "fairly traceable" to the defendant's challenged conduct; and (3) it is likely, not merely speculative, that a favorable decision will redress the injury. See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., 528 U.S. 167, 180-81 (2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. at 560-61). In addition, organizations such as Elephant Advocates and Ganesh may have standing to sue on its members' behalf when its members would otherwise have standing themselves to sue, the interests involved are relevant to the organizations' purposes, and the claim and relief do not require the individual members' participation in the lawsuit. Hunt v. Wa. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Here, Elephant Advocates cannot demonstrate a sufficient injury in fact. While Elephant Advocates asserts standing based on a claim of standing of one member, Sandra Bark, an elephant researcher, Ms. Bark's asserted injuries are insufficient to confer standing on her or the organization. Specifically, Ms. Bark has no special relationship with the seven elephants at issue, because she has not researched or seen them in over two years, and claims merely "some-day" future intentions to return to Corbett National Park to do follow-up research.

- i. Ms. Bark's general observations of Asian elephants at Corbett National Park are insufficient to establish an injury in fact through a special relationship.

While Ms. Bark is a wild Asian elephant researcher, and has visited Corbett to conduct research, similar cases in sister circuits clearly show that such general observations cannot demonstrate a special relationship with the animals at issue sufficient to confer standing.

Although the Supreme Court has not spoken on the issue of what constitutes a sufficient special relationship with an animal to satisfy Article III, the District of Columbia Circuit has, and on facts strikingly similar to those here. For example, in The Humane Society of the United States v. Babbitt (hereinafter "Babbitt"), the court found an animal welfare organization lacked standing to challenge a zoo's decision to donate an aggressive Asian elephant to a circus because its claim that an individual member would lose the opportunity to study Asian elephants at the zoo did not show an injury in fact. 46 F.3d 93, 99-100 (D.C. Cir. 1995). The court specified that an injury in fact was lacking because plaintiffs could not show the challenged conduct threatened the member's ability to observe and study Asian elephants generally. Id. at 97.

Here, Ms. Bark's asserted loss of the ability to study these seven elephants in Corbett is virtually identical to the claim set forth in Babbitt, because she claims "an emotional attachment to the elephants." R. at 6. However, as the Babbitt court stated, aesthetic interests have been found sufficient for standing purposes *only* in cases where "the plaintiffs asserted injury because the challenged conduct threatened to diminish or deplete the *overall* supply of endangered animals available for observation and study." Babbitt, 46 F.3d at 97 (citing Defenders of Wildlife, 504 U.S. at 562; Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Japan Whaling Assoc. v. Am. Cetacean Soc., 407 U.S. 221, 231 n.4 (1986)). As a result, Ms. Bark's claimed

emotional attachment to the seven elephants at issue does not confer standing because she has not asserted any harm to her ability to observe the overall supply of endangered Asian elephants.

Moreover, Ms. Bark has not claimed that she would be unable to continue to observe these seven elephants at WAP; rather, she argues merely that although she could do so, her enjoyment would be severely diminished. R. at 6. However, the diminution of her enjoyment of these animals in a new environment does not demonstrate an overall inability to continue her research, and therefore is insufficient to meet Article III's standing requirements.

- ii. Ms. Bark does not have a special relationship with the elephants, as described in ASPCA, and her claim of harm does not rise to the level of harm asserted in ASPCA.

In addition, Ms. Bark's asserted special relationship with these animals is insufficient to prove an injury in fact. While the appellants rely upon, and the district court is persuaded by, Am. Soc. for the Prevention of Cruelty to Animals v. Ringling Bros., 317 F.3d 334 (D.C. Cir. 2003) (hereinafter "ASPCA"), the District of Columbia Circuit's finding of an aesthetic and emotional attachment to the elephants in that case is factually distinguishable from Ms. Bark's claimed relationship with the Corbett elephants. Specifically, the ASPCA court only considered the relationship that Thomas Rider, a former elephant handler and employee with the Ringling Brothers circus, had with elephants that were claimed to have been abused by other circus employees and practices. See id. at 335-36. Here, however, Ms. Bark does not play a significant role in the lives of the seven elephants at issue, unlike Mr. Rider's role in caring for the circus elephants, because she has not seen these seven elephants in over two years. Moreover, she researches and observes Asian elephants at Corbett National Park generally, and does not regularly spend multiple hours each day with these seven elephants in particular, as Mr. Rider presumably did with the elephants he cared for while employed by the circus.

Further, the ASPCA court found standing when claims of abuse to the endangered elephants were asserted by Mr. Rider, while no abuse or similar harm is claimed by appellants here. See id. at 335. Indeed, Ms. Bark does not argue that these elephants would be subject to abuse or other serious harm if they were moved to WAP; rather, she admits that she would be able to visit these seven elephants in their new environment, even though “her aesthetic enjoyment of them would be severely diminished.” R. at 6. Thus, the harm claimed here is far from the observed abuse asserted by Mr. Rider in ASPCA.

- iii. Important procedural distinctions with ASPCA also demonstrate that Ms. Bark does not have an injury in fact sufficient for standing purposes.

There are also important procedural differences between this case and ASPCA. First, Mr. Rider was found to have standing under the citizen-suit provision of the Endangered Species Act, 16 U.S.C. § 1540(g), which this Court has specifically stated is not at issue. See R. at 2 n.1 (finding appellants “could not challenge [the import permits] under the citizen suit provision of the ESA.”). As a result, the ASPCA court found that the prudential limits on standing did not apply, and Mr. Rider had to meet only the constitutional requirements to have standing to sue. 317 F.3d at 336. Here, however, appellants have an additional burden to show that their claims meet the prudential requirements of asserting their own rights and interests, which are not generalized grievances; and that their claims fall within the “zone of interests” protected or regulated by the statute in question. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 476 (1982). While appellants may meet these prudential requirements, they are secondary to the constitutional standing limits, which appellants have not met here. See id.

Second, the ASPCA court found that Mr. Rider’s specific allegations of harm from his relationship with the animals as part of his full-time employment with the circus were sufficient

for standing only at the pleading stage. ASPCA, 317 F.3d at 336. Indeed, the court specifically observed that such general allegations would not necessarily suffice at later stages of litigation, stating that “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice’ because courts assume plaintiffs can back up their general claims with specifics at trial.” Id. at 336 (quoting Defenders of Wildlife, 504 U.S. at 561).

Here, however, the district court decided cross-motions for summary judgment, which is far removed from the lenient requirements at the pleading stage. See R. at 3. Unlike the standing granted at the pleading stage in ASPCA, Bennett v. Spear, 520 U.S. 154 (1997), and Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003), appellants here are subject to more stringent standing requirements because this appeal is the result of a finding of summary judgment. R. at 3. Therefore, appellants must demonstrate that their claims confer standing under the courts’ requirements at the summary judgment stage in Babbitt, 46 F.3d 93 (D.C. Cir. 1995), Defenders of Wildlife, 504 U.S. 555, and Los Angeles v. Lyons, 461 U.S. 95 (1983). As the Defenders of Wildlife Court stated, “[i]n response to a summary judgment motion, . . . the plaintiff can no longer rest on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” 504 U.S. at 561. Thus, appellants’ reliance on ASPCA is misplaced.

- iv. Finally, Ms. Bark lacks the actual or imminent plans to return to Corbett National Park required for an injury in fact under the Supreme Court’s opinion in Defenders of Wildlife.

Ms. Bark also lacks standing because she lacks concrete plans to return to Corbett National Park to visit these elephants in the future. Although Ms. Bark claims to plan to “visit [the elephants in Corbett National Park] next spring for a follow-up research project,” R. at 6, this amorphous assertion of general future plans to return to the park is insufficient for standing

purposes under the Court’s decision in Defenders of Wildlife. The Defenders of Wildlife Court found that “the [plaintiffs’] profession of an ‘inten[t]’ to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – is simply not enough.” 504 U.S. at 564.

Similarly, Ms. Bark’s general intent to return to the park where she claims her opportunity to observe and continue research on the Asian elephants is not enough to confer standing. As the Defenders of Wildlife Court found, “[s]uch ‘some-day’ intentions – without any description of concrete plans, or even any specification of *when* the some day will be – do not support a finding of the ‘actual or imminent’ injury that our cases require.” Id. Here, Ms. Bark asserts plans to return next spring, but there is no evidence that these plans are actual or imminent, and not informal and tentative. Indeed, the Defenders of Wildlife Court continued:

Although “imminence” is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is “certainly impending.” It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time.

504 U.S. at 564 n.2 (internal citations omitted). Here, as in Defenders of Wildlife, Ms. Bark has not shown an impending injury, because her intent to return to the park next spring is neither actual nor imminent enough to meet Article III’s standing requirements.

Because Ms. Bark has not suffered an actual or imminent injury in fact, she does not have standing under the Supreme Court’s jurisprudence or other circuits’ approaches to standing in similar situations. As a result, Elephant Advocates lacks standing to sue because none of its members can meet the constitutional standing requirements imposed by Article III.

- b. The Ganesh Project also lacks standing to sue because it lacks a concrete and particularized injury in fact required for standing under Article III.

The Ganesh Project has similarly failed to establish an injury in fact for standing purposes. Although Ganesh relies upon the declaration of its member and head of its India tour operations, Ms. Gambet, to prove an injury in fact, Ms. Gambet nevertheless fails to demonstrate an aesthetic injury sufficient to confer standing. See R. at 7. Specifically, while Ms. Gambet asserts that the number of elephants available in the future for Ganesh tours of Corbett will be diminished, this assertion does not rise to the level of an injury in fact required at the summary judgment stage of this litigation to satisfy constitutional standing requirements. In addition, Ms. Gambet's claim of a personal aesthetic injury if she sees fewer elephants during a potential future trip to the park is too indefinite to establish an actual or imminent injury, as required by Article III and the Court's jurisprudence. Because Ms. Gambet and Ganesh's patrons will continue to be able to view the elephant population at Corbett after these seven elephants are moved to the Wumba Amusement Park, appellants' vague claims of a general interest in the loss of wildlife do not meet the standing requirements of Article III.

- i. Ms. Gambet's indefinite and vague plans to return to the affected area are insufficient to confer standing under Article III and the Court's decision in Defenders of Wildlife.

While Ms. Gambet claims that the elephant population in the park will be diminished if these seven elephants are moved to a new environment, this assertion does not rise to the level of an injury in fact sufficient for standing purposes at this stage in litigation. Because this Court must determine whether the district court erred in granting summary judgment, the requirements of specificity in the Record to support Ganesh and Ms. Gambet's claims are more demanding than at the pleading stage, as discussed above. Like Ms. Bark, discussed above, Ms. Gambet has amorphous and indefinite intentions to return to Corbett in the future which are insufficient for

standing. Specifically, Ms. Gambet's declaration states that "she visits Corbett *once a year, or every other year*, to lead a tour," and claims future aesthetic injury for that indefinite trip during which she expects to see fewer elephants. R. at 7 (emphasis added). However, as discussed above, this intent of future aesthetic injury based upon her return to Corbett is as hazy and obscure as the stated plans of the plaintiffs in Defenders of Wildlife, which were found insufficient to satisfy the injury in fact requirement for standing. In Defenders of Wildlife, the plaintiffs had no current plans to return to the affected areas, although they asserted their intent to return in the future but would not do so during the following year, due to a civil war in the affected country. See 504 U.S. at 563-64. Here, Ms. Gambet has no actual or imminent plans to return to the park; these uncertain statements of intent are insufficient under the Supreme Court's jurisprudence to confer standing.

- ii. Appellants' reliance on Clark and Norton is unpersuasive because it is procedurally and factually distinguishable from the case at issue here.

Appellants' reliance on Fund for Animals v. Clark, 27 F. Supp. 2d 8 (D.D.C. 1998), and Fund for Animals v. Norton, 281 F. Supp. 2d 209 to support Ms. Gambet's claims of a personal aesthetic injury is misplaced. Specifically, procedural and factual differences between Clark and Norton, and the appeal in question, demonstrate that these lower court opinions should be unpersuasive and inapplicable here. For example, unlike this case, Clark and Norton were both district court decisions involving motions for preliminary injunctions, and neither involved issues of standing. See 27 F. Supp. 2d at 9; 281 F. Supp. 2d at 219. Moreover, Clark and Norton focused on the irreparable harm element required for a preliminary injunction, which differs from the injury in fact requirement of the standing doctrine. Id.

The cases are also factually distinguishable. In Clark and Norton, the plaintiffs were concerned with government noncompliance with its regulations which would result in the killing

of a substantial number of protected animals. 27 F. Supp. 2d at 14; 281 F. Supp. 2d at 220-21. The Clark court determined that “the aesthetic injury the individual plaintiffs would suffer from seeing or contemplating the bison *being killed in an organized hunt* [was sufficient] that the plaintiffs have carried their burden of demonstrating the presence of an irreparable harm should the court not grant injunctive relief.” 27 F. Supp. 2d at 14. (emphasis added). Here, however, there is no similar harm intended or contemplated by respondent; rather, the seven elephants’ removal to a new environment where they would serve conservation and education purposes is far from the type of harm at issue in Clark and Norton. Indeed, the Norton court also placed much emphasis on the irreparability of permitting such killing to go forward when a possibility of reversal on appeal existed. 281 F. Supp. 2d at 221 (“[W]e would be killing animals, and . . . there is no way of rectifying that injury if, in fact, two months down the line . . . the court concludes that the agency has acted in . . . an illegal fashion.”) (quoting Fund for Animals v. Glickman, Civ. A. No. 99-245 (D.D.C. Feb. 12, 1999)). Any similar reliance upon Fund for Animals v. Espy is also misplaced for the same factual differences. See 814 F. Supp. 142, 141 (D.D.C. 1993) (seeing or contemplating proposed killing of 10 to 60 bison through an organized hunt could cause plaintiffs to suffer an aesthetic injury not compensable in money damages).

- iii. Ms. Gambet’s claims are similar to the nonspecific claims of loss of wildlife rejected in Frizzell and thus are insufficient to confer standing.

Ganesh and Ms. Gambet’s claims are more similar to those rejected by the District of Columbia Circuit in Fund for Animals v. Frizzell, in which no irreparable harm was found from nonspecific claims of the destruction of wildlife. See 530 F.2d 982, 987 (D.C. Cir. 1975). In a per curiam opinion, the Frizzell court struck down the argument that the loss of one bird alone would be a sufficient injury; rather, the court determined the death of a small percentage of the species did not constitute an irreparable injury without a showing that the species’ well-being

was jeopardized. Id. Similarly, appellants here claim that the move of seven elephants from the park to a new environment creates an injury in fact by virtue of appellants' varied uses and interests in the elephant species generally. Because there is no contemplation of the death of any of these seven elephants, which takes appellants' claims beyond what the Frizzell court was even unwilling to accept, and the appellants have also failed to demonstrate that the well-being of the Asian elephant species overall is in jeopardy, appellants' claims of an injury in fact must fail.

- iv. Finally, appellants' concerns about the long-term viability of the park's elephant population are unfounded and therefore fail to establish standing.

Finally, appellants' concerns over the long term effects of removing seven elephants from Corbett National Park on the viability of the park's herd are inconsistent with recent data trends on India's Asian elephant population. While the overall number of Asian elephants has declined over the last hundred years to the point of being endangered, studies on its population in India over the last forty years actually show a substantial growth. Using various research sources and publications, compiled information available on www.animalinfo.org shows that from 1964 to 1997, the estimated population of wild Asian elephants in India has risen from 7000 to nearly 25,000. See Animal Info – Asian Elephant: India, available at <http://www.animalinfo.org/>. Moreover, the Smithsonian Institute notes that India has one of the largest populations of Asian elephants in the world. See Asian Elephant Conservation and Science, available at <http://nationalzoo.si.edu/Animals/AsianElephant/elephantstudy.cfm>.

Specifically, websites about Corbett National Park list the Asian elephant species within the park at 300-350. See Corbett Elephants, India, available at <http://www.corbetthideaway.com/elephants.html> (“About 300-350 Asiatic elephants roam around the park in herds, along the river Ramganga or foraging in the grasslands.”). Because the Asian elephant population generally consists of more females than males, moving these seven

elephants to a new environment should not disrupt the long-term viability of the park's population. Thus, appellants' assertions of harm to the Asian elephant population in Corbett as a result of the removal of these seven elephants finds no support in the facts, and fails to meet the requirements for standing.

II. The FWS's decision to issue the import permit was neither arbitrary and capricious nor contrary to law.

The District Court did not err in finding that the FWS did not violate the APA, CITES, or ESA, in issuing the import permit for the seven juvenile Asian elephants because the purpose of the import is neither detrimental to the survival of the species nor primarily commercial and the import will enhance the survival of the species. Appellants challenge the FWS import permit under the APA because the permit cannot be challenged under the citizen suit provisions of the ESA. See Bennett, 520 U.S. at 171-74. Thus, the procedural vehicle for appellants' claims is the judicial review provision of the APA, 5 U.S.C. § 706, which requires the Court to determine whether an agency action - here, issuance of the import permit - is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

Appellants assert that the FWS decision was arbitrary and capricious and contrary to law under the APA, 5 U.S.C. § 706, because WAP is importing the elephants for a primarily commercial purpose in violation of the FWS's CITES permitting regulations, 50 C.F.R. §§ 23.11-23 (2005), and the ESA which makes it unlawful to "engage in any trade in any specimens contrary to the provisions of" CITES, 16 U.S.C. § 1538(c)(1) (2005); CITES, art. III(3), T.I.A.S. No. 8249, 27 U.S.T. 1087, entered into force July 1, 1975; see also 16 U.S.C. § 1538(c)(2) (importation not made in the course of a commercial activity presumed to be lawful). Appellants also claim that the FWS's determination that the import would enhance the propagation or the survival of the species in the wild under § 10(a)(1)(A) of the ESA is arbitrary and capricious.

- a. FWS rationally and reasonably conformed to CITES and its own regulations in issuing the import permit.

The decision of the FWS to issue the elephant import permit was neither “arbitrary and capricious” nor “otherwise not in accordance with the law” according to the standards set out in CITES, article III(3), and the FWS regulations, 50 C.F.R. §§ 23.11-23, 17.22 (2005).

Even if appellants have standing, appellants cannot succeed with their CITES claims. To prevail, appellants must show that FWS' actions were arbitrary and capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(a)(2); see also Bennett, 520 U.S. at 171-74 (court explains that discretionary decisions relating the Endangered Species Act are subject to judicial review only through the APA § 706). The scope of review under the arbitrary and capricious standard is narrow and a court must not substitute its judgment for that of the agency. Motor Vehicle Mfrs., 463 U.S. at 43; Sierra Pac. Indus. v. Lyng, 866 F.2d 1099 (9th Cir. 1989).

This standard of review is highly deferential, presuming the agency's action to be valid. County of Rockland v. U.S. Nuclear Regulatory Comm'n, 709 F.2d 766 (2d Cir. 1983), cert. denied, 464 U.S. 993 (1983). The court must affirm the agency's decision is a rational basis for the decision is presented, even though the court might otherwise disagree. Ritter Transp., Inc. v. Interstate Commerce Comm'n, 684 F.2d 86 (D.C. Cir. 1982), cert. denied, 460 U.S. 1022 (1983); Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 284 (D.C. Cir. 1981); Soler v. G. & U., Inc., 833 F.2d 1104 (2d Cir. 1987), cert. denied, 488 U.S. 832 (1988) (reviewing court may neither weigh alternatives available to agency and then determine which is more reasonable nor resolve conflicts in testimony unless on its face it is hopelessly incredible); Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974), rehearing denied, 420 U.S. 956 (1975) (reviewing court must consider whether decision was based on consideration of relevant factors and where there has been clear error of judgment).

The arbitrary and capricious standard of review requires only that the agency's action have a rational basis, not that the action be supported by substantial evidence. Hurley v. U.S., 676 F.2d 792 (10th Cir. 1978); see also Bowman, 419 U.S. 281 at 285-86 (arbitrary and capricious test was satisfied where the agency disclosed rational basis for its treatment of the evidence); Bedford County Mem'l Hosp. v. Heckler, 583 F. Supp. 367 (W.D. Va. 1984), affirmed, 769 F.2d 1017 (4th Cir. 1985) (action upheld where agency demonstrated rational connection between facts found and choice made). The burden of overcoming this presumption falls upon the appellant as the party challenging the agency action. Costle, 657 F.2d at 284, n.28.

CITES is a multilateral treaty that regulates international trade in wild fauna and flora based on a system of permits that can be issued if certain conditions are met. CITES, arts. I-III. Under CITES, each State that is a party to the Convention must designate a Scientific Authority and a Management Authority, who are tasked with evaluating import and export permits of species listed on the Appendices to CITES.¹ In the U.S., the FWS serves as both the Scientific and Management Authorities. The FWS may issue import permits after deliberating upon the following questions: whether or not trade will be detrimental to the survival of the species; whether or not the specimens were legally acquired; how preparation for shipment of live specimens occurs; and, for Appendix I species, whether the importer has suitable facilities to house and care for specimens. CITES, art. III; 50 C.F.R. §§23.11-23, 17.22. Finally, imports of Appendix I specimens cannot take place if they are to be used for primarily commercial purposes. CITES, art. III(3)(c). The parties to CITES adopted a Conference Resolution that defines a "commercial purpose" as an activity designed "to obtain economic benefit, including

¹ CITES also requires the exporting State, here India, to make certain determinations before issuing an export permit. India must determine that: the export will not be detrimental to the survival of the species; the animals were not captured in contravention of the laws of India; the animals will be prepared and shipped in a manner to minimize risk of injury, damage to health, or cruel treatment; and an import permit has been granted for the animals. CITES, art. III(2).

profit (whether in cash or kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.” Conf. Res. 5.10. It remains in the discretion of each State Party to determine if a commercial purpose is the primary purpose of the import.

According to CITES and FWS regulations, the Scientific and Management Authorities must make three positive determinations before issuing an Appendix I import permit:

- (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 Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;
- (c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

CITES, art. III(3). First, FWS must determine that the purpose of the import will not be a detriment to the survival of the species. Second, FWS must determine that the specimens were obtained in compliance with the laws of India.² Finally, FWS must determine that the animals are not to be used for a primarily commercial purpose. Only if each of these three conditions is met can FWS issue the import permit for the requested endangered species.

- i. The FWS’s determination that the purpose of import for these elephants is not detrimental to the survival of the species was not arbitrary and capricious.

The FWS determination that the purpose of import was not detrimental to the survival of the species was not arbitrary and capricious or contrary to law. The FWS did not violate its own regulations in making this determination: there are no regulations in the U.S. specifically defining the obligations of the Scientific Authority to make this determination that the purpose of the import permits for WAP is not for a purpose that would be detrimental to the survival of the species. The Secretariat of CITES, however, has indicated that the question of detriment will

² Appellants have not challenged this requirement; thus, on appeal, the Court must assume that the elephants were obtained in compliance with India’s laws. This brief will not further address this requirement.

vary “...from species to species... and from purpose to purpose.” WILLEM WIJNSTEKERS, THE EVOLUTION OF CITES 71 (7th ed. 2005).³ Examples of non-detrimental purposes include:

- Personal use. Conf. Res. 5.10, ex. (a).
- Scientific research in the interest of the survival of the species: to enhance the reproduction and survival rates of animals in the wild or in captivity. Conf. Res. 5.10, ex. (b).
- Biomedical research intended to promote public health. Conf. Res. 5.10, ex. (c).
- Education, conservation, or training: Appendix I species can be imported by government agencies or non-profit organizations for purposes of conservation, education, or training, such as training customs officials in CITES control, Conf. Res. 9.10 (rev.), and imports to universities, zoos, and plant collectors. Conf. Res. 5.10, ex. (d).
- Captive breeding and artificial propagation, either to promote the reintroduction of the species in the wild, to increase small existing wild populations, or to reduce the number of specimens that would otherwise be taken from the wild. Conf. Res. 5.10, ex. (e); see also Conf. Res. 2.12.⁴

Here, a clear objective of WAP is to loan the female elephants to the Bonanza Circus’s successful artificial insemination program. R. at 3-4. A goal of the Bonanza Circus’s program is to increase the number of elephants born in captivity, thereby *reducing* the number of animals that would otherwise be taken from the wild. As reflected in the record below, the Bonanza Circus has the only successful Asian elephant breeding program in the United States. R. at 3-4. Furthermore, the captive Asian elephant population in the US is in crisis due to the general failure of captive breeding programs and foot problems in captive elephants. R. at 4-5. This crisis justifies the importation of seven female elephants who can be artificially inseminated

³ Available at <http://www.cites.org/eng/resources/pub/evolution.pdf>.

⁴ Importantly here, Conference Resolution 2.12 does not require that the importation of Appendix I specimens for captive-breeding purposes must “be aimed at the long term protection of the affected species.” Compare Conf. Res. 2.12 with Conf. Res. 5.10, ex. (e). Conference Resolution 2.12 does not include consideration of the priority of the aims of the breeding operation, which may very well be purely commercial. The effect of a successful captive breeding or artificial propagation operation is that it may reduce the number of animals or plants which would otherwise be taken from the wild, legally or illegally, and that it therefore contributes to the conservation of the species concerned. WIJNSTEKERS,supra, at 74.

through the Bonanza Circus program and propagate the species in captivity.

Additionally, a clear objective of WAP's desired import is to conduct educational conservation efforts in conjunction with the use of the elephants for rides through the constructed Asian jungle. R. at 5. WAP's expansion plan is based on an Asian theme: a tsunami ride, alerting park-goers to the dangers of storms in the Asian-Pacific region, street vendor food sales, giving park-goers a first-hand look at life in Asian villages and cities, and elephant rides through the constructed jungle, alerting park-goers to conservation efforts in Asian jungles, including conservation of animals, such as the Asian elephant, and plants. R. at 5.

Not only was FWS's decision to issue the import permit not arbitrary and capricious, it was carefully considered. Notably, although the herd in Corbett would be reduced by seven juvenile elephants, the herd is 300 to 350 elephants strong, and the herd's propagation will not be endangered by the removal of these few female elephants. FWS determined that granting the purpose of the import these elephants will be breeding and conservation education. This determination is rationally based on the record below and the Administrative Record. This Court cannot insert its judgment for that of the FWS, and therefore must affirm the FWS determination that the purpose of this import is *not* for purposes detrimental to the survival of the species.

- ii. The FWS's determination that the import is not primarily for commercial purposes was not arbitrary and capricious.

The Management Authority of the State of import is obliged to make a finding of whether or not an import is primarily for commercial purposes. CITES, art. III(3)(c). The general principles governing this determination were set out by the State Parties in Conference Resolution 5.10. Explicit instructions on how to make this determination are not found within this Resolution or any other; in fact, at numerous Conferences of the Parties, the difficulty of this determination and the reservation of discretion in its determination to the importing State have

been discussed. See WIJNSTEKERS, supra, at 68 (“[T]he term ‘not to be used for primarily commercial purpose’ cannot be applied in general and can, in addition, hardly be defined.”).

General Principle 2 of Conference Resolution 5.10 states that “an activity can generally be described as ‘commercial’ if its purpose is to obtain economic benefit, including profit (whether in cash or in kind) and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.” Conf. Res. 5.10, at Gen. Prin. 2. General Principle 2 must be read in conjunction with General Principle 3, which explains that, in transactions that have commercial and non-commercial aspects, “all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature. . . .” Id. at Gen. Prin. 3. WAP, as the entity seeking to import the Asian elephants, bore the burden of demonstrating that its intended use of the animals was predominantly noncommercial. Id.

WAP made that showing to FWS: although the expansion plan was put forth as a means to increase profits for WAP’s shareholders, the purposes of the Asian elephants in the Asian exhibit are conservation education and breeding. It is not important that WAP is seeking to increase its profits: all corporations are required by law to attempt to increase shareholder profits. Instead, the reasons behind the chosen project should be examined. WAP hopes to profit from the interest generated by conservation and cultural education,⁵ much like The Walt Disney Corporation profits from the interest of the public in cultural and conservation education, at the Epcot Center and Animal Kingdom. Thus, the FWS determination that the import was not for primarily commercial purposes was a reasoned and rational interpretation of Conference Resolution 5.10 and CITES, article III(3)(c), and not arbitrary or capricious.

⁵ Elephants are often considered “flagship species” at zoos and amusement parks. Conservation is central to the idea of a flagship species: a species that has the ability to arouse public attention and thereby help preserve habitat and conserve other species.

- b. The FWS conformed to the ESA and corresponding regulations in determining that the taking requisite with the import of the elephants would enhance the survival of the species.

The FWS rationally conformed to the standards of the ESA and related regulations in issuing the import permit by finding that the taking and importation would enhance the survival of the species. The FWS decision thus not arbitrary or capricious and complied with the ESA.

CITES is implemented in the U.S. through the ESA. 16 U.S.C. § 1531 (2005). Endangered species⁶ are protected by section 9;⁷ the FWS has the delegated authority to permit activities “otherwise prohibited by section 9 . . . if the purpose of the activity is ‘scientific’ or ‘to enhance the propagation or survival of the affected species.’” R. at 10, citing 16 U.S.C. § 1539(a)(1)(A) (2005). The FWS has established a “Captive-Breeding Wildlife Program” which allows registered participants to keep endangered species in captivity and conduct normal husbandry activities without violating the ESA. 50 C.F.R. § 17.21(g) (2005). The FWS is allowed to “issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific purposes, for enhancing the propagation or survival, or for the incidental taking of endangered wildlife.” 50 C.F.R. § 17.22.

The application must include, *inter alia*, sufficient information to allow the FWS to make a reasoned decision: a complete description of where the animal will be used, displayed, or maintained, id. at § 17.22(a)(2)(v); a complete description of the facilities to house and care for the animals, including photographs and diagrams, id. at § 17.22(a)(2)(vi); and, if a purpose of the taking is propagation, “a statement of the applicant’s willingness to participate in a cooperative breeding program and to maintain or contribute data to a studbook,” id. at § 17.22(a)(2)(vii).

⁶ An “endangered species” is “any species which is in danger of extinction.” 16 U.S.C. § 1532(6) (2005).

⁷ Section 9 prohibits the “taking” of any endangered species, as well as the possession, sale, delivery, transport, or shipment of any members of the species (1) that are unlawfully taken or (2) during the course of a commercial activity. 16 U.S.C. § 1538(a).

Discretion to issue or refuse the permit lies with the FWS. Id. at § 17.22(a)(3).

Guidance for making this determination is found in the subsections to 50 C.F.R. § 17.22(a)(3), but the ultimate decision, after weighing these considerations and the application, rests with the FWS. Id. at § 17.22(a)(3) (“ . . . the Director will decide whether or not a permit should be issued.”). The considerations include balancing the purpose of the permit against the potential change in the status of the remaining species in the wild, any potential conflicts with known programs intended to enhance the survival of the species, the possibility that the taking of the animals sought in the permit will reduce the threat of extinction facing the species, the opinions and views of scientists with expertise in the species, and the adequacy of the applicant’s resources to accomplish the goals of the taking. Id. at §§ 17.22(a)(3)(i)-(vi).

Appellants’ argument that the FWS determination that FWS’s finding, in light of these factors, that the import of the seven elephants will “enhance the survival of the species” is arbitrary and capricious does not comport with the evidence before this Court and before the FWS. FWS balanced the purpose of the permit, which it found to be breeding and conservation education, against the potential effects of removing these seven elephants from the wild, and reasonably determined that the removal of only seven, out of 300 to 350 elephants, from Corbett, would not harm the survival of the species in the wild. Furthermore, FWS determined that, considering the matriarchal nature of Asian elephant herds, the removal of seven related female elephants would give those elephants a greater chance of survival in captivity. FWS determined additionally that the import and taking did not conflict with any known programs to enhance the survival of the species; in fact, a primary purpose of the import and taking was to involve the elephants in the Bonanza breeding program.

Finally, the FWS considered scientists’ opinions regarding Asian elephants. As the court

below noted, experts disagree about the survival of the captive North American Asian elephant population. R. at 4. Experts from the American Zoo and Aquarium Association (AZA) in fact support the taking of selected animals from the wild to support the survival of the species in North America. See AZA Elephant Conservation Program, available at <http://www.azaelephantconservation.org/>. In fact, the AZA, the International Elephant Foundation, and other elephant conservation groups support elephants in captivity to promote elephant conservation efforts. Seeing elephants in real life helps promote elephant conservation, according to a 2005 national public opinion poll conducted by Harris Interactive (HI). Most American adults – 95 percent – agree that seeing elephants in real life fosters a greater appreciation of these majestic animals; 96 percent agree that it is important that people work to conserve these; and 95 percent agree that many of the successes to save endangered species are because of work done in zoos and aquariums. HI Endangered Species Poll (2005). Based on this evidence, the FWS made a reasonable, reasoned decision to permit the taking of the seven juvenile Asian elephants from Corbett in India, and their import into the U.S.

The District Court’s dismissal of Appellant’s complaint at the summary judgment phase should be upheld. The FWS decision to issue the import permit for seven juvenile Asian elephants did not violate the APA, ESA, CITES, or FWS regulations because the decision to issue the import permit was rationally based on evidence before the FWS and complied with the legal requirements of both the ESA and CITES. The District Court’s summary judgment for the FWS on the lawfulness of the import permit should be affirmed.

CONCLUSION

For these reasons, Respondent respectfully requests that this Court reverse the lower court’s finding of standing to sue and affirm the lower court’s decision on the merits.

Respectfully submitted,

Date: _____

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