

Bennett v. Spear:

Did Congress Intend for the Endangered Species Act's Citizen-Suit Provision to be One Size Fits All?

by Brennan Cain

Introduction

In *Bennett v. Spear*,¹ the Supreme Court held that two ranchers and two irrigation districts have standing to bring a lawsuit against the United States Fish and Wildlife Service ("Service") under the citizen-suit provision of the Endangered Species Act (ESA).² At issue in *Bennett* was whether the broad language of the ESA's citizen-suit provision negated the "zone of interests" test for enforcement of the statute.³ The Supreme Court determined that Congress intended for the citizen-suit provision to allow any interested party, even industry, to allege that the Service violated the ESA. This decision marks the first time that the Court has permitted a party to assert solely an economic interest to directly challenge a biological opinion issued by the Service.⁴

Industry representatives and environmentalists have conflicting opinions regarding the importance of the *Bennett* decision.⁵ One industry representative stated that this decision was as significant as any in the past twenty-five years, including *Roe v. Wade*, and *Regents of University of California v. Bakke*.⁶ In contrast, an environmental attorney stated that the decision will have little impact on ESA implementation.⁷ However, there is one aspect to the decision that industry, environmentalists, and commentators agree upon: the big loser in the *Bennett* decision was the federal government.

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Prior to the Supreme Court's decision in *Bennett*, the federal government only had to fend off ESA citizen-suit actions brought by interests claiming underenforcement of the Act. These lawsuits were primarily brought by environmental organizations and individuals alleging that the government was not adequately protecting listed species. As a consequence of the *Bennett* decision, the government must now address legal claims brought by industry regarding overenforcement of the Act.

This Note will argue that the Supreme Court was correct in determining that the plaintiffs in *Bennett* satisfied the ESA's zone of interests test. Part I will introduce the ESA and discuss recent criticisms of the Act. Part II will discuss the creation of the zone of interests test and its evolution during the past fifty years. Part II will also discuss the state of the law prior to the Supreme Court's decision in *Bennett*. Part III will then present the facts, holding, and rationale of the *Bennett* decision. Part IV will analyze the decision and discuss its potential ramifications. Finally, this Note will argue that though industry deserves its day in court, the *Bennett* decision may stifle the Service's ability to effectively fulfill its mission under the ESA, which is to protect imperiled species.

I. The Endangered Species Act

A. A Brief Introduction to the Endangered Species Act

The Endangered Species Act has been described as the "pitbull" of environmental laws and the "most comprehensive legislation for the preservation of endangered species ever enacted...."⁹ After two previous endangered species laws proved ineffective, Congress enacted the ESA in 1973 to provide imperiled species with much stronger protection than the previous acts granted. Passed during the height of environmental consciousness,¹⁰ Congress stated that the ESA must put the preservation of species above all else. The ESA had overwhelming support in both the Senate and the House of Representatives.¹¹

Section 4 of the ESA requires the Service to publish a list of threatened and endangered species.¹² Once listed, a species receives special protection. For example, section 9 of the Act prohibits actions that "harm" a listed species.¹³ Recently, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,¹⁴ the Supreme Court held that "harm" includes habitat modification on private lands that could result in physical injury to a listed species.

Section 7 of the ESA also protects listed species. Section 7 states that any action authorized, funded, or carried out by a federal agency must ensure that any listed species are not "jeopardized" and that the species' critical habitats are not destroyed.¹⁵ To satisfy section 7, when an agency proposes a project, this "action agency," must consult with the Service. Procedurally, section 7 entails a three step process.¹⁶ Under step one, the action agency asks the Service if there are any listed species within the project area.¹⁷ If the Service indicates that there are listed species within the project area, then the action agency proceeds to step two.¹⁸ Step two requires the action agency to prepare a biological assessment to determine if any listed species is likely to be affected by the project.¹⁹ If the action agency concludes that a listed species is likely to be affected, step three is triggered.²⁰ Step three mandates formal consultations between the action agency and the Service. The Service then prepares a biological opinion that involves a "jeopardy" or "no jeopardy" determination for the listed species at issue.²¹

If the Service determines that a project jeopardizes an endangered species, the

biological opinion must also include "reasonable and prudent alternatives" to enable the project to go forward.²² The reasonable and prudent alternatives component includes both a stick and a carrot to motivate the action agency to comply with the Service's recommendations. The stick is that the action agency must comply with the reasonable and prudent alternatives to satisfy section 7.²³ The carrot is that if the agency complies with the reasonable and prudent alternatives, they receive an incidental take permit that allows them to harm listed species to a limited degree.²⁴

The vast majority of section 7 consultations between the action agencies and the Service result in no jeopardy determinations.²⁵ Of the few jeopardy determinations that the Service issues, the action agencies can usually incorporate the suggested alternatives without materially changing the project.²⁶ On occasion, the Service has issued jeopardy determinations and the action agencies have ignored the Service's reasonable and prudent alternatives.²⁷ Legally, the action agency is not required to comply with the Service's biological opinion. However, agencies that have ignored the jeopardy determinations have often done so at their own peril. The jeopardy opinions leave a "paper trail" that environmentalists have utilized to bring ESA citizen-suit lawsuits against action agencies that violate section 7.²⁸

B. Criticism of the Endangered Species Act

In recent years the ESA has come under increasing criticism for being insensitive to the needs of industry and private property owners.²⁹ Newspaper editorials claim that as a result of overzealous ESA listings and enforcement, jobs are becoming endangered.³⁰ From this perspective, the ESA is viewed as an excessively powerful tool in the hands of insensitive bureaucrats. The public saw the need to protect such charismatic species as the bald eagle, blue whale, and California Condor. However, recent Service decisions to list such species as the Delhi Sands flower-loving fly, coastal California gnatcatcher, and three species of fairy shrimp have received harsh criticism in press editorials.³¹

The Service's unpopular listings and their potential impact on industry and private property rights spurred Congress to pass an ESA moratorium in 1994. This moratorium prohibited the Service from listing any additional species as threatened or endangered.³² Although the moratorium was rescinded after one year, Congress' discontent with the Act still exists. For example, Senators and Representatives alike introduced a number of bills in 1995 to amend and emasculate the ESA.³³

However, congressional discontent with the ESA began long before these recent events; the Act has been amended numerous times. Industry lobbying for a weakened Act countered by environmental organizations lobbying for a stronger Act have led to a polarized Congress.³⁴ Although the Act was up for reauthorization in 1992, Congress was unable to get past this entrenched gridlock.³⁵

The ESA is controversial because there is a high cost to protecting species. One

of these expenses is for studies to determine if and why a particular species is imperiled. A second cost is for recovery plans to increase the population so the species can be removed from the endangered species list. A third "cost" is the restrictions placed on landowners' use of their private property. Although society as a whole, and arguably environmentalists in particular, benefit from species preservation, industry and private property owners feel that they are being forced to shoulder an inordinate amount of the financial burden.³⁶ Environmentalists, in contrast, view industry as being a large part of the problem, and feel that industry should be forced to contribute substantially to the solution.

In addition to the high cost of protecting imperiled species, the Act inflames emotional feelings. Environmentalists view the Act as the last bastion for imperiled species. If the Act does not adequately protect these species, they will disappear forever from the Earth. In contrast, industry and private property rights proponents see the government's actions as tyrannical and insensitive. This group believes that the ESA elevates the interests of species over the interests of people. The debate is vexing because each side has ample evidence to promote their point of view.

II. Background Regarding the Zone of Interests Test

A. Standing

For a party to be heard in court, that party must have standing to sue. Standing is defined as having sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.³⁷ Article III of the United States Constitution establishes the minimum case or controversy requirements for plaintiffs to have standing to bring a lawsuit.³⁸ To satisfy these case or controversy requirements, the plaintiff must demonstrate that she has suffered an "injury in fact," the injury must be "fairly traceable" to the defendant's actions, and the injury must likely be "redressed" by a favorable decision.³⁹ The Supreme Court thoroughly analyzed Article III standing in *Lujan v. Defenders of Wildlife*.⁴⁰ In *Lujan*, the Court held that Congress cannot grant standing to plaintiffs who fail to satisfy Article III's requirements.⁴¹

A plaintiff must also satisfy the "prudential" standing requirements to have standing to sue. Under prudential standing, the court decides whether a particular plaintiff is entitled to seek legal aid or to enforce a statute. However, unlike Article III standing, Congress can expand or restrict those who have prudential standing to sue.⁴² One method courts use to determine if a party may commence a legal action is the "zone of interests" test.⁴³

B. The Zone of Interests Test

The zone of interests test simply asks if the plaintiff is a member of a group that Congress sought to empower with judicial enforcement of a statute.⁴⁴ At a minimum,

the plaintiff's interests must be "marginally related to" the purposes of the act in issue.⁴⁵ The requirement of a connection between the plaintiff and the statute is to protect the defendant from having to devote its energies to lawsuits brought by citizens representing solely the broad interests of society.⁴⁶ These citizens can seek change through the legislative rather than the judicial process. Thus, the zone of interests test promotes the separation of powers.⁴⁷

The zone of interests test has been addressed most frequently in Administrative Procedure Act (APA) cases.⁴⁸ In these cases, plaintiffs allege that a federal agency has acted unlawfully.⁴⁹ Agency actions, because of their direct effect on some individuals and indirect effect on others, often impact different interest groups in different ways. To allow those who are slightly or tangentially impacted by an agency action to sue could force an agency to divert scarce resources to defending against trivial lawsuits.⁵⁰ Although the Supreme Court created the zone of interests test to adjudicate APA claims, lower courts have expanded the zone of interests test beyond APA lawsuits.⁵¹

C. Case Law Applying the Zone of Interests Test

1. Early Cases

Discussions of the zone of interests test focus on three cases decided after the Administrative Procedure Act's (APA) enactment in 1946. However, one decision prior to the APA's creation may be the origin of the zone of interests test. In *FCC v. Sanders Brothers Radio Station*,⁵² the Supreme Court did not use the phrase "zone of interests test." Instead, the Court utilized a functional equivalent of the test. In *Sanders*, plaintiff radio station challenged a decision by the Federal Communications Commission ("Commission") that had allowed a second radio station to broadcast in the plaintiff's town.⁵³ Plaintiff alleged that there was insufficient advertising revenue in the region to support two radio stations. The Communications Act⁵⁴ stated that a "person aggrieved" or whose interests were negatively impacted by the Commission could seek judicial review of the Commission's actions.⁵⁵ Thus, after the agency denied the request for a rehearing, the plaintiff sought judicial review. The court of appeals ruled that the plaintiff lacked standing to seek judicial review of the Commission's decision.⁵⁶

In reversing the appellate court, the Supreme Court concluded that injury to the plaintiff's economic interests was sufficient to confer it standing under the Communications Act.⁵⁷ The Court indicated that otherwise bad decisions by the Commission would go unchallenged, and the public as a whole would suffer. The Court noted that the section of the statute that addressed the appeal of Commission decisions included those who could be financially injured by the issuance of a radio license to another. Specifically, the language quoted by the Court in *Sanders* noted that the Communications Act provided for an appeal by *any* applicant for a license or permit, or by *any* other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.⁵⁸

Congress passed the APA⁵⁹ in 1946, six years after the Supreme Court decided

Sanders. The APA provides a procedural framework for federal agencies to follow while performing their mandated duties.⁶⁰ The APA also describes those individuals who have a right to review agency actions. Specifically, APA section 702 states that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."⁶¹ This language is similar to the applicable language from the *Sanders* decision. The majority of plaintiffs who bring lawsuits contesting agency action rely on APA section 702 for standing. Like the Communications Act, the APA does not expressly use the term "zone of interest."

Despite the language in *Sanders*, most commentators cite *Association of Data Processing Organizations, Inc. v. Camp*⁶² as the first case to articulate the zone of interests test.⁶³ In *Data Processing*, the plaintiffs brought an action under the APA against the Comptroller of the Currency Secretary.⁶⁴ The Comptroller oversaw banks, and decided to allow banks to expand into data processing in 1964.⁶⁵ The plaintiffs alleged that the Comptroller's decision violated the Bank Service Corporation Act of 1962,⁶⁶ which limited the services that banks could provide.⁶⁷

The trial court determined that the plaintiffs lacked standing, and the court of appeals affirmed.⁶⁸ In reversing the lower courts' holdings and remanding for a hearing on the merits, the Supreme Court articulated the two-pronged zone of interests test.⁶⁹ Step one of the test was to determine if the plaintiff suffered any injury in fact. The Court stated that harm to an economic interest could satisfy this "injury" requirement.⁷⁰ The Court also commented that harm to aesthetic, conservational, and recreational interests could also satisfy step one's injury requirement.⁷¹ If step one was satisfied, step two analyzed whether the injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statute or constitutional guarantee in question.⁷² In dicta, the Court noted that the judicial trend was toward enlarging the class of people who could protest an administrative action.⁷³

In 1987, the Supreme Court revisited the zone of interests test in *Clarke v. Securities Industries Association*.⁷⁴ *Clarke* arose after the Comptroller decided that bank discount brokerage offices were not "branches" within the meaning of the McFadden Act.⁷⁵ The Comptroller's decision thus allowed large banks to compete with the securities industry. The plaintiffs, representatives of the securities industry, alleged a competitive injury because of the Comptroller's decision.⁷⁶ The trial court held that the plaintiffs satisfied the zone of interests test.⁷⁷ A divided panel of the court of appeals affirmed.⁷⁸ The Comptroller then sought review from the Supreme Court, which affirmed that plaintiffs had standing, but reversed the case on the merits.⁷⁹

In *Clarke*, the Supreme Court indicated that the zone of interests test was designed to determine if Congress intended for a particular plaintiff to have standing to bring a legal action. The Court noted that any indicator of Congress' intent, such as legislative history, must be weighed to determine whether plaintiff was entitled standing.⁸⁰ The Court noted that both the specific statutory provision and the overall context of the act must be taken into account.⁸¹ Further, the Court stated that if a plaintiff not

directly subject to regulatory action seeks to challenge that action, her interests must be more than “marginally related to” the statute and cannot be “inconsistent with” the statute’s purposes.⁸² However, the Court noted that the zone of interests test was “not meant to be particularly demanding.”⁸³ In footnote 16, the Court indicated its reluctance to apply the zone of interests test outside the APA.⁸⁴

The *Sanders*, *Data Processing*, and *Clarke* decisions appear to be consistent. In all three of the cases, the plaintiffs alleged an economic injury due to the government’s actions. Also, all three of the cases found that the plaintiffs had established that they were entitled to standing. Although the cases stated that the plaintiffs were required to allege a particularized injury and interest in the issue before the court, the Supreme Court indicated that the burden on the plaintiff was low. Thus, before the *Bennett* decision, the Supreme Court’s stance was that the plaintiff’s burden under the zone of interests test was not demanding.

2. Circuit Split

Prior to *Bennett*, the federal appellate courts were divided as to whether the zone of interests test applied to lawsuits brought outside the APA. This split arose as lower courts struggled to interpret footnote 16 in the *Clarke* decision.⁸⁵ Footnote 16 discussed the inapplicability of the zone of interests test outside the APA framework. Specifically, the Court noted that the zone of interests test “is not a test of universal application.”⁸⁶ Some courts interpreted this statement to mean that they should not apply the test outside the APA.⁸⁷ Other courts interpreted this statement to mean that they were to determine which plaintiffs satisfied the zone of interests test by focusing on the language of the statute in issue.

The District of Columbia Circuit (“D.C. Circuit”), which reviews more agency actions than any other circuit,⁸⁸ interpreted footnote 16 to permit the use of the zone of interests test outside APA actions. The most recent case in which the D.C. Circuit affirmed this approach was *Idaho Public Utility Commission v. ICC*.⁸⁹ In that case, the court acknowledged that the determination of whether the state had prudential standing was a difficult question.⁹⁰ The court concluded that the state satisfied the zone of interests test because it had a property interest in the land in issue and was advocating for wildlife protection.⁹¹

Conversely, the Eighth Circuit determined that the zone of interests test does not apply outside of APA lawsuits in *Defenders of Wildlife v. Hodel*.⁹² In *Defenders*, environmental organizations challenged a Service regulation that exempted federal agencies from complying with ESA section 7 requirements.⁹³ The plaintiffs alleged both APA and ESA violations. The court held that the plaintiffs satisfied the zone of interests test for their APA claim, and thus had standing to bring the action against the federal government.⁹⁴ The court also determined that the plaintiffs had standing for their ESA claim. However, the court indicated that for an ESA action, the zone of interests test did not apply.⁹⁵ Thus, the stage had been set for the Supreme Court to resolve this contentious issue.

III. The Case

In *Bennett v. Spear*, two ranchers and two irrigation districts claimed that the Service violated the ESA and APA by issuing a biological opinion that lacked scientific merit.⁹⁶ The Service had issued the biological opinion in response to an ESA section 7 request by the United States Bureau of Reclamation ("Bureau") regarding the implementation of the Klamath Basin Project.⁹⁷ The Klamath Basin Project is a series of

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lakes, rivers, reservoirs, and canals that has been used to channel water for irrigation in northern California and southern Oregon. In the biological opinion, the Service concluded that the Bureau's water allocation scheme was likely to jeopardize the existence of two endangered fish species, the Lost River sucker and the shortnose sucker.⁹⁸ Thus, the Service's biological opinion included a jeopardy determination.

The Service provided the Bureau with reasonable and prudent alternatives in the biological opinion to maintain the suckers' populations.⁹⁹ One of these alternatives was for the Bureau to maintain

minimum levels of water in the Clear Lake and Gerber reservoirs.¹⁰⁰ The Bureau stated that it would comply with the Service's recommendations.¹⁰¹

The plaintiffs brought legal action against the Director and Regional Director of the Service, and Bruce Babbitt, the Secretary of the Interior.¹⁰² The plaintiffs sought declaratory and injunctive relief to compel the government to withdraw certain components of the biological opinion.¹⁰³ The lawsuit alleged three causes of action. First, the plaintiffs claimed that the Service violated ESA section 7 by issuing a biological opinion that did not use scientifically reliable information.¹⁰⁴ Second, the plaintiffs claimed that the Service's "recommendation" that the Bureau impose minimum water levels also violated section 7.¹⁰⁵ Finally, the plaintiffs alleged that the Service's imposition of minimum water levels was an "implicit designation" of critical habitat, which violated section 4 of the Act.¹⁰⁶ Each cause of action included both an ESA and an APA claim.¹⁰⁷ For the APA claims, the plaintiffs claimed that the Service's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁰⁸

The essence of the plaintiffs claims was that the Service's decision was not based on the best available science, as required by the Act. The plaintiffs claimed that the Service's biological opinion improperly concluded that maintaining minimum water levels was necessary to protect the endangered fish. The ranchers claimed that because of the Service's biological opinion, the Bureau was not supplying the ranchers with water. Consequently, the ranchers alleged an economic loss because of their in-

ability to water the crops. Thus, the plaintiffs claimed a “competing interest” for the water.¹⁰⁹

The district court dismissed the suit for lack of jurisdiction, finding that the plaintiffs failed the zone of interests test, and thus lacked standing to bring their claim.¹¹⁰ The Ninth Circuit affirmed, holding that the zone of interests test limits those who may obtain judicial review under both the APA and ESA.¹¹¹ The Ninth Circuit also held that only plaintiffs who allege an interest in preserving an endangered species fall within the ESA’s zone of interests.¹¹² The plaintiffs appealed the Ninth Circuit’s holding and the Supreme Court granted certiorari. Interestingly, during arguments in front of the Supreme Court, the federal government did not defend the Ninth Circuit’s interpretation of the zone of interests test.¹¹³ Instead, the government argued that the petitioners lacked Article III standing.¹¹⁴

The Supreme Court unanimously rejected both the Ninth Circuit’s holding and the federal government’s claim that petitioners lacked Article III standing.¹¹⁵ Instead, the Court held that the ESA’s citizen-suit provision expanded the zone of interests test to include plaintiffs with a competing economic interest to a listed species.¹¹⁶ The rationale behind Justice Scalia’s opinion is that the plain meaning of the ESA’s citizen-suit provision is clear. This provision states that “*any person* may commence a civil suit” against the government for a violation of the Act.¹¹⁷ By using the phrase “any person,” Congress did not intend for courts to permit environmentalists to be able to challenge an agency action, yet simultaneously deny industry the opportunity to make the same argument. Relying on the language in the *Data Processing* decision, the Court found that the *Bennett* petitioners’ interest was within the interest sought to be protected or regulated by the statute at issue. The Court noted that the overall subject matter of the ESA was the environment, “a matter in which it is common to think that all persons have an interest.”¹¹⁸

IV. Analysis

A. Was Bennett Properly Decided?

The Supreme Court properly decided that the citizen-suit provision of the ESA expanded the zone of interests test to include individuals such as the petitioners in *Bennett*. The zone of interests test was designed to enable the courts to hypothesize if Congress intended for a particular plaintiff to be heard in court. The expansive wording in the ESA’s citizen-suit provision indicates that Congress wanted an array of individuals to be permitted to file a lawsuit regarding ESA enforcement. Additionally, allowing environmentalists to claim that there is ESA underenforcement, while denying industry the opportunity to claim that there is overenforcement, conflicts with the basic tenets of the United States’ adversarial legal system.

The separation of powers doctrine, a basic tenet of our legal system, and precepts of statutory construction both confirm that the Supreme Court decided *Bennett* correctly. It is the role of the legislative branch to make laws. In interpreting the laws,

the judiciary's role is to first look at the plain meaning of the statute's words. If the words are unambiguous, the court is required to effectuate the meaning of those words.¹¹⁹ Currently, the ESA states that "any person" can commence a lawsuit to enforce the Act. If Congress truly intends for only environmentalists to have standing under this citizen-suit provision, they can amend the Act to state that only those who promote an environmental interest have standing to enforce the Act.¹²⁰ Congress has already amended numerous statutes to either restrict or expand those individuals who have standing requirement to bring a lawsuit. In the citizen-suit provision of the ESA, it appears that Congress intended for a broad array of individuals to have standing to sue to enforce the Act. Absent a congressional pronouncement that only those advocating for increased species protection can sue to enforce the Act, the courts should not restrict the citizen-suit provision's expansive language.

Absent a congressional pronouncement that only those advocating for increased species protection can sue to enforce the Act, the courts should not restrict the citizen-suit provision's expansive language.

In contrast to the Supreme Court, which focused on the language of the Act's citizen-suit provision to determine that plaintiffs had standing, the Ninth Circuit relied on the wording of the 1973 Endangered Species Act to determine that the *Bennett* plaintiffs lacked standing. The Ninth Circuit noted that the preamble to the ESA and numerous sections within the 1973 Act made it clear that Congress felt that species protection was of paramount importance. For example, Congress stated that each federal agency shall use "all methods and procedures that are necessary" to bring imperiled species populations to the point where they can be removed from the endangered species list.¹²¹ Congress arguably intended to protect imperiled species, regardless of the cost, when it enacted the ESA.

The Ninth Circuit also relied on the Supreme Court's language in *Tennessee Valley Authority v. Hill*¹²² to reach its holding in *Bennett*. In 1978, the Supreme Court determined that the goal of the Act was "to halt and reverse the trend toward species extinction, whatever the cost"¹²³ in its seminal *Hill* decision.¹²⁴ In *TVA v. Hill*, environmental groups and others brought an ESA action to enjoin the TVA from completing a dam and impounding water. The plaintiffs claimed that dam operation would eradicate the endangered snail darter, which was thought to exist solely in the Little Tennessee River. The TVA claimed that the dam was over 80 % completed¹²⁵ at a cost of over \$110,000,000.¹²⁶ The district court refused a permanent injunction¹²⁷ and the court of appeals reversed.¹²⁸

In affirming the court of appeal's decision, the Supreme Court relied on specific language from the ESA to hold that the Act prohibited the completion of the dam. The Court noted that Congress intended for endangered species "to be afforded the highest

of priorities.¹²⁹ The Court further noted that the priority of species protection over other concerns was “not only in the stated policies of the Act, but in literally every section of the statute.”¹³⁰ Thus, in the 1970’s at least, it was clear that Congress intended to provide species with protection above other concerns. The question that arises is whether the numerous amendments to the Act have changed the amount of protection that Congress has bestowed on species.

Although amendments to the Act specify that in some circumstances the Secretary is to take economics into account, it is apparent that the section 7 consultation process cannot. After the 1973 Act, industry interests vigorously attacked the section 7 consultation process.¹³¹ Industry spokespersons claimed that they should be given the opportunity to “pit the value of protecting a species against the cost of stopping development.”¹³² Congress rejected these arguments and refused to amend this section of the Act. Thus, it appears that those claiming competing economic interests are not the intended beneficiaries of the statute.

However, amendments to other sections of the Act have illustrated Congress’ willingness to allow some economic costs to be considered. These amendments illustrate Congress’ desire to protect industry and private property concerns.¹³³ For example, Congress determined that the Secretary of the Interior should take economics into account when designating “critical habitat”¹³⁴ for a listed species. Critical habitat consists of specific geographic areas that contain the essential physical or biological features that a particular species needs to survive.¹³⁵ To protect the species in issue, land use on critical habitat may be restricted. For example, a conceivable land use restriction on black-footed ferret critical habitat would be to ban the use of pesticides to kill prairie dogs, the ferrets’ primary food source. By directing the Secretary to take economics into account when deciding whether to designate critical habitat, this amendment illustrates that Congress retreated from the “protect species at all costs” mentality of the 1973 Act.

The Ninth Circuit’s holding that the *Bennett* plaintiffs failed the zone of interests test contained some merit. The court determined that the plaintiffs satisfied step one of the zone of interests test because the ranchers had suffered an economic injury due to the Service’s biological opinion. However, the court determined that the plaintiffs failed step two because their injury fell outside the zone of interests to be protected or regulated by the ESA. Because their interest in challenging the Service’s biological opinion was not to “further the protection” of any listed species, the *Bennett* petitioners were not protected by the Act. In fact, the ranchers were direct competitors with the listed fish for the water at issue. The ranchers never claimed that the Service’s actions would harm the suckers or any other listed species in the Klamath Basin. Instead, the petitioners challenged the Service’s action because of the economic damage that they would suffer. As Chief Justice Burger announced in *TVA v. Hill*, the ESA provides for species protection, regardless of the cost.¹³⁶

Similarly, the Ninth Circuit determined that the ranchers were not regulated by the Act. Instead, the Service’s section 7 biological opinion regulated only the Bureau of

Reclamation. Because the decision to deny the ranchers water was made solely by the Bureau, the Service was not "regulating" the ranchers.

The Ninth Circuit considered the ESA's citizen-suit provision within the overall context of the Act. Because the overall focus of the ESA is preservation of imperiled species, the Ninth Circuit determined that the petitioners were not within the statute's zone of interests. The Ninth Circuit relied on a number of cases that supported this proposition.¹³⁷ For example, in *Dan Caputo Co. v. Russian River County Sanitation*,¹³⁸ the court denied standing to a plaintiff who claimed the defendant violated the Clean Water Act. The court determined that the plaintiff failed the zone of interests test because the alleged injury did not arise from an interest in the environment and the company did not seek to vindicate environmental concerns. From the Ninth Circuit's perspective, because the *Bennett* petitioners were seeking to restrict enforcement of the ESA, they also fell outside the statute's zone of interests.

B. The Supreme Court's Rationale in *Bennett*

The Supreme Court disagreed with the Ninth Circuit's argument that the zone of interests test looks at the overall purpose of the statute at issue. Instead, the Court concluded that whether a plaintiff's interest satisfies the zone of interests test is determined by reference to the specific statutory section at issue.¹³⁹ For example, the Court noted that in *Data Processing*, the plaintiffs were not required to vindicate the overall purposes of the Bank Service Corporation Act of 1962.¹⁴⁰ Rather, the plaintiffs satisfied the zone of interests test by establishing that they fell within the protection of the statute's anti-competition provision. The Court further reiterated its statement from the *Lujan v. National Wildlife Federation*¹⁴¹ decision that the plaintiff must merely demonstrate that her injury "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis of the complaint."¹⁴²

The *Bennett* Court noted that Congress can expand or restrict those individuals who satisfy the zone of interests test. Thus, Congress has discretion in determining who has prudential standing to contest an agency's administration of a statute.¹⁴³ Although the APA's review provisions have been characterized as "generous," other statutes' review provisions can be less broad. For example, the Court noted Congress limited standing to "any person suffering legal wrong" in the Energy Supply and Environmental Coordination Act of 1974.¹⁴⁴ Congress' declaration that "any person" can allege an ESA violation convinced the court that Congress sought to expand, not restrict, those with standing to sue.

Further, the Supreme Court rejected the Ninth Circuit's contention that the ranchers were not regulated by the Act. The Court looked at the practical outcome of the Service's jeopardy determination. Because the Service's reasonable and prudent alternatives forced the Bureau to restrict water, the ranchers were clearly regulated by the Act.¹⁴⁵ Once the Bureau decided to restrict water allocations, the ranchers' economic interests were "harmed" by the Act.

The Supreme Court's decision in *Bennett* was consistent with previous zone of interests jurisprudence. First, previous Court decisions stated that the zone of interests test was to be a relatively minor hurdle for plaintiffs. Second, the Supreme Court has consistently granted standing to plaintiffs in zone of interest cases. Third, the *Bennett* decision comports with the Eighth Circuit's interpretation of the zone of interests test.¹⁴⁶

C. Policy Arguments For and Against *Bennett*

Numerous policy reasons support the Supreme Court's conclusion that industry should be able to challenge a biological opinion. First, businesses have capital that they can utilize to make sure that the Service's biological conclusions are not scientifically flawed.¹⁴⁷ These industry-funded studies can serve as a quality control check on Service actions. Second, businesses can be reliable private attorneys general against cheating competitors; a noted shortcoming of the ESA is that there has been insufficient funding to monitor compliance. Third, there is a growing recognition of the need to harmonize environmental and economic concerns regarding implementation of the Act. Allowing industry to express its concerns with a Service determination may lead to more cooperation between the Service and industry. This cooperation may result in increased species protection with less negative impact on industry projects.

At the same time, numerous policy reasons support the denial of industry citizen-suit standing under the ESA. Congress knew that the Service had insufficient resources to fulfill the ESA's enforcement obligations. The citizen-suit provision was added to enable "private attorneys general" to assist the Service in enforcing the Act's requirements. But industry plaintiffs, such as the ranchers in *Bennett*, frustrate this purpose by seeking to prevent enforcement of the Act. Instead of furthering the statute's purpose of protecting species, industry lawsuits require the Service to use scarce resources to defend its actions.

The relationship between industry and the ESA is different than the relationship between industry and the statutes at issue in *Sanders*, *Association of Data Processors*, and *Clarke*. For example, in *Sanders*, Congress thought that those with economic interests in FCC decisions would be competent private attorneys general. These individuals would ensure that the FCC decisions made financial sense. In contrast, the ESA does not focus on making financial sense. Instead, Congress stated in the ESA that species preservation was of utmost importance. For example, listing decisions and biological opinions are supposed to be based solely on the best scientific information available; the Service may not take economics into account. Thus, those who fall within the Communication Act's zone of interest would include parties suffering potential economic damage, while the ESA listing process would deny standing to parties with mere economic interests.

V. Significance of the Case

A. Impact of the Decision on Service Section 7 Consultations

Those commenting on the *Bennett* decision have differing opinions regarding the significance of the case. Industry and private property owners, generally speaking, are ecstatic with the decision because it grants them the opportunity to be heard in court. Environmentalists, in contrast, do not think the case will significantly impact ESA decisions. Environmental interests have had standing since the 1973 Act and are aware of the many hurdles that a plaintiff must overcome to win a lawsuit against the federal government. For example, in instances when judicial review is permitted for an agency action, the level of judicial review is the arbitrary or capricious standard.¹⁴⁸ Under this standard of review, courts are deferential to the decision made by the agency at issue. In the overwhelming majority of lawsuits challenging agency action, the court has ruled in the agency's favor. Thus, from the environmentalist perspective, the *Bennett* decision will not significantly impact the implementation of the ESA.

Representatives of the federal government have made few public comments about *Bennett's* potential impact on ESA enforcement. The Department of the Interior's Solicitor, John Leshy, predicted that *Bennett* would not significantly affect the Service's administration of the ESA.¹⁴⁹

Clearly, however, this decision will put additional pressure on the Service to make sure their section 7 biological opinions are scientifically defensible. Currently, the overall scientific defensibility of the Service's biological opinions is unknown because there has been little scientific peer review for a number of Service determinations. However, the Service's biological opinion in *Bennett* appears to have been valid. The Lost River and shortnose suckers' populations were low and have continued to decline,¹⁵⁰ which contradicts the petitioners' claims that the populations were stable and increasing.

Although the *Bennett* decision may increase the amount of time and effort that the Service puts into section 7 consultations, such increased diligence is desirable. In section 7 consultations where the Service's recommendations require the action agency to negatively impact industry or private party interests, the Service needs to be able to back its decision with scientifically defensible data. If the Service's data is valid, they will win cases on the merits. In past cases, environmentalists have brought actions alleging section 7 violations where both the Service and environmentalists had scientifically defensible, yet contradictory data.¹⁵¹ In those instances, the courts deferred to the Service's judgment. However, if the Service's data is scientifically invalid, industry has as much of a right as environmentalists to challenge the conclusions reached in the Service's biological opinion.

Any discussion of the Service's ESA enforcement necessarily focuses on the insufficient funds that Congress provides the Service to complete its mission of species

protection.¹⁵² Scientific studies can be expensive as well as time consuming. It is particularly costly and difficult to study endangered species because of their scarcity.¹⁵³ If the Service's actions were to be analyzed under a microscope, the Service may become less willing to undertake these studies to protect species.

Further, the Service may be tempted to consider other variables rather than science in issuing their biological opinions. The Service may be unwilling to rely solely on science in those instances where its actions may be challenged in court.¹⁵⁴ Lawsuits not only divert scarce resources from fulfilling mandated actions, they also thrust scientific decisions into the public spotlight. Thus, if the Service was asked to perform a biological opinion for a project run by a litigious timber company, the Service might go out of its way to avoid issuing a jeopardy opinion out of fear of a lawsuit. In contrast, if an agency requested a section 7 consultation for a less powerful project proponent, the Service may be more willing to issue a biological opinion requiring adequate protection of a listed species. Thus, by allowing industry to challenge the Service's biological opinions, the Service may cease basing their decisions on the best available science. Instead, the Service's conclusions would be based on the litigiousness of the project proponent.

However, the Court has consistently indicated that the [zone of interests] test was not meant to be demanding.

B. The Future of the Zone of Interests Test

The *Bennett* decision, while clearly abolishing the zone of interests test in ESA cases, may also foreshadow the complete demise of the test. The zone of interests test has never worked well.¹⁵⁵ Lower courts have rarely mentioned the test when addressing whether or not a particular plaintiff had standing to sue.¹⁵⁶ Courts that do rely on the zone of interests test have used it in a conclusory manner.¹⁵⁷ In *Bennett*, the Supreme Court provided the lower courts with little guidance on how the zone of interests test should be used to discern which plaintiffs satisfy this prudential standing requirement. Justice Scalia, the author of the opinion, did not thoroughly discuss the two steps of the test.¹⁵⁸

The impact of the *Bennett* decision may be limited by the procedural posture of the case. The trial court decided *Bennett* on a motion to dismiss.¹⁵⁹ Thus, no court reached the merits of the case. Often when lawsuits are brought against federal agencies, the plaintiff loses without the court ever reaching the merits of the case. Congress has provided the federal government with numerous procedural protections against lawsuits, such as requiring plaintiffs to file a sixty day notice of intent to sue before filing a lawsuit against the government.¹⁶⁰ Similarly, there are often very short statutes of limitations to bringing a lawsuit against the federal government. These procedural advantages often allow the Service to completely escape meritorious claims brought against it. In *Bennett*, however, the government may have to address the merits of the

case. If so, it is likely that the Service will win; in analyzing biological opinions, courts have given great deference to the Service's determinations.¹⁶¹

Even if the ranchers win on the merits, the only remedy that they would receive is for the Service to redo its biological opinion. Thus, even in circumstances where the Service uses bad data or makes a decision without essential data, the best that industry can hope for is to have the court require the Service to revisit its biological opinion. Industry's enthusiasm for the *Bennett* decision may soon be dampened as litigation with the federal government grinds through the judicial system.

Conclusion

In *Bennett v. Spear*, the Supreme Court reached the correct conclusion that ranchers and irrigation districts have standing to sue the federal government for violating the ESA. The biological opinion issued by the Service clearly injured the ranchers. Because of the Service's jeopardy determination, the Bureau refused to provide the ranchers with water.

The Court created the zone of interests test to deny standing to those plaintiffs whose interests are tangentially related to a statute's purposes. The Supreme Court has only addressed this zone of interests test a few times, and until *Bennett*, the Court had never addressed the test outside an APA claim. However, the Court has consistently indicated that the test was not meant to be demanding.

The ESA has received a substantial amount of criticism in recent years for being insensitive to the needs of industry and private property rights. In the past nine years, Congress has failed to amend the Act to address these criticisms. The Ninth Circuit interpreted the zone of interests test in a manner to enforce the idealism inherent in the Endangered Species Act of 1973. In contrast, the Supreme Court interpreted the citizen-suit provision of the Act according to the plain meaning of the section's language. According to the Supreme Court, "any person" means "any person."

Neither environmentalists nor the federal government has voiced displeasure at the Supreme Court's unanimous ruling. Instead, both groups predict that the decision will not significantly impact ESA implementation. Environmentalists have been banging their heads against the wall of the government's procedural obstacles regarding the ESA for close to twenty-five years. Perhaps they are looking forward to industry experiencing the same headache.

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Notes

1 See 117 S. Ct. 1154 (1997).

2 See Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, (codified as amended at 16 U.S.C. §§ 1531-44 (1994)).

3 See 117 S. Ct. at 1162.

4 See Joan Biskupic & Joby Warrick, *Court Rules Landowners Can Use Endangered Species Act to Fight Protections*, WASH. POST, Mar. 20, 1997, at A11.

5 See *Endangered Species: Industry Pleased with Court Ruling; Government, Environment Groups Nonchalant*, Daily Env't Rpt. (BNA), Mar 21, 1997

6 See *id.*; see also Marianne Lavelle, *Businesses Gain Ground on Standing*, NAT'L L.J., Apr. 7, 1997, at B1 (stating decision will grant standing for utility company snowmobilers and others).

7 See Lavelle, *supra* note 6, at B1.

8 See Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371, 371 (1996).

9 See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978); see also Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1,2 (1996).

10 See Kevin D. Hill, *The Endangered Species Act: What Do We Mean by Species?*, 20 B.C. ENVTL AFF. L. REV. 239, 240 (1993).

11 The Senate unanimously passed the ESA; the House passed the ESA with only four dissenting votes. See 119 CONG. RCD. 25694, 42915 (1973).

12 See 16 U.S.C. § 1533 (1994). The National Marine Fisheries Service (NMFS) is the federal agency in charge of enforcing the Act with regard to anadromous fish. NMFS is under the authority of the Secretary of Commerce.

13 See 16 U.S.C. §1538.

14 See 115 S. Ct. 2407 (1995).

15 See 16 U.S.C. §1536 (a)(2) (1994); see also 50 C.F.R. § 402.02 (1996).

16 For a discussion of the three step process, see Cheever, *supra* note 9, at 17-18.

17 See 16 U.S.C. § 1536 (c)(1) (1994); see also 50 C.F.R. § 402.10 (1996).

18 See 16 U.S.C. § 1536 (c)(1) (1994); 50 C.F.R. § 402.10-16 (1996).

19 See 16 U.S.C. § 1536 (c)(1) (1994); 50 C.F.R. § 402.12 (1996).

20 See 50 C.F.R. § 402.12 (1996).

21 See 50 C.F.R. § 402.14 (1996). For an in-depth discussion of the Service's use and the impact of jeopardy determinations, see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 315-29 (1993).

22 See 16 U.S.C. § 1536 (b)(3)(A) (1994); 50 C.F.R. § 402.14 (1996).

23 See 50 C.F.R. § 402.14 (1996).

24 The Incidental Take Statement specifies the terms and conditions under which an agency may take a listed species. See 16 U.S.C. § 1536(b)(4) (1994); see also 50 C.F.R. § 402.02 (1996).

25 See Jon W. Steiger, *The Consultation Provision of Section 7(A)(2) of the Endangered Species Act and Its Application to Delegable Federal Programs*, 21 ECOLOGY L.Q. 243, 259 (1994) (discussing studies finding few jeopardy opinions); see also World Wildlife Fund, *For Conserving Listed Species, Talk is Cheaper Than We Think: The Consultation Process Under the Endangered Species Act* iii (1992) (stating that less than 1 % of § 7 formal consultations in five year period resulted in terminating project).

26 See General Accounting Office, *Endangered Species Act: Types and Number of Implementing Actions* 30-32 (1992) (reporting that of 181 jeopardy opinions, 158 provided alternatives that enabled the project to go forward).

27 See e.g., *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987).

28 See Larry J. Bradfish, *Recent Developments in Listing Decisions Under the Endangered Species Act and Their Impact on Salmonids in the Northwest*, 3 HASTINGS W. NW. J. ENVTL. L. & POL'Y 77, 85 (1995); see also *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); Monica Reimer, *Competitive Standing as a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109, 145 (1995) (quoting H.R. REP. NO. 96-1625 at 12 (1978)).

29 See *Keep Act Endangered*, ATL. J. AND CONST., May 3, 1996, at A14; Richard Pombo, *Is the Endangered Species Act a Failure? Yes*, PRESS ENTERPRISE, at A15 (1996).

30 See *Endangered Humans*, WASH. TIMES, Mar. 21, 1997, at A20.

31 See James Coburn, *Contractors Told Species Act Takes Away Jobs*, SAN ANTONIO EXPRESS NEWS, Mar. 3, 1996.

32 See Ken Miller, *Interior Resuscitates Endangered Species List*, IDAHO STATESMAN, May 11, 1996.

33 See J.B. Ruhl, *Section 7(a)(1) of the 'New' Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1153-60 (1996) (analyzing five ESA bills introduced during the 104th Congress).

34 See Nancy Kabasasek, M. Neil Browne & Robyn Mohn-Klee, *The Endangered Species Act: Time for a New Approach?*, 24 ENVTL. L. 329, 329 (1994); see also Margaret Kriz, *The Showdown Over Endangered Species*, 27 NAT'L J., Sept. 16, 1995, at 2315.

35 Appropriations to implement the ESA have been authorized only through 1992. See 16 U.S.C. §1542; see also William J. Steele, Jr., *Major Issues in Reauthorization of the Endangered Species Act*, 24 ENVTL. L. 321, 328 (1994).

36 See Ted Williams, *Defense of the Realm*, SIERRA, Jan. 11, 1996 at 34.

37 See BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

38 See U.S. CONST. art. III.

39 See 117 S. Ct. 1154 (quoting *Lujan v. Defenders of Wildlife*).

40 See 504 U.S. 555 (1992).

41 See *id.* at 576-78.

42 See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

43 See *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). For discussions of the zone of interests test, see Reimer, *supra* note 28, at 124; John C. Yang, *Standing... In the Doorway of Justice*, 59 GEO. WASH. L. REV. 1356, 1362 (1991); Sanford A. Church, *A Defense of the 'Zone of Interests' Standing Test*, DUKE L.J. 447, 448 (1983).

44 See *Clarke v. Securities Industries Association*, 479 U.S. 388 (1987). These individuals are known as private attorneys general.

45 See 479 U.S., at 399.

46 See Rachel H. Blumenfeld, *Administrative Law—Clarke v. Securities Industry Association: Standing and the Zone of Interest Inquiry Under the Administrative Procedure Act*, 18 MEM. ST. U. L. REV. 310, 323 (1988).

47 The legislative branch is empowered to make laws, the executive branch is required to carry out laws, and the judicial branch is charged with interpreting the laws and adjudicating disputes under the laws. See BLACK'S LAW DICTIONARY 1365 (6th ed. 1990).

48 See Blumenfeld, *supra* note 46, at 318-19.

49 See Reimer, *supra* note 28, at 121.

50 See Blumenfeld, *supra* note 46, at 323.

51 See Yang, *supra* note 43, at 1364-65.

52 See 309 U.S. 470 (1940).

53 See *id.* at 470-71.

54 See The Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

55 See 309 U.S. at 476.

56 See 106 F.2d 321, 323 (D.C. Cir. 1939).

57 See *id.* at 477.

58 See *id.* at 476-77. The Court summarized § 402(b) of the Act as follows: "Section 402(b) of the Act provides for an appeal to the Court of Appeals of the District of Columbia (1) by any applicant for a license or permit, or (2) by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

59 See 60 Stat. 237 (1946), 5 U.S.C. §§ 551-59.

60 See DANIEL J. GIFFORD, ADMINISTRATIVE LAW CASES AND MATERIALS 3 (1992).

61 In part, § 702 states that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

62 See 397 U.S. 150 (1970).

63 See, e.g., Blumenfeld, *supra* note 46, at 315; Church, *supra* note 43, at 450.

64 See 279 F. Supp. 675 (D. Minn. 1968).

65 See *id.* at 676-77.

66 See Pub. L. No. 87-856, 76 Stat. 1132 (codified at 12 U.S.C. § 1864) (amended 1982).

67 Specifically, § 4 of the Bank Service Corporation Act of 1962 states, "No Bank service corporation may engage in any activity other than the performance of bank services for banks."

68 See 397 U.S. 150, 151 (1970).

69 See *id.* at 152-53.

70 See *id.* at 154. The majority opinion noted that harm to noneconomic interests, such as "aesthetic, conservational, and recreational" values could also satisfy the injury requirement.

71 See *id.*

72 See *id.* at 153.

73 See *id.* at 154.

74 See 479 U.S. 388 (1987).

75 See McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified as amended in scattered sections of 12 U.S.C.).

76 See 479 U.S. at 403.

77 See *id.* at 393.

78 See 758 F.2d 739 (D.C. Cir. 1985).

79 See 479 U.S. at 409.

80 See *id.* at 400

81 See *id.* at 401.

82 *See id.* at 399.

83 *See id.*

84 *See id.* at 400, n.16.

85 *See Bennett v. Plenert*, 63 F.3d 915, 917 (9th Cir. 1995).

86 *See Clarke*, 479 U.S. at 400, n.16.

87 *See* 851 F.2d 1035, 1039 (8th Cir.1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990) *rev'd on other grounds sub nom.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

88 *See Yang, supra* note 43, at 1368.

89 *See* 35 F.3d 585, 592 (D.C. Cir. 1994).

90 *See id.* at 592.

91 *See id.*

92 *See Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir.1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990) *rev'd on other grounds sub nom.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

93 *See* 851 F.2d at 1036.

94 *See id.* Section 702 of the APA allows individuals adversely affected by an agency action to seek judicial review. *See* 5 U.S.C. § 702 (1994).

95 *See id.* at 1039.

96 *See* 117 S. Ct. 1154, 1159 (1997).

97 *See id.*

98 The shortnose sucker and Lost River sucker were placed on the endangered species list in 1988. *See* Determination of Endangered Status for the Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27130, 27130 (1988). In response to a lawsuit, the Service proposed critical habitat for the fish. *See* Proposed Determination of Critical Habitat for Lost River Sucker and Shortnose Sucker, 59 Fed. Reg. 61744 (1994). A final rule designating critical habitat has not been issued.

99 *See* 117 S. Ct. at 1159.

100 *See id.*

101 *See id.*

102 Surprisingly, no action was brought against the Bureau, the actual agency that denied the transport of water to the plaintiffs. The Service's Regional Director, Marvin Plenert was the named defendant. Plenert has since been replaced by Michael Spear.

103 *See* 63 F. 3d 915, 916 (9th Cir. 1995).

104 *See* 117 S. Ct. at 1160.

105 *See id.*

106 *See id.*

107 *See id.*

108 *See id.*; *see also* 5 U.S.C. §706 (A)(2) (1994).

109 *See* 117 S. Ct. at 1160.

110 *See id.*

111 *See* 63 F.3d at 922 (9th Cir. 1995).

112 *See id.* at 919.

113 *See* 117 S. Ct. at 1160.

114 *See id.* at 1163.

115 It is this aspect of the case that environmentalists find encouraging. Prior to this decision, Lujan limited standing for plaintiffs who brought an action against the government. The Court's Bennett decision appears to make it easier for plaintiffs to establish redressibility and causation in lawsuits against the government. The Court noted that because this case was decided at the motion to dismiss stage, petitioners had a more modest burden of proof.

116 See 117 S. Ct. at 1162 (stating that ESA citizen-suit provision "negates...or, perhaps more accurately, expands the zone of interests").

117 See *id.* (emphasis added).

118 See *id.*

119 See *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984).

120 Congress substantively amended the ESA in 1978, 1982, and 1988.

121 See 16 U.S.C. § 1532(2)

122 See 437 U.S. 153 (1978).

123 See *id.* at 184.

124 See *id.*

125 See *id.* at 197.

126 See *id.* at 200, n.6.

127 See 419 F. Supp. 753 (E.D. Tenn. 1976).

128 See 549 F.2d 1064 (6th Cir. 1977).

129 See *id.* at 174.

130 See *id.* at 184.

131 See Reimer, *supra* note 28, at 141-42.

132 See *id.*

133 The ESA has been substantively amended in 1978, 1982, and 1988. For example, section 10 (j) was added to the ESA in 1982. This addition states that "experimental populations" of endangered species will be released into certain areas, but not receive the full protection of the Act. The purpose of this amendment to the Act was to convince private property owners that reintroduced species would not lead to restrictions on private property

134 See 16 U.S.C. § 1533 (b)(2) (1994).

135 See 16 U.S.C. § 1532 (5)(A) (1994).

136 See 437 U.S. 153, 184 (1978). Justice Burger stated that Congress' intent in enacting the statute "was to halt and reverse the trend toward species extinction, whatever the cost. That is reflected not only in the stated policies of the Act, but in literally every section of the statute."

137 See *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 574 (9th Cir. 1984); see also *Nevada Land Action Ass'n v. U.S. Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993).

138 See 749 F.2d 571, 574 (9th Cir. 1984).

139 See 117 S. Ct. at 1167. The Court then took a swipe at the Ninth Circuit, stating "it is difficult to understand how the Ninth Circuit failed to see this from our cases." *Id.*

140 See 397 U.S. 150, 157 (1970); see also *Clarke*, 479 U.S. 388 (1987) in which the Court determined that the plaintiffs satisfied the zone of interests test because the interest they asserted had a "plausible relationship" to the policies underlying §§ 36 and 81 of the National Bank Act.

141 See 497 U.S. 871, 883 (1992).

142 See *id.*; see also 117 S. Ct. at 1167.

143 See 117 S. Ct. at 1161-62.

144 See Pub. L. No. 93-319, 88 Stat. 246 (1974), 15 U.S.C. § 797(b)(5).

145 See 117 S. Ct. at 1164-65.

146 See 851 F.2d 1035, 1039 (8th Cir.1988), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990) *rev'd on other grounds sub nom.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

147 See Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 797 (1994).

148 See 5 U.S.C. § 706 (2)(A) (1994) (authorizing judicial review for arbitrary or capricious agency action).

149 See Statement by Solicitor of the Interior John Leshy on Supreme Court Decision in *Bennett v Spear*, March 19, 1997. Leshy stated that the Service "broadly speaking" agrees that all affected interests are entitled to have their case heard in court. See *id.*

150 See *Endangered Species: Industry Pleased with Court Ruling; Government, Environment Groups Nonchalant*, Daily Env't Rpt. (BNA), Mar 21, 1997.

151 See, e.g., *Louisiana ex rel. Guste v Verity*, 853 F.2d 322, 329 (5th Cir. 1988) (stating "our deference to the agency is greatest when reviewing technical matters within its expertise"). The court furthered commented that where the agency presents "scientifically respectable conclusions" courts will not displace the agency's determination. See *id.* Further, administrative decisions within an agency's expertise are accorded judicial submission based on the "Chevron deference." See *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984). Numerous scholarly articles discuss Chevron deference. See Quincy M. Crawford, *Chevron Deference to Agency Determinations that Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994), Russell L. Weaver & Thomas Schweitzer, *Deference to Agency Interpretations of Regulations: A Post-Chevron Analysis*, 22 MEM. ST. U. L. REV. 411 (1992). However, where an agency's interpretation of data conflicts with an earlier interpretation of the same data, less deference is accorded. See *Southwest Center for Biological Diversity v Babbitt*, 926 F. Supp. 920 (D. Ariz. 1996) (holding Service must reevaluate its decision to not list northern goshawk as threatened based on questionable interpretation of data).

152 See Jon Welner, *Natural Communities Conservation Planning: An Ecosystem Management Approach to Protecting Endangered Species*, 47 STAN L. REV., at 326.

153 See Niklas Wahlberg et al., *Predicting the Occurrence of Endangered Species in Fragmented Landscapes*, 273 SCI. 1536, 1536, Sept. 13, 1996.

154 See Steven A. Daugherty, *Threatened Owls and Endangered Salmon: Implementing the Consultation Requirements of the Endangered Species Act*, 14 PUB. LAND L. REV. 203, 253-55 (1993) (noting that Service is reluctant to issue jeopardy opinions unless they have strong scientific evidence).

155 See Yang, *supra* note 43, at 1363. Between 1971 and 1990, the Supreme Court only addressed the zone of interests test in three cases. See *id.*

156 See Church, *supra* note 43, at 447. Church argues that the Supreme Court provided guidance on neither how to apply the zone of interests test nor when to apply the test. See *id.*; see also Yang, *supra* note 43, at 1363.

157 See Church, *supra* note 43, at 453-54.

158 In contrast, Justice Scalia went to great lengths to provide lower courts with detailed instructions on how to apply Article III standing to plaintiffs in *Lujan*. In exacting detail, he delineated the now famous "three prong test" to determine if plaintiffs satisfy Article III's standing requirements. Lower courts rely on Lujan's three prong test as an essential component to determine whether a plaintiff has standing. Justice Scalia fine-tuned this test in *Bennett*.

159 See 117 S. Ct. at 1154.

160 See 16 U.S.C. § 1540 (g)(2)(A)(i) (1994).

161 See Reimer, *supra* note 28, at 109, 145,n.189 (1995).