

Should The Endangered Species Act Apply Internationally?: An Analysis of Defenders of Wildlife v. Lujan

by Jennifer Harder

BACKGROUND TO THE CASE

Animal and plant species are disappearing from the earth at an alarming rate. Biologists estimate that 10 to 30 vertebrate species are lost each year.¹ Only in the past twenty years has Congress acknowledged the gravity of this crisis through legislation designed to preserve endangered species. The first federal statute aimed at protecting wildlife, the Lacey Act of 1900, predominantly safeguarded the interests of hunters by prohibiting interstate movement of illegally killed wild animals and birds. The statute, limited in both scope and objective, was substantially ineffective because it failed to address the main cause of species' decline: loss of habitat. The Lacey Act represented the spirit of conservation law in America for the first half of the twentieth century.

In 1966, the U.S. Congress formally acknowledged the need to protect vanishing ecosystems with the Endangered Species Preservation Act (ESPA). This statute, among other things, established the National Wildlife Refuge System, which set aside parcels of wildlife habitat to be protected from developers. Three years later another bill, the Endangered Species Conservation Act, expanded on the ESPA by prohibiting wildlife "threatened with worldwide extinction" from being imported into the United States.² Critics maintained that the statutes were substantively insignificant because they provided only limited protection to certain species.³

Congress responded to these concerns with the Endangered Species Act of 1973 (ESA).⁴ With this Act, Congress chose to protect endangered species with an essentially procedural remedy. The ESA requires the Secretary of the Interior (Secretary) to list all species "threatened" and "endangered" and to designate the "critical habitat" of those species.⁵ The statute further mandates that the Secretary must insure that actions "authorized, funded, or carried out" by federal agencies are not "likely to jeopardize" the existence of endangered or threatened species.⁶ Toward this end, agencies must consult with the Secretary of the Interior when proposing an action; the Secretary then determines if endangered or threatened species are present in the area of the proposed action. If such species are present, the Secretary must suggest "reasonable and prudent" alternatives which can be implemented by the agency to reduce or eliminate impacts which harm endangered species.⁷

The U.S. Supreme Court affirmed the real power of the Endangered Species Act in Tennessee Valley Authority v. Hill (TVA).⁸ This case centered around a federal dam project found to seriously threaten the continued existence of an endangered species of fish, the snail darter. The Court held in TVA that, given the "plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost", it had no choice but to enjoin the operation of Tellico Dam.⁹

The TVA decision produced two results. First, Congress exempted Tellico Dam from the scope of the ESA. Next Congress amended the Act itself; the current version of section 7 includes a process for exempting certain agency actions.¹⁰ In addition, the 1978 amendment created an exemption committee, often referred to as the 'God Squad'. *Id.* at 1536(e). The nickname stems from the committee's primary duty, which is to balance the benefits and costs of federal projects against the existence value of an endangered species on a case-by-case basis. TVA demonstrated clearly that Congress does not unequivocally support the sanctions the

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ESA provides. In fact, Congress has amended the Act three times since 1969 and, given the current political climate, is very likely to revise it again.

THE CONTROVERSY IN DEFENDERS

The respondents in this case, Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society (Defenders) assert that federal agencies supporting projects outside the United States have a duty to consult with the Secretary of the Interior about the impacts of those projects on endangered species. They contest a recent regulation promulgated by the Secretary of the Interior which limits this consultation duty to agency action “in the United States or upon the high seas.”¹¹ Defenders argues that the ESA applies to US government actions in foreign countries as well.

The Secretary, on appeal, charges that Congress did not intend for the Endangered Species Act (ESA) to apply to projects in foreign countries. The appellant maintains that the United States’ duty to respect the sovereignty of foreign nations outweighs the regulatory authority of the ESA. In any case, the Secretary contends, Defenders lack standing to sue because they cannot prove that the organization or its members were in fact injured by the regulation in question.

A decision in favor of Defenders would require federal agencies to consult with the Secretary when funding or otherwise supporting projects in foreign countries. Agencies would have to invest a significant amount of time, money, and labor in this process. The exact percentage of resources commanded would depend on the specifics of each project.

If the court denies Defenders standing, or rules against them on the merits of the suit, the environmental groups involved would lose much that is precious to their cause. The interests of endangered species and their habitats which Defenders seek to protect are in fact the groups’ raison d’etre. Professional benefits flowing from those interests, including research and public relations opportunities, would disappear along with the endangered species.

On an individual level, Defenders, as well as the rest of the world, would be deprived of the scientific, medicinal, recreational, aesthetic, and spiritual values associated with wild plants and animals in foreign countries. The court’s decision is particularly significant considering that 507 of the 1,046 species listed as endangered or threatened as of May 1989 have their primary range outside United States. Another 71 species’ habitats overlap both U.S. and foreign territory.¹²

The portion of the ESA at issue in Defenders is embedded in section 7, “Interagency Cooperation”.¹³ The key clause requires the Secretary to insure that actions “authorized, funded, or carried out” by federal agencies are not “likely to jeopardize” the existence of endangered or threatened species.¹⁴ A 1986 regulation issued by the Secretary limited the scope of section 7 to agency actions occurring “in the United States or upon the high seas.”¹⁵ Defenders contend, with this suit, that Congress intended section 7 consultation procedures to extend to agency actions in foreign countries; respondents thus assert that the Secretary’s interpretation is invalid.

The executive branch as a whole has not been able to agree whether Section 7 applies internationally. The U.S. Fish & Wildlife Service (FWS)¹⁶ steadfastly maintained that it does, until recently. In 1976, the Service issued guidelines which explicitly linked Section 7 to agency projects in foreign countries.¹⁷ FWS twice proposed to retain this standard while revising its code, even over the objections of several federal agencies. The Secretary received criticisms on this matter from the State Department, Defense Department, Export-Import

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Bank, Agency for International Development (AID), International Trade Administration, and the Nuclear Regulatory Commission (NRC).¹⁸

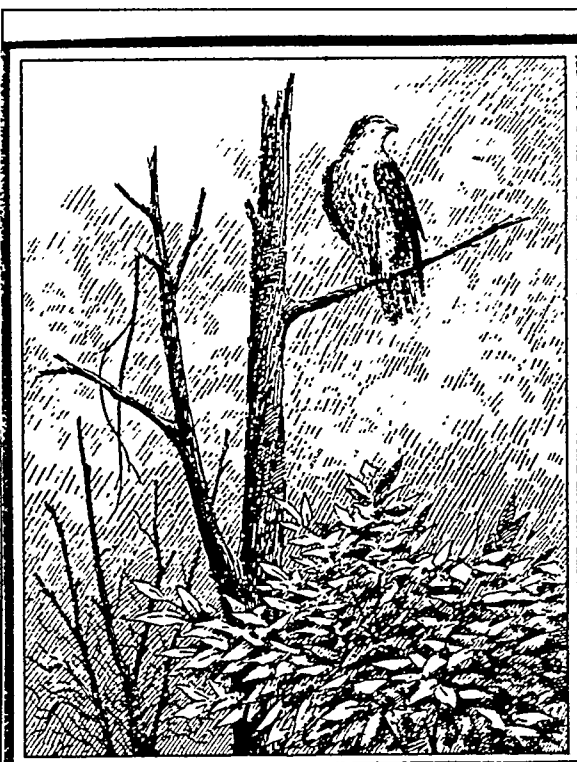
The debate continued for years. In 1981, the Associate Solicitor for Conservation and Wildlife took sides in a legal opinion which held that federal projects in foreign countries are not governed by Section 7 consulting procedures. Subjected to pressure from fellow agencies and the legal community, the Secretary finally succumbed to the prevailing political climate and in 1986 issued the rule challenged here.

Appellate courts have previously examined the territorial scope of environmental statutes with varying results. In United States v. Mitchell,¹⁹ the court held that the Marine Mammal Protection Act (MMPA) does not apply to the taking of dolphins in the Bahamas. To reach its conclusion, the Mitchell court employed the standard set out in the Supreme Court decision Foley Brothers v. Filardo.²⁰ Foley examined whether U.S. labor laws apply to work contracted overseas. The court here determined that if there is no clear expression of congressional intent and “the nature of the law does not mandate its extraterritorial application”, then “a presumption arises against such application.”²¹

The courts explored the extraterritorial reach of the National Environmental Policy Act (NEPA) in National Resources Defense Council v. Nuclear Regulatory Commission, (NRDC) and, more recently, in Greenpeace U.S.A. v. Stone.²² NEPA is an essentially procedural statute which instructs federal agencies to prepare an Environmental Impact Statement (EIS) for all “major Federal actions significantly affecting the quality of the human environment...”²³ The NRDC Court held that the Nuclear Regulatory Commission’s decision to export a nuclear reactor did not require an EIS. In the judges’ opinion, effects on foreign policy can be dismissed only when there is an “unequivocal mandate” from Congress.²⁴ The Greenpeace Court reaffirmed this standard by refusing to require an EIS pursuant to a U.S./Germany chemical munitions program.²⁵ The statutes mentioned above, however, can be differentiated from the ESA in aspects which may significantly affect their territorial reach. NEPA, for example, specifically limits support of environmental programs to those “consistent with the foreign policy of the United States.”²⁶ The ESA contains no such mandate.

Defenders can further be distinguished from Mitchell, NRDC, and Greenpeace in that these opinions reflect a case-by-case analysis of extraterritoriality in their respective statutes. Practically, the holdings in these cases do not necessarily extend to other cases involving the same statute. The nature of the case-by-case analysis allows that in “other situations in which foreign policy concerns are less compelling...extraterritorial application of the statutes [may be warranted].”²⁷ In contrast, Defenders asks the court to establish the scope of the ESA’s consultation requirements once and for all, absent, of course, congressional remedy.

Defenders initially brought this suit in 1987. The Secretary moved to dismiss the case, maintaining that Defenders possessed neither a justiciable controversy nor standing to sue. The



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district court granted the motion to dismiss.²⁸ On appeal, the Eighth Circuit, finding that Defenders had alleged an actual injury which was “fairly traceable and likely to be redressed,” reversed the decision and remanded the case to the lower court.²⁹ After considering additional evidence presented by both sides, the district court on remand granted Defenders’ motion for summary judgment on the merits.³⁰ The court held that both the Act’s plain language and legislative history supported Defenders’ belief that Congress intended section 7’s consultation provisions to apply in foreign countries.³¹ The court directed the Secretary to revise his order accordingly. The Secretary subsequently appealed, contending that the district court erred both in granting Defenders standing and in the analysis of the merits of the case. Thus, Defenders of Wildlife v. Lujan again came before the Eighth Circuit for decision.³²

Defenders argues that the plain language of the Endangered Species Act mandates section 7 be applied overseas. Congress clearly defined the scope of the ESA, they maintain, in section 2: “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction.”³³ Defenders also point to various sections of the Act which address international concerns as proof that Congress intended the Act to apply overseas. Section 2, for example, in addition to the language concerning conservation in the international community, lists various international agreements relating to endangered species.³⁴ The section further affirms Congress’ commitment to such agreements, and declares one of the ESA’s purposes is to achieve the goals of those treaties.³⁵

Defenders also finds congressional intent in the wording of section 4, which details the listing process.³⁶ This portion of the Act requires the Secretary to take into account the efforts of “any State or foreign nation” to protect endangered species; to consider designating any species identified as in danger of extinction by “any State agency or by any agency of a foreign nation;” and to give actual notice to and invite comment from “each foreign nation” in which species proposed for listing are found.³⁷

The Secretary asserts that Congress did not intend for the ESA to apply to federal projects in foreign countries. He argues that the sections of the Act which address international relations represent Congress’ complete response to the issue. The Secretary points to the “apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments” as proof of congressional intent.³⁸ Exemptions are granted, he notes, only if “the action is of regional or national significance”, and require a balancing of public interests which would intrude on the sovereignty of foreign nations.³⁹

The Secretary also charges that Congress purposely restricted the critical habitat clause of the Act to domestic projects, and could not have simultaneously intended the consulting process to extend further.⁴⁰ Finally, the Secretary argues that limiting the scope of section 7 is proper under the Foley test of statutory construction. The Foley test presumes statutes are intended to have domestic scope only, absent a clear mandate from Congress to the contrary.⁴¹ The Secretary, therefore, claims that the ESA does not apply to agency actions in foreign nations.

The parties to Defenders also dispute the issue of standing. The Secretary asserts that Defenders failed to prove that the organization or its members were in fact injured by the new regulation. He claims no members actually use the area around any foreign projects being funded by the United States.⁴² Defenders, conversely, maintain that affidavits submitted by individuals on their behalf demonstrate injury-in-fact. The affidavits show that members of Defenders have visited, and plan to visit again, endangered species’ habitats in areas that may be affected by agency projects. If the species in question were to become extinct, Defenders assert, then the benefits of visiting the species’ habitats would be lost. Specifically, Defenders

claim injury resulting from the Mahaweli project in Sri Lanka, funded by the U.S. Agency for International Development (AID), as well as from the Bureau of Reclamation's Aswan High Dam project in Egypt.⁴³

The Secretary contends that, in order to establish procedural injury, Defenders must prove a "geographical nexus" to the project sites.⁴⁴ The Eighth Circuit rejected this standard in favor of a more recent ruling, Fernandez v. Brock.⁴⁵ Fernandez concerned an attempt by a farmworkers group to force the government to promulgate special regulations relating to pension benefits for seasonal workers.⁴⁶ When the Secretary, as now, argued that the farmworkers must prove a geographical nexus in order to establish procedural injury, the Fernandez court disagreed. In the opinion, the court explained that the test for geographical nexus as described in Davis stems from a judicial interpretation of NEPA and does not necessarily apply to cases involving other statutes.⁴⁷ The court established a new test which considers "statutory language, statutory purpose, and the legislative history" of an act when determining procedural rights.

The standing of environmental groups under federal statutes has long been a subject of controversy.⁴⁸ Cases such as Sierra Club v. Morton, Davis v. Coleman, and Fernandez v. Brock have each in turn debated the issue of standing.⁴⁹ The case most applicable to the issues presented in Defenders is Lujan v. National Wildlife Federation (NWF).⁵⁰ In NWF, members of the environmental groups sued the Secretary of the Interior over policy which would potentially open up land in South Pass-Green Mountain, Wyoming to mining. The court held that the affidavits, which alleged use of a relatively small number of acres "in the vicinity of" a two million acre tract of land were insufficient to support standing under summary judgment.⁵¹ The NWF court reviewed the case under the standard for summary judgment set forth in Rule 56 of the Federal Rules for Civil Procedure. Under this rule, NWF had the burden of proving the existence of "a genuine issue as to a material fact."⁵² The court held that the group failed to meet the Rule 56 standard because members only alleged use of "unspecified portions of immense tracts of land" upon which governmental activity "may or may not occur."⁵³ [Ed. Note: For a more detailed discussion of the NWF v. Lujan case, see the article by Daniel Muller beginning on page 7 of this issue.]

The Eighth Circuit also applied the Rule 56 standard in Defenders. Rule 56(e) requires that judgment be entered against the non-moving party unless evidence...set forth specific facts showing there is a genuine issue for a trial." The court distinguished Defenders from NWF based on the fact that members of Defenders identified specific agency projects as the source of their injuries, and established personal use of the particular area in question.⁵⁴

8th Circuit's Holding

Allowing that Defenders had proved specific facts as required under summary judgment, the court also found that Defenders correctly demonstrated a procedural injury based on the Secretary's failure to follow the consultation procedures in foreign countries.⁵⁵ The court held that Defenders set forth specific facts adequate to show procedural injury, established that the benefits flowing from the procedures in issue are an objective of the statute, and identified the agency action which is the source of its injuries.⁵⁶

Citing Fernandez v. Brock, the Defenders court determined that the ESA imposes statutory duties which "create correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirements of injury-in-fact in article III."⁵⁷ The opinion also discussed the Act's citizen suit clause which allows "any person" to bring suit to enjoin any other person who allegedly has violated the ESA.⁵⁸ The ESA provides specifically that

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environmental associations are “persons” and may bring suit in their own name.⁵⁹

Having granted Defenders standing, the court ruled on the merits that the plain language and the legislative history of the statute reveal that Congress intended the section 7 consultation requirements to apply extraterritorially.⁶⁰ The Eighth Circuit analyzed the merits of Defenders according to the test established in Foley and in Mitchell.⁶¹ The court found it unnecessary to presume that the ESA’s scope is limited due to evidence of Congress’ ambitious intent, reflected in “literally every section of the statute.”⁶² As evidence, the court cited portions of five sections which neither distinguish between domestic and foreign species nor limit geographical scope.⁶³ In addition, parts of some sections explicitly discuss the role of foreign countries under the ESA.⁶⁴

The Defenders Court noted that Congress did not revise the consultation clause during the 1978 amendment process. This lack of action, the court concluded, can be viewed as a strong indicator of congressional intent. The court suggested that by retaining existing law, Congress granted “tacit approval” of the prior regulation.⁶⁵

In a recent article for the *Georgetown Law Journal*, Mary A. McDougall distinguishes the legal issues present in Foley from those demonstrated in Defenders. Specifically, McDougall contends that extraterritoriality is not a valid concern under Defenders.⁶⁶ “Extraterritoriality” has been defined as “the exercise by a state of its jurisdiction beyond its boundaries or over its nationals present in the territory of another state.”⁶⁷ Since Defenders attempts only to regulate the decision-making process of federal agencies “within the territorial jurisdiction of the United States only,” McDougall argues, extraterritoriality is not an issue.

McDougall further asserts that the court, having mischaracterized the question, incorrectly applied the Foley test. The language of the test “makes clear that any substantial ambiguity should trigger the presumption against its application overseas.”⁶⁸ Defenders relies instead on a balancing of evidence, a process not allowed by the stringent standard set out in Foley. McDougall suggests that the court could have avoided its “strained analysis” of congressional intent simply by “admitting that extraterritoriality was not at issue.”⁶⁹ Such an admission, she contends, would have freed the court to apply a looser standard of statutory construction with similar substantive results.

Why is Defenders Significant?

On the positive side, a decision in favor of Defenders would integrate environmental concerns into the foreign aid application process. Clear support for this policy may encourage developing countries to create their own environmental protection programs. In any case, the procedure would send a strong message to the world that the United States considers preservation of endangered species a top priority.

On the other hand, the same decision would create additional bureaucratic delay and incur considerable cost. Critics maintain that the requirement would damage foreign relations and delay implementation of important international development projects.⁷⁰ The agencies most affected include the Defense Department, Army Corps of Engineers and Agency for International Development (AID). *Id.* at 436. The decision may also affect United States Treasury Department votes in the World Bank and other multilateral development banks, by requiring that the Department consult with the Secretary of the Interior before voting on any development project.⁷¹

The Supreme Court granted certiorari to Defenders of Wildlife v. Lujan in December of 1991.⁷² The Court’s holding will play a pivotal role in the ultimate legal and policy

significance afforded the most recent Defenders opinion. If the Supreme Court upholds the Eighth Circuit's ruling by denying Defenders standing or by affirming the decision, future courts ruling on the scope of the ESA's consultation procedure may be tempted to similarly apply principles of extraterritoriality.⁷³ Consequently, the concept of extraterritoriality may become "hopelessly twisted." To accept the Eighth Circuit's reasoning is to imply that the government, as a matter of law, cannot regulate the actions of its own agencies and employees simply because the effects of these actions are felt outside the borders of the United States.⁷⁴

A decision to grant Defenders standing to sue would suggest that correlative procedural rights do exist under the ESA. Correlative procedural rights derive from the nature of the duties imposed by a statute. If achievement of an Act's objective depends on the completion of statutorily imposed duties, then a refusal to perform those duties constitutes injury-in-fact.⁷⁵ Practically, if section 7 creates correlative procedural rights in a plaintiff, then it will be much easier for environmental groups like Defenders to establish standing.

Aside from the issue of procedural injury, the Supreme Court's review of Defenders ought to clarify significantly what constitutes "specific facts" in a test for substantive injury-in-fact under federal statutes. Fed.R.Civ.Reg. 56(e). NWF established a range of land use which does not constitute injury under the ESA, but said nothing about which levels of use might qualify.⁷⁶ If Defenders are granted standing, the case may serve as a yardstick against which to measure the specificity of alleged facts.

A decision in favor of Defenders would potentially compel Congress to revise both the ESA's procedure and substance. The language of the exemption clause of the ESA would have to be changed to include actions of international significance. McDougall at 455. Such a result would necessitate changes in the makeup of the exemption committee, in order to include foreign advisors. *Id.* Policy would need to address the sensitive foreign policy concerns presented by overseas cases, requiring careful debate and decision-making from Congress.

Congress is well aware of the potency of the ESA, that substantive power was affirmed in TVA v. Hill. The ability of the court to compel federal agencies to follow ESA consultation procedures outside the U.S. will depend on Congress' relative ability to speak as one voice on the primacy of the politics of state. Given support, Congress may either exempt individual overseas projects or limit the geographical scope of the Endangered Species Act through an amendment. In order to preserve the integrity of the ESA as it written, creative strategies for integrating environmental concerns with diplomatic and economic policies must be developed. As noted in Mitchell, however, "the traditional method of resolving differences in the international community is through negotiation and agreement."⁷⁷ Until legal and policy solutions are developed, Congress will probably favor a negotiatory approach over the regulatory method suggested by Defenders.

ENDNOTES

¹Soule, M.E. Conservation Biology: The Science of Scarcity and Diversity. Sinauer Associates, Sunderland, Mass. 584 pp.

²McDougall, Mary A., Extraterritoriality and the Endangered Species Act of 1973 80 Georgetown Law Journal 435, 438 (1991), citing Pub.L. No. 91-135, 83 Stat. 275 (repealed 1973).

³*Id.*

⁴16 U.S.C. 1531-1544 (1988).

⁵*Id.* at 1533(a)(2)(A)(i) and (a)(3)(A).

⁶*Id.* at 1536(a)(2).

⁷*Id.* at 1536(b)(3)(A).

⁸437 U.S. 153 (1978).

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⁹ *Id.* at 184 (emphasis added).

¹⁰ 16 U.S.C. 1536(e)-(p).

¹¹ 50 C.F.R. 402.01 (1986).

¹² 911 F.2d at 123, citing Appellee's Brief at 4.

¹³ 16 U.S.C. 1536(a)(2).

¹⁴ *Id.*

¹⁵ 50 C.F.R. 402.01.

¹⁶ The U.S. Fish & Wildlife Service (FWS) is an agency within the Department of the Interior. FWS is responsible for listing endangered and threatened species.

¹⁷ McDougall at 441, citing 42 Fed. Reg. 4869.

¹⁸ *Id.* at 442.

¹⁹ 553 F. 2d. 996 (1977).

²⁰ 336 U.S. 281 (1949).

²¹ McDougall at 450, citing 336 U.S. at 285.

²² 42 U.S.C. 4321-4370(a), McDougall at 452, citing 647 F.2d 1345 (1981), 748 F.Supp. 749 (1990), appeal dismissed as moot, 924 F.2d 175 (1991).

²³ 42 U.S.C. §4332(2)(c).

²⁴ 647 F.2d at 1357.

²⁵ 748 F.Supp. at 760-61.

²⁶ McDougall at 453, citing 647 F.2d at 1366 (emphasis added by court). The manner in which Mitchell can be distinguished from Defenders plays a significant role in the analysis of the Eighth Circuit's holding: please see Section III: *8th Circuit's Holding* for a discussion of this issue.

²⁷ McDougall at 452-53, citing 647 F.2d at 1366.

²⁸ 658 F.Supp. 43 (1987).

²⁹ 851 F.2d. 1035 (1988).

³⁰ 707 F.Supp. 1082 (1989).

³¹ *Id.* at 1084-86.

³² 911 F.2d 117 (1990).

³³ 16 U.S.C. 1531(a)(4).

³⁴ *Id.* at 1534(a)(4).

³⁵ *Id.* at 1531(a)(5), 1531(b).

³⁶ 16 U.S.C. 1533.

³⁷ *Id.* at 1533(b)(1)(A); 1533(b)(1)(B)(i),(ii); 1533(b)(5)(B). (emphasis added).

³⁸ 911 F.2d at 124 (1990), citing Appellants' App. at 84.

³⁹ 16 U.S.C. 1536(h)(1)(A)(iii), 1536 (h)(1)(A)(ii).

⁴⁰ *Id.* at 1536(a)(2).

⁴¹ 336 U.S. 281 (1949).

⁴² 911 F.2d at 117.

⁴³ *Id.* at 119.

⁴⁴ 911 F.2d at 120, citing City of Davis v. Coleman, 521 F.2d 661 (1975).

⁴⁵ 840 F.2d at 622 (1988).

⁴⁶ *Id.* at 628, 631.

⁴⁷ *Id.* at 630.

⁴⁸ For a historical perspective on the issue of standing, see Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972). Although the opinion deals specifically with standing under NEPA, the issues it raises are relevant here.

⁴⁹ See 405 U.S. 727 (1972), 521 F.2d 661 (1975), 840 F.2d at 622 (1988).

⁵⁰ 110 S.Ct. 3177 (1990).

⁵¹ 110 S.Ct. at 3187, 3189.

⁵² 110 S.Ct. at 3187, citing Fed.R.Civ.P. 56(c).

⁵³ 911 F.2d at 121, citing 110 S.Ct. at 3187-89.

⁵⁴ 911 F.2d at 121 n.2 (1990).

⁵⁵ 911 F.2d at 119, 120.

⁵⁶ *Id.* at 121.

⁵⁷ 911 F.2d at 121, citing 840 F.2d at 630.

⁵⁸ 16 U.S.C. 1540(g).

⁵⁹ 16 U.S.C 1532(13), cited in 911 F.2d at 122, 851 F.2d at 1039.

⁶⁰ 911 F.2d at 125.

⁶¹ 336 U.S. 281 (1949), 553 F.2d 996 (1977).

⁶² 911 F.2d at 122, citing TVA v. Hill, 437 U.S. at 184.

⁶³ 911 F.2d at 123, citing 16 U.S.C. 1532, 1533, 1534, 1537, 1538.

⁶⁴ Here, the court's analysis mirrors the position taken by Defenders. See discussion *supra* of Defenders' rationale on the merits in Analytical Summary of the Controversy.

⁶⁵ 911 F.2d at 124.

⁶⁶ McDougall at 445-46.

⁶⁷ *Id.* at 437, citing 15A C.J.S. Conflicts of Law-6 (1967).

⁶⁸ McDougall at 446 (emphasis in original).

⁶⁹ *Id.* at 451.

⁷⁰ McDougall at 436, citing Brief for Appellant at 31, Defenders of Wildlife v. Lujan, 911 F.2d 117 (1990).

⁷¹ *Id.*

⁷² 111 S.Ct. at 2008.

⁷³ McDougall at 437.

⁷⁴ *Id.* at 437-38.

⁷⁵ 911 F.2d at 121.

⁷⁶ 110 S.Ct. 3177 (1990).

⁷⁷ McDougall at 450, citing 553 F.2d at 1002.

