

MEASURING BRIEF

No. 05-2334

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

—————
ELEPHANT ADVOCATES

AND

THE GANESH PROJECT,

Plaintiffs/Appellants

v.

U.S. FISH AND WILDLIFE SERVICE,

Defendant/Respondent

—————
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE STATE OF BLISS

BRIEF FOR THE APPELLANTS

—————
Team #8
Brian L. Blalock
Matthew G. Liebman
550 Nathan Abbott Way
Stanford, California 94305
Phone: 650.625.1245
Attorneys for Appellants

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STATEMENT OF THE CASE

This is a civil action for injunctive and declaratory relief arising out of the decision by Fish and Wildlife Service (“FWS”) to issue a permit to Wumba Amusement Park (“Amusement Park”) allowing the importation of seven juvenile female Asian elephants.

Plaintiffs Elephant Advocates and The Ganesh Project filed suit in the District Court for the State of Bliss alleging violations of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), the Endangered Species Act (“ESA”), and the implementing regulations for both CITES and the ESA.

Elephant Advocates (“Advocates”) is a nonprofit organization dedicated to promoting the conservation and humane treatment of elephants. The Ganesh Project (“Ganesh”) is a Bliss-based nonprofit organization devoted to the conservation of wild Asian elephants and their habitat. Ganesh offers humane viewing tours of Asian elephants in India. FWS is the bureau within the Department of the Interior tasked with issuing permits under CITES and the ESA.

On Nov. 30, 2005, the District Court held that the plaintiffs had standing to sue, and that FWS’s grant of the import permit did not violate CITES or the ESA. Plaintiffs immediately appealed the decision on the merits, while defendants appealed the ruling on standing.

STATEMENT OF FACTS

Asian elephant populations consist of matriarchal family groups, which roam throughout a “home range” of native grasslands usually between 200 and 800 square kilometers. District Court at 4.¹ They are highly intelligent mammals with excellent memories and close kinship ties. *Id.* Mothers, grandmothers, sisters, and aunts all remain together as a family group throughout their lives. *Id.* Their large, padded feet are acutely sensitive – so much so, that

¹ Hereinafter, references to the District Court’s opinion will be cited as “DC” followed by the page number, e.g., DC 4.

researchers think elephants can communicate with one another by sending vibrations that are felt by other elephants through their footpads. Id. When housed in urban or other “high vibration” locales, elephants suffer significant pain and distress, especially when confined to concrete flooring. Indeed, there has been a crisis in the North American captive elephant industry due to frequently crippling or fatal foot problems caused by captive elephants standing on concrete in areas of high-vibration. DC 5. Training wild elephants for exhibition in captivity involves the use of corporal inducement, i.e., they are beaten until broken. DC 3.

Elephant Advocates is a nonprofit organization dedicated to the promotion of humane treatment and conservation of elephants. Ms. Sandra Bark, a wild Asian elephant researcher and member of Elephant Advocates, has been studying the elephants in Corbett National Park in southern India for six years and has developed a personal familiarity with and research interest in the seven juvenile elephants involved in this proceeding. DC 6. Ms. Bark has plans to return to Corbett next spring to complete a follow-up research project involving these elephants. Id.

The Ganesh Project is a nonprofit organization with home offices in San Harmonica, Bliss, and a tour operation in southern India. Dedicated to protecting elephant habitat and Asian elephants in the wild, Ganesh and its tour director, Ms. Gambet, routinely organize and lead viewing tours to observe Asian elephants in their natural habitats. DC 7. Ganesh’s tours rely on being able to view Asian elephants in Corbett National Park. Id.

In 2002, Wumba Amusement Park began implementing a “master plan” to increase profits and out-compete their closest rival, Whitewater Fun Amusement Park. DC 5. Part of the master plan involves importing endangered Asian elephants from Corbett to provide rides to patrons in the amusement park as part of an “Asia Exhibit,” which will also include a tsunami ride and food booths. Id. The elephants are to be housed in enclosures with concrete floors near the

Amusement Park's roller coasters and other rides. Id. The Amusement Park received an export permit from India and an import permit from FWS for seven juvenile female elephants. Id.

Wumba Amusement Park claims it will loan the juvenile elephants to Bonanza Circus to use in its captive-breeding program. DC 9. Bonanza Circus, which uses artificial insemination to impregnate elephants, regularly yields baby elephants for use in captivity. DC 4-5. Wumba Amusement Park also intends to post signage around their elephant exhibit informing visitors of the threats to Asian elephants and their habitat. DC 9-10.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in finding that the plaintiffs have standing to bring this case?
2. Did the District Court err 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 APA, and did not violate the ESA and the APA because it will enhance the survival of the species?

STANDARD OF REVIEW

Agency action taken pursuant to the Endangered Species Act is reviewed under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 686 (D.C. Cir. 1982); *see also* Sierra Club v. Glickman, 67 F.3d 90, 95 n.5 (5th Cir. 1995) (citing same holding in multiple circuits). This includes permits issued under Section 10 of the ESA as well as CITES. Born Free USA v. Norton, 278 F. Supp. 2d 5, 9 (D.D.C. 2003); World Wildlife Fund v. Hodel, 1988 U.S. Dist. LEXIS 19409, 7 (D.D.C. 1988).

Section 706(2)(A) requires a reviewing court to hold unlawful and set aside agency actions and findings that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). While this standard does not allow the reviewing court to

substitute its judgment for that of the agency, neither is the court a rubber stamp for the agency's decision. Ohio v. Ruckelshaus, 776 F.2d 1333, 1339 (6th Cir. 1985). Section 706(2)(A) requires the court to conduct a "searching and careful" inquiry into the facts and the justifications for the agency action. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The agency must have considered the relevant factors and not made a clear error of judgment. Id.

With regard to an agency's interpretation of a law that it administers (e.g., the ESA by FWS), the court must first determine whether Congress spoke clearly in the statute at issue. Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). If so, the court interprets that clear language as written, using traditional tools of statutory interpretation. Id. at 842-43. If on the other hand, Congress has not spoken clearly and the agency interpretation was promulgated through a formal notice and comment process, then the court gives strong deference to the interpretation. 533 U.S. at 226-27. It will uphold the agency interpretation so long as it is reasonable or permissible. 467 U.S. at 843-44.

SUMMARY OF THE ARGUMENT

The District Court properly held that the plaintiffs have standing to bring this suit. However, the court erred in upholding the permit against plaintiffs' challenges under CITES and the ESA.

Standing

Plaintiffs Elephant Advocates and The Ganesh Project have constitutional standing: they will suffer aesthetic and economic injuries that are fairly traceable to FWS's decision to permit the importation of seven juvenile elephants. These injuries would be redressed by an injunction against the importation. The plaintiffs have organizational standing based on the constitutional standing of their members, the germaneness of the case to the organizations' respective missions, and the nonnecessity of the participation of their members. Both plaintiffs will suffer aesthetic

injuries from witnessing (a) the depletion of the population of elephants in the wild and (b) the decrease in the quality of life endured by the elephants in captivity. Elephant Advocates' economic injury is based on the research interests of one of its members. The Ganesh Project's economic injury results from its reduced ability to conduct elephant-viewing tours.

Legal Challenge: CITES and ESA

CITES prohibits the importation of Asian elephants for a primarily commercial purpose. Yet the Amusement Park's use of the elephants is part of its "master plan" to increase profits and compete with a rival park. Neither captive-breeding nor conservation education demonstrates a non-commercial nature of the importation. The ESA prohibits the importation and taking of endangered species like the Asian elephant. It also forbids the receipt of endangered species in foreign commerce in the course of a commercial activity. FWS's decision to grant a Section 10 permit under the ESA was arbitrary, capricious, and a violation of law because the importation has no scientific purpose, and will not enhance the propagation or survival of the Asian elephant.

ARGUMENT

I. Plaintiffs Elephant Advocates and The Ganesh Project have standing to bring this case against the FWS for improperly issuing permits under CITES and the ESA.

Because Elephant Advocates and The Ganesh Project have suffered cognizable aesthetic and economic injuries, which were caused by FWS's actions and would be redressed by an invalidation of the import permit at question, they have standing to sue.

In order to show that a party possesses a sufficient stake in an otherwise judiciable controversy, i.e., that it meets Article III "case or controversy" standing requirements, a party

must demonstrate that 1) it will suffer an injury in fact without judicial relief; 2) the injury “fairly can be traced to the challenged action;” and 3) that a favorable decision will likely redress the injury in question. Friends of the Earth, Inc. v. Laidlaw Env'tl. Services, 528 U.S. 167, 180-181 (2000). See also Sierra Club v. Morton, 405 U.S. 727, 732 (1972). Legally cognizable interests can include aesthetic as well as physical and economic injuries. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (holding “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest”); See also Sierra Club, 405 U.S. at 734 .

Cognizable aesthetic injuries include the depletion of an animal population, Japan Whaling Association v. American Cetacean Society, 478 U.S. 221 (1986), witnessing degradation of the animals’ environment, Humane Society of the United States v. Hodel, 840 F.2d 45 (D.C. Cir. 1988), witnessing inhumane treatment of animals, Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998), or even the contemplation of inhumane treatment, Fund for Animals v. Norton, 281 F.Supp.2d 209, 221 (D.D.C. 2003) (noting a line of cases finding aesthetic injury in the contemplation or witnessing of a particular treatment of animals). For an aesthetic injury to qualify as an “injury-in-fact,” it must be particularized and individual. Lujan 504 U.S. at 563 (requiring that “the party seeking review be himself [or herself] among the injured”); See also Glickman 154 F.3d at 433 (“The key requirement [of an aesthetic injury]... is that the plaintiff have suffered his [or her] injury in a personal and individual way”). The injury must also be either actual or concretely imminent. Lujan, 504 U.S. at 563.

In addition to the Article III “case or controversy” requirement, courts have also established a prudential standing requirement. However, this inquiry is inapplicable where the statute itself contains a citizen suit provision. The citizen-suit provision of the ESA negates the zone of

interest requirement for prudential standing analysis. Bennett v. Spear, 520 U.S. 154, 163 (1997) (the “any person may commence a civil suit” provision of the ESA demonstrates “remarkable breadth” and “negates the zone of interests” in standing inquiry); See also American Society for the Prevention of Cruelty to Animals v. Ringling Bros., 317 F.3d 334, 336 (D.C. Cir. 2003) (in suit brought under the APA and ESA by animal welfare organization, the “any person” provision of the ESA “eliminates any prudential standing requirement”).²

An organization bringing suit must also meet the tripartite organizational standing requirements: 1) the organization’s members “would otherwise have standing to sue in their own right;” 2) the action involves interests “germane to the organization’s purpose;” and 3) neither the claim nor the relief requires the participation of individual members. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977); HSUS v. Hodel, 840 F.2d at 52. If an organization meets these standing requirements, it may bring suit on behalf of its injured members. Sierra Club, 405 U.S. at 739.

A. Elephant Advocates has standing to bring the present case based on the standing of its member, Ms. Sandra Bark.

Elephant Advocates meets both individual and organizational standing requirements based on the standing of its member, Sandra Bark, a wild Asian elephant researcher. Ms. Bark’s injury is a classically aesthetic one, involving a particularized injury from both depletion of the Asian elephant population and from the planned relocation of the elephants to an amusement park and subsequent degradation of their environment. Hodel, 840 F.2d at 52 (holding that witnessing the depletion of an animal population or the degradation of the animals’ environment are “classic aesthetic interests, which have always enjoyed protection under standing analysis.”) If the

² The present action is brought under the ESA and APA; thus, the prudential standing requirement is accordingly made unnecessary by statute.

Amusement Park is allowed to import these seven breeding female elephants to use as entertainers in their amusement park, Ms. Bark's interest in observing and studying them will be injured. Wildlife Federation v. Dunkle, 829 F.2d 933, 937 (9th Cir. 1987) (holding that a decrease in migratory birds constitutes a cognizable injury to those who "wish to hunt, photograph, observe, or carry out scientific studies").

Ms. Bark will suffer further aesthetic injury if her only opportunity to visit these elephants is in the artificial and stressful confines of an amusement park. See Glickman 154 F.3d at 434 n.5 (finding "an [aesthetic] interest in the *quality* of animal life"). Ms. Bark will suffer aesthetically from seeing these elephants housed on concrete floors besides roller coasters and other rides and "adapted" to captivity through being beaten into submission after having developed a relationship with them in the wild. DC 3. Further, Ms. Bark will be unable to continue carrying out her scientific studies with these elephants as planned next spring. Dunkle 829 F.2d at 937. The fact that her research project will be hampered or nullified by the removal of these elephants also constitutes an economic injury.

Ms. Bark's injury is not a generalized interest, but rather a particularized and concrete injury resulting from her interest in observing Asian elephants. Indeed, the District Court even notes that Ms. Bark has a "personal familiarity with, and aesthetic research interests in, these *particular elephants involved*." DC 6 (emphasis added). Further, Ms. Bark's research project, scheduled to commence this spring, meets the imminence requirements that "ensure that the alleged injury is not too speculative for Article III purposes" and that the injury is "certainly impending." Lujan, 504 U.S. at 564 n.2. Unlike the plaintiff in Lujan, Ms. Bark has particular plans to return to India to continue her research involving these particular elephants and others in their herd. The elaborate planning that necessarily goes into a research project, including

obtaining grant money and supplies, coordinating teamwork, and navigating schedules and permits, ensures that Ms. Bark has amply met Lujan's "plane-ticket standard." 504 U.S. at 579.

Ms. Bark's injury is "fairly traceable" to the defendant's action. Without a permit from FWS, the Amusement Park could not import these elephants. 16 U.S.C. § 1538(d). If this court enjoins the elephants' importation, Ms. Bark's injury will be redressed since the elephants will remain in the wild in India. Thus, Ms. Bark has standing to sue.

Elephant Advocates has standing to sue on behalf of Ms. Bark due to her individual standing and her membership in the organization. Sierra Club, 405 U.S. at 739 ("An organization whose members are injured may represent those members in a proceeding for judicial review"). This suit is also germane to EA's mission and purpose. Germaneness is not intended to be a stringent requirement, but rather an attempt by the courts to insure some expertise in the matter at hand. Hodel, 840 F.2d at 56. Elephant Advocates is a non-profit organization dedicated to the protection and conservation of elephants. Ensuring that endangered elephants in the wild in India are not improperly imported to the United States to work in an amusement park in violation of CITES and the ESA is certainly germane to their interest and an area in which they have expertise. Elephant Advocates does not seek monetary damages and neither the claim nor the relief requires participation of individual members. Thus, Elephant Advocates has standing to bring its case against FWS.

B. The Ganesh Project has standing to bring the present case based on the standing of its member, Ms. Gambet.

The Ganesh Project meets both individual and organizational requirements based on the standing of its member, Ms. Gambet, the head of a tour operation in India. Like, Ms. Bark, Ms. Gambet's injury is primarily aesthetic. If the elephants are exported to the United States, neither

she nor her patrons will be able to continue to observe them in the wild in India. The removal of seven endangered breeding females from Corbett National Park would greatly diminish the ability of Ms. Gambet and her patrons to view Asian elephants in the wild now and in the future. Hodel, 840 F.2d at 61. See also Fund for Animals v. Norton, 281 F. Supp.2d at 221 (noting a line of cases where witnessing population depletion constituted a cognizable aesthetic interest without requiring a personal connection to specific animals).

As reflected in the record, these endangered breeding females represent a generation that will not be present “for breeding and producing more elephants in Corbett.” DC 8. With the loss of a generation of breeding females, the number of Asian elephants viewable in the future will be drastically lessened. Further, since Ms. Gambet’s business relies on her ability to present animals in the wild to patrons, fewer Asian elephants would have a direct detrimental effect on her business. This constitutes a further economic injury.

Ms. Gambet’s injury is not merely a general interest, but is particularized, concrete, and imminent. Ms. Gambet periodically returns to India to lead tours. The removal of seven breeding females of an endangered species will aesthetically and economically injure Ms. Gambet since her business thrives on the availability of animals for viewing. DC 7.

Ms. Gambet’s injuries are traceable to the defendant’s action and are redressible by a favorable judicial decision by this court. The permit issued by FWS is the cause of Ms. Gambet’s injuries, since without the permit, the Amusement Park would not be able to import the elephants. 16 U.S.C. § 1538(d). An injunction against the removal of the endangered elephants would redress Ms. Gambet’s injuries. Thus, Ms. Gambet has standing to bring this case against FWS for the improper issuance of a permit for importation in violation of CITES and the ESA.

The Ganesh Project has organizational standing based on 1) the standing of its member; 2) the germaneness of the action; and 3) the fact that neither the claim nor the relief requires the participation of individual members. Ms. Gambet's individual standing is outlined above. The action is also germane to Ganesh's mission and purpose. Hodel, 840 F.2d at 56. Ganesh is a non-profit organization dedicated to preserving elephant habitat and providing the public opportunities to see Asian elephants in the wild. Ensuring that endangered Asian elephants are not improperly removed from the wild is central and germane to Ganesh's stated organizational purpose and ensures some level of expertise in the present matter. Ganesh is not seeking economic damages and neither the claim nor the relief sought requires the participation of individual members.

For these reasons, the District Court properly concluded that plaintiffs have standing.

II. The District Court erred in upholding FWS's issuance of an import permit under CITES and a Section 10 permit under the ESA.

Because the Amusement Park will use the elephants for a primarily commercial purpose, and because that use is not for the propagation or survival of the species, the FWS's approval of the CITES and ESA permits was arbitrary, capricious, and contrary to law.

A. FWS's issuance of a CITES permit to Wumba Amusement Park was arbitrary, capricious, and contrary to law.

Because Wumba Amusement Park seeks to import elephants for a primarily commercial purpose, CITES obligates FWS to deny the permit. The Director's decision to grant the permit was therefore arbitrary, capricious, and a violation of the law.

CITES, convened in 1973 and entered into force in 1975, protects wildlife by restricting trade in certain species of wildlife. Parties to CITES, including the U.S. and India, recognize that

“wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth.” CITES, Preamble, Signatories. To ensure the protection of species, CITES lists wildlife in three appendices, which are tiered to reflect the varying strictness of controls on their trade. Appendix I species, including the Asian elephant (*Elephas Maximus*), are those threatened with extinction that are or may be affected by trade. CITES, Article II(1), Appendix I. CITES subjects the trade in Appendix I species to “particularly strict regulation.” Article II(1). Parties can only authorize such trade in “exceptional circumstances.” *Id.* To trade an Appendix I species internationally, the importer must obtain both an export permit from the country of the specimen’s origin and an import permit from the country in which the specimen will be received. CITES, Article III(2)-(3). These permits are issued by the national scientific and management authorities of the parties to the Treaty. CITES, Article I(f), (g). In the U.S., the duties of the “Scientific Authority” and “Management Authority” are designated to the Secretary of the Interior and carried out through FWS. CITES, Article IX; 16 U.S.C. § 1537a(a)-(c).

The importing country’s scientific and management authorities may not issue an import permit unless the recipient of the animal satisfies several strict conditions. First, the purposes of import must not be detrimental to the survival of the species. CITES, Article III(3)(a). Second, the recipient of the animal must be “suitably equipped to house and care for it [sic].”³ CITES, Article III(3)(b). Finally, the recipient must not use the animal for “primarily commercial purposes.” CITES, Article III(3)(c).

Conference Resolution 5.10 clarifies the non-commercial purpose requirement. Reiterating that Appendix I species must be protected through “particularly strict regulation,” the Parties

³ “To refuse the dishonesty of that little word ‘it’ is at least a beginning, an insistence on truth that keeps open an awareness that we are speaking of genuine creatures in their own rights.” Anthony Weston, *Back to Earth: Tomorrow’s Environmentalism* 149 (1994).

note that “commercial purposes” must be defined “as broadly as possible so that *any* transaction which is not *wholly* ‘non-commercial’ will be regarded as ‘commercial.’” Conf. Resolution 5.10(3) (emphasis added). They define “commercial” as any activity whose “purpose is to obtain economic benefit, including ... and is directed toward resale, exchange, provision of a service or other form of economic use or benefit.” Id. (2). The Resolution also places the burden of proof on the importer to demonstrate that non-commercial purposes “clearly predominate.” Id. at (3). Failure to meet this heavy burden requires the denial of an import permit. Id.

In the present case, Wumba Amusement Park seeks to import these elephants for primarily commercial purposes. Unlike the nonprofit zoos in Born Free v. Norton, the Amusement Park is a for-profit corporation whose principal business is the provision of entertainment for economic gain. DC 10; *compare* 278 F. Supp. 2d. at 14, 16. The District Court found, based on undisputed evidence in the administrative record, that the importation of these elephants was part of “a master plan ... to increase profits for its shareholders and out compete nearby Whitewater Fun Amusement Park” by creating an “Asia Exhibit” with a tsunami ride and food vendors. Id. at 5. The Amusement Park charges admission to its facilities and would let paying customers ride the juvenile elephants as part of this plan to generate increased profits. Id. at 5-6. The purpose of the Amusement Park’s display – namely the viewing and riding of elephants – “is to obtain economic benefit” and “is directed toward ... provision of a service.” Conf. Resolution 5.10(2). The Amusement Park’s proposed exhibition of these animals for profit is far from “*wholly* non-commercial.” Conf. Resolution 5.10(3) (emphasis added).

The record does not show whether Wumba Amusement Park intends to charge an extra fee for elephant rides. If it does, the plan is indistinguishable from that in World Wildlife Fund v. Hodel, in which the court enjoined the Toledo Zoo from charging an extra fee for its Panda

exhibit. 1988 U.S. Dist. LEXIS 19409 (D.D.C. 1988). The zoo had imported the Pandas from China under a CITES permit issued by FWS. Id. at 3. The court concluded that because the zoo planned to profit off of the exhibit, the action was for a primarily commercial purpose, and therefore was unlawful under CITES. Id. at 10-14. Charging extra for elephant rides is an almost identical activity with an unlawful commercial purpose. Even if an extra fee is not charged, the WWF court's reasoning still applies to the facts of this case. If the sole inquiry is whether the importer charges an extra, discrete fee, exhibitors could easily circumvent this formality. A for-profit exhibitor could still make money from importing wild, endangered animals. Without charging an extra fee, the exhibitor could raise the general admission price and vendor fees, or use the animals to advertise for general admission tickets. In the end, the importer profits, even if he or she does not charge a separate fee.

Despite these commercial purposes, the District Court upheld the issuance of the importation permits by FWS. While the court was unwilling to agree that importation of the elephants was solely non-commercial, it reasoned that the amusement park's "overall purpose" was the maintenance of elephant populations, not profit. DC 10. The court found that the importation of the animals would not violate CITES for two primary reasons. First, the Amusement Park will loan the elephants to Bonanza Circus's captive-breeding program. Id. at 11. Second, the Amusement Park will use "conservation education" in the exhibit's signs. Id. at 12. However, these programs are irrelevant to the commercial purpose inquiry, and will not benefit the species.

Legally, the District Court conflated two distinct CITES inquiries in its decision. The court concluded that because importation could arguably benefit the species, it was not "primarily commercial" and therefore did not violate CITES. DC 10. However, CITES separates the question of whether a use will be detrimental to a species from the question of whether the use is

primarily commercial. *Compare* Article III(3)(a) with Article III(3)(c). As the Department of Interior itself has noted, the two queries are intended to be separate prongs: “Conservation benefit to the species is *not relevant* to whether an appendix I specimen is to be used for primarily commercial purposes.” Meeting Notice, 56 Fed. Reg. 67627 (Dec. 31, 1991) (emphasis added); *see also* Meeting Notice, 57 Fed. Reg. 7774 (Mar. 4, 1992). Consequently, the District Court improperly let the “detrimental to survival” inquiry from Article III(3)(a) bleed into the “commercial purpose” inquiry from Article III(3)(c). If captive breeding and conservation education are not *wholly* non-commercial, the permit may not be issued, *even if the programs benefit the species*.⁴ Conf. Resolution 5.10(3). Because the Amusement Park’s asserted non-commercial reasons do not “clearly predominate,” its actions are illegal under CITES. Conf. Resolution 5.10(3); Art. III(3)(c), (1). Under CITES, simply proving a benefit to the species from importation is insufficient to justify an import permit.

Yet, despite the commercial nature of the Amusement Park’s importation, the District Court still upheld the permit as “not primarily commercial.” DC 10. The court may have been relying on the Annex to Conf. 5.10, which details categories of transactions where non-commercial aspects may predominate. However, Wumba Amusement Park’s current proposal is well outside any of the proposed categories.

Resolution 5.10 carefully tailors the examples of permissible, non-commercial importations

⁴ Were this Court to uphold the District Court’s use of a “benefit to the species” inquiry, it would in effect adopt an approach explicitly rejected by the Parties to CITES. *See, e.g.,* John L. Garrison, COMMENT: The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use, 12 Pace Env’tl. L. Rev. 301, 349-50 (1994). At the CITES Meeting in Kyoto in 1992, four nations urged a redefinition of the phrase “primarily commercial purposes.” CITES, 8th mtg., Doc. 8.49 (rev.) at 1 (Kyoto, March 1992) at <http://www.cites.org/eng/cop/08/doc/E-49.pdf>. The proponents of the change argued that a “benefit to the species” or “sustainable use” inquiry should replace the “wholly non-commercial” requirement of Conf. Resolution 5.10. The opposition of such nations as the U.S. soundly defeated the resolution. Meeting Notice, 57 Fed. Reg. 7774 (Mar. 4, 1992).

to those activities that lead to overall benefit of the species. For captive breeding programs, importation “must be aimed as a priority at the long term protection of the affected species.” Conf. 5.10 Annex (e). CITES is concerned with the survivability of the *wild* population. Taking wild elephants out of the wild to increase a circus’ commercial captive breeding program will not benefit the wild population. Further, CITES prohibits using wild animals for captive commercial breeding programs: “[I]mport of wild-caught specimens of Appendix I species for purposes of establishing a commercial captive-breeding operation is precluded by Article III, paragraph 3 (c).” Conf. 12.10 (Rev. CoP 13).

Consequently, the District Court’s reasoning⁵ that the captive breeding program benefits captive elephants still begs the question: How would it benefit the population CITES aims to protect – *wild* Asian elephants? “[I]mportations must be part of general programmes aimed at the *recovery* of species and be undertaken with the help of the Parties in whose territory the species originate.” Conf. 5.10 Annex (e) (emphasis added). There is not even a suggestion Bonanza Circus or Wumba Amusement Park has created a program to re-introduce captive-bred elephants or otherwise benefit the Asian elephant population in India.

There is no evidence in the record that Bonanza Circus’s breeding program will be anything other than an elephant production factory for the captive elephant industry. The District Court notes a shortage of elephants in captivity due to failed breeding programs and foot problems. DC 4-5. However, a successful breeding program would only increase the supply of elephants to be used in commercial ventures, including circuses and amusement parks. Both the Amusement

⁵ The District Court suggests that importation could benefit a “North American elephant population.” DC 10. There is not and never has been an Asian elephant “population” in North America. Captive elephants are not grouped “in common spatial arrangement” and do not “interbreed when mature.” 50 C.F.R. § 17.3 (defining population).

Park and the Circus stand to profit⁶ from the captive breeding program: the Amusement Park by “loaning” the animals to the Circus (for cash or kind), and the Circus by selling either the resulting elephants into captivity or by selling the techniques developed in its breeding program. Such financial benefit constitutes a commercial purpose. Conf. Resolution 5.10(2).

The other justification the District Court accepted was the use of the elephants for conservation education. CITES, however, narrowly prescribes who can import endangered species for education purposes, possibly due to the ease with which a commercial organization could seek profit while offering an educational justification. Conf. Resolution 5.10 Annex (c). Only “government agencies or *non-profit* institutions acknowledged by the Management Authority” may import animals for education purposes. Conf. Resolution 5.10 Annex (c) (emphasis added). Unlike the facilities in Born Free, Wumba Amusement Park is neither nonprofit, nor a zoo, nor governmental, and therefore does not fit this carefully tailored categorical exception. Compare Born Free, 278 F. Supp. 2d at 16 (noting “the role of zoos in providing conservation education”) (emphasis added). Allowing the importation of endangered wild elephants by an amusement park is not the type of primarily non-commercial activity anticipated by CITES as conservation education.

Further, the Amusement Park’s minimal educational gestures – posting signs and reciting a

⁶ While CITES allows for some profit to be generated in a captive breeding importation, such profit must “not inure to the . . . economic benefit” of a private entity and must “be used to support the continuation of the captive-breeding programme.” Conf. Resolution 5.10 Annex (e). In Born Free, for example, the proceeds from the increased gate receipts went back into the nonprofit zoo, the breeding program, and conservation programs. 278 F. Supp. 2d at 14. Even in that case, however, the court concluded that the importation did not fall under Conf. Resolution 5.10 Annex (e). Id. at 15. Nothing in the record suggests that the Amusement Park has any intention of giving the profits generated by the seven female elephants to benefit the species. An amusement park that is seeking to import wild elephants as part of a “master plan” to increase profits and justifies it by loaning elephants to a circus’ breeding program hardly suffices. In short, even if Wumba Amusement Park loans the elephants to the circus for captive breeding, a commercial purpose still predominates.

short description of the elephants as “endangered” – are insufficient to qualify as education, especially in the context of a for-profit amusement park with patrons eager for fun. Even with zoos, which are often nonprofit and are regarded as serving an educational role, visitors barely cognize signage.⁷ The street vendors in Wumba Amusement Park’s Asia Exhibit will capitalize on the animals’ draw through the elephants’ presence, and vendors will bolster their sales to the profit of the Amusement Park with “conservation education” a tertiary concern – if at all. While these “educational exhibits” make money for facilities like Wumba Amusement Park, they fail to actually educate visitors about the species and its endangerment. By the time the visitors leave, most not having taken the time to absorb the “conservation education,” the facility has profited from heightened sales of admission tickets and food, while the elephants linger in an artificial and concrete environment.⁸

Because Wumba Amusement Park failed to meet the non-commercial requirement of CITES, FWS’s decision to grant the import permit was arbitrary, capricious, and contrary to law.

B. FWS’s issuance of an ESA Section 10 permit to Wumba Amusement Park was arbitrary, capricious, and contrary to law.

Because Wumba Amusement Park’s importation of seven female Asian Elephants would violate the Endangered Species Act (“ESA” or “the Act”) and is neither for scientific purposes nor to enhance the propagation or survival of the species, the Director’s decision to grant a Section 10 permit was arbitrary, capricious, and contrary to law.

⁷ Journalist Vicki Croke, citing several zoo studies including demographic research by the American Zoo and Aquarium Association, notes that the “quintessential” zoo visitor “will breeze through the exhibits; she won’t read many informational signs. And she will *buy* snacks and drinks.” Vicki Croke, *The Modern Ark* 96 (1997) (emphasis added).

⁸ These visitors spend only one to three minutes per exhibit, according to a curator at the National Zoo. *Id.* at 97. Croke says, “As people approach the elephant exhibit, for example, they are excited about seeing the actual animals, and few would postpone the pleasure to read a sign—even a well-designed one—first.” *Id.* at 98.

The ESA reflects the United States' commitment "to conserve to the extent practicable the various species of ... wildlife ... facing extinction." 16 U.S.C. § 1531(a)(4). The Act makes it the policy of the federal government to conserve endangered species. 16 U.S.C. § 1531(c)(1). ESA is the domestic implementing legislation for CITES and makes any violation of CITES illegal under federal law. 16 U.S.C. § 1537a, 1538(c)(1). The Act defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Section 4 of the Act provides for the listing of endangered and threatened species after the Secretary of the Interior makes determinations based on the best available scientific and commercial data. 16 U.S.C. § 1533. The Asian elephant has been listed as endangered since 1976.⁹ 41 Fed. Reg. 24064 (June 14, 1976) (codified at 50 C.F.R. § 17.11).

All endangered species listed under Section 4 are entitled to the protections of Section 9 of the ESA. 16 U.S.C. § 1538(a)(1). Section 9 prohibits any person from importing or "taking"¹⁰ any endangered species. 16 U.S.C. § 1538(a)(1)(A), (B). Neither may any person "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 species. 16 U.S.C. § 1538(a)(1)(E).

Section 10 of the Act establishes exceptions to the general rule against importation and taking of endangered species. 16 U.S.C. § 1539. The Secretary may issue permits for actions that Section 9 prohibits if such acts are "for scientific purposes or to enhance the propagation or

⁹ The Asian Elephant was one of the first species mentioned when the ESA was introduced to Congress in January 1973. *A Bill to Strengthen the Endangered Species Act [of 1966]*, CONG. REC. (Jan. 11, 1973) (statement of Rep. Dingell), *reprinted in* COMM. ON ENV. AND PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973 ("LEGISLATIVE HISTORY"), at 72 (1982) ("[This bill] would enable better consideration to be given to the Asiatic elephant ... [which is] being heavily exploited and [is] in trouble...").

¹⁰ Take means "to harass, harm, pursue, hunt, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19)

survival of the affected species.” 16 U.S.C. § 1539(a)(1)(A).¹¹ The issuance criteria for these permits are set out in 50 C.F.R. § 17.22(a)(2). Among other factors, FWS must consider whether the permitted action’s purpose justifies the removal of the animals from the wild, what direct and indirect effects the action would have on wild populations, the opinions of persons and organizations with expertise regarding the species, and whether the applicant has available sufficient expertise, facilities, and other resources to accomplish the objectives set forth in the permit application. 50 C.F.R. § 17.22(a)(2)(i), (ii), (v), (vi).

1. Section 9 of the ESA prohibits the Amusement Park’s use of the elephants.

FWS’s nearly unprecedented¹² decision to allow the importation of wild elephants by an amusement park violates three provisions of the ESA: Section 9(a)(1)(A), (B), and (E).

First, Section 9(a)(1)(A) plainly prohibits the importation of endangered species like Asian elephants. 16 U.S.C. § 1538(a)(1)(A). No one disputes that the Amusement Park’s actions constitute an importation covered by Section 9. 50 C.F.R. § 17.21(b); 16 U.S.C. § 1532(10).

Second, Section 9(a)(1)(B) protects the elephants against the taking that would result from placing them in captivity. 16 U.S.C. § 1538(a)(1)(B). The Amusement Park will take these elephants through (a) their training techniques¹³ and (b) their inadequate habitat.

As plaintiffs have maintained, the training of these elephants to give rides would involve

¹¹ She may also issue permits for takes that are “incidental” to otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). No incidental take permit was issued in this case.

¹² Only once before has a for-profit corporation received a permit to import wild elephants for commercial exhibition. *In Defense of Animals v. Norton*, Civ. No. 02-2068 (D.D.C. 2002). Because the corporation, Six Flags Marine World, surrendered its permit before importing the elephants, the legality of the permit was never tested.

¹³ See *ASPCA v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (holding plaintiffs had standing in ESA suit alleging defendant’s training of Asian elephants constituted take, but not reaching the merits).

harassment¹⁴ and harm,¹⁵ including the use of corporal punishment and negative reinforcement to adjust the animals to life in captivity. DC 3. The resulting anxiety and suffering will ultimately break these juvenile elephants, literally taming them into submission.

Furthermore, as the District Court noted, the proposed habitat includes concrete flooring, one of the major contributors to injury and death in captive elephants. DC 5. Even the captive elephant industry acknowledges that it faces a “crisis” brought about in part by the extensive and crippling foot problems in captive elephants. DC 4-5. The elephant habitat will also be on the amusement park grounds, in the vicinity of “roller coasters, go-carts, and other rides,” which will cause further vibrations in the concrete flooring potentially injurious to the sensitive footpads of the seven juvenile elephants. DC 5. This placement will contribute to the emotional and environmental stress the elephants will suffer at Wumba Amusement Park.

Third, Section 9(a)(1)(E) flatly prohibits the Amusement Park’s receipt, transportation, and shipment of the elephants in the course of its commercial activity. 16 U.S.C. § 1538(a)(1)(E); 50 C.F.R. 17.21(e). As discussed above, the Amusement Park will use these elephants to make profits through increased ticket sales and vendor sales. Supra at 13. The ESA defines commercial activity as “all activities of industry and trade.” 16 U.S.C. § 1532(2). The FWS further defines industry and trade as “the actual or intended transfer of wildlife or plants from one person to another person in the pursuit of gain or profit.” 50 C.F.R. § 17.3; Humane Society of the United States v. Lujan, 1992 U.S. Dist. LEXIS 16140, 10 (D.D.C. 1992) (“[Section 17.3] includes trades and exchanges of animals ... wherever those trades or exchanges are undertaken

¹⁴ FWS defines “harass” as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. There are three exceptions for captive wildlife, none of which give the Amusement Park legal cover for their future harassment of the elephants.

¹⁵ FWS defines “harm” as “an act which actually kills or injures wildlife.” 50 C.F.R. § 17.3.

in the pursuit of any gain or profit.”) (emphasis added); Humane Society of the United States v. Babbitt, 46 F.3d 93, 95-96 (D.C. Cir. 1995). These HSUS cases involved the shipment of an Asian elephant across state lines by an elephant training and exhibition corporation as part of its for-profit activities. However, because there was no transfer of ownership of the elephant, the court found that the activity was not commercial.¹⁶ In this case, however, there *is* a transfer of elephants from one person (India) to another (the Amusement Park), undertaken in pursuit of gain as part of the Amusement Park’s “master plan ... to increase profits.” DC 5.

2. FWS’s decision to issue a Section 10 permit was arbitrary, capricious, and contrary to law.

FWS excused these Section 9 violations by granting Wumba Amusement Park a Section 10 permit to import and use the elephants. The District Court held that this decision was lawful because Wumba Amusement Park would use the animals to enhance the propagation and survival of the species, pursuant to 16 U.S.C. § 1539(a)(1)(A).¹⁷ DC 11-12. It based its conclusions on two findings: (1) that the captive-breeding program¹⁸ would enhance the “North American elephant population” and (2) that the conservation education efforts would enhance the elephant’s survival by informing the public about the perils faced by the animals.

Before addressing these two rationales independently, it should be noted that these two

¹⁶ This case included a claim that the transfer of the elephant from a zoo to the corporation was commercial activity. However, that claim was not presented to the DC Circuit. 46 F.3d at 96, n.3. The District Court had held (possibly erroneously) that the transfer was a gift for non-commercial purposes. 1992 U.S. Dist. LEXIS 16140 at 20-21. No evidence in this case shows that the transfer from India to the Amusement Park was a gift for non-commercial purposes.

¹⁷ The District Court rightly did not determine that the “North American population” was experimental under § 1539(j). This importation would not constitute a “release” under §1539(j)(2)(A). Quite the opposite, in fact. Neither did FWS find that this action is “essential” to the elephants’ continued existence. We therefore do not address § 1539(j) here.

¹⁸ Because these elephants are wild and not captive-bred, the District Court properly concluded that 50 C.F.R. 17.21(g) is not applicable to this case. DC 11.

activities are not the central purpose of the importation (which is the exhibition of the animals as rides at an amusement park). Rather, they are *mitigation measures* designed to lessen the impact of Wumba Amusement Park's exploitation of the animals for profit. Allowing this sort of tit for tat exchange would require new regulations not currently promulgated and potentially even an amendment of the Act itself.¹⁹

The District Court erred in concluding that the captive-breeding program would enhance the propagation of the Asian Elephant. An activity for the propagation of a species may only be conducted in captivity if it is "the most practicable and realistic opportunity to encourage the development of the species concerned." H.R. REP. NO. 93-412 (1973), *reprinted in* LEGISLATIVE HISTORY, at 156. The Secretary must also find that "such excepted conduct [for propagation] furthers the intent of the Act." S. REP. NO. 93-307 (1973), *reprinted in* LEGISLATIVE HISTORY, at 303. The intent of the Act is the conservation, protection, and restoration of the endangered animals' ecosystems, not their systematic replacement with concrete enclosures. H.R. REP. NO. 93-412 (1973), *reprinted in* LEGISLATIVE HISTORY, at 145 ("The basic purpose of the Act is ... to provide a means whereby the *ecosystems* upon which endangered species and threatened species depend may be conserved, protected or *restored*.") (emphasis added). The Act concerns itself not only with raw numbers of the species in a vacuum, but also with their conservation and restoration within their natural ecosystems. However, there is no evidence whatsoever that any of the elephants bred by Wumba Amusement Park or Bonanza Circus will be reintroduced into

¹⁹ Revisions to the Regulations Applicable to Permits Issued Under the Endangered Species Act, 68 Fed. Reg. 53327 (proposed Sept. 10, 2003); Draft Policy for Enhancement-of-Survival Permits for Foreign Species Listed Under the Endangered Species Act, 68 Fed. Reg. 49512 (proposed Aug. 18, 2003); *See* International Fund for Animal Welfare, "Comments on Proposed Revisions to the Regulations Applicable to Permits Issued Under the Endangered Species Act 68 Fed. Reg. 53327," available at http://www.ifaw.org/ifaw/dfiles/file_325.pdf, at 13-14 ("[A]bsent a Congressional amendment to the statute, the Service has no authority to permit otherwise prohibited acts in exchange for promises to assist conservation...").

the wild. Allowing a for-profit corporation to round up wild animals to increase their numbers in amusement parks and circuses is certainly not the intent of the Act.

FWS did not find that the importation would be the most practicable and realistic way to encourage the elephants' development. Neither did it find that the purpose of captive-breeding was adequate to justify removing the animals from the wild. 50 C.F.R. § 17.22(a)(2)(i). In fact, the direct and indirect effects of the importation of these seven juvenile females will be detrimental to the survival of the Asian Elephant in the wild.²⁰ 50 C.F.R. § 17.22(a)(2)(ii); *compare* Born Free, 278 F. Supp. 2d at 8 (finding no detriment because elephants would be culled if left in the wild). If allowed to stay in India, these elephants will contribute to the propagation of the species. Removing them from their natural habitat will deprive the local elephant population of valuable breeding females and their genetic diversity. Because Asian elephants have matriarchal social structures, removing these juvenile females will also destabilize the local Indian elephant population. Finally, FWS improperly concluded that the Amusement Park has adequate expertise and facilities to engage in captive-breeding. 50 C.F.R. § 17.22(a)(2)(vi). The record indicates that the Amusement Park itself will not be doing the breeding, so it is impossible to tell whether the resources available to them through Bonanza Circus are "adequate." Id.

The District Court also erred in concluding that conservation education would enhance the survival of the Asian Elephant. Unlike the nonprofit zoo in Born Free, Wumba Amusement Park has no expertise with which to educate the public on the threats facing Asian elephants. 278 F. Supp. 2d at 1650; C.F.R. § 17.22(a)(2)(vi). As discussed above, there is no evidence showing

²⁰ 16 U.S.C. § 1539(d) also requires the Secretary to find that the activity will not be detrimental to the species, and that it will be consistent with the purposes of the Act. Through these requirements, Congress intended to "limit substantially" the number of exemptions that the Secretary may grant. H.R. REP. NO. 93-412 (1973), *reprinted in* LEGISLATIVE HISTORY, at 156.

that conservation education will have any positive effect on the wild population of Asian elephants. 50 C.F.R. § 17.22(a)(2)(ii). There is something distinctly Orwellian in the FWS's conclusion that conservation education²¹ about the threats to wild elephants is "adequate to justify removing [them] from the wild." 50 C.F.R. § 17.22(a)(2)(i). This finding flies in the face of the ESA's goal of protecting wild animals in their natural ecosystems. Supra at 24.

As Congress understood, "When we threaten endangered species, we tinker with our own futures. We run risks whose magnitude we understand dimly, if at all. And we do so, for the most part, for reasons that can be described most charitably as *trivial*." *House Consideration*, CONG. REC. (Jan. 11, 1973) (statement of Rep. Sullivan), *reprinted in* LEGISLATIVE HISTORY, at 193 (emphasis added).

CONCLUSION

The District Court properly held that plaintiffs have standing to bring this suit. The court erred in upholding the CITES and ESA permits on the grounds that they were non-commercial and for the propagation and survival of the species. This Court should reverse the judgment of the District Court, permanently enjoin FWS from issuing Asian elephant import permits to Wumba Amusement Park, and grant such further review as this Court deems just and equitable.

²¹ Although FWS regulations define "enhance the propagation or survival" to include "exhibition ... designed to educate the public about the ecological role and conservation needs of the affected species," this allowance is limited to only those activities that "would not be detrimental to the survival of wild ... populations." 50 C.F.R. § 17.3.