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NOTES

The Supreme Court Gives an Endangered Act New Life: *Bennett v. Spear* and Its Effect on Endangered Species Act Reform

Rebellious environmental author Edward Abbey once wrote: “Original sin . . . is the blind destruction for the sake of greed of this natural paradise which lies all around us.”¹ Unlike many who would agree with the notion of protecting those creatures of intrinsic and aesthetic beauty, Mr. Abbey was not only advocating that the most eye-catching aspects of our environment warrant protection, but also creatures both unappealing and pestilent.² While many of us may acquiesce in protecting a disagreeable species whose habitat is located on public land far from our homes, few of us are as tolerant as Mr. Abbey and would not likely welcome government condemnation of our own backyards because of a few unsightly insects.³ Yet that is exactly what the Endangered Species Act⁴ (“ESA” or “the Act”) empowers the government to do, and it is for this reason that the Act itself is labeled endangered.⁵

Despite the Act’s application to private property,⁶ courts often

1. EDWARD ABBEY, *DESERT SOLITAIRE* 190 (1968).

2. *See id.* In his vision of paradise, Mr. Abbey includes “scorpions and tarantulas and flies, rattlesnakes and Gila monsters.” *Id.*

3. The problem with protecting endangered species is that of the ten million species in the world, most are insects, plants, and fungi located in backyards and irrigation ditches. *See Nature, Nurture and Property Rights*, *ECONOMIST*, July 8, 1995, at 24, 24.

4. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

5. The ESA was passed with virtually no opposition 20 years ago, but it is now “nearly as imperiled as the creatures it was designed to protect.” Betsy Carpenter, *Is He Worth Saving? The Potent New Campaign to Overturn the Endangered Species Act*, *U.S. NEWS & WORLD REP.*, July 10, 1995, at 43, 43. The Act is said to be “clearly in trouble.” David Seligman, *Keeping up: Our Spirited Republicans, Insects on the March, and Other Matters*, *FORTUNE*, Dec. 25, 1995, at 231, 232.

6. The Supreme Court’s holding in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), interpreted the Act’s broad prohibitions against harming an endangered species to apply to private landowners. *See id.* at 692, 708; *see also infra* notes 154-59, 274-79 and accompanying text (discussing *Sweet Home*). The application of the ESA to private property is perhaps the most controversial aspect of the Act. *See* Frona M. Powell, *Defining Harm Under the Endangered Species Act: Implications of Babbitt v. Sweet Home*, 33 *AM. BUS. L.J.* 131, 149 (1995) (“To many, the most controversial aspect of the [ESA] is its power to take private property through

differed on whether landowners and other parties could assert economic-based interests under the ESA.⁷ Some courts decided that Congress had limited the class of plaintiffs who could bring challenges under the ESA to those falling within the zone of interests that the statute was intended to protect.⁸ As a result, these courts held that the plaintiffs' economic-based claims were outside the zone of interests protected by the ESA because the plaintiffs did not have an interest in protecting endangered species.⁹ Other courts determined that the plaintiffs' economic-based claims fell within the zone of interests protected by the Act and thus concluded that these plaintiffs had the requisite standing to bring their challenges.¹⁰ Still other courts refused to apply the zone of interests test to claims under the ESA, determining that plaintiffs need to meet only traditional Article III standing requirements.¹¹ The courts' conflicting decisions became a source of confusion for property owners and environmentalists alike.¹²

Along with the uncertainty in the courts regarding judicial access for property interests was the increasing intensity of the cry to reform "America's most controversial environmental law"¹³ so as to incorporate economic interests in ESA determinations.¹⁴ In spite of

extensive regulation of land use.").

7. Compare *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058, 1065-67 (9th Cir. 1994) (applying the zone of interests test to plaintiff's suit brought pursuant to the ESA), *Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 590-92 (D.C. Cir. 1994) (same), and *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 51-52 (D.C. Cir. 1988) (same), with *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988) (refusing to apply the zone of interests test to plaintiff's claim under the ESA), *rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Mausolf v. Babbitt*, 913 F. Supp. 1334, 1341 (D. Minn. 1996) (same), *rev'd on other grounds*, 125 F.3d 661 (8th Cir. 1997).

8. See, e.g., *Idaho Pub. Utils. Comm'n v. ICC*, 35 F.3d 585, 590-95 (D.C. Cir. 1994).

9. See, e.g., *Bennett v. Plenert*, 63 F.3d 915, 919-20 (9th Cir. 1995) (determining that the plaintiffs were without standing to challenge an ESA decision because they asserted a purely economic interest), *rev'd sub nom. Bennett v. Spear*, 117 S. Ct. 1154 (1997).

10. See, e.g., *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232-34 (D.C. Cir. 1996) (holding that the plaintiffs' economic-based claims fell within the zone of interests that the ESA was intended to protect).

11. See, e.g., *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988), *rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

12. See William W. Buzbee, *Expanding the Zone, Tilting the Field: The Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 ADMIN. L. REV. 763, 777 (1997) (noting that prior to *Bennett* the prevailing sentiment surrounding the application of the zone of interests test was uncertainty).

13. 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, 278 (1993).

14. See Betsy Carpenter, *This Land Is My Land*, U.S. NEWS & WORLD REP., Mar. 14, 1994, at 65, 65-69 (describing the new private property rights movement); Richard

vocal political support for reducing the effect of the ESA on property owners,¹⁵ proponents of the ESA have been unwilling to sacrifice their hard work on species conservation, and prior congressional attempts at ESA reform have proven unsuccessful without environmentalists' support.¹⁶ On March 19, 1997, with a stalemate halting congressional reform efforts between environmentalists and property-interest proponents, a unanimous Supreme Court, led by Justice Scalia, handed down its most recent decision involving the Endangered Species Act.

In *Bennett v. Spear*,¹⁷ the Supreme Court resolved the long-standing debate regarding judicial access, holding that property owners asserting economic interests are not subject to the zone of interests test when determining standing under the citizen-suit provision of the ESA.¹⁸ In contrast, the Court determined that for purposes of standing under the Administrative Procedures Act¹⁹ ("APA"), parties asserting that they have suffered economically because of agency action are required to meet the zone of interests test. Thus, when asserting a claim under the APA, plaintiffs must show that their asserted interest falls within the zone of interests Congress contemplated when enacting the provision at issue in the underlying statute.²⁰

Minter, *You Just Can't Take It Anymore: America's Property Rights Revolt*, POL'Y REV., Fall 1994, at 40, 40-46 (comparing the private property rights revolt to the tax revolt that resulted in tax cuts during the Reagan Administration in the 1980s); Robert H. Nelson, *Shoot, Shovel & Shut up*, FORBES, Dec. 4, 1995, at 82, 82 (stating that "growing agreement among many insiders [is] that the [ESA] must be revised by establishing strong positive, rather than negative, incentives . . . for landowners to protect endangered species habitat"); see also Stuart Hardy, *The Endangered Species Act: On a Collision Course with Human Needs*, 13 PUB. LAND L. REV. 87, 97 (1992) (asserting that for the ESA to survive it must be restructured to include "flexibility, balance and accommodation"); Michelle K. Walsh, Note, *Achieving the Proper Balance Between the Public and Private Property Interests: Closely Tailored Legislation As a Remedy*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 317, 317 (1995) (proposing that ESA legislation should seek to include the interests of private property owners).

15. President Bush called the ESA a "broken" law that "must not stand." Houck, *supra* note 13, at 278.

16. See T.H. Watkins, *New Congress, Old Lesson*, AUDUBON, Jan.-Feb. 1997, at 112, 112 (asserting that any ESA reform efforts must include environmentalists, given the re-energized environmental movement and the futile attempts of the 104th Congress to reform the ESA).

17. 117 S. Ct. 1154 (1997).

18. See *id.* at 1162-63; see also *infra* notes 56-61 and accompanying text (discussing the zone of interests test).

19. Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified as amended at 5 U.S.C. §§ 701-706 (1994)).

20. See 5 U.S.C. § 702 (1994); *Bennett*, 117 S. Ct. at 1167-68 (determining that petitioners' claims brought pursuant to § 7 of the ESA fall within the zone of interests

This Note first discusses the basic structure of the ESA, explaining briefly how a species is determined to be endangered and how its habitat is designated as critical.²¹ Next, the Note explains the threshold issue of standing, including both constitutional and prudential limitations.²² After reviewing the recent Supreme Court decision in *Bennett v. Spear*, highlighting the relevant facts and arguments,²³ the Note then examines the statutory background of the ESA, including the policies and theories that were the impetus for its enactment and subsequent amendment.²⁴ The Note next discusses how *Bennett* comports with modern endangered species litigation and how the *Bennett* decision will affect Congress's legislative actions in reforming the ESA.²⁵ This Note thereafter reviews the legal background leading up to the *Bennett* decision, focusing particularly on the history of prudential standing and the zone of interests test in the context of citizen suits brought under the ESA, and discusses how the Court's decision clarifies ESA civil-suit standing requirements.²⁶ Finally, the Note assesses how the *Bennett* decision will impact litigation involving the application of the National Environmental Policy Act²⁷ ("NEPA") to the ESA.²⁸

A basic summary of the ESA²⁹ and standing³⁰ is helpful in understanding the significance of the *Bennett* decision in the jurisprudential landscape. Hailed as an "environmental jewel"³¹ and

that Congress intended to protect in enacting § 7). The APA provides a right of review "where there is no other adequate remedy in court." 5 U.S.C. § 704. The plaintiff, however, must also demonstrate that she suffered a "legal wrong" or was "adversely affected or aggrieved by agency action *within the meaning of a relevant statute.*" *Id.* at § 702 (emphasis added).

21. See *infra* notes 29-44 and accompanying text.

22. See *infra* notes 45-61 and accompanying text.

23. See *infra* notes 62-142 and accompanying text.

24. See *infra* notes 143-87 and accompanying text.

25. See *infra* notes 188-235 and accompanying text.

26. See *infra* notes 236-88 and accompanying text.

27. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C.A. §§ 4321-4370 (West Supp. 1995)).

28. See *infra* notes 289-321 and accompanying text.

29. For an extensive overview of the ESA, see generally DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* (1989), and James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closer Look from a Litigator's Perspective*, 21 ENVTL. L. 499 (1991).

30. For an account of the evolution of the standing doctrine, see GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 94-106 (2d ed. 1991), William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-28 (1988), and Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 168-97 (1992).

31. Elizabeth A. Foley, *The Tarnishing of an Environmental Jewel: The Endangered*

the most powerful environmental statute in existence today,³² the ESA is triggered by the listing of a species as “endangered” or “threatened.”³³ The task of listing terrestrial species is granted to the Secretary of the Interior through the Fish and Wildlife Service (“FWS”), while the Secretary of Commerce, acting through the National Marine Fisheries Service (“NMFS”), is responsible for listing all marine species.³⁴ Listing is carried out using only “the best scientific and commercial data available.”³⁵ After listing a species, the Act requires the Secretary to designate as “critical habitat” land or water areas that are essential to the listed species’ existence.³⁶ The critical habitat determination is based on “the best scientific data available” as well as the “economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”³⁷ In addition to designating critical habitat, the Secretary must develop and implement recovery plans for the continued survival of the

Species Act and the Northern Spotted Owl, 8 J. LAND USE & ENVTL. L. 253, 253 (1992).

32. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (calling the ESA “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation”); Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises and the Quest for Certainty*, 67 U. COLO. L. REV. 371, 371 (1996) (dubbing the ESA the “‘pitbull of all environmental [legislation]’” (alteration in original) (quoting *AMC Fears Legislative “Pitbull” Industry Anxious for ESA Rewrite*, 7 MINE REG. REP. 412, 412 (1994))); Shelli Lyn Iovino, Casebrief, *Habitat Modification and ESA Takings Under Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 7 VILL. ENVTL. L.J. 481, 481 (1996) (stating that the ESA is “indisputably the most powerful and sweeping wildlife legislation to date”).

33. See 16 U.S.C. § 1533 (1994). A species is considered “endangered” if it is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6) (excluding, however, certain insect species determined by the Secretary to be pests). A species is considered “threatened” if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20). For the most part, the ESA does not distinguish between endangered and threatened species; however, the prohibitions are somewhat more lenient regarding private activities affecting a species that is merely threatened. See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 312 (1997).

34. See 16 U.S.C. § 1533(a). A species becomes a candidate for listing either by initiation of the Secretary, by petition of an interested party such as an environmental organization, or by an emergency listing. See 50 C.F.R. §§ 424.10, 424.14, 424.20 (1996). Criteria used in deciding whether a species should be listed include: (1) the present state of the species’ habitat and the potential for its destruction or modification; (2) the overuse of the species’ habitat; (3) disease and predation; (4) the effectiveness of current regulation on the species’ survival; and (5) any other natural or man-made factors affecting the species’ continued existence. See 16 U.S.C. § 1533(a)(1).

35. 16 U.S.C. § 1533(b)(1)(A).

36. See *id.* § 1533(a)(3)(A).

37. *Id.* § 1533(b)(2).

species.³⁸

Once a species is listed, section 9 of the ESA forbids the taking, possession, or sale of that species by any person.³⁹ Federal agencies also must comply with section 7's consultation requirements to ensure that their actions do not "jeopardize the continued existence of any [listed] species" or adversely affect a species' critical habitat.⁴⁰ To fulfill section 7, when an agency proposes a project, it must consult with the FWS to see if any listed species are in the area where the proposed project will take place.⁴¹ If a listed species is found, the agency must prepare a biological assessment to determine if the listed species will be affected by the project.⁴² If the biological assessment determines that the species will be affected, formal consultation between the agency and the FWS must take place, and the FWS will then prepare a biological opinion using the "best scientific and commercial data available."⁴³ The biological opinion will contain a "jeopardy" or "no jeopardy" determination for the listed species, but if the biological opinion concludes that the project is likely to jeopardize the species, the opinion must provide "reasonable and prudent alternatives" that would allow the project to proceed.⁴⁴

The ESA also contains a citizen-suit enforcement provision allowing aggrieved individuals to file civil suits.⁴⁵ The citizen-suit provision of the ESA allows "any person" to enjoin an alleged violation of the Act, to compel the Secretary of the Interior to assert the prohibitions on takings, or to compel the Secretary to perform a duty that is not discretionary under section 4 of the ESA.⁴⁶ Individuals bringing citizen suits must meet the requirements of

38. *See id.* § 1533(f)(1). A recovery plan must be implemented "unless [the Secretary] finds that such a plan will not promote conservation of the species." *Id.*

39. *See id.* § 1538(a)(1). Section 9's prohibition applies to both federal and nonfederal (i.e., private and state) actions. *See id.*

40. *Id.* § 1536(a)(2).

41. *See id.* § 1536(c)(1).

42. *See id.*

43. *Id.* § 1536(c)(1)-(2).

44. *Id.* § 1536(b)(3)(A).

45. *See id.* § 1540(g)(1). The Clean Air Act was the first environmental statute to contain a citizen-suit provision. *See Clean Air Amendments of 1970*, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1706-07 (codified as amended at 42 U.S.C. § 7604 (1994)). For a complete analysis of the developments leading up to the creation of the citizen-suit component of environmental statutes, see generally Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833 (1985) (discussing the impetus for and evolution of citizen suits in environmental statutes).

46. *See* 16 U.S.C. § 1540(g)(1). Section 4 of the ESA contains the provisions for the listing of endangered and threatened species. *See id.* § 1533.

standing.⁴⁷ The standing inquiry involves both constitutional and prudential limitations.⁴⁸ Constitutional standing refers to the Article III requirement that judicial review be limited to “cases” and “controversies.”⁴⁹ The “irreducible constitutional minimum” requirements of standing are met when (1) the plaintiff suffers an “injury in fact” to a legally protected interest, (2) a “causal connection” between the injury and the conduct complained of exists, and (3) it is “‘likely,’” not “‘merely ‘speculative,’” that the injury will be “‘redressed by a favorable decision.’”⁵⁰

In addition to constitutional requirements for standing, courts have imposed prudential requirements that are rooted in policy concerns.⁵¹ Courts have discretion as to what prudential considerations to use,⁵² unless Congress has explicitly granted standing to the full limits of Article III.⁵³ Because of the courts’ broad discretionary power in this area, prudential standing requirements have been applied inconsistently.⁵⁴ Controversy

47. See Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223, 227 (1996) (explaining that a plaintiff must meet the requirement of standing to sue and “show that he or she has a legally recognized interest in the outcome of [an] action”).

48. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

49. See U.S. CONST. art. III, § 2. For a discussion of standing and its purpose of serving the doctrine of separation of powers, see generally Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983) (explaining the importance of standing in light of the doctrine of separation of powers). *But see generally* Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991) (deconstructing the importance of standing in the theory of separation of powers).

50. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

51. See *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (noting that the Court has rules limiting the cases it may hear that are based solely on policy grounds, rather than on constitutional considerations). Prudential concerns, like constitutional requirements of standing, also play a role in the separation of powers. See, e.g., David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37, 46-48 (asserting that while prudential limitations are not imposed by Article III, the Court imposes prudential limitations to serve the policy of separation of powers).

52. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (determining that prudential standards do not constitute a “limitation on judicial power”); see also *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) (establishing that courts are “free to weigh [prudential] principles”).

53. See *Warth*, 422 U.S. at 501 (recognizing that “Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules”).

54. See Sanford A. Church, Note, *A Defense of the “Zone of Interests” Standing Test*, 1983 DUKE L.J. 447, 448 (arguing that “[c]ourts have blindly applied the test, confused

concerning their application has centered largely on whether Congress intended to override the prudential limitations in defining who may sue under the ESA's citizen-suit provision.⁵⁵

The prudential standing concern in *Bennett* involved the zone of interests test.⁵⁶ The zone of interests test originated in specific language in the APA, stating that "[a] person . . . aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review."⁵⁷ Despite its origin in the APA, lower courts increasingly have applied the zone of interests test in the context of non-APA environmental litigation to determine whether the plaintiff's injury is the kind Congress contemplated as worthy of protection under the environmental statute in question.⁵⁸ This application has sparked a debate over whether the zone of interests test should apply to actions outside the APA.⁵⁹ In *Bennett v. Plenert*,⁶⁰ the Ninth Circuit held that

the contexts in which it applies, and distorted its method of application").

55. See Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 794 (1994) (finding that "the central issue presented in many cases is whether Congress has displaced the prudential concerns with its grant of standing").

56. For a discussion of the history of prudential standing and the zone of interests test, see *infra* notes 239-79 and accompanying text. For a comprehensive review of the zone of interests test of prudential standing, see 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.7, at 506-26 (2d ed. 1984); Church, *supra* note 54, at 449-69.

57. 5 U.S.C. § 702 (1994) (emphasis added).

58. See, e.g., *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 60-61 (D.C. Cir. 1988) (citing *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399-400 (1987), as authority for applying the zone of interests test to the ESA). But see *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1043 (8th Cir. 1988) (refusing to apply the zone of interests test to the ESA), *rev'd on other grounds sub nom.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

59. Compare Charles D. Kelso & R. Randall Kelso, *Standing to Sue: Transformations in Supreme Court Methodology, Doctrine and Results*, 28 U. TOL. L. REV. 93, 146 (1996) (arguing that "the modern court will not extend the use of the zone of interests test much beyond . . . the [APA]"), with Sarah A. Robichaud, Note, *Lujan v. National Wildlife Federation: The Supreme Court Tightens the Reins on Standing for Environmental Groups*, 40 CATH. U. L. REV. 443, 460-63 (1991) (characterizing the zone of interests test as having general prudential applicability). See generally Jeffrey W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345, 351 (1993) (arguing that absent congressional limits written into the law, citizen suits extend to the full limits of Article III); Martha Colhoun & Timothy S. Hamill, Comment, *Environmental Standing in the Ninth Circuit: Wading Through the Quagmire*, 15 PUB. LAND L. REV. 249, 270 (1994) (asserting that "confused courts [have applied] prudential restrictions in situations of both APA and non-APA review").

60. 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.* *Bennett v. Spear*, 117 S. Ct. 1154 (1997). On July 4, 1994, Marvin Plenert was replaced by Michael Spear as Regional Director of the United States Fish and Wildlife Service. See Brief for Respondents at 1 n.1, *Bennett* (No. 95-813).

the zone of interests test did apply to citizen-suit claims brought under the ESA.⁶¹ This decision set the stage for the Supreme Court's reversal in *Bennett v. Spear*.

In 1992, in accordance with the consultation provisions of section 7 of the ESA,⁶² the Bureau of Reclamation⁶³ (the "Bureau") notified the FWS that the Bureau's continuing Klamath Irrigation Project⁶⁴ might affect the Lost River Suckerfish and the Shortnose Suckerfish, both listed as endangered in 1988.⁶⁵ As a result of the consultation, the FWS issued a biological opinion⁶⁶ on the project which concluded that the Klamath Project was likely to jeopardize the fish.⁶⁷ Under the ESA, however, a project may continue if "reasonable and prudent alternatives" are provided that avoid putting a species in jeopardy.⁶⁸ The biological opinion of the FWS recommended several alternatives, including a proposal to maintain minimum water levels

61. See *Bennett*, 63 F.3d at 919.

62. See 16 U.S.C. § 1536(a)(2) (1994). Section 7 of the ESA mandates that each federal agency ensure that any action it authorizes, funds, or carries out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.*

63. The Reclamation Act, passed by Congress in 1902 to aid small farmers in the arid western United States, led to the formation of the Bureau, which was to sell unused federal lands to raise funds to "reclaim" or irrigate small family plots to encourage land development. See Reclamation Act, ch. 1093, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-498 (1994)). The Secretary of the Interior initially created the Reclamation Service to administer the Reclamation Act; however, the service was later renamed the "Bureau of Reclamation." See Gregory Horwood, *Forfeiture of Rights to Federal Reclamation Project Waters: A Threat to the Bureau of Reclamation*, 29 IDAHO L. REV. 153, 154 n.4 (1992-93). The Secretary of the Interior is given general authority to do what is necessary to carry out the Reclamation Act. See 43 U.S.C. § 373.

64. The Klamath Project is "one of the oldest federal reclamation schemes [consisting] of a series of lakes, rivers, dams and irrigation canals in Northern California and Southern Oregon." *Bennett*, 117 S. Ct. at 1159. The project was undertaken by the Secretary of the Interior in 1905 and is administered by the Bureau of Reclamation. See *id.*

65. See Endangered and Threatened Wildlife and Plants; Determination of Endangered Statuses for the Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27,130 (1988).

66. See *supra* notes 41-44 and accompanying text (discussing the steps an agency must follow prior to issuance of a biological opinion).

67. See *Bennett*, 117 S. Ct. at 1159 ("[L]ong term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." (quoting Appendix to Petition for Certiorari at 3, *Bennett* (No. 95-813) (quoting Biological Opinion of the Fish and Wildlife Service))).

68. See 16 U.S.C. § 1536(b)(3)(A) (1994). In addition to "reasonable and prudent alternatives," the biological opinion also must contain an "Incidental Take Permit," which enables the agency to avoid the "take" prohibitions of the ESA in operating its project provided that the taking is done in compliance with the terms and conditions of the alternatives set forth in the biological opinion. See *id.* § 1536(o)(2); *infra* notes 151-59 (discussing the definition of "take" under the ESA).

on Upper Klamath Lake and on Clear Lake and Gerber reservoirs.⁶⁹ The Bureau decided that it would continue to operate the Klamath Project but would protect the suckerfish by using this alternative to maintain minimum water levels.⁷⁰

Subsequently, two Oregon irrigation districts that received water from the Klamath Project and two ranchers within those districts filed suit against the director and regional director of the FWS and the Secretary of the Interior.⁷¹ The petitioners claimed competing " 'recreational, aesthetic and commercial' " interests in the water that the FWS biological opinion had determined was necessary to preserve the endangered fish.⁷² First, petitioners alleged that the FWS's determination violated section 7 of the ESA because there was " 'no scientifically or commercially available evidence' " supporting the FWS's conclusion that without minimum water levels the Bureau's Klamath Project would cause a decline in the endangered sucker population.⁷³ In support of this argument, the petitioners noted that the Bureau's procedures for storing and releasing water from the reservoirs were consistently maintained and followed throughout the twentieth century.⁷⁴ The second claim also alleged a violation of section 7 of the ESA, averring that there was " 'no commercially or scientifically available evidence' " indicating that minimum water levels would have a beneficial effect on the suckerfish population.⁷⁵ Petitioners' third claim asserted that a minimum water level requirement was equivalent to a determination

69. See *Bennett*, 117 S. Ct. at 1159. Petitioners received water from Clear Lake and Gerber reservoirs. See *id.*

70. See *id.* Theoretically, the Bureau may ignore the alternatives set forth in the biological opinion, but if it does not follow those alternatives, the Bureau is ineligible for an Incidental Take Permit. See *id.* at 1165. Without an Incidental Take Permit, the Bureau exposes itself to the ESA's civil penalties of up to \$25,000 per violation, criminal penalties of up to \$50,000, and imprisonment for one year for "any person" who knowingly takes an endangered or threatened species. See 16 U.S.C. § 1540(a), (b).

71. See *Bennett*, 117 S. Ct. at 1159. The Bureau of Reclamation was not included in those named as defendants. See *id.*

72. *Id.* at 1160 (quoting Appendix to Petition for Certiorari at 34, *Bennett* (No. 95-813)). Specifically, the petitioners sought to challenge the reduction in their water supplies, the threats to their crops, and the subsequent devaluation of their land. See Oral Argument for Petitioners (Nov. 13, 1996), *Bennett* (No. 93-813), available in WESTLAW, 1996 WL 668337, at *3.

73. *Bennett*, 117 S. Ct. at 1159-60 (quoting Appendix to Petition for Certiorari at 37, *Bennett* (No. 95-813)).

74. See *id.* (citing Appendix to Petition for Certiorari at 36, *Bennett* (No. 95-813)).

75. *Id.* at 1160 (quoting Appendix to Petition for Certiorari at 39, *Bennett* (No. 95-813)). Section 7 of the ESA requires that the FWS use the "best scientific and commercial data available" in determining the impact of an agency's action on a listed species. 16 U.S.C. § 1536(a)(2).

of critical habitat for the fish and thus violated section 4 of the ESA because it failed to take into consideration the economic impacts associated with such a designation.⁷⁶ Each of the claims also stated that the relevant action violated the APA's prohibition against agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁷⁷

The district court dismissed the petitioners' claims for lack of jurisdiction, concluding that the petitioners lacked standing because their "recreational, aesthetic, and commercial interests . . . [did] not fall within the zone of interests sought to be protected by ESA."⁷⁸ The Ninth Circuit Court of Appeals affirmed the district court, holding that the zone of interests test for standing applies to persons who are entitled to judicial review not only under the APA,⁷⁹ but also under the citizen-suit provision of the ESA.⁸⁰ Moreover, the court concluded that plaintiffs fall within the zone of interests for standing only when they allege an interest in the preservation of the endangered species.⁸¹

The Ninth Circuit reached its decision by first noting that the issue was not whether constitutional standing had been met by the plaintiffs, but whether the plaintiffs' action was allowed under the doctrine of prudential standing.⁸² Relying on precedent in which the zone of interests test was applied to claims brought under the ESA, the Ninth Circuit determined that the zone of interests test was applicable.⁸³ The court identified species preservation as the ESA's

76. See *Bennett*, 117 S. Ct. at 1160. Section 4 requires the Secretary to designate critical habitats for listed species using the "best scientific data available and after taking into account the economic impact, and any other relevant impact, of specifying . . . critical habitat." 16 U.S.C. § 1533(b)(2).

77. 5 U.S.C. § 706(2)(A) (1994). Petitioners also raised a fourth claim: that the implicit designation of critical habitat violated NEPA because it was not preceded by the preparation of an environmental assessment. See *Bennett*, 117 S. Ct. at 1160 n.1. The claim, however, was dismissed by the Ninth Circuit and was not challenged on appeal to the Supreme Court. See *id.*; see also *infra* notes 289-321 and accompanying text (discussing the implications of applying NEPA to environmental determinations).

78. *Bennett v. Plenert*, No. 93-6076-HO, 1993 WL 669429, at *5 (D. Or. Nov. 18, 1993), *aff'd*, 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.* *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

79. Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified as amended at 5 U.S.C. 701-706 (1994)).

80. See 16 U.S.C. § 1540(g) ("[A]ny person may commence a civil suit on his own behalf . . ."); *Bennett v. Plenert*, 63 F.3d 915, 918-19 (9th Cir. 1995), *rev'd sub nom.* *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

81. See *Bennett*, 63 F.3d at 919, 921-22.

82. See *id.* at 917.

83. See *id.* at 918 (citing *Pacific Northwest Generating Coop. v. Brown*, 38 F.3d 1058, 1065 (9th Cir. 1994); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581 & n.8 (9th

overall objective and noted that the congressional intent behind the Act's enactment was to halt species extinction "whatever the cost."⁸⁴ The court concluded that because the plaintiffs sought only economic and recreational benefits from the water, their interests were only "marginally related" to the purposes of the ESA and thus they lacked standing.⁸⁵

On appeal to the Supreme Court, the petitioners' claims presented two issues. The first issue was whether the prudential standing zone of interests test applied to claims brought under the citizen-suit provision of the ESA, given the language of the citizen-suit provision that "any person" may file suit, which could be interpreted as negating all prudential standing limitations.⁸⁶ If the prudential standing test applied, the second issue was whether the petitioners were within the requisite zone of interests, given that the petitioners' interests were primarily economic and that the petitioners were not concerned with the preservation of the endangered suckerfish or their habitat.⁸⁷

The Supreme Court began its analysis by turning first to the claims under the ESA and the question of whether the prudential standing zone of interests test should apply to a citizen suit brought pursuant to section 11(g)⁸⁸ of the ESA.⁸⁹ The Court reviewed its

Cir. 1993)).

84. *Id.* at 919-20 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)).

85. *Id.* at 921 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)). For further discussion of the Ninth Circuit's decision, see Lynette McCloud, *A Hot Debate: Application of the Zone of Interests Test to the Endangered Species Act*, 4 MO. ENVTL. L. & POL'Y REV. 38, 38-40 (1996), Robert W. Henry, Note, *Bennett v. Plenert, or Who Loves the Suckers? A Question of Standing Under the Endangered Species Act*, 18 PUB. LAND & RESOURCES L. REV. 227, 230-40 (1997), Sheldon K. Rennie, Note, *Bennett v. Plenert: Using the Zone-of-Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375, 392-99 (1996), and Alyssa Wardrup, Note, *Bennett v. Plenert: The Ninth Circuit's Application of the Zone of Interests Test to Citizen Suits Under the Endangered Species Act*, 48 MERCER L. REV. 917, 923-29 (1997).

86. See *Bennett*, 117 S. Ct. at 1160.

87. See *id.* The Court did not address directly in *Bennett* whether the zone of interests test will apply outside of the APA. However, after *Bennett* it is clear that statutory language such as "any person may file suit" will be adequate to negate the zone of interests prudential standing requirement completely. See Buzbee, *supra* note 12, at 776 (stating that according to the *Bennett* Court, Article III and zone of interests standing are "coextensive"). Despite the uncertainty of the application of the zone of interests test outside of the APA, the test remains a requirement for filing a challenge against agency action under the APA. See *Bennett*, 117 S. Ct. at 1167. But when the claim is brought pursuant to section 7 of the ESA, a plaintiff asserting solely economic interests will fall within the zone of interests protected by the statute. See *id.* at 1168.

88. The citizen-suit provision of the ESA, section 11(g), provides:

[A]ny person may commence a civil suit . . . (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . .

earlier decisions on standing and explained that the concept of standing involves both constitutional and prudential limitations.⁹⁰ The Court emphasized that there is an “irreducible constitutional minimum”⁹¹ of standing under the Case and Controversy Clause of Article III,⁹² whereby the plaintiff must show: (1) that he has suffered “injury in fact”; (2) that there is a “causal connection” between the injury and the disputed conduct such that the injury is “fairly traceable” to the actions of the defendant; and (3) that the injury is likely to be redressed by a favorable decision.⁹³ The *Bennett* Court further noted that in addition to this constitutional standing requirement, there are “‘judicially self-imposed limits on the exercise of federal jurisdiction’”⁹⁴ that are “‘founded in concern about the proper—and properly limited—role of the courts in a democratic society.’”⁹⁵ Unlike constitutional standing requirements, the Court explained that a number of prudential standing requirements can be enhanced or reduced by Congress.⁹⁶ The Court specified that the prudential requirement of particular concern in *Bennett* was that the plaintiffs’ grievance fall within the zone of interests protected by the provision of the statute at issue in the suit.⁹⁷

alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or . . . (C) against the Secretary where there is alleged failure of the Secretary to perform any act or duty under [section 4 of the ESA] which is not discretionary with the Secretary.

16 U.S.C. § 1540(g) (1994).

89. See *Bennett*, 117 S. Ct. at 1160-61. The Court began with the ESA rather than the APA because the former would enable petitioners to recover their litigation costs, and because the APA authorizes review only when no other adequate remedy is available. See *id.* (citing 16 U.S.C. § 1540(g)(4)).

90. See *id.* at 1161 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

91. The Supreme Court emphasized the “irreducible constitutional minimum” of Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

92. U.S. CONST. art. III, § 2, cl. 1. The Constitution states:

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States; . . . between a State and Citizens of another State; . . . between citizens of different States; . . .

Id.

93. See *Bennett*, 117 S. Ct. at 1161 (citing *Defenders of Wildlife*, 504 U.S. at 560-61; *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-72 (1982)).

94. *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

95. *Id.* (quoting *Warth*, 422 U.S. at 498).

96. See *id.* (citing *Warth*, 422 U.S. at 501).

97. See *id.* Courts look to the statute and legislative history to determine whom Congress intended to protect in enacting the statute. See *Church*, *supra* note 54, at 455-66 (citing *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130 (D.C. Cir. 1977), as an ideal

With this background established, the Court compared the language of the ESA citizen-suit provision with statutes that were more explicit and restrictive in describing the class of people who could bring suit.⁹⁸ Because Congress can overcome prudential standing requirements using statutory language, the Court concluded that the ESA's civil-suit provision was phrased broadly enough to reflect Congress's intention to negate any prudential standing requirements.⁹⁹ The Court emphasized two factors in deciding that the term "any person" within the citizen-suit provision of the ESA was meant to bypass prudential limitations.¹⁰⁰ First, the Court concluded that the overall subject matter of the ESA was the environment, in which it is customary to think that all persons have an interest.¹⁰¹ Second, the Court determined that the purpose of the citizen-suit provision was to encourage enforcement of the Act by "private attorneys general,"¹⁰² given the lack of the usual amount-in-controversy and diversity-of-citizenship jurisdictional requirements, the potential for recovering litigation fees, and the government's right to refuse to pursue an action initially and intervene later.¹⁰³

The *Bennett* Court likened Congress's decision to grant standing to the full limits of Article III to the Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*,¹⁰⁴ a case involving the Civil Rights

example of the statutory and legislative analysis courts should use). Parties within the zone of interests are the only ones with standing under this prudential requirement. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

98. For example, the Court examined the Clean Water Act, Pub. L. No. 92-500, § 505, 86 Stat. 816, 888 (1972) (codified as amended at 33 U.S.C. § 1365(g) (1994)), and the Surface Mining Control and Reclamation Act, Pub. L. No. 95-87, § 520, 91 Stat. 467, 503-04 (1977) (codified as amended at 30 U.S.C. § 1270(a) (1994)), which permit a claim by any person having an adverse interest. The Court also reviewed similar provisions in the Energy Supply and Environmental Coordination Act, Pub. L. No. 93-319, § 12, 88 Stat. 246, 264 (1974) (codified as amended at 15 U.S.C. § 797(b) (1994)), which authorizes any person suffering a legal wrong to file suit, and the Ocean Thermal Energy Conversion Act, Pub. L. No. 96-320, § 114, 94 Stat. 974, 990 (1994) (codified as amended at 42 U.S.C. § 9124(a) (1994)), which restricts judicial review to any person asserting a valid legal interest that is or will be adversely affected only when the action gives rise to a case or controversy. *See Bennett*, 117 S. Ct. at 1162.

99. *See Bennett*, 117 S. Ct. at 1162-63; *see also supra* note 88 (quoting the citizen-suit provision of the ESA).

100. *See Bennett*, 117 S. Ct. at 1162.

101. *See id.*

102. "Private attorneys general" is a term often used to refer to citizens acting as plaintiffs to enforce statutory or administrative requirements. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972).

103. *See Bennett*, 117 S. Ct. at 1162.

104. 409 U.S. 205 (1972).

Act of 1968.¹⁰⁵ At issue in *Trafficante* was a provision authorizing “‘[a]ny person . . . claim[ing] . . . injur[y] by a discriminatory housing practice’” to sue under the Act.¹⁰⁶ In *Trafficante*, the Court stated that the “any person” language in the Civil Rights Act provision reflected congressional intent to expand standing to the limits of Article III.¹⁰⁷ Given the similarly broad statutory language of the ESA provision at issue, the *Bennett* Court held that Congress had intended to include economic interests in its grant of the right to file suit pursuant to the ESA citizen-suit provision and that standing is not restricted under the ESA to those asserting exclusively environmental concerns.¹⁰⁸

The ranchers’ and irrigation districts’ economic interests were sufficient under the statutory provisions of the ESA to confer standing to bring a citizen suit.¹⁰⁹ However, even if the statute conveyed standing, the petitioners still were required to show that they met the constitutional requirements for standing. The government respondents had made no attempt to defend the Ninth Circuit’s holding that the petitioners did not have the requisite standing under the ESA citizen-suit provision. Instead, the respondents offered three alternative grounds for affirming the Ninth Circuit decision.¹¹⁰

First, the government contended that the petitioners failed to satisfy the constitutional standing requirements embodied in the case or controversy provision of Article III.¹¹¹ The government asserted

105. Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

106. *Bennett*, 117 S. Ct. at 1163 (first alteration in original) (quoting Civil Rights Act of 1968, Pub. L. No. 90-284, § 810, 82 Stat. at 85 (codified as amended at 42 U.S.C. § 3610(a))).

107. *See id.* at 1162-63 (citing *Trafficante*, 409 U.S. at 210-11).

108. *See id.* at 1162. The Court stated that while interpreting the ESA citizen-suit provision to extend up to the limits of Article III may allow persons to assert over-enforcement, as well as under-enforcement, of the Act, “the citizen-suit provision does favor the environmentalists in that it covers all private violations of the Act but not all failures of the Secretary to meet his administrative responsibilities.” *Id.* at 1163; *see also infra* notes 119-23 and accompanying text (explaining that a challenge may be brought against the Secretary only for failure to perform a non-discretionary duty).

109. *See Bennett*, 117 S. Ct. at 1163 (finding that the Ninth Circuit “erred in concluding that petitioners lacked standing under the zone-of-interests test”).

110. *See id.* at 1164-67. Because the district court and the Ninth Circuit viewed the zone of interests ground as dispositive, these alternative grounds were not reached. The Court, perhaps in order to clarify its current view on standing, chose to address these alternative grounds as well, given “[a] respondent[’s] . . . entitle[ment] to . . . judgment on any ground supported by the record.” *Id.* at 1163 (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Ponte v. Real*, 471 U.S. 491, 500 (1985)).

111. *See id.* The “irreducible constitutional minimum” of Article III standing requires

that the petitioners had not shown "injury in fact" because the petitioners claimed only a reduction in the overall amount of water available, and did not provide an adequate evidentiary basis that they would *actually* receive less water.¹¹² The Court disagreed, concluding that the plaintiffs' allegations regarding the reduced amount of water they would receive were sufficient at this stage of the case¹¹³ to justify a finding of "injury in fact."¹¹⁴

As part of their first argument, the government also asserted that the injury lacked a causal connection to the conduct complained of and was not "fairly traceable" to the actions of the defendants nor "redressable" by a favorable decision because the harm came not from the FWS biological opinion but from a decision that had not yet been made as to the amount of water the petitioners would be allocated.¹¹⁵ The Court also ruled against the government on this issue, pointing out that the government itself acknowledged that while the FWS's biological opinion theoretically may serve only an "advisory function," in reality, the opinion has a coercive impact on the agency's decision to adopt the proposed alternatives.¹¹⁶ The Court stated that the FWS also was aware of the finality of its biological opinions.¹¹⁷ Because of the compelling practical effect of the biological opinion and the modest burden at this particular stage

an injury in fact, causality, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

112. *See Bennett*, 117 S. Ct. at 1163.

113. The Court noted that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 1164 (quoting *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990))).

114. *See id.*

115. *Id.* (quoting Brief for Respondents at 22, *Bennett* (No. 95-813)).

116. *Id.* (quoting Interagency Cooperation—Endangered Species Act of 1973, As Amended; Final Rule, 51 Fed. Reg. 19,926, 19,928 (1986) [hereinafter Interagency Cooperation]). The government respondents acknowledged that a reviewing court gives considerable deference to the FWS's views, and any agency that chooses to disregard the alternatives proposed in the biological opinion must include reasons for disagreeing with the biological opinion in its administrative record. *See* Brief for Respondents at 20-21, *Bennett* (No. 95-813) (citing Interagency Cooperation, *supra*, 51 Fed. Reg. at 19,956). The coercive effect of the biological opinion also arises from the fact that by failing to follow the biological opinion's proposed alternatives, the Bureau may be subject to the civil and criminal penalties of the ESA. Penalties can include fines of \$25,000 to \$50,000 per violation and up to a year of imprisonment. *See Bennett*, 117 S. Ct. at 1165; *see also supra* note 70 (explaining that without an Incidental Take Permit, the Bureau may expose itself to civil and criminal penalties).

117. *See Bennett*, 117 S. Ct. at 1165 (noting that "[t]he Service itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions").

in the case, the Court determined that the plaintiffs had adequately alleged the elements of causality and redressability.¹¹⁸

The government's second assertion was that the petitioners' claims were not reviewable under the ESA citizen-suit provision because the statute provides only for suits alleging a violation of the Act or suits against the Secretary for failure to perform a nondiscretionary duty under section 4 of the Act.¹¹⁹ The Court agreed that the ranchers' claims brought pursuant to section 7¹²⁰ of the ESA clearly were not reviewable under subsection (C) of the ESA citizen-suit provision because that provision allows for civil suits against the Secretary only for alleged failure to perform a nondiscretionary duty under section 4 of the ESA.¹²¹ The Court concluded, however, that the ranchers' section 4 claim¹²² did fall under the purview of subsection (C) of the citizen-suit provision and was subject to judicial review because the biological opinion contained an implicit critical habitat designation without assessing, as required by section 4, the economic impact of that designation.¹²³

After concluding that the petitioners' section 7 claims were not reviewable under subsection (C) of the citizen-suit provision, the Court continued to analyze the strength of the government's second

118. *See id.* at 1164 (stating that the government "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation").

119. *See id.* at 1165; *see also supra* note 88 (quoting the ESA's citizen-suit provision).

120. Petitioners alleged that the FWS's determination that the Klamath Project would result in jeopardy to the endangered suckerfish and the Bureau's consequential imposition of minimum water levels violated section 7 of the ESA, which requires that each agency "use the best scientific and commercial data available" in making these determinations. 16 U.S.C. § 1536(a)(2) (1994); *see Bennett*, 117 S. Ct. at 1160.

121. *See* 16 U.S.C. § 1540(g)(1)(C). The Court stated that subsection (C) is "clear and unambiguous" in dictating that it covers only violations of section 4 of the ESA. *See Bennett*, 117 S. Ct. at 1165. Petitioners' first and second claims, which asserted that the Secretary violated section 7, clearly were not reviewable under this provision. *See id.*

122. Petitioners alleged that imposing minimum water levels on the reservoirs was equivalent to a determination of critical habitat for the suckerfish, which violated section 4's mandate that the Secretary take into consideration economic and other relevant factors when making such a determination. *See* 16 U.S.C. § 1533(b)(2); *Bennett*, 117 S. Ct. at 1160.

123. *See Bennett*, 117 S. Ct. at 1166 ("[T]he fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical requirement that . . . he 'tak[e] into consideration the economic impact, and any other relevant impact,' and use 'the best scientific data available.'" (quoting 16 U.S.C. § 1533 (b)(2))). Justice Scalia, writing for a unanimous Court, expressed his disapproval of the lower courts' decisions regarding this issue: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943)).

assertion by addressing whether the same claims were reviewable under subsection (A), which permits private parties to bring injunction actions against alleged violators of ESA regulations.¹²⁴ Analyzing the section 7 claims under subsection (A), the Court refused to read the “in violation of” provision¹²⁵ as an alternative mechanism for obtaining judicial review of the Secretary’s performance under the Act.¹²⁶ The Court also noted that the term “violation” is used elsewhere in contexts that do not refer to a failure of the Secretary or other officer to perform their administrative duties under the Act.¹²⁷ Thus, the Court determined that the reference to “violations” of the ESA in subsection (A) does not include the Secretary’s “maladministration of the Act.”¹²⁸

Because the statutory provisions of the ESA did not give the petitioners standing to bring their section 7 claims,¹²⁹ the Court returned to the prudential zone of interests standing test to determine whether the plaintiffs could challenge the action under the APA.¹³⁰ In applying the “zone of interests” test, whether a plaintiff’s interest is protected by the statute is determined by looking at the particular provision upon which the plaintiff relies, not the overall purpose of the Act.¹³¹ The Court stated that the obvious purpose of

124. *See id.*

125. *See supra* note 88 (quoting the relevant portion of 16 U.S.C. § 1540(g)(1)(A)).

126. *See Bennett*, 117 S. Ct. at 1166. The Court explained that in its view, subsection (A) was a “means by which private parties may . . . enforce the substantive provisions of the ESA against regulated parties—both private entities and Government agencies—but is not an alternative avenue for judicial review of the Secretary’s implementation of the statute.” *Id.*

127. *See id.* As an example, the Court cited § 1540(a), which enables the Secretary to impose civil penalties on “[a]ny person who knowingly violates . . . any provision of [the ESA].” *Id.* (quoting 50 C.F.R. § 1540(a) (1994)).

128. *Id.* at 1167.

129. *See supra* note 120 (summarizing the petitioners’ section 7 claims).

130. *See Bennett*, 117 S. Ct. at 1160. The APA allows courts to prohibit “agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting 5 U.S.C. § 706(2)(A) (1994)). Petitioners can file suit to challenge administrative action under the APA, which provides for judicial review of final agency actions when “there is no other adequate remedy in a court.” 5 U.S.C. § 704. However, the APA itself does not confer standing. Given that the petitioners’ section 7-based claims were not within the statutory citizen-suit provisions of the ESA that conferred standing, there was no congressional conferral of standing. If Congress has not augmented standing through express statutory language, the prudential “zone of interest” standing requirements apply and petitioners must show they are within the zone of interests to be protected by the provision of the ESA at issue. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 91 (1984); *see also supra* note 87 (discussing the application of the zone of interests test under both the ESA and the APA).

131. *See id.* (citing *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

the requirement that each agency use the “best scientific and commercial data available”¹³² is to “ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.”¹³³ The Court determined that the provision’s requirement was essential to avoid the economic disorder that may result from agency officials unwittingly pursuing environmental objectives with complete disregard for the commercial consequences.¹³⁴ Thus, the Court concluded that the petitioners’ claim that they had suffered from an “uneconomic (because erroneous) jeopardy determination” adequately met the zone of interests test for standing under section 7 of the ESA.¹³⁵

The Court then addressed the government’s third and final contention that petitioners could not obtain judicial review under the APA because a biological opinion is not “final agency action” reviewable under the APA.¹³⁶ The Court explained that two conditions must be met for agency action to be “final.”¹³⁷ First, the action must be the culmination of the agency’s decisionmaking process.¹³⁸ Second, the action must be one that determines rights or obligations, or one that creates legal consequences.¹³⁹ It was uncontested that the first element of finality had been met, and the Court decided that the second requirement also was fulfilled.¹⁴⁰

132. 16 U.S.C. § 1536 (a)(2) (1994).

133. *Bennett*, 117 S. Ct. at 1168.

134. *See id.*

135. *Id.* The Court determined that the zone of interests test was required for the action under the APA, but was not required for the citizen-suit provision. *See Bennett*, 117 S. Ct. at 1163, 1167; *see also supra* note 87 (explaining the effect of *Bennett* on the zone of interests test in civil suits under the ESA and APA). At least one commentator believes that in addition to abolishing the zone of interests requirement in ESA cases, the *Bennett* decision “may also foreshadow the complete demise of the test.” Brennan Cain, Note, *Bennett v. Spear: Did Congress Intend for the Endangered Species Act’s Citizen-Suit Provision to Be One Size Fits All?*, 20 ENVIRONS ENVTL. L. & POL’Y J. 2, 16 (1997). Complete dissolution of the zone of interests test would likely have pleased Justice Brennan, who characterized the test as confusing and constitutionally unnecessary. *See Barlow v. Collins*, 397 U.S. 159, 168-69 (1970) (Brennan, J., concurring and dissenting).

136. *Bennett*, 117 S. Ct. at 1168-69 (internal quotation marks omitted). The APA provides for review of final agency action when no other adequate remedy exists. *See* 5 U.S.C. § 704 (1994).

137. *See Bennett*, 117 S. Ct. at 1168.

138. *See id.* (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)). The Court stated that the agency action “must not be of a merely tentative or interlocutory nature.” *Id.*

139. *See id.* (citing *Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

140. *See id.* at 1168-69 (noting that “the Biological Opinion and accompanying Incidental Take Statement [would] alter the legal regime to which the action agency is subject” and would have “direct and appreciable legal consequences”). The Court

Hence, the Supreme Court concluded that the Ninth Circuit had erred in affirming the district court's dismissal of petitioners' claims¹⁴¹ and remanded the case for review of petitioners' section 4 claim under the ESA citizen-suit provision and the petitioners' remaining section 7 claims under the APA.¹⁴²

The policies and theories that led to the enactment and subsequent amendment of the ESA significantly influenced the outcome in *Bennett* and therefore warrant discussion. Passed with overwhelming congressional support in 1973,¹⁴³ the ESA represented an effort to conserve plants and animals that were threatened with extinction.¹⁴⁴ The ESA, informally called "Mother Nature's 911,"¹⁴⁵

assessed the finality of the Biological Opinion by comparing the effect of the Opinion to other events the Court had previously found too tentative to constitute final agency action. *See id.* at 1168 (citing *Dalton v. Specter*, 511 U.S. 462, 470 (1994) (holding that the submission of base closure recommendations to the President by the Secretary of Defense and corresponding committee did not constitute final agency action because the recommendations had to be approved by the President, who also had complete discretion to reject them); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (explaining that the Secretary of Commerce's presentation of a decennial census report to the President did not constitute final agency action because the preliminary nature of the census had no direct legal consequences)).

141. The Court noted that "petitioners' complaint allege[d] facts sufficient to meet the requirements of Article III standing, and none of their ESA claims [were] precluded by the zone-of-interests test." *Id.* at 1169.

142. *See id.*

143. The Senate passed the ESA unanimously, *see* 119 CONG. REC. 25,692 (1973), and the House of Representatives passed the Act with only four dissenting votes, *see id.* at 42,915. Two previous endangered species laws had proven ineffective prior to the enactment of the ESA in 1973. *See* MARTY BERGOFFEN, ENDANGERED SPECIES ACT REAUTHORIZATION: A BIOCENTRIC APPROACH 31-34 (Elissa C. Lichtenstein ed., 1995) (tracing the history leading up to the creation of the ESA in 1973). The two previous acts were the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 5, 83 Stat. 275, 278, and the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926.

144. *See* Pub. L. No. 93-205, § 2, 87 Stat. 884, 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)) (providing congressional findings for enacting the ESA, including that various fish, wildlife, and plants have become extinct as a result of economic growth and development); H.R. REP. NO. 95-1625, at 4-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455 (stating that Congress's impetus for the Act was concern about rapid deterioration of environmental resources and an increasing number of species threatened with extinction). A species is considered "endangered" if it "is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined . . . to constitute a pest." 16 U.S.C. § 1532(6). A species is considered "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

145. Mollie Beattie, Former Director of the U.S. Fish and Wildlife Service, was a strong proponent of the ESA, and often referred to the Act as an "early warning system," a "weather vane," or "Mother Nature's 911." *See* Patrick Parenteau, *She Runs with Wolves*, 21 VT. L. REV. 743, 745 (1997) (paying tribute to Director Beattie, who died of cancer on June 5, 1996).

was intended to counteract the greatest threats facing endangered species: environmental degradation, habitat destruction, and collection.¹⁴⁶ The ESA has been credited with creating “a new era in species conservation”¹⁴⁷ in which the goal is to “halt and reverse the trend toward species extinction, whatever the cost.”¹⁴⁸

Regulation under the ESA is broad and extensive.¹⁴⁹ The Act has been interpreted to apply to the actions of private citizens on private land.¹⁵⁰ The ESA makes it unlawful for *any* person “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a member of an endangered species], or to attempt to engage in any such conduct.”¹⁵¹ The Secretary of the Interior has interpreted the term “harm” as “an act which actually kills or injures wildlife.”¹⁵² The Secretary later broadened this definition by specifying that “harm” also includes habitat modification significant enough to actually kill or injure wildlife by impairing behavioral patterns such as “breeding, feeding or sheltering.”¹⁵³ This interpretation of the term “harm” was upheld in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,¹⁵⁴ the most recent Supreme Court decision dealing with the ESA prior to *Bennett*. *Sweet Home* also found the regulation applicable to the actions of landowners on

146. See James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 311 (1990). In addition to the ESA's prohibitions on injuring threatened or endangered wildlife and their habitat, section 9 of the ESA also makes it unlawful for any person to sell, deliver, receive, carry, transport, or ship any such species, by any means, in interstate or foreign commerce. See 16 U.S.C. § 1538(a)(1)(D)-(F).

147. Cathryn Campbell, *Federal Protection of Endangered Species: A Policy of Overkill?*, 3 UCLA J. ENVTL. L. & POL'Y 247, 263 (1983).

148. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

149. See Lori Hackleman Patterson, Comment, *NEPA's Stronghold: A Noose for the Endangered Species Act?*, 17 CUMB. L. REV. 753, 759 (1997).

150. See 16 U.S.C. § 1538(a) (making it unlawful for “any person subject to the jurisdiction of the United States” to take an endangered species). Section 7 of the ESA applies to federal agencies acting in reference to public land. See *id.* § 1536(a)(2) (mandating the application of section 7 to “Interagency Cooperation” and stating that “[e]ach federal agency” shall not take an endangered species).

151. *Id.* § 1532(19) (defining the term “take”).

152. 50 C.F.R. § 17.3 (1997).

153. *Id.*; see also THOMAS J. SCHOENBAUM & RONALD H. ROSENBERG, ENVIRONMENTAL POLICY LAW 568 (3d ed. 1996) (stating that “because the Secretary was concerned that the old definition of ‘harm’ could be read to mean habitat modification alone, the Secretary inserted the phrase ‘actually kills or injures wildlife’ to preclude claims that only involve habitat modification without any attendant requirement of death or injury to protected wildlife”).

154. 515 U.S. 687 (1995). The *Sweet Home* Court held that the section 9 prohibition on “taking” a listed species applies to significant habitat modification on non-federal land. See *id.* at 708.

private land.¹⁵⁵ The *Sweet Home* decision incited criticism¹⁵⁶ that restricting development on private land constitutes a taking without just compensation under the Fifth Amendment to the Constitution,¹⁵⁷ and debate continues as to whether Congress intended the ESA to apply to development on private land.¹⁵⁸ Additionally, ambiguity remains regarding how close to death or injury wildlife must be before a violation of the Act occurs.¹⁵⁹

155. See *id.* at 697-98.

156. See Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 SUP. CT. ECON. REV. 1, 5-26, 49-57 (1997) (asserting that the Court upheld the Secretary's definition without an adequate understanding of the ESA's policies and without respect for the Constitution); Beth S. Ginsberg, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: A Clarion Call for Property Rights Advocates*, 25 ENVTL. L. REP. 10,478, 10,484 (1995) (asserting that the *Sweet Home* decision provided fodder for the property rights movement); Deborah Meigs Bibbins, Note, *The Goal of Imperfection: Babbitt v. Sweet Home and the Necessity of Imperfect Property Rights*, 29 CONN. L. REV. 919, 931 (1997) (determining the *Sweet Home* Court's interpretation of "harm" to be partly responsible for creating tension between property law and environmental law).

157. The Fifth Amendment states in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V; see Mark Sagoff, *Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act*, 38 WM. & MARY L. REV. 825, 831-51 (1997) (comparing two positions on whether the Fifth Amendment requires compensation in all regulatory takings); Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 58-66 (1993) (explaining how the ESA is suspect under the Fifth Amendment for causing direct and indirect takings of property). Moreover, broad application of the definition of "harm" to include habitat modification by states may violate the Tenth Amendment. See Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 356-64 (1997) (examining the ESA in light of state sovereignty under the Tenth Amendment). The ESA also may face constitutional challenges regarding the power of Congress to use the Commerce Clause as authority for regulating endangered species, given the modern Court's more restrictive interpretation of interstate commerce. See *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting); J. Blanding Holman, IV, Note, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 VA. ENVTL. L.J. 139, 177-211 (1995) (assessing the constitutionality of the ESA and the Clean Water Act in light of a more restrictive reading of the Commerce Clause).

158. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued in dissent in *Sweet Home* that the majority had misinterpreted Congress's intent because no reasonable interpretation of the ESA would apply strict liability penalties to people's daily activities. See *Sweet Home*, 515 U.S. at 721-22 (Scalia, J., dissenting); see also Christopher F. Tate, Note, *Getting out of "Harm's" Way: Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 5 GEO. MASON L. REV. 101, 135-36 (1996) (concluding that the Court in *Sweet Home* misinterpreted Congress's intent and asserting that future litigants face uncertainty as to what behavior will be found to violate the ESA).

159. In her concurring opinion, Justice O'Connor argued that the Secretary's regulation is limited to significant habitat modification causing actual, not merely

Despite the severity of the ESA's prohibitions and penalties, the statute does offer some flexibility. First, the Secretary is required to consider economic impacts in designating critical habitat.¹⁶⁰ The parameters of a critical habitat proposal may be modified if the economic costs of a designation outweigh its benefits, so long as the alteration does not lead to the extinction of a species.¹⁶¹ If extinction might result, the agencies are not permitted to consider economic costs.¹⁶²

The ESA also provides an exemption process for economic interests. In *Tennessee Valley Authority v. Hill*,¹⁶³ the Supreme Court enjoined the construction of the nearly completed Tellico Dam because of a three-inch endangered fish called the snail darter.¹⁶⁴ The Snail Darter fed exclusively on snails that in turn required gravel cleaned by a constant flow of water in order to survive.¹⁶⁵ The Court concluded that despite more than \$103 million expended by Congress in building the dam, the relatively small number of snail darters should receive priority because of what the Court perceived as congressional intent to "halt and reverse the trend toward species extinction, whatever the cost."¹⁶⁶ In response to the *Tennessee Valley Authority* decision, Congress amended the ESA to reduce the statute's rigidity.¹⁶⁷ The ESA Amendments created an "Endangered Species Committee,"¹⁶⁸ which is popularly referred to as the "God

hypothetical or speculative, death or injury to identifiable, individual animals. See *Sweet Home*, 515 U.S. at 709 (O'Connor, J., concurring). She emphasized that the application of the definition is predicated on notions of proximate causation restricting liability within reasonable bounds of foreseeability. See *id.* at 713-14 (O'Connor, J., concurring). Justice O'Connor also suggested that *Palila v. Hawaii Department of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*), was wrongly decided because the link between habitat modification and actual injury was too tenuous to comport with her ideas of proximate causation. See *Sweet Home*, 515 U.S. at 713-14 (O'Connor, J., concurring) (citing *Palila II*, 852 F.2d at 1106, which held that a Hawaiian agency's decision to allow feral sheep to eat seedlings that, when full grown, would have fed and sheltered endangered palila birds was considered a "taking" in violation of the ESA).

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

161. See *id.*; see also Jon A. Souder, *Chasing Armadillos Down Yellow Lines: Economics in the Endangered Species Act*, 33 NAT. RESOURCES J. 1095, 1115-18 (1993) (explaining how the economic analysis proceeds in designating or modifying critical habitat).

162. See 16 U.S.C. § 1533(b)(2).

163. 437 U.S. 153 (1978).

164. See *id.* at 195.

165. See *id.* at 162.

166. *Id.* at 184.

167. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. §§ 1531-1543).

168. See *id.* § 7(e), 92 Stat. at 3753.

Squad"¹⁶⁹ because, in essence, it plays God and makes a determination affecting the survival of a species.¹⁷⁰ Under the amendments, the Committee is entitled to grant exemptions from the ESA if: (1) the proposed action is of national or regional public interest; (2) no feasible alternative exists; and (3) the benefits of the action outweigh the benefits of conservation.¹⁷¹ The exemption process is limited, however, in that it is unavailable to private property owners.¹⁷² Furthermore, exemptions are politically controversial and extremely rare.¹⁷³

One way state and private interests can avoid the prohibitions of section 9 of the ESA¹⁷⁴ is to apply for an Incidental Take Permit.¹⁷⁵ An Incidental Take Permit is granted if the taking will be incidental to otherwise lawful activity by the party, and if the party has devised an appropriate conservation plan (Habitat Conservation Plan, or "HCP") that minimizes the impact of the taking on the endangered species and ensures the species' survival and recovery.¹⁷⁶ While most property owners have applied for Incidental Take Permits on an individual basis in conjunction with a specific project, there is a growing trend toward the creation of regional HCPs, incorporating

169. The source of the nickname is unknown, but it is used frequently. See John Lowe Weston, Comment, *The Endangered Species Committee and the Northern Spotted Owl: Did the "God Squad" Play God?*, 7 ADMIN. L.J. AM. U. 779, 780 n.1 (1993).

170. For further discussion on the role of the Endangered Species Committee, see generally Jared des Rosiers, Note, *The Exemption Process Under the Endangered Species Act: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

171. See 16 U.S.C. § 1536(e)-(p) (1994).

172. See *id.* § 1536(g).

173. The Endangered Species Committee has granted only two exemptions. See Tanya L. Godfrey, Note, *The Reauthorization of the Endangered Species Act: A Hotly Contested Debate*, 98 W. VA. L. REV. 979, 989 (1996). One exemption allowed the construction of the Tellico Dam despite the presence of the snail darter. See *id.* A second exemption was granted in 1992 to allow logging in a habitat occupied by the northern spotted owl in Oregon. See *id.*

174. See *supra* notes 39-44 and accompanying text (discussing section 9 of the ESA).

175. See Endangered Species Act Amendments of 1982, Pub. L. No. 100-478, 102 Stat. 2306 (codified as amended at 16 U.S.C. §§ 1531-1543 (1994)). The Incidental Take Permit provision was part of the 1982 Amendments to the ESA. See H.R. REP. NO. 97-835, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2870. If a development project requires any federal involvement, section 7 would supersede section 9, thereby avoiding section 9's restrictions. Developers prefer this option because section 7 consultations have fixed time limits and requirements that are usually lower than those faced when applying for a section 10 Incidental Take Permit. See Thompson, *supra* note 33, at 315 n.59.

176. See 16 U.S.C. § 1539 (a)(1)(b)-(2)(A). An Incidental Take Permit also may be granted "for scientific purposes or to enhance the propagation or survival of the affected species," but this is usually not applicable to private developmental interests. *Id.* § 1539(a)(1)(A).

multiple property owners and sometimes multiple endangered species.¹⁷⁷ Given that over ninety percent of threatened and endangered species rely on state and private land for part of their habitat, and over sixty percent rely on these segments for a majority of their habitat,¹⁷⁸ HCPs may be an effective way for private landowners to meet the ESA's demands with only limited restrictions on the use of the land.¹⁷⁹ Yet limiting land use, even marginally, still leaves the residual problem of unconstitutional takings under the Fifth Amendment.

To address the takings problem, the FWS and NMFS have proposed administrative reforms.¹⁸⁰ Proposed reforms include special permits for landowners conducting activities that have a low effect on an endangered species.¹⁸¹ Also proposed is a "no surprises" policy to exempt landowners with an appropriate HCP from having to pay additional money for unforeseen circumstances that arise after an HCP is approved, as well as a "safe harbor" provision providing immunity from further ESA liability for landowners who improve a species' habitat on private land.¹⁸² Finally, another proposal is a "candidate conservation agreement," making landowners eligible for a permit for the incidental taking of a species that is not yet listed but may be proposed for listing.¹⁸³

177. See Thompson, *supra* note 33, at 318-21 (noting the increase in proposed regional HCPs and addressing some of the unique issues involved in a regional HCP).

178. See U.S. GEN. ACCOUNTING OFFICE, *ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 1* (1994).

179. As many as 400 HCPs, covering approximately 18 million acres of private and state property, are either completed or on the way to completion. See B.J. Bergman, *A Plan to Die for: With Friends Like These, Wild Creatures Don't Need Enemies*, SIERRA, Nov. 21, 1997, at 32, 34; see also George Frampton, *Ecosystem Management in the Clinton Administration*, 7 DUKE ENVTL. L. & POL. F. 39, 40-42 (1996) (demonstrating the Clinton Administration's preference for HCPs as exemplified by the Administration's increased use of them); Donald L. Soderberg & Paul E. Larsen, *Triggering Section 7: Federal Land Sales and "Incidental Take" Permits*, 6 J. LAND USE & ENVTL. L. 169, 177-78 (1991) (stating that many commentators suggest that an Incidental Take Permit may be the only way to develop private property comprising an endangered species' critical habitat). But see John Kostyack, *Reshaping Habitat Conservation Plans for Species Recovery*, 27 ENVTL. L. 755, 757-64 (1997) (criticizing the current HCP requirements for species conservation and proposing remedies).

180. See Patrick Gallagher, *Endangered Species Act Reforms Aid Landowners*, NAT'L L.J., Sept. 29, 1997, at B9, B10.

181. See *id.*

182. See *id.* For further discussion of the "no surprises" reform measure, see generally Donald C. Baur & Karen L. Donovan, *The No Surprises Policy: Contracts 101 Meets the Endangered Species Act*, 27 ENVTL. L. 767 (1997).

183. See Gallagher, *supra* note 180, at B10. For further discussion of the candidate conservation agreements, see generally Martha F. Phelps, Comment, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an*

A strict interpretation of the ESA provides for little consideration of economic impacts because the Secretary and FWS are given considerable discretion. Nevertheless, the agencies sometimes consider economic consequences in administering the Act because they often face political opposition and threats of litigation.¹⁸⁴ Ultimately, economic interests are not without power to influence the administration of the ESA. Although the ESA initially was applied stringently to halt development projects that had even minimal adverse effects on endangered species, the Act has been amended subsequently and interpreted to provide greater leverage for property owners.¹⁸⁵ Thus, while the Court in *Tennessee Valley Authority* was willing to protect a listed species "whatever the cost,"¹⁸⁶ the current trend is towards greater involvement of all

Administrative Experiment, 25 B.C. ENVTL. AFF. L. REV. 175 (1997).

184. See *Lifting of the Moratorium on ESA Listings: Hearing Before the Comm. on Resources*, 104th Cong. 75 (1996) (prepared statement of John G. Rogers, Acting Director, U.S. Fish and Wildlife Service) (stating that the FWS is "currently faced with several hundred Notices of Intent to Sue, as well as 159 lawsuits against the Service on endangered species issues"), available in WESTLAW, 1996 WL 345821, at *2; Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569, 584-90 (1995) (highlighting attacks on the ESA by business and industry groups). The ten amicus briefs filed by governmental and developmental interests, in addition to the absence of any amicus briefs filed by environmental groups, confirms the immense pressure of development interests in the *Bennett* litigation. See Brief for American Forest & Paper Ass'n, American Petroleum Inst., Northwest Forest Resource Council, and Southern Timber Purchasers Council, *Bennett* (No. 95-813); Brief for the National Ass'n of Home Builders of the United States, the California Bldg. Indus. Ass'n, the Building Indus. Legal Defense Found., the National Multi-Housing Council, the National Apartment Ass'n, and the National Ass'n of Indus. and Office Properties, *Bennett* (No. 95-813); Brief for American Homeowners Found., American Land Rights Alliance as Amici Curiae, *Bennett* (No. 95-813); Brief for the Washington Legal Found., U.S. Senator Dirk Kempthorne, U.S. Representatives Bill Baker, Helen Chenoweth, Gerald B. Solomon, and Richard W. Pombo, *Bennett* (No. 95-813); Brief for the Allied Educ. Found., and Fairness to Land Owners Comm., *Bennett* (No. 95-813); Brief for the State of Texas, *Bennett* (No. 95-813); Brief for the Association of Cal. Water Agencies, the State Water Contractors, and the Central Valley Project Water Ass'n, *Bennett* (No. 95-813); Brief for the American Farm Bureau Fed'n, California Farm Bureau, Idaho Farm Bureau, Texas Farm Bureau, and Oregon Farm Bureau, *Bennett* (No. 95-813); Brief for the States of California, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Kansas, Missouri, Montana, Nebraska, Ohio, Utah, and West Virginia, *Bennett* (No. 95-813); Brief for the Pacific Legal Found., California Cattlemen's Ass'n, National Cattleman's Beef Ass'n, the CATL Fund, and POSSEE, *Bennett* (No. 95-813).

185. See Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat. 2306, 2312 (codified as amended at 16 U.S.C. §§ 1531-1543 (1994)); Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411, 1427 (codified as amended at 16 U.S.C. § 1539 (1994)); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, 3767 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

186. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 154 (1978).

parties and interests affected.¹⁸⁷

The *Bennett* decision appears to comport with the trend in ESA legislation and jurisprudence toward incorporating economic and developmental interests in the major decisions involving endangered species. The *Sweet Home* Court's decision to apply the broad prohibitions of the ESA to private parties created a disparity in favor of environmental interests.¹⁸⁸ The result was to create greater instability in an already weak Act, with fears among ESA proponents that the statute would be dismembered by Congress.¹⁸⁹ By giving landowners and developers equal footing to challenge erroneous ESA decisions, the *Bennett* decision creates a more equal balance between environmentalists and property owners.¹⁹⁰

While species advocates assert that the ESA has been under-regulated, private landowners argue that there has been too much regulation.¹⁹¹ Predictions prior to *Bennett* were that the Act would not survive if the public outcry over private property rights continued.¹⁹² Opposition to the ESA grew as people lost their jobs

187. See *supra* notes 180-83 (explaining the development of incentives for landowners to minimize the impact of habitat modification).

188. Justice Scalia criticized the majority opinion in *Sweet Home* for imposing "unfairness to the point of financial ruin" on even the smallest property owners. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting). For further discussion of *Sweet Home*, see *infra* notes 274-79 and accompanying text.

189. Commentators predicted that the *Sweet Home* decision would lead to the ultimate demise of the ESA. See Craig Robert Baldauf, Comment, *Searching for a Place to Call Home: Courts, Congress, and Common Killers Conspire to Drive Endangered Species into Extinction*, 30 WAKE FOREST L. REV. 847, 849 (1995); Kerry L. Sigler, Note, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: An Invitation to Extinguish the Endangered Species Act*, 23 N. KY. L. REV. 113, 113 (1995). Following the *Sweet Home* decision, property rights groups voiced their widespread opposition to the decision and instigated an ESA reform effort in the Republican Congress in 1995. See Norman J. Vig & Michael E. Kraft, *The New Environmental Agenda*, in ENVIRONMENTAL POLICY IN THE 1990S, at 365, 371 (Norman J. Vig & Michael E. Kraft eds., 1996). The reform effort did little to achieve the necessary meeting of the minds required for effective reform. See R. Clark Morrison, *The Endangered Species Act in an Era of Regulatory Reform*, 3 ENVTL. L. & PRAC. 13, 13 (1995) (finding most ESA supporters to be in a "defensive posture" regarding congressional reform of the ESA).

190. See Robert S. Nix, Comment, *Bennett v. Spear: Justice Scalia Oversees the Latest "Battle" in the "War" Between Property Rights and Environmentalism*, 70 TEMP. L. REV. 745, 781 (1997) (claiming the *Sweet Home* decision created an inequality in favor of environmentalists resulting in a heated property rights versus endangered species debate in Congress, making the *Bennett* decision a "politically necessary outcome").

191. See Zygmunt J.B. Plater, *The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine*, 27 ENVTL. L. 845, 859-60 (1997) (lamenting the influential environmentalist movement in America today).

192. See Patterson, *supra* note 149, at 759-60. The broad interpretation of the ESA's

and property, not just to owls and grizzly bears with notable appeal, but to the smallest species of insects and plants.¹⁹³ Particularly controversial incidents, in which multi-million dollar ventures were halted because of the existence of a seemingly insignificant number of minute species, brought the issue to the media forefront in 1997, demanding attention.¹⁹⁴ The *Bennett* decision at least gives those parties who are affected directly an opportunity to ensure that the Secretary has not abused his discretion in deciding that land use must be limited.

While property owners may have difficulty meeting the abuse of discretion threshold,¹⁹⁵ the potential for a legal challenge will nonetheless compel federal agencies to use sound scientific data in making critical habitat designations and in issuing biological

provisions to include prohibitions on takings by private citizens has created public controversy. *See id.* Reform of the ESA has become a top priority among grassroots organizations. *See id.* at 759 n.36.

193. *See* WILLIAM PERRY PENDLEY, *WAR ON THE WEST* 89 (1995). Pendley notes that the ESA implementation costs have been estimated to be several billion dollars and asserts that "Westerners know all too well what the ESA is costing in terms of lost jobs, lost wages, lost revenues, lost projects, and lost land uses." *Id.* at 97.

194. One of the most unsettling events involving the ESA in 1997 concerned the endangered Delhi Sands flower-loving fly. To avoid prosecution under the ESA for the taking of eight Delhi Sands flies, a California county was compelled to relocate the construction of a hospital and set aside acreage for the preservation of the flies. *See* National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1043 (D.C. Cir. 1997). Additionally, the county had to fund research on the flies. *See Forum: Issues Affecting the Environment in 1997*, METRO. CORP. COUNSEL, Apr. 1997, at 56, available in LEXIS, Legnew Library, Allnws File. The total cost of the relocation, the land preserve, and the research funding was \$4.5 billion. *See id.*

195. Judicial review of agency action requires a court to determine if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994). In the context of administrative law, "arbitrary and capricious" is defined as "willful and unreasonable action without consideration or in disregard of facts or law or without determining principle." BLACK'S LAW DICTIONARY 105 (6th ed. 1991). Abuse of discretion is characterized by "[a] judgment or decision . . . which has no foundation in fact or law." *Id.* at 6. Section 706(2)(A)'s standard of review has been interpreted to mean that the reviewing court should consider whether relevant factors were weighed and whether there was a "clear error of judgment." *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The Supreme Court determined that while the reviewing court's examination of the facts should be "searching and careful, the ultimate standard of review is a narrow one." *Id.*

Given the uphill battle plaintiffs face in challenging agency action under the abuse of discretion standard, they rarely succeed in overturning agency decisions. *See* Cain, *supra* note 135, at 15. Aware of this outcome, many environmentalists do not expect the *Bennett* decision to affect ESA decisions. *See id.* *But see* Lynwood P. Evans, Note, *Bennett v. Spear: A New Interpretation of the Citizen Suit Provision*, 20 CAMPBELL L. REV. 173, 191 (1997) (stating that while the *Bennett* decision alone will not lead to environmental destruction, it will give property interests greater leverage to increase pressure on the environment overall).

opinions. Decisions rendered under the ESA have been criticized for their lack of scientific support.¹⁹⁶ The National Biological Survey (“NBS”) was created in response to this problem; its principal mission is to gather accurate information about endangered and threatened species.¹⁹⁷ Yet despite the hopes of the NBS’s creators, private landowners opposed research conducted by the NBS on their property.¹⁹⁸ This opposition was not surprising given that, prior to *Bennett*, landowners would not have the opportunity to challenge any decisions made concerning their land. While the *Bennett* decision may not affect the final outcome in an ESA determination, perhaps it will alleviate fears among private landowners who may now challenge these determinations concerning their land, and consequently improve the scientific quality of the determination.¹⁹⁹ On the other hand, *Bennett* may perpetuate the exclusion of government scientists from private land because an incentive remains to deprive ESA decisionmakers of the data required to make accurate scientific decisions.²⁰⁰ The final outcome remains to be seen, but the prevailing sentiment among commentators is that the outcome will improve the

196. See Beth Baker, *Endangered Species Legislation*, BIOSCIENCE, Dec. 1, 1997, at 731, 733 (“The Act too often lists species without a sound scientific basis.” (quoting the testimony of W. Henson Moore, head of the American Forest and Paper Association, before the Senate and Environmental Works Committee hearing on a Senate bill to reauthorize the ESA)); see also Michael C. Blumm et al., *Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s*, 27 ENVTL. L. 21, 111-19 (1997) (stating that there are widespread complaints that recovery efforts for endangered salmon lack scientific justification and offering solutions); Nelson, *supra* note 14, at 82 (asserting that the one area of ESA reform that legislators must improve upon is science). One commentator notes that the Forest Service imposed restrictions on boating in the Sawtooth Recreation Area in 1996 to protect the listed Chinook Salmon, despite the Service’s admitted lack of scientific evidence that the boating would have any effect on the fish. See Murray D. Feldman, *Bennett v. Spear: Supreme Court Confirms Standing to Challenge Excessive Government Regulation Under the Endangered Species Act*, 40 ADVOC. 20, 23 (1997).

197. See National Biological Survey; Establishment of Organization, 58 Fed. Reg. 63,387 (1993).

198. See Royal C. Gardner, *Taking the Principle of Just Compensation Abroad: Private Property Rights, National Sovereignty, and the Cost of Environmental Protection*, 65 U. CIN. L. REV. 539, 565-66 (1997). The solution to the problem presented by this opposition was to require NBS personnel to seek consent from the owner before entering private property. See *id.* at 566.

199. See Emily E. Granzotto, *Extending Standing Under the Endangered Species Act to Include Non-Environmentally Interested Parties*, 6 S.C. ENVTL. L.J. 240, 244 (1997) (predicting that the *Bennett* decision will add to the scientific caliber of ESA decisions).

200. The NBS has been portrayed as a “guerrilla army that [sneaks] uninvited on to private property in search of rare creatures in whose name to block development.” *Biodiversity*, ECONOMIST, Feb. 25, 1995, at 85, 85.

science used in ESA determinations.²⁰¹

The popular response to the flood of problems surrounding the ESA has been a movement among both land use proponents and endangered species advocates towards reforming the ESA.²⁰² When the ESA was enacted in 1973, Congress included a sunset provision that would require periodic reauthorization of the statute.²⁰³ The statute was reauthorized accordingly during the Carter Administration in 1978²⁰⁴ and during the Reagan Administration in 1982²⁰⁵ and 1988.²⁰⁶ While the statute officially expired in 1992,

201. See Feldman, *supra* note 196, at 22 (asserting that *Bennett* sends an important signal to agencies involved in ESA determinations that they will be held accountable for the scientific adequacy and support of these decisions); Granzotto, *supra* note 199, at 244 (claiming that the *Bennett* decision will “force[] federal agencies to establish sound factual data before interrupting the lives of persons affected by the policies”); Cain, *supra* note 135, at 15 (stating that the *Bennett* decision will require the FWS to make sure that their section 7 biological opinions are “scientifically defensible”).

202. The ESA has been “maligned by biodiversity conservation proponents and opponents alike, either as not doing enough or as running ramshackle over private property rights.” J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 579 (1995). ESA proponents want to improve the statute’s protection of biodiversity and to reduce the recurring conflict between environmental and developmental interests. See Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 ECOLOGY L.Q. 1, 1-33 (1996) (addressing the ESA’s failures in addressing biological diversity and suggesting reforms); Stuart L. Somach, *What Outrages Me About the Endangered Species Act*, 24 ENVTL. L. 801, 801-13 (1994) (examining the conflicts between endangered species advocates and land use interests, and proposing solutions); James Drozdowski, Note, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. L. REV. 553, 600-02 (1995) (concluding that the ESA has failed to address biodiversity and proposing that this failure will result in irreversible loss of diversity). Property owners want the Act to address the issue of unconstitutional takings under the Fifth Amendment, and they want to be more directly involved in the recovery efforts. See *Bipartisan ESA Reform Moves in Senate; Bill Features Breaks for Landowners*, REAL EST./ENVTL. LIABILITY NEWS, Oct. 17, 1997, available in LEXIS, Legnew, Allnws File [hereinafter *Bipartisan ESA Reform*] (stating that landowners want to be more involved in the recovery planning process of endangered species and want incentives for creating HCPs); see also *supra* notes 180-83 and accompanying text (mentioning proposed incentives to remedy the takings problem for landowners who participate in habitat conservation efforts).

203. See Eva Tompkins, Comment, *Reauthorization of the Endangered Species Act—A Comparison of Two Bills That Seek to Reform the Endangered Species Act: Senate Bill 768 and House Bill 2275*, 6 DICK. J. ENVTL. L. & POL’Y 119, 121 (1997). Sunset provisions are common in public interest statutes like the ESA. See Plater, *supra* note 191, at 876 n.3.

204. See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

205. See Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (codified as amended at 16 U.S.C. § 1539).

206. See Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat.

Congress has continued to appropriate funds annually for enforcement of the Act without reauthorizing the statute.²⁰⁷ A rider attached to a Defense Department supplemental appropriations bill in 1995 put a one-year moratorium on funding for new listings of and critical habitat designations for endangered species,²⁰⁸ but Congress decided not to enact a similar provision in 1996, and listing has since resumed.²⁰⁹ Listings, critical habitat designations, and proposed recovery plans for endangered species have become significantly backlogged.²¹⁰ Agencies complain that a lack of financial resources has affected their ability to implement the Act effectively.²¹¹ Because

2306 (codified as amended at 16 U.S.C. §§ 1531-1543).

207. See Tompkins, *supra* note 203, at 121.

208. See Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, tit. II, ch. 4, 109 Stat. 73, 86. The FWS claimed that the urgent need for defense appropriations was fabricated. See John F. Turner & Jason C. Rylander, *Conserving Endangered Species on Private Lands*, 32 LAND & WATER L. REV. 571, 590 (1997). The effect of the moratorium on FWS was twofold. First, the rider kept the agency from listing endangered species or designating critical habitats. See Jason Coatney, *The Council on Environmental Cooperation: Redaction of "Effective Enforcement" Within the North American Agreement on Environmental Cooperation*, 32 TULSA L.J. 823, 832-33 (1997). Second, the rider reduced the FWS budget for implementing the ESA by \$1.5 million and prohibited offsetting the loss from other programs. See *id.* at 833. For a discussion of the destructive effect riders may have on environmental regulations, see generally Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997).

209. The moratorium ended on April 26, 1996, pursuant to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-159 to -160.

210. Currently, 1686 species are listed as threatened or endangered. See Division of Endangered Species, U.S. Fish & Wildlife Serv., *Box Score: Listing and Recovery Plans as of January 31, 1998* (visited Feb. 24, 1998) <<http://www.fws.gov/~r9endspp/boxscore.html>>. Recovery plans have been prepared for only 744 of the 1686 listed species. See *id.* Harvard biologist Edward O. Wilson estimates that 27,000 species of flora and fauna disappear each year at a rate of approximately 74 per day, or three per hour. See Copley News Service, *scene1*, COPLEY NEWS SERV., Nov. 3, 1997, available in LEXIS, News Library, Curnaws File.

211. Environmentalists are "yelling for more money," which, they say, is necessary to alleviate problems with the Act and for the successful implementation of the Act. Laura Spitzberg, *The Reauthorization of the Endangered Species Act*, 13 TEMP. ENVTL. L. & TECH. J. 193, 233 (1994); see also *Testimony of Jamie Rappaport Clark, Director of U.S. FWS Before the Senate Committee on Environment and Public Works*, M2 PRESSWIRE, Sept. 26, 1997, available in WESTLAW, 1997 WL 14464191, at *10 [hereinafter *Testimony of Jamie Rappaport Clark*] (asserting that lack of adequate funding will result in "significant litigation backlogs"; moreover, actions by federal agencies will be delayed, and the agencies will be unable to meet the burden of their increased responsibilities under the Act). In response to Senator Thomas's (R-Wyo.) question regarding why recovery plans have not been implemented for all listed species, Ms. Clark referred to a lack of sufficient funds and resources. See *Testimony of Jamie Rappaport Clark, supra*, at

Congress controls the appropriations for the ESA on an annual basis, listing activities remain at risk.²¹² The overall consensus among agencies involved in implementing the ESA, property rights advocates, and environmentalists is that the ESA needs reauthorization and reform.²¹³ With *Bennett* creating a more level playing field for property rights interests, reauthorization and reform may proceed with both parties making greater efforts to compromise.²¹⁴

Both houses of Congress are currently considering ESA bills.²¹⁵ On September 16, 1997, Senator Dirk Kempthorne (R-Idaho), joined by Senators John Chafee (R-Rhode Island), Max Baucus (D-Montana), and Harry Reid (D-Nevada), introduced Senate Bill 1180 to reauthorize the ESA.²¹⁶ The bill was sent to the Senate Environment and Public Works Committee by a vote of fifteen to three and was placed on the Senate legislative agenda under general

*10.

212. See Richard Littell, *The Endangered Species Act: Not Just for Environmentalists Anymore*, LEGAL TIMES, Apr. 14, 1997, at 34, 36 (stating that since the ESA expired in 1992, the FWS has had to depend on "year-to-year grants of funds" and "cutbacks in the agency's programs").

213. See Bruce Babbitt, *The Endangered Species Act and "Takings": A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355 (1994) (suggesting reform measures to continue effective environmental policy under the ESA); Bill Thompson, *Externalization of Federal Public Policy Costs: The Endangered Species Act*, 8 FORDHAM ENVTL. L.J. 171, 171-74 (1996) (asserting that ESA reform is a "good place to begin" to find ways to meet the needs of our economy and environment); Michael Vivoli, Note, *"Harm"ing Individual Liberty: Assessing the U.S. Supreme Court's Decision in Babbitt v. Sweet Home*, 32 CAL. W. L. REV. 275, 329 (1996) (concluding that the ESA is flawed and suggesting repeal).

214. One commentator has suggested that because the "strongest property rights arguments" have been resolved by *Bennett*, "Congress can now get down to the business of reauthorizing the [ESA] . . . with a calm, rational deliberation, rather than by [the] heated, rhetorically charged, partisan fighting" that characterized prior reform efforts. Nix, *supra* note 190, at 780. But see Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547 (1997) (asserting that the Supreme Court has not had much impact on environmental regulations).

215. Eight bills to reform the ESA were pending at the adjournment of the 104th Congress. See Lynn L. Bergeson & Brenda L. Tollett, *Environmental Legislative Forecast: What to Expect in 1997*, CORP. LEGAL TIMES, Jan. 1997, at 25, available in LEXIS, Legnew Library, Allnews File. Two of the most prominent bills were the Young-Pombo House Bill, H.R. REP. 2275, 104th Cong. (1995), and the Kempthorne Senate Bill, S. 1364, 104th Cong. (1995). For a discussion of the Young-Pombo and Kempthorne bills and other major bills introduced in the 104th Congress, see Jeffrey S. Kopf, *Slamming Shut the Ark Doors: Congress's Attack on the Listing Process of the Endangered Species Act*, 3 ANIMAL L. 103, 118-21 (1997), and 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, 1153-59 (1995).

216. See S. 1180, 105th Cong. (1997).

orders.²¹⁷ The bipartisan bill appears to have the support of property and development interests.²¹⁸ The bill stresses species recovery over maintenance of species on the brink of extinction, requiring the FWS or the NMFS to develop recovery plans for all listed species within a five-year period.²¹⁹ The bill seeks to improve the quality of the ESA's scientific findings by requiring "peer review" of listing and delisting decisions by scientists nominated by the National Academy of Sciences and appointed by the Secretary.²²⁰ The bill also stresses greater public and state participation in managing listed species.²²¹ The bill provides incentives for landowners to protect a species' habitat by issuing "low effect" permits,²²² installing "no surprises"²²³ and "safe harbor"²²⁴ policies, and creating a "candidate conservation agreement" provision.²²⁵ Finally, the bill authorizes a generous increase in expected funding.²²⁶ The Senate is expected to take action on the bill in 1998.²²⁷ Senators opposed to the bill are preparing to introduce amendments to improve its species recovery provisions when it is brought to the Senate floor.²²⁸

On July 31, 1997, Representative George Miller (D-California), along with fifty-three other Democrat and Republican representatives, introduced House of Representatives Bill 2351.²²⁹ After introduction, the bill was referred to the Committee on Resources and to the Committee on Ways and Means for a period to be determined by the Speaker.²³⁰ Deemed "an environmentalists'

217. *See id.*

218. Environmentalists say Senate Bill 1180 would add new regulatory loopholes for avoiding species protection. *See Baker, supra* note 196, at 733 (citing statement of John Kostyak, counsel for the NWF). No environmental organization has endorsed the bill. *See NWF Endangered Species Update* (last modified Feb. 3, 1998) <<http://www.nwf.org/Endangered/you/digest10.html>>.

219. *See Baker, supra* note 196, at 733.

220. *See id.*

221. *See id.*

222. S. 1180, 105th Cong. § 5(c)(4) (1997); *see supra* note 181 and accompanying text.

223. S. 1180, 105th Cong. § 5(c)(5); *see supra* note 182 and accompanying text.

224. S. 1180, 105th Cong. § 5(f); *see supra* note 182 and accompanying text.

225. S. 1180, 105th Cong. § 5(d); *see supra* note 183 and accompanying text.

226. *See Bipartisan ESA Reform, supra* note 202. The bill proposes to double the money for regulators and increase both the FWS and the NFMS budgets. *See id.* Fifty million dollars would be appropriated for landowner incentives and forty million would be made available for an interest-free loan fund. *See id.*

227. *See Senate Species Rewrite Backers Plan for Quick Start*, CONGRESS DAILY, Jan. 16, 1998, available in WESTLAW, 1998 WL 6604580, at *1 (predicting an early start for action on the ESA reform bill).

228. *See id.*

229. H.R. 2351, 105th Cong. (1997).

230. *See id.*

[sic] 'wish list,'²³¹ the House bill also seeks to promote species recovery and create balanced incentives for engaging landowners in species conservation, but without the Senate bill's proposed peer review and with a more limited spectrum of incentives for landowners.²³² Supported primarily by environmentalists, the bill's future is uncertain.²³³

Common to both bills is the recognition that an accord must be struck between environmentalists and property rights advocates if there is to be species recovery.²³⁴ Ultimately, the success of any reform effort depends on a proposed bill's ability to balance economic and environmental interests. The *Bennett* decision affirmed property owners' rights to be involved in ESA determinations.²³⁵ Similarly, Congress also should acknowledge such interests in ESA reform.

Regardless of the *Bennett* decision's influence on ESA reauthorization and reform, the decision is notable in that it has cleared up the confusion among the circuit courts regarding the application of the zone of interests test of prudential standing.²³⁶ Prior to *Bennett*, the circuit courts were in significant discord regarding both the applicability of the zone of interests test to actions outside of the APA²³⁷ and whether or not economic concerns alone would be adequate to bring a plaintiff within the zone of interests protected by environmental statutes.²³⁸

The zone of interests test of prudential standing made its first

231. Elizabeth Megginson, chief counsel for the House Resources Committee, said House Bill 2351 "reads like an environmentalists' [sic] 'wish list'" and stands no chance of passing. *House Efforts to Reach ESA Compromise Continue*, CONGRESS DAILY, Jan. 16, 1998, available in WESTLAW, 1998 WL 6604581, at *2.

232. See Baker, *supra* note 196, at 733.

233. For updates on the status of both the Senate and House ESA reform bills, see *Thomas Legislative Information on the Internet* (updated daily) <<http://thomas.loc.gov/>>.

234. See Baker, *supra* note 196, at 733.

235. See *Bennett*, 117 S. Ct. at 1169.

236. See *supra* notes 7-11 and accompanying text (discussing further the disagreement among the circuit courts).

237. See *supra* note 7 (citing and comparing the circuit court cases that address whether the zone of interests test applies to civil suits under the ESA).

238. Compare *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1237 (D.C. Cir. 1996) (holding that protection of economic interests is consistent with the statutory purpose of the ESA), with *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (concluding that "[t]he purpose of [the statute] is to protect the environment, not the economic interests of those adversely affected by agency decisions"), and *Dan Caputo v. Russian River County Sanitation Dist.*, 749 F.2d 571, 575 (9th Cir. 1984) (holding that plaintiffs did not have standing under the civil-suit provision of the ESA because their claims arose out of economic, and not environmental, concerns).

appearance in *Association of Data Processing Service Organizations, Inc. v. Camp*.²³⁹ In that case, the plaintiffs, who sold data processing services to other companies, challenged a ruling of the Comptroller of the Currency allowing banks to provide data processing services directly to other banks and to bank customers.²⁴⁰ The Supreme Court held, pursuant to section 702 of the APA, that in addition to the case or controversy requirement of Article III, a plaintiff seeking judicial review under the APA must also show that his interests are “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”²⁴¹ The Court analyzed the legislative history of the Banking Service Corporation Act of 1962²⁴² and, finding no congressional intent to preclude review of the plaintiffs’ action, recognized that the plaintiffs were within the zone of interests protected by the statute.²⁴³

After the *Association of Data Processing* decision, the Court began applying the zone of interests test as a prudential standing limitation,²⁴⁴ although its use was limited.²⁴⁵ Subsequently, in *Clarke v. Security Industry Ass’n*,²⁴⁶ the Court revisited the zone of interests test in another case involving an APA claim. In *Clarke*, the Supreme Court broadened the requirements of the zone of interests test by

239. 397 U.S. 150 (1970).

240. *See id.* at 151.

241. *Id.* at 153. Congress can use its legislative authority to grant standing to citizens as long as the constitutional requirements of Article III are met. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (holding that Congress can increase standing to the limits of Article III). If Congress has not granted standing, the courts will apply the zone of interests test. *See Nichol, supra* note 130, at 91. In determining the zone of interests, courts look to the structure of the statute and its legislative history to reveal congressional intent. *See Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 399-400 (1987). The interests of a plaintiff that the statute protects may be “aesthetic, conservational, and recreational” values, as well as economic values. *Association of Data Processing*, 397 U.S. at 154.

242. Pub. L. No. 87-856, 76 Stat. 1132 (codified as amended at 12 U.S.C. § 1864 (1994)).

243. *See Association of Data Processing*, 397 U.S. at 155-56. The Court pointed out that Congress could eliminate prudential standing questions by authorizing standing up to the limits of Article III. *See id.* at 156.

244. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982).

245. The Court has rarely used the zone of interests test outside of the APA, although it has been applied in constitutional cases and in private rights of action. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (stating that the zone of interests test applies to the Constitution generally); *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 530 (1991) (holding that the Postal Reorganization Act does not give postal service workers a right to sue the United States Postal Service for employing private couriers to deliver mail abroad).

246. 479 U.S. 388 (1987).

holding that judicial review will be denied only when "the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute."²⁴⁷ The Court asserted that the zone of interests test was "not meant to be especially demanding."²⁴⁸ The Court in *Clarke* did not limit its inquiry to the specific provision of the statute challenged by the plaintiffs, but decided that it could look at *any* provision bearing on the overall purpose of the act.²⁴⁹ The Court also stated that the zone of interests test was not universally applicable to questions of prudential standing involving claims other than those brought under the APA.²⁵⁰ The Court did not specify, however, what tests would apply to plaintiffs seeking judicial review under statutes other than the APA.²⁵¹

The Supreme Court later narrowed the interpretation of the zone of interests test in *Air Courier Conference of America v. American Postal Workers Union*.²⁵² Unlike the *Clarke* court, the Court in *Air Courier* refused to accept that the overall purpose of the act in question might support the plaintiffs' claims in deciding whether their interest fell within the requisite zone of interests.²⁵³ The Court asserted that applying such a "level of generality . . . could deprive the zone-of-interests test of virtually all meaning."²⁵⁴ Thus, according to the Court, to meet the zone of interests test, the plaintiff's interest must be consistent with the provision of the act at issue, not merely the overall purpose of the act.²⁵⁵

Prior to the *Bennett* decision, circuit courts did not agree on whether the zone of interests test applied to actions brought pursuant to the citizen-suit provision of the ESA.²⁵⁶ In *Defenders of Wildlife v. Hodel*,²⁵⁷ the Eighth Circuit held that a plaintiff must meet only Article III constitutional standing requirements to attain proper

247. *Id.* at 399.

248. *Id.*

249. *See id.* at 401.

250. *See id.* at 400 n.16.

251. *See id.* at 400.

252. 498 U.S. 517 (1991). In *Air Courier*, postal workers brought suit to challenge a United States Postal Service decision that allowed private mail couriers to deliver mail abroad under certain conditions. *See id.* at 519.

253. *See id.* at 529-30 (concluding that the overall policies of the Postal Reorganization Act ("PRA") did not bring the plaintiffs' claims within the zone of interests of the PRA's Private Express Statutes provisions).

254. *Id.*

255. *See id.* at 530.

256. *See supra* notes 7-11 and accompanying text.

257. 851 F.2d 1035 (8th Cir. 1988), *rev'd on other grounds sub nom.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

standing under the ESA citizen-suit provision.²⁵⁸ The court's position was that the zone of interests test should not be applied because the "any person" language in the ESA citizen-suit provision reflected the intent of Congress to bypass the zone of interests test.²⁵⁹ Conversely, the D.C. Circuit applied the zone of interests test in *Idaho Public Utilities Commission v. Interstate Commerce Commission*,²⁶⁰ a suit brought under the ESA citizen-suit provision. The D.C. Circuit cited *Clarke* in emphasizing that the threshold question for the zone of interests test is whether Congress intended to permit a particular class of plaintiffs to challenge agency violations of the statute in question.²⁶¹ Because the state of Idaho, as plaintiff, asserted an interest in wildlife protection, the Court concluded that Idaho was within the zone of interests protected by the ESA.²⁶²

Similarly, in *Pacific Northwest Generating Cooperative v. Brown*,²⁶³ the Ninth Circuit applied the zone of interests test brought under the ESA's civil-suit provision by hydropower producers and consumers of endangered salmon.²⁶⁴ The court noted that it was still an "open question" whether the zone of interests test should be

258. See *id.* at 1038 (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). The Supreme Court reversed the Eighth Circuit in *Defenders of Wildlife* because the plaintiffs failed to meet the constitutional standing requirements of injury-in-fact and redressability, but the Court never addressed the circuit court's conclusion that the citizen-suit provision of the ESA removed prudential standing limitations. See *Defenders of Wildlife*, 504 U.S. at 562-71. More recently, the Eighth Circuit did not apply the zone of interests test to an ESA citizen suit in *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997), a case that arose when snowmobilers challenged the National Park Service's closure of areas in Voyageurs National Park because of the presence of endangered species. See *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996), *rev'd on other grounds*, 125 F.3d 661 (8th Cir. 1997). At the district court level, the court applied the zone of interests test to plaintiffs' claims brought under the APA, but not to a claim filed under the ESA civil-suit provision. See *id.* at 1341-42. The Park Service and intervening conservation groups appealed to the Eighth Circuit, but the circuit court did not address the district court's conclusion regarding the snowmobilers' standing under the ESA. See *Mausolf*, 125 F.3d at 667.

259. See *Defenders of Wildlife*, 851 F.2d at 1039 (citing 16 U.S.C. §§ 1540(g), 1532(13)).

260. 35 F.3d 585 (D.C. Cir. 1994). In *Idaho v. Public Utilities Commission*, the state of Idaho and three mining companies filed suit against the Interstate Commerce Commission for failure to prepare a biological assessment within the 180-day limit mandated by the ESA. See *id.* at 597.

261. See *id.* at 590-91. The D.C. Circuit has also applied the zone of interests test to claims brought under other environmental statutes. See *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921-27 (D.C. Cir. 1989) (applying the zone of interests test applied in the citizen-suit context to limit actions to those who are directly regulated or benefited by the Resource Conservation and Recovery Act).

262. See *Idaho v. Public Utils. Comm'n*, 498 U.S. at 592.

263. 38 F.3d 1058 (9th Cir. 1994).

264. See *id.* at 1065.

applied to parties asserting solely economic harm,²⁶⁵ but a determination on such grounds was unnecessary because the plaintiffs also asserted an interest in the preservation of the salmon in question, and thus their environmental interests alone met the standing requirement.²⁶⁶ However, prior to Supreme Court review, the Ninth Circuit subsequently resolved the "open question" in *Bennett v. Plenert*,²⁶⁷ in which it held that the zone of interests test applied to citizen suits brought under the ESA and that petitioners asserting solely economic interests were barred from filing suit for failure to satisfy the test.²⁶⁸

Circuit courts applying the zone of interests test of prudential standing to suits brought under the ESA's citizen-suit provision still had to determine whether each plaintiff's particular harm fell within the zone of interests protected by the statute.²⁶⁹ For example, even though the D.C. Circuit applied the zone of interests test in *Mountain States Legal Foundation v. Glickman*,²⁷⁰ the court concluded that the plaintiffs' economic interests alone were sufficient to satisfy the zone of interests test of prudential standing for suits brought pursuant to the ESA citizen-suit provision.²⁷¹ In that case, non-profit corporations, municipalities, and logging companies sued to challenge the government's choice of alternatives for the method of

265. See *id.* (noting that the Eighth Circuit had decided to dispense with the zone of interests requirement for citizen suits under the ESA).

266. See *id.* at 1065.

267. 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.* *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

268. See *id.* at 918-19. For further discussion of the Ninth Circuit decision in *Bennett v. Plenert*, see *supra* notes 79-85 and accompanying text. The Ninth Circuit has also determined that non-environmental concerns do not satisfy the prudential standing requirements for other environmental statutes. In *Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713 (9th Cir. 1993), the Ninth Circuit applied the zone of interests test to a citizen suit under NEPA and decided that the plaintiffs' solely economic interests were not within the zone of interests Congress intended to protect by statute. See *id.* at 716. Similarly, in *Dan Caputo Co. v. Russian River County Sanitation District*, 749 F.2d 571 (9th Cir. 1984), the Ninth Circuit denied plaintiffs' standing under the Clean Water Act's citizen-suit provision, see Pub. L. No. 92-500, § 505, 86 Stat. 816, 888 (1972) (codified as amended at 33 U.S.C. § 1365 (1994)), because the plaintiffs' injury did not arise out of an environmental interest. See *Dan Caputo Co.*, 749 F.2d at 575.

269. Even though some circuit courts applied the zone of interests test, at least one commentator notes that they sometimes applied it incorrectly. See Kathleen C. Becker, *Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interest Test*, 26 ENVTL. L. 1071, 1081-85 (1996) (addressing misapplication of the zone of interests prudential standing test in circuit courts). The author suggests that the language "'any person' [in the ESA citizen-suit provision] does not grant all conceivable persons a cause of action" and asserts that such an interpretation is supported by policy reasons. *Id.* at 1088.

270. 92 F.3d 1228 (D.C. Cir. 1996).

271. See *id.* at 1237.

timber harvesting in a national forest.²⁷² The court determined that Congress had intended to subject agencies to both environmental and economic challenges, and granted standing to the plaintiffs.²⁷³

The issue of whether prudential standing applied to actions brought pursuant to the citizen-suit provision of the ESA was nearly resolved in 1995 in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.²⁷⁴ Landowners, logging companies, and families dependent on the forest product industries brought the case against the Secretary of the Interior and the Director of the FWS under the citizen-suit provision of the ESA.²⁷⁵ Plaintiffs alleged that the application of the “harm” regulation²⁷⁶ to the red-cockaded woodpecker and northern spotted owl had injured the plaintiffs economically.²⁷⁷ The Supreme Court granted certiorari, but the question of the plaintiffs’ standing was not raised despite the plaintiffs’ assertion of solely economic interests in challenging the Secretary’s regulation regarding habitat modification.²⁷⁸ Because the issue of standing was not raised, the Supreme Court deferred answering the question regarding the applicability of the zone of interests test to citizen suits under the ESA until the *Bennett* decision.²⁷⁹

Bennett clears up the confusion among the circuit courts regarding the applicability of the zone of interests test to suits brought under the ESA’s citizen-suit provision. The *Bennett* Court held that “any person” may bring suit, expanding standing to the limits of Article III and displacing prudential standing requirements

272. *See id.* at 1231. The plaintiffs’ first claim asserted an interest in observing grizzly bears in the wild. *See id.* at 1236. The court dismissed this claim, stating that the plaintiffs did not have a real interest in such protection. *See id.* at 1236-37.

273. *See id.* at 1236-38. Also at issue in *Mountain States Legal Foundation* was the question of whether the plaintiffs’ interests fell within the zone of interests protected by NEPA to grant them standing under their NEPA claim. *See id.* at 1235-36; *see also infra* notes 292-302 and accompanying text (discussing the procedural requirements imposed by NEPA on federal agencies). For a more comprehensive analysis of the *Mountain States Legal Foundation* opinion, see generally Robert I. Levy, Note, *Mountain States Legal Foundation v. Glickman: Environmental Standing Continues Its Trek As a Moving Target*, 10 TUL. ENVTL. L.J. 123 (1997), and Elizabeth Monohan & Brian Wright, Comment, *Mountain States Legal Foundation v. Glickman: Disputes over Timber Removal from National Forests*, 12 J. NAT. RESOURCES & ENVTL. L. 189 (1996-97).

274. 515 U.S. 687 (1995).

275. *See id.* at 692.

276. *See supra* notes 141-55 and accompanying text (discussing the Secretary’s definition of the term “harm”).

277. *See Sweet Home*, 515 U.S. at 692.

278. *See id.*

279. *See Bennett*, 117 S. Ct. at 1163.

for claims brought under the citizen-suit provision.²⁸⁰ Plaintiffs bringing claims pursuant to the APA, however, must still meet the prudential standing zone of interests requirements.²⁸¹ Whether a plaintiff's claim lies within the zone of interests is determined by reference to the particular provision of law upon which the plaintiff relies, not the overall purpose of the act, a determination the Court believed had been established by precedent.²⁸² The petitioners in *Bennett* brought claims pursuant to section 7 of the ESA,²⁸³ which required the Secretary to use economic considerations in making critical habitat designations.²⁸⁴ Because Congress contemplated that the Secretary would consider economic factors, the Court determined that the petitioners' economic interests were among those protected by the provision of the statute on which the petitioners relied and, therefore, the petitioner's met the zone of interests test necessary to pursue their claim.²⁸⁵

The inclusion of economic interests within the zone of interests for claims brought under the APA may have implications for other cases brought pursuant to environmental statutes. Provided that economic interests are contemplated within the statutory provision on which a plaintiff relies, it is likely that economic interests will now be found within the zone of interests protected by other environmental statutes. Cases like *Dan Caputo Co. v. Russian River County Sanitation District*²⁸⁶ and *Nevada Land Action Ass'n v. United States Forest Service*,²⁸⁷ denying standing to plaintiffs with completely economic interests, appear to have been decided wrongly in light of *Bennett*.²⁸⁸

280. *See id.* at 1167.

281. *See id.*; *see also supra* note 20 (discussing a plaintiff's right to judicial review under the APA).

282. *See Bennett*, 117 S. Ct. at 1167 (citing *Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517 (1991); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)). Justice Scalia, writing the opinion of the Court, expressed frustration at the Ninth Circuit's denial of standing, stating that it was "difficult to understand how the Ninth Circuit could have failed to see . . . from our cases" that the plaintiff's economic interests should be consistent with the particular provision of the ESA at issue. *Id.*

283. *See id.* at 1168.

284. *See id.*

285. *See id.*

286. 749 F.2d 571 (9th Cir. 1984); *see also supra* note 268 (discussing *Dan Caputo Co.*).

287. 8 F.3d 713 (9th Cir. 1993); *see also supra* note 268 (discussing *Nevada Land Action Ass'n*).

288. Other environmental statutes using the "any person" language, like the NEPA and the Clean Water Act, will most likely be found to negate the zone of interests requirement. Absent such language, the zone of interests test may still apply; however,

While the Supreme Court did not address the issue directly, the *Bennett* decision could affect standing determinations for parties with development interests desiring to bring a claim against the Secretary making an ESA determination.²⁸⁹ Controversy exists among the circuit courts as to whether the Secretary of the Interior or the Secretary of Commerce should be exempt from complying with NEPA when taking action under the ESA and declaring critical habitat for species listed as endangered or threatened.²⁹⁰ Using NEPA to delay government action is a tactic generally favored by environmentalists,²⁹¹ but this tactic becomes problematic when it threatens environmental interests.

NEPA contains procedural requirements that federal agencies must follow to assess the consequences of certain actions.²⁹² When an agency proposes an action that may have consequences for the environment, the agency first must conduct an environmental assessment.²⁹³ The environmental assessment is a preliminary analysis of the agency's action and the effects it will have on the physical and economic environment.²⁹⁴ The environmental assessment concludes with a finding of no significant impact or with a determination that the effects will be significant on the environment.²⁹⁵ If the effects of the action are predicted to be significant, the federal agency must prepare an environmental impact statement ("EIS").²⁹⁶ To fulfill the EIS requirement, the agency must prepare a finding of all possible effects of a proposed action,²⁹⁷ list all reasonable alternatives to the action,²⁹⁸ and solicit comments from

the ESA and APA).

9. The petitioners in *Bennett* raised a fourth claim: that the designation of critical habitat violated NEPA because it was not preceded by an environmental assessment. *See Bennett*, 117 S. Ct. at 1160 n.1. The court of appeals' dismissal of this claim was not reversed on appeal and the Supreme Court did not address the issue. *See id.*

10. *See Patterson, supra* note 149, at 754.

11. *See* Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 578 (1997) (asserting that NEPA may be used to promote environmental justice by facilitating a delay in government action).

12. *See* 42 U.S.C. §§ 4321, 4331-4332 (1994).

13. *See* 40 C.F.R. § 1501.1 (1997).

14. *See id.* § 1508.9.

15. *See id.* § 1501.4.

16. *See* 42 U.S.C. § 4332(C).

17. *See id.* § 4332(C)(ii). The EIS must assess both direct and indirect effects. *See* 40 C.F.R. § 1508.8.

18. *See* 42 U.S.C. § 4332(C)(iii); 40 C.F.R. § 1508.25(b).

federal and state agencies and other interested parties.²⁹⁹ Not surprisingly, the NEPA process is often the source of endless delays in agency actions and is sometimes the cause of a project's complete injunction.³⁰⁰ If the NEPA process were made applicable to ESA actions, this "could create a situation in which anyone could use NEPA as an obstructionist tactic to impede the protection of an endangered species."³⁰¹ Allowing NEPA challenges to ESA actions might create situations in which the time required to comply with the NEPA mandates or to defend a NEPA challenge would result in the loss of an endangered species or a species' critical habitat.³⁰²

Despite the possibility of abuse, at least one circuit court has determined that NEPA does apply to ESA actions.³⁰³ In *Catron County Board of Commissioners v. United States Fish and Wildlife Service*,³⁰⁴ the Tenth Circuit held that the Secretary of the Interior must comply with NEPA guidelines when making critical habitat designations.³⁰⁵ The court rejected the Secretary's argument that the similarities in procedure between NEPA and the ESA,³⁰⁶ along with congressional silence as to judicial and executive noncompliance with the NEPA mandates, was evidence that the ESA displaced NEPA.³⁰⁷ The Tenth Circuit explicitly rejected the assertion that no impact to the physical environment would occur from a designation of critical habitat.³⁰⁸ The court concluded that when the environmental effects of an action are unknown, Congress intended that an environmental assessment be prepared in accordance with NEPA guidelines.³⁰⁹

In contrast, the Court of Appeals for the Ninth Circuit held in

299. See 42 U.S.C. § 4332(C).

300. See Patterson, *supra* note 149, at 757-58.

301. *Id.* at 784.

302. See *id.*

303. See *Catron County Bd. of Comm'rs v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1432 (10th Cir. 1996).

304. 75 F.3d 1429 (10th Cir. 1996).

305. See *id.* at 1436.

306. See *id.* The Secretary claimed that the ESA requirements were duplicative of the NEPA requirements. See *id.* A federal agency may be excused from NEPA requirements if (1) "by complying [with NEPA] the agency would . . . violate its own enabling statute," or (2) if the action the agency is planning requires the agency to make assessments that are "functionally equivalent" to NEPA's requirements. Richard W. Bertelson, III, Note, *Danger for the Endangered Species Act?: Catron County Board of Commissioners, New Mexico v. United States Fish and Wildlife Service*, 12 J. NAT. RESOURCES & ENVTL. L. 167, 176, 178 (1996-97) (addressing the functional equivalence doctrine).

307. See *Catron County*, 75 F.3d at 1436.

308. See *id.* at 1436-39.

309. See *id.* at 1439.

*Douglas County v. Babbitt*³¹⁰ that NEPA did not apply to designations of critical habitat for the northern spotted owl.³¹¹ The Ninth Circuit determined that the ESA's primary purpose of preventing species extinction superseded the NEPA mandate of a comprehensive analysis of a designation's effects on the human environment.³¹² The court interpreted the legislative intent narrowly in determining that the congressional requirement to consider economic and other relevant impacts was restricted to actions that change the physical environment.³¹³ Finally, the Ninth Circuit concluded that applying NEPA to the ESA would not further the purposes of either statute.³¹⁴

The conflict between the circuit courts regarding the applicability of NEPA to the ESA was not directly resolved in *Bennett*. Perhaps the Supreme Court's decision not to address the Ninth Circuit's dismissal of the petitioners' NEPA claim exemplifies its agreement with the Ninth Circuit's holding in *Douglas County* that the ESA is not subject to NEPA mandates. It has been suggested that because the Supreme Court, through *Bennett*, "has . . . allowed challenges to federal actions taken pursuant to the ESA based solely on economic injury, no need exists to use NEPA for [such a] purpose."³¹⁵ If the Court were to determine that NEPA is intended to apply to the ESA, this determination could significantly affect the strength of the ESA through substantial delays in agency action and additional challenges to agency determinations.³¹⁶ However, the Court may be unwilling to pull all of the teeth from the ESA, one of the few environmental statutes that is considered to have any bite.³¹⁷

310. 48 F.3d 1495 (9th Cir. 1995).

311. *See id.* at 1507.

312. *See id.* at 1503.

313. *See id.*

314. *See id.* at 1506. For further discussion on the *Douglas County* decision, see generally Melaney Payne, Note, *Critically Acclaimed but Not Critically Followed—The Inapplicability of the National Environmental Policy Act to Federal Agency Actions: Douglas County v. Babbitt*, 7 VILL. ENVTL. L.J. 339 (1996).

315. Patterson, *supra* note 149, at 790.

316. *See* Johnson, *supra* note 291, at 579 (stating that NEPA is time-consuming and that citizens can force further delays through litigation if the government does not comply fully with NEPA's mandates).

317. Unlike some other environmental statutes, the ESA contains stringent enforcement provisions, including civil and criminal penalties. *See* 16 U.S.C. § 1540(2)(b) (1994); Jean M. Emery, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L.J. 973, 975 (1996); Kevin D. Batt, Comment, *Above All, Do No Harm: Sweet Home and Section Nine of the Endangered Species Act*, 75 B.U. L. REV. 1177, 1191 n.67 (1995) (asserting that it is the civil and criminal penalties of section 11 that give the Act

Given the detrimental effect that NEPA challenges could present, it seems unlikely that the Court would allow them, particularly now that plaintiffs can bring facial challenges to the ESA when they believe the Secretary has failed to consider the importance of economic interests. Despite the potential delays NEPA could create in ESA determinations, NEPA supporters believe broad application of the NEPA procedural requirements will preserve the ESA's integrity for balancing economics against the environment.³¹⁸ Mechanisms like the ESA emergency listing provision³¹⁹ and NEPA's "functional equivalence" doctrine may reduce the negative effects on the species involved.³²⁰ While the intense scrutiny that the NEPA procedures require may be valuable in improving the scientific basis of a federal agency's decision, ultimately the *Bennett* decision has made NEPA unnecessary by providing adequate incentive for agencies to use diligence in making listing and critical habitat decisions.³²¹

Armed with the *Bennett* decision, parties with property interests are asserting their newly recognized right to challenge agency determinations under the ESA,³²² and it is likely that more challenges will follow.³²³ This increased litigation may create even greater financial demands on already underfunded agencies,³²⁴ further

"its bite"); see also *supra* note 70 (explaining civil and criminal penalties under the ESA).

318. See Jim Davis, Note, *Environmental Law—Can NEPA and the ESA Work Together? Designations of Critical Habitat for an Endangered Species Must Fulfill National Environmental Policy Act Requirements*, 32 LAND & WATER L. REV. 677, 691-93 (1997).

319. One commentator suggests that the ESA's emergency regulations will alleviate the risk of potential extinction of species and permanent loss of habitat for species awaiting critical habitat designations. See *id.* at 696-97.

320. See Payne, *supra* note 314, at 373.

321. See Cain, *supra* note 135, at 15 (recognizing that while the *Bennett* decision might increase the time and effort the FWS puts into a section 7 determination, it is nevertheless desirable because it ensures valid data).

322. See *Building Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.C. Cir. 1997) (concluding that landowners meet the standing requirement in an action challenging FWS's listing of the fairy shrimp as endangered); *Wyoming Farm Bureau Fed'n v. Babbitt*, Nos. 94-CV-286-D, 95-CV-027-D, 95-CV-1015-D, 1997 WL 781027, at *5 (D. Wyo. Dec. 12, 1997) (granting standing to Farm Bureau members asserting an economic interest in ranching in an action under the ESA challenging the re-introduction of gray wolves in Yellowstone National Park).

323. Ten amicus briefs were filed in *Bennett* on behalf of developmental organizations and other property interests. See *supra* note 184. Vermont Law School's Environmental Law Center Director, Patrick Parenteau, believes the *Bennett* decision will lead to "a surge of litigation under the [ESA]." See Littell, *supra* note 212, at 34 (quoting Patrick Parenteau).

324. See *Testimony of Jamie Rappaport Clark*, *supra* note 211, at *10 (addressing the lack of sufficient agency funding). Providing compensation for landowners who are

decreasing their ability to conduct listing determinations, establish critical habitats, and prepare recovery plans.³²⁵ The ESA reauthorization movement should address the potential strain on agency financial resources if the ESA is to continue to function properly.

Despite the current consensus that ESA reform should include greater consideration of parties with property interests, reform provisions should not compromise the preservation of our endangered species. Although many species may appear unimportant or unattractive, we cannot lose sight of the larger picture. Ultimately, all species, including the human species, are interconnected and reliant on one another for a healthful existence.³²⁶ To remove even a seemingly insignificant number of minute organisms from an ecosystem is to disrupt a delicate balance with repercussions on a larger scale.³²⁷

The potential benefits of even microscopic species also should not be overlooked.³²⁸ In enacting the ESA, Congress appreciated

required to surrender their property because of the presence of an endangered species is often very expensive. For example, the federal government paid \$250 million dollars to a Texas man and \$130 million to the state of California in order to save from logging and development 7000 acres of prime redwoods, the home of the Marbled Murrelet bird. See Michael Satchell, *To Save the Sequoias: A Dollars for Trees Deal Ends a Fight in an Ancient Forest*, U.S. NEWS & WORLD REP., Oct. 7, 1996, at 42, 42.

325. In addition to the significant time factor associated with making listing and critical habitat determinations, the analysis can be expensive. See Cain, *supra* note 135, at 15-16. With heightened scrutiny applied to their decisions, the agencies responsible for implementing the ESA may be hesitant to make decisions that are not economically beneficial to the parties involved. See *id.*

326. See Jeffrey A. Lockwood, *The Intent and Implementation of the ESA: A Matter of Scale*, 32 LAND & WATER L. REV. 551, 556-58 (1997) (discussing the interdependency of all species in an ecosystem). One commentator noted that Congress's ill approach toward an environmental issue also might adversely affect the health of all species, including humans. See Dick Thompson, *Congressional Chain-Saw Massacre*, TIME, Feb. 27, 1995, at 58, 58.

327. In determining the fate of the Delhi Sands flower-loving fly, Judge Wald gave credence to the interconnectedness of nature, using biologist Edward Wilson's words:

"Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage."

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1053 (1997) (quoting EDWARD WILSON, THE DIVERSITY OF LIFE 308 (1992)).

328. While human science has been able to fully explore the largest of the Earth's species, there are perhaps thousands of microscopic species that have not yet been studied. See EDWARD O. WILSON, NATURALIST 364 (1994) (asserting that "[m]icrowildernesses exist in a handful of soil" and that "[t]en million bacteria live in a gram of ordinary soil," which "represent thousands of species, almost none of which are known to science").

what miracle cures the Earth's creatures might hold, stating that the "value of this genetic heritage is, quite literally, incalculable."³²⁹ While all creatures may not hold intrinsic value,³³⁰ the fact that organisms may contain medicinal value necessitates careful deliberation before decisions are made that could deprive mankind, as well as the creature in question, of a fighting chance of survival.³³¹ In addition to medicinal value, learning more about endangered species can help to develop new agricultural products and lead to the discovery of cleaner, renewable sources of energy.³³² While no one knows for certain the future of the ESA, in the wake of *Bennett*, it appears that property owners will play an integral role. But the presence of property owners at the endangered species roundtable does not have to be a threatening event for environmentalists. The

329. H.R. REP. NO. 93-412, at 4 (1973).

330. Some species have been found to have medical uses; for example, the Pacific Yew tree contains a substance called taxol that may cure cancer, but the vast majority of species do not. See Plater, *supra* note 191, at 852-53. However, Senator Chafee (R-RI), sponsor of the most recent Senate ESA Reauthorization bill, Senate Bill 1180, noted that when Noah filled his ark, God told him to include all species, "clean and unclean, of birds and everything that crawls on the ground" and did not limit the passengers to "only the most beautiful animals or those plants that might have some particular use to mankind and perhaps to help him cure cancer." 142 CONG. REC. 1842 (daily ed. Mar. 12, 1996) (statement of Sen. Chafee (quoting *Genesis* 7:8)). Recently, otherwise conservative Evangelical Christians have begun a movement to support a stronger ESA. See Peter Steinfelds, *Evangelical Group Defends Laws Protecting Endangered Species As a Modern "Noah's Ark,"* N.Y. TIMES, Jan. 31, 1996, at A12. The Evangelical Christian supporters asserted in 1996, when urging Congress not to weaken the ESA, that "[o]nly the Creator has the right to destroy His creation." Eugene Linden, *What Have We Wrought? Our Descendants in the Next Century May Find Themselves Paying Dearly for the Material Magic of the Consumer Society*, TIME INT'L, Nov. 1, 1997, available in WESTLAW, 1997 WL 13376245, at *9 (internal quotation marks omitted).

331. Justice Douglas, in his famous dissent in *Sierra Club v. Morton*, 405 U.S. 727 (1972), recognized the importance of all organisms and the limitations courts face in making decisions regarding endangered species:

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth."

See *id.* at 750-51 n.8 (Douglas, J., dissenting) (quoting an environmental publication). Justice Douglas noted that penicillin, tetracycline, and other antibiotics were created from "lowly molds" and now rank among the "most powerful and effective medicines ever discovered by man." *Id.* (Douglas, J., dissenting) (quoting an environmental publication). He continued by stating, "Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth." *Id.* (Douglas, J., dissenting) (quoting an environmental publication).

332. See Kelly A. Keenan, Note, *They Paved Paradise and Put up a Parking Lot: Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 60 ALB. L. REV. 1483, 1506-07 (1997).

ESA process actually may function better if property owners understand its components and become stakeholders with a vested interest in the process.³³³ The time is ripe to realize that without the enlistment of property owners, the Act itself may become extinct.

DEANNE M. BARNEY

333. See *Institute for Environment & Natural Resources Board Principles*, 32 LAND & WATER L. REV. 623, 623 (1997) (suggesting that the ESA will work better if landowners are involved and that they may be able to propose solutions to improve ESA implementation and generate greater public support).