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**BENNETT v. PLENERT, OR WHO LOVES
THE SUCKERS? A QUESTION OF STANDING UNDER
THE ENDANGERED SPECIES ACT**

Robert W. Henry*

I. INTRODUCTION

In 1973, the United States Congress passed the Endangered Species Act (ESA)¹ in response to growing public concern over the accelerating rate of extinction of wildlife species in the United States.² Section 4(a) of the ESA requires the Secretary of Commerce or the Secretary of the Interior to determine whether any species is “endangered” or “threatened” and to designate the critical habitat necessary for the continued survival of such species.³ Section 4(b) of the ESA requires that the designation of critical habitat be based on the “best scientific data available taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.”⁴ Like most environmental protection statutes, the ESA also contains a citizen-suit provision that allows citizens to act as “private attorneys general,” supplementing federal government enforcement of these statutes.⁵

*Bennett v. Plenert*⁶ addresses the standing issue concerning plaintiffs bringing citizen suits challenging governmental actions taken pursuant to the ESA. In *Bennett*, the Ninth Circuit Court of Appeals narrowed the scope of the citizen-suit provision of the ESA by using a “zone of interests” test to exclude from standing any plaintiffs not alleging an interest in the preservation of endangered species.⁷ Using the zone of interests test, the Ninth Circuit held that the plaintiffs in *Bennett*, Oregon ranchers and irrigation districts, lacked standing under the citizen-suit provision of the ESA because they sought to protect their irrigation water from federal government actions designed to benefit endangered sucker fish in two Bureau of Reclamation reservoirs.⁸

Bennett is a significant case because it is one of the latest attempts by

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

2. ROBERT V PERCIVAL ET AL., ENVIRONMENTAL REGULATION 1181-90 (2d ed. 1996).

3. See 16 U.S.C. § 1533(a) (1994).

4. See § 1533(b)(2).

5. PERCIVAL ET AL., *supra* note 2, at 1077 (describing 16 U.S.C. § 1540).

6. 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom*, *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

7. See 63 F.3d at 919.

8. *Id.* at 921.

the federal court system to clarify the issue of standing in environmental suits in the wake of *Lujan v. Defenders of Wildlife*,⁹ the case in which the United States Supreme Court established a constitutional test for standing for plaintiffs suing under citizen-suit provisions of federal statutes.¹⁰ *Bennett* is also significant because it will be the case in which the Supreme Court clarifies the issue of standing under the ESA, and decides whether the Ninth Circuit's interpretation of the zone of interests test will stand.

II. FACTUAL AND PROCEDURAL HISTORY OF *BENNETT V. PLENERT*

The Klamath Project was constructed in the early twentieth century, by the United States Bureau of Reclamation (Bureau), for the purpose of providing irrigation water to farmers and ranchers living in an arid region of southern Oregon and northern California.¹¹ The Klamath Project consists of several lakes, reservoirs, and rivers which are utilized to store and transport water used to irrigate approximately 240,000 acres.¹² Two reservoirs are used to store water in the eastern portion of the Klamath Project: Clear Lake Reservoir, located in California, and Gerber Reservoir, located in Oregon.¹³ The waters of the Klamath Project are home to two species of endangered fish, the Lost River sucker (*Deltistes luxatus*) and the shortnose sucker (*Chasmistes brevirostris*).¹⁴

In 1988, the Lost River sucker and shortnose sucker were listed as endangered species under the ESA.¹⁵ In 1991, the Bureau, concerned over population declines of the listed suckers, initiated consultation with the United States Fish and Wildlife Service (USFWS), pursuant to section 7 of the ESA.¹⁶ In 1992, the USFWS issued its Biological Opinion, concluding that unless the Bureau took mitigating action, the "long-term operation of the Klamath Project is likely to jeopardize the continued existence of the Lost River and shortnose suckers."¹⁷ In August, 1992,

9. 504 U.S. 555 (1992).

10. See *id.* at 560-61. Under *Lujan*, to have standing a plaintiff must show: 1) an injury in fact; 2) a causal connection between the injury and the conduct complained of; and 3) the likelihood that the injury will be redressed by a favorable decision. *Id.*

11. Complaint for Declaratory and Injunctive Relief at *10a, *Bennett v. Plenert*, 1993 WL 669429 (D. Or. 1993) (No. 93-6076-HO) (Complaint appears as an appendix to Brief for Petitioners on Writ of Certiorari, 1996 WL 277131, at *5a).

12. Appellee's Brief at 8, *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) (No. 94-35008), *rev'd.*, 117 S. Ct. 1154 (1997) (on file with author).

13. Complaint, 1996 WL 277131, at *10a, *Bennett* (No. 93-6076-HO).

14. *Id.*, see also 53 Fed. Reg. 27,130, 27,133 (1988).

15. Complaint, 1996 WL 277131, *10a, *Bennett* (No. 93-6076-HO); see also 53 Fed. Reg. 27,130, 27,133 (1988).

16. *Bennett*, 63 F.3d at 916.

17. *Id.*

the Bureau notified the USFWS that it intended to comply with the mitigation measures recommended by the USFWS in the Biological Opinion, which included the maintenance of minimum reservoir levels in Clear Lake and Gerber reservoirs.¹⁸ In order to maintain the minimum water levels recommended by the Biological Opinion, the Bureau would have to store more water in the reservoirs, making less water available for irrigation.¹⁹

On March 8, 1993, the Plaintiffs, two Oregon ranchers and two Oregon irrigation districts who receive their irrigation water from Clear Lake and Gerber reservoirs, filed suit in federal district court against the Director and Regional Director of the USFWS, and the Secretary of the Interior.²⁰ Plaintiffs claimed violations of the ESA in the preparation of the Biological Opinion, and sought injunctive and declaratory relief requiring the Bureau and the USFWS to withdraw portions of the Biological Opinion, thus allowing the release of more water from the reservoirs for irrigation.²¹ The Plaintiffs asserted jurisdiction under the citizen-suit provision of the ESA.²²

The Plaintiffs argued that the Biological Opinion, by setting minimum water levels in the two reservoirs in question, had, in effect, designated critical habitat for the suckers without taking into account the economic impacts of the designation, as required by section 4 of the ESA.²³ The Plaintiffs also challenged the Biological Opinion, claiming that it showed that the populations of suckers in Clear Lake Reservoir and Gerber Reservoir were healthy despite the use of these reservoirs for irrigation purposes for nearly a century.²⁴ The Plaintiffs claimed the decline of the sucker populations had occurred only in the western portion of the Klamath Project, in waters not physically connected to the two reservoirs in question.²⁵

According to the Plaintiffs, the Biological Opinion violated section 7 of the ESA by improperly concluding that continued operation of the Klamath Project was likely to jeopardize the existence of the suckers.²⁶ The Plaintiffs argued that there was no credible evidence to show that

18. *Id.*

19. *Id.*

20. Complaint, 1996 WL 277131, *5a, *Bennett* (No. 93-6076-HO). The regional director, Region One, of the USFWS was Marvin L. Plenert, the director of the USFWS was John F. Turner, and the Secretary of the Interior was Bruce Babbitt. *Id.*

21. *Bennett*, 63 F.3d at 916.

22. *Bennett*, 1993 WL 669429, at *1.

23. *Id.*

24. Complaint, 1996 WL 277131, *10a-*11a, *Bennett* (No. 93-6076-HO).

25. *Id.* at *12a.

26. *Id.* *14a-*15a.

restricting water releases from the reservoirs would benefit the endangered suckers.²⁷ Thus, the Plaintiffs also asserted that the Biological Opinion was arbitrary and capricious under the Administrative Procedure Act (APA).²⁸

On May 27, 1993, the federal government filed a motion to dismiss Plaintiffs' action, arguing that the Plaintiffs lacked standing under the ESA, and that the Biological Opinion was not an agency action subject to judicial review under the APA.²⁹ The government also argued that Plaintiffs' claim of a de facto designation of critical habitat was invalid because the "issuance of a biological opinion does not constitute a designation of critical habitat."³⁰

On November 19, 1993, Judge Michael R. Hogan, of the U.S. District Court for Oregon, granted the government's motion to dismiss.³¹ The court held that the Plaintiffs lacked standing to bring claims under the ESA because "the recreational, aesthetic, and commercial interests advanced by plaintiffs do not fall within the zone of interests sought to be protected by ESA."³² The court also did not agree that the Biological Opinion constituted a de facto designation of critical habitat for the suckers, and found that this issue would be more appropriately handled by a National Environmental Policy Act (NEPA)³³ claim.³⁴ The Plaintiffs then appealed to the Ninth Circuit.³⁵

III. THE NINTH CIRCUIT COURT'S HOLDING

The primary issue in *Bennett* is who has standing under the citizen-suit provision of the ESA.³⁶ The Ninth Circuit, in a decision written by Judge Stephen Reinhardt, held that this question would be answered by applying the zone of interests test to determine prudential standing, the issue the district court had likewise found dispositive.³⁷

27. *Id.* at *14a.

28. *Id.* *15a (alleging violation of APA, 5 U.S.C. § 706(2)(A) (1994)).

29. Appellant's Brief at 2, *Bennett* (No. 94-35008); Appellee's Brief at 10-11, *Bennett* (No. 94-35008).

30. *Bennett*, 1993 WL 669429, at *1 (quoting Federal Defendant's Memorandum (# 4)).

31. *Id.* at *5.

32. *Id.*

33. 42 U.S.C. §§ 4321-4370d (1994). NEPA sets out procedural requirements for "major federal action[s]." In order to state a NEPA claim, the Plaintiffs would have to show that the Biological Opinion constituted a major federal action, with substantial environmental effects, and that it adversely affected their interests. *See Bennett*, 1993 WL 669429, at *5 n.4.

34. *Bennett*, 1993 WL 669429, at *5 & n.4; *but see Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (holding that economic interests were not to be included in the zone of interests protected by NEPA).

35. *Bennett*, 63 F.3d at 915.

36. *See id.* at 917.

37. *Id.*

The court discussed the origin of the zone of interests test in *Data Processing Service v. Camp*,³⁸ in which the U.S. Supreme Court held that plaintiffs seeking judicial review under the APA must show that the interest they seek to protect is protected or regulated by the statute in question.³⁹ The Ninth Circuit, citing *Clarke v. Securities Industry Ass'n*,⁴⁰ held that the zone of interests test applies to statutory citizen-suit provisions, like the one included in the ESA.⁴¹ The Ninth Circuit adopted *Clarke's* holding concerning the application of the zone of interests test to a "plaintiff who is not directly subject to the regulatory action that he seeks to challenge . . ."⁴² The test denies standing "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit."⁴³

After determining that the zone of interests test applied to the ESA's citizen-suit provision, the Ninth Circuit held that "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA."⁴⁴ The court held that the Plaintiffs in *Bennett* had no standing under the zone of interests test because they did not "seek to further the statutory purpose" of the ESA.⁴⁵ The court pointed to the failure of the Plaintiffs to affirmatively plead an interest in the preservation of the endangered suckers in their complaint.⁴⁶ Since the Plaintiffs did not "allege any community of interest between themselves and the suckers," but rather, according to the court, claimed a competing interest, they lacked standing under the ESA.⁴⁷

The court found that since the Plaintiffs had no standing under the ESA, they also had no standing under the APA, since the same zone of interests test applies to both statutes; and because the Plaintiffs had not stated a NEPA claim, they had no standing under NEPA either.⁴⁸ Thus, the Ninth Circuit affirmed the district court's dismissal of Plaintiffs' ac-

38. 397 U.S. 150 (1970).

39. *Bennett*, 63 F.3d at 917.

40. 479 U.S. 388 (1987). Under *Clarke*, the key to the zone of interests test is determining congressional intent. The *Clarke* Court held that "the 'zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Id.* at 399.

41. *Bennett*, 63 F.3d at 918.

42. *Id.* at 917.

43. *Id.* at 917-18 (citing *Clarke*, 479 U.S. at 399).

44. *Id.* at 919 (emphasis added).

45. *Id.* at 921.

46. *Id.* at 919.

47. *Id.* at 921.

48. *Id.* at 922.

tion.⁴⁹

IV STANDING AND THE ZONE OF INTERESTS TEST

In its 1992 decision, *Lujan v. Defenders of Wildlife*, the Supreme Court determined that plaintiffs utilizing the citizen-suit provision of the ESA must meet certain requirements to have Article III constitutional standing to invoke federal jurisdiction.⁵⁰ Under *Lujan*, in order to have standing a plaintiff must show: 1) an injury in fact; 2) a causal connection between the injury and the conduct complained of; and 3) the likelihood that the injury will be redressed by a favorable decision.⁵¹

In footnote seven of *Lujan*, the Court also stated that a plaintiff's failure to satisfy every Article III standing requirement might not jeopardize the plaintiff's standing.⁵² The Court stated that a plaintiff "who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."⁵³ The Court described a person living next to a dam, and suing over an issue concerning the operation of the dam, as being an example of the type of plaintiff who would fit the footnote seven standing requirements.⁵⁴

In denying the Plaintiffs in *Bennett* standing under the citizen-suit provision of the ESA, the Ninth Circuit held that in addition to meeting the constitutional standing test outlined in *Lujan*, the Plaintiffs must also meet an additional prudential test for standing—the zone of interests test—and that Plaintiffs' failure to meet this test was dispositive regarding the issue of standing.⁵⁵ The Ninth Circuit stated that standing may be decided on prudential grounds without first undertaking the constitutional inquiry.⁵⁶

In applying the zone of interests test to the citizen-suit provision of the ESA, the Ninth Circuit disagreed with the Eighth Circuit's decision in *Defenders of Wildlife v. Hodel*.⁵⁷ In *Defenders*, the Eighth Circuit, citing *Gladstone, Realtors v. Village of Bellwood*,⁵⁸ determined that Congress

49. *Id.*

50. 504 U.S. 555, 560-61 (1992).

51. *Id.* at 560-61.

52. *Id.* at 572 n.7.

53. *Id.*

54. *Id.*

55. 63 F.3d at 917.

56. *Id.* at 917 n.1 (citing *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921 n.2 (D.C. Cir. 1989)).

57. *Defenders*, 851 F.2d 1035 (8th Cir. 1988), *rev'd on other grounds sub nom.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see *Bennett*, 63 F.3d at 918 n.3.

58. 441 U.S. 91 (1979).

could eliminate prudential standing requirements, like the zone of interests test, by legislation.⁵⁹ The Eighth Circuit determined congressional intent by examining the plain language of the ESA's citizen-suit provision, which states that "any person" may commence a suit based on a violation of the ESA, and held that a plaintiff "need meet only the constitutional requirements for standing for their claims under the ESA."⁶⁰

In contrast, the D.C. Circuit has joined the Ninth Circuit in holding that the prudential zone of interests test does apply to the citizen-suit provision of the ESA.⁶¹ However, the D.C. Circuit has not been called upon to clearly delineate the boundaries of the zone of interests test as it applies to the ESA, nor has it used the zone of interests test to deny standing to plaintiffs asserting an economic injury under the ESA.⁶²

In two cases decided before *Bennett*, *Pacific Northwest Generating Cooperative v. Brown*,⁶³ and *Mount Graham Red Squirrel v. Espy*,⁶⁴ the Ninth Circuit had applied the zone of interests test to plaintiffs utilizing the ESA's citizen-suit provision.⁶⁵ In *Mount Graham Red Squirrel*, the Ninth Circuit applied the zone of interests test to an ESA suit, in a manner consistent with its later application of the test in *Bennett*.⁶⁶ In *Mount Graham Red Squirrel*, the court found that environmental plaintiffs had standing to challenge alleged violations of section 9 of the ESA because they sought to protect endangered squirrels and could demonstrate injury in fact.⁶⁷

However, in *Pacific Northwest*, the Ninth Circuit, citing the Eighth Circuit's decision in *Defenders*, stated that it was an "open question" whether or not plaintiffs suing under the citizen-suit provision of the ESA had to satisfy the zone of interests test in addition to the Article III constitutional standing requirements.⁶⁸ Despite this apparent ambivalence, the court assumed that the zone of interests requirement had been met by the plaintiffs.⁶⁹ However, in *Pacific Northwest*, the Ninth Circuit held that plaintiffs asserting claims based upon economic interests were not auto-

59. *Defenders*, 851 F.2d at 1039.

60. *Id.*

61. See *Idaho ex rel. Idaho Pub. Utilities Comm'n v. Interstate Commerce Comm'n*, 35 F.3d 585, 590-91 (D.C. Cir. 1994); *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 61 (D.C. Cir. 1988).

62. Brief for Petitioner, *Bennett*, 1996 WL 277131, at *24 n.14.

63. 38 F.3d 1058 (9th Cir. 1994).

64. 986 F.2d 1568 (9th Cir. 1993).

65. *Bennett*, 63 F.3d at 918.

66. See *Mount Graham Red Squirrel*, 986 F.2d at 1582-83.

67. *Id.* at 1581 n.8.

68. *Pacific Northwest*, 38 F.3d at 1065 (quoting *Defenders*, 851 F.2d at 1039).

69. 38 F.3d at 1065.

matically excluded from the zone of interests protected by the ESA.⁷⁰ The Ninth Circuit reached this decision despite its finding that the plaintiffs in *Pacific Northwest*, hydropower producers and consumers, would have been as well off if three listed species of endangered salmon were extinct as they would have been if the fish were flourishing.⁷¹ Because the plaintiffs in *Pacific Northwest* had also alleged an interest in the preservation of the salmon, the court found they had satisfied the zone of interests test.⁷²

In *Central Arizona Water Conservation District v. EPA*,⁷³ the Ninth Circuit also applied the zone of interests test to determine standing, under the provision of the Clean Air Act⁷⁴ (CAA) that allows judicial review of administrative rules promulgated under the authority of the CAA (here, to protect the air in the Grand Canyon).⁷⁵ The plaintiffs in *Central Arizona* were irrigation districts who alleged that economic injury would result from a final rule issued by the Environmental Protection Agency (EPA).⁷⁶ Despite the EPA's arguments that such economic interests were not within the zone of interests protected by the CAA, the Ninth Circuit found that under the "permissive standard" set by *Clarke*, the economic interests of the plaintiffs fell within the zone of interests protected by the CAA's visibility provisions.⁷⁷

V THE NINTH CIRCUIT COURT'S REASONING IN *BENNETT V PLENERT*

In *Bennett*, the Ninth Circuit Court defined the purposes of the ESA as "singularly devoted to the goal of species preservation."⁷⁸ Quoting the U.S. Supreme Court's holding in *Tennessee Valley Authority v. Hill*, the Ninth Circuit stated: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."⁷⁹ Guided by this interpretation of the ESA, the Ninth Circuit used the zone of interests test to deny standing to plaintiffs seeking to protect economic interests under the citizen-suit provision of the ESA.⁸⁰

The court ignored the issue of Article III constitutional standing, in effect conceding that the Plaintiffs in *Bennett* were entitled to standing

70. *Id.* at 1065-66.

71. *Id.* at 1065.

72. *Id.*

73. 990 F.2d 1531 (9th Cir. 1993).

74. 42 U.S.C. §§ 7401-7671(q) (1994).

75. *See* 990 F.2d at 1533, 1538-39.

76. *Id.* at 1533-34.

77. *Id.* at 1539.

78. 63 F.3d at 920.

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

80. 63 F.3d at 919.

under *Lujan*.⁸¹ It seems clear that the Plaintiffs suffered economic “injury in fact” because of the reallocation of Klamath Project water from them to the endangered suckers, an action taken under the authority of the ESA.⁸² The Ninth Circuit apparently acknowledged the Plaintiffs’ injury in fact when it stated: “they claim a competing interest—an interest in using the very water that the government believes is necessary for the preservation of the species.”⁸³ The causation element of the *Lujan* test seems also to have been met because the alleged failure of federal officials to comply with the ESA resulted in the reallocation of water from the Plaintiffs to the fish.⁸⁴ The Ninth Circuit, in *Central Arizona*, held that the involvement of an intermediate third party, like the Bureau in *Bennett*, does not undermine a plaintiff’s causation argument if “the government’s action [is] substantially likely to cause the petitioner’s injury despite the presence of intermediary parties.”⁸⁵ Finally, the redressability prong of the constitutional standing test was satisfied because setting aside the Biological Opinion and enjoining the federal agencies from acting in alleged violation of sections 4 and 7 of the ESA would restore the Plaintiffs’ priority status for receiving Klamath Project water.⁸⁶

It also seems clear that the Plaintiffs in *Bennett* did have at least *Lujan* footnote seven standing under the Ninth Circuit’s decision in *Pacific Northwest*. In that case, the Ninth Circuit held that the plaintiffs, hydro-power producers and consumers seeking to protect their economic interests, probably had footnote seven standing because they were “entities whose way of conducting business may be affected by the alleged failures of the federal agencies under the Endangered Species Act.”⁸⁷ Similarly, the Plaintiffs in *Bennett* lived close to the reservoirs in question and implementation of the Biological Opinion would have deprived them of irrigation water, thus affecting their way of conducting business.⁸⁸

In *Bennett*, the Ninth Circuit applied the zone of interests test articulated in *Data Processing*, where the Supreme Court held that to establish standing, a plaintiff must show that “the interest sought to be protected by [the plaintiff was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”⁸⁹ How-

81. *Id.* at 917.

82. See Complaint, 1996 WL 277131, at *8a-*9a, *Bennett* (No. 93-6076-HO).

83. 63 F.3d at 921.

84. See Complaint, 1996 WL 277131, at *8a-*9a, *Bennett* (No. 93-6076-HO).

85. *Central Arizona*, 990 F.2d at 1538 (quoting *Competitive Enter. Inst. v. National Highway Traffic Safety Admn.*, 901 F.2d 107 (D.C. Cir. 1990)).

86. See Complaint, 1996 WL 277131, at *8a-*9a, *Bennett* (No. 93-6076-HO).

87. *Pacific Northwest*, 38 F.3d at 1065.

88. See Complaint, 1996 WL 277131, at *8a-*9a, *Bennett* (No. 93-6076-HO).

89. *Id.* (emphasis added) (quoting *Association of Data Processing Serv. Org.*, 397 U.S. at 153).

ever, in *Bennett*, the Ninth Circuit focused only on the zone of interests protected by the ESA, and not on the zone of interests regulated by the ESA.

In *Bennett*, the Ninth Circuit also cited the U.S. Supreme Court's decision in *Clarke* in applying the zone of interests test to determine whether Congress intended to permit plaintiffs asserting an economic interest to utilize the citizen-suit provision of the ESA.⁹⁰ The Ninth Circuit quoted the *Clarke* Court as follows: "[A]t bottom the reviewability question turns on congressional intent, and *all* indicators helpful in discerning that intent must be weighed."⁹¹ However, in *Bennett*, the Ninth Circuit downplayed indicators that Congress intended to provide certain procedural safeguards for interests regulated under the ESA.⁹² The court also ignored the part of the *Clarke* holding which stated: "The [zone of interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."⁹³

The Ninth Circuit discounted congressional amendments to the ESA, made after *Tennessee Valley Authority v Hill*, for the purpose of taking into account the economic impacts of designating critical habitat for endangered species.⁹⁴ Concerning these amendments, the court stated that they were intended to do no more than "ensure a rational decision-making process by providing guidance for government officials."⁹⁵ The Ninth Circuit's view of the purpose of these amendments does not correspond well with the legislative history, which showed that Congress intended for the amendments to increase the flexibility of the ESA with regard to the potential economic impacts of species listing and critical habitat designation.⁹⁶ However, by addressing this issue, the court seemed to acknowledge the Plaintiffs' claim that a de facto critical habitat designation had taken place. The issue of de facto critical habitat designation is very important in light of the fact that, as of 1993, critical habitat designations had not been made for more than eighty percent of all species listed under the ESA.⁹⁷

The interpretation of *Clarke* used by the Ninth Circuit in *Bennett* also contradicts its earlier holding in *Central Arizona Water Conservation*

90. See *Bennett*, 63 F.3d at 917-18.

91. *Id.* at 918 (emphasis added) (quoting *Clarke*, 479 U.S. at 400).

92. 63 F.3d at 921.

93. 479 U.S. at 399-400 (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)).

94. 63 F.3d at 921.

95. *Id.*

96. Brief for Petitioner, *Bennett*, 1996 WL 277131, at *37-*40.

97. Oliver Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 322 (1993).

District v. EPA.⁹⁸ In *Central Arizona*, irrigation districts suing to protect economic interests under the visibility provisions of the CAA⁹⁹ were granted standing by the Ninth Circuit using the zone of interests test.¹⁰⁰ The Ninth Circuit, citing its earlier interpretation of *Clarke* in *National Wildlife Federation v. Burford*, stated that the zone of interests test was "not meant to be particularly demanding."¹⁰¹ Therefore, the court rejected the EPA's argument that the plaintiffs' economic injury was not within the zone of interests of the CAA.¹⁰² The court in *Central Arizona* held that the CAA required the EPA administrator to consider the cost of compliance in setting clean air standards, and thus: "[A]s entities required to pay those costs of compliance, the [plaintiffs'] interests cannot reasonably be described as marginally related to or inconsistent with the purposes of the Act."¹⁰³ However, in *Bennett*, despite the fact that the ESA requires that economic impacts be assessed when designating critical habitat; the Ninth Circuit found that the Plaintiffs' claims were "at best 'marginally related' to the purposes that underlie the Act . . ."¹⁰⁴

In *Bennett*, the Ninth Circuit held that because the Plaintiffs had failed to claim the government's actions would harm the endangered suckers, they did not seek to further the statutory purpose of the ESA.¹⁰⁵ The court found that the Plaintiffs had no "community of interest" with the endangered suckers, and in fact were asserting a "competing interest" because they wanted to use water that the government believed was needed by the suckers.¹⁰⁶ However, in *Pacific Northwest*, the Ninth Circuit found that plaintiffs asserting economic interests similar to those of the Plaintiffs in *Bennett* had standing under the ESA because they had claimed government actions that harmed their economic interests also harmed endangered salmon in the Columbia River system.¹⁰⁷ Although *Pacific Northwest* supports the holding in *Bennett* regarding pleading requirements, the *Pacific Northwest* court seemed more willing to recognize that economic interests and the interests of endangered species did not necessarily conflict with each other, stating that "a narrow or cynical under-

98. *Central Arizona*, 990 F.2d 1531.

99. 42 U.S.C. § 7491.

100. See 990 F.2d at 1539.

101. *Id.* at 1538 (quoting *National Wildlife Fed'n v. Burford*, 871 F.2d 849, 852 (9th Cir. 1989)).

102. 990 F.2d at 1538.

103. *Id.* at 1539.

104. *Bennett*, 63 F.3d at 921 (citations omitted).

105. *Id.*

106. *Id.*

107. *Pacific Northwest*, 38 F.3d at 1065.

standing of economic interest is not decisive."¹⁰⁸

In *Pacific Northwest*, the Ninth Circuit found that the plaintiffs did not "have an economic interest only in extinction," even though they would have been as well off if three listed species of endangered salmon were extinct.¹⁰⁹ The Ninth Circuit could find no "irremediable conflict of interest between the consumers of hydropower and the fish in the streams."¹¹⁰ Yet, in *Bennett*, the court found such a conflict between users of irrigation water and the suckers in the reservoirs.¹¹¹

In *Pacific Northwest*, the Ninth Circuit stated that the critical question in determining whether the plaintiffs satisfied the zone of interests test was "whether the plaintiffs' economic interest is a legal interest protected by the Endangered Species Act."¹¹² The court concluded that the plaintiffs had "a genuine economic interest in preserving the salmon and therefore an interest protected by the Endangered Species Act."¹¹³ In *Bennett*, the court held that because the Plaintiffs had failed to affirmatively claim an interest in preserving the endangered suckers, they had no similar interest protected by the ESA.¹¹⁴

The Ninth Circuit has been consistent in applying the zone of interests test to determine whether plaintiffs have standing to challenge actions taken by federal regulatory agencies under the citizen-suit provisions of federal statutes.¹¹⁵ However, the Ninth Circuit has been inconsistent in the standards it has applied to determine congressional intent, the key determination, according to *Clarke*, in defining the zone of interests protected by, or regulated by, a particular statute.¹¹⁶

In cases like *Bennett*, the Ninth Circuit has strictly construed congressional intent to grant standing only to plaintiffs clearly protected by the particular statute.¹¹⁷ In *Nevada Land Action Association v United States Forest Service*, the Ninth Circuit found that the plaintiffs' economic inter-

108. *Id.*

109. *Id.*

110. *Id.*

111. *Bennett*, 63 F.3d at 921.

112. *Pacific Northwest*, 38 F.3d at 1065.

113. *Id.*

114. *Bennett*, 63 F.3d at 921.

115. *See Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713, 716 (9th Cir. 1993) (zone of interests test applied to citizen-suit provision of NEPA); *Dan Caputo Co. v. Russian River County Sanitation*, 749 F.2d 571, 575 (9th Cir. 1984) (zone of interests test applied to citizen-suit provision of the Clean Water Act (CWA)); *Alvarez v. Longboy*, 697 F.2d 1333, 1337 (9th Cir. 1983) (zone of interests test applied to citizen-suit provision of the Farm Laborer Contractor Registration Act); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir. 1982) (zone of interests test applied to citizen-suit provision of CWA).

116. *See Clarke*, 479 U.S. at 400.

117. *See Bennett*, 63 F.3d at 919; *see also Dan Caputo Co.*, 749 F.2d at 575; *Nevada Land Action Ass'n*, 8 F.3d at 716.

ests were not included in the zone of interests protected by NEPA, and, in fact, their suit was likely to frustrate the environmental protection objectives of NEPA.¹¹⁸

However, in cases like *Central Arizona*, the Ninth Circuit has applied a more permissive standard in determining congressional intent concerning the zone of interests protected by, or regulated by, a particular statute.¹¹⁹ In *Central Arizona*, plaintiffs attempting to avoid clean air compliance costs imposed by the EPA were granted standing under the CAA,¹²⁰ despite the fact that their suit could reasonably be construed as likely to frustrate the environmental protection objectives of the CAA.

In *Mount Graham Red Squirrel v. Espy*, the Sierra Club challenged the construction of a University of Arizona astronomical observatory authorized by the Arizona-Idaho Conservation Act of 1988 (AICA),¹²¹ on the grounds that it would jeopardize a population of endangered red squirrels.¹²² The Ninth Circuit granted the Sierra Club standing to seek judicial review of the AICA, despite the University's arguments that the sole purpose of Title VI of the AICA was to expedite the construction of the observatory by excluding the project from challenges based upon section 7 of the ESA.¹²³ The court stated:

The University, citing *Clarke*, argues that Sierra Club's interests are wholly inconsistent with the purposes of the AICA. Even if it were so, this is only half an argument. Under *Clarke*, we would have to conclude not only that Sierra Club's interest is inconsistent with the purposes of the AICA, but also that this inconsistency is so fundamental as to make it impossible to believe that Congress intended to permit Sierra Club to bring suit. That judicial review is not expressly forbidden by the AICA is, under the particular circumstances of this case, substantial evidence that it was not intended implicitly to be foreclosed.¹²⁴

Thus, the Ninth Circuit used a permissive standard to determine con-

118. 8 F.3d at 716.

119. See *Central Arizona*, 990 F.2d at 1539; see also *Pacific Northwest Generating Coop v. Brown*, 38 F.3d at 1065; *Mount Graham Red Squirrel v. Espy*, 986 F.2d at 1582.

120. 990 F.2d at 1538. In footnote 6 of *Bennett*, the court attempted to distinguish the facts of *Central Arizona* from those of *Bennett*, stating that the *Central Arizona* plaintiffs were directly regulated and thus the zone of interests test did not apply in *Central Arizona*. See *Bennett*, 63 F.3d at 920 n.6. However, in *Central Arizona*, the court held that the plaintiffs were indirectly regulated and the zone of interests test did apply. See 990 F.2d at 1538-39. Whether or not the zone of interests test should have applied in either of these cases, it is clear the court applied a different standard in each case.

121. Pub. L. No. 100-696, 102 Stat. 4571 (1988).

122. 986 F.2d at 1570.

123. *Id.* at 1582.

124. *Id.* at 1582-83.

gressional intent in order to grant standing to the Sierra Club, despite the fact that its suit could be reasonably construed as frustrating the purpose of Title VI of the AICA.

The inconsistency with which the Ninth Circuit has applied the zone of interests test for standing, as well as the conflict between the circuits as to whether the zone of interests test should be applied at all to the citizen-suit provisions of federal statutes, makes this subject ripe for review by the U.S. Supreme Court. It is time for the U.S. Supreme Court to elaborate on *Clarke* and give the lower courts better instructions on how to gauge congressional intent concerning the issue of standing to challenge federal regulatory actions.

VI. CONCLUSION

The United States Supreme Court should overturn the Ninth Circuit's decision in *Bennett v. Plenert*. In *Clarke*, the U.S. Supreme Court held that determining congressional intent was the key to applying the zone of interests test. In *Bennett*, the Ninth Circuit misinterpreted *Clarke* by recognizing only half of the factors that *Clarke* set out as necessary to determine congressional intent concerning the zone of interests associated with a particular statute. In *Clarke*, the U.S. Supreme Court followed *Data Processing* by requiring that a plaintiff seeking judicial review of federal regulatory actions must show that the interest they seek to protect is "arguably within the zone of interests to be protected or regulated by the statute"¹²⁵ The Ninth Circuit, in *Bennett*, only considered the interests protected by the ESA in determining congressional intent, not the interests regulated by the ESA.

In *Bennett*, the Ninth Circuit also contradicted its own decision in *Central Arizona* by ignoring *Clarke's* holding that: "The [zone of interests] test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff."¹²⁶ The Ninth Circuit applied a demanding test in *Bennett* that excluded the Plaintiffs' economic interests, reasoning that the ESA was not designed to benefit plaintiffs who did not claim to be advancing the interests of an endangered species. Yet, in *Central Arizona* and *Mount Graham Red Squirrel*, the Ninth Circuit granted standing to plaintiffs using the zone of interests test, despite the fact that these plaintiffs' interests were likely to frustrate the objectives of the CAA and the AICA, respectively.

The U.S. Supreme Court should adopt a more flexible zone of interests test, one which gives the same consideration to plaintiffs whose inter-

125. *Clarke*, 479 U.S. at 397 (citing *Data Processing*, 397 U.S. at 153 (1970)).

126. *Clarke*, 479 U.S. at 399-400 (citing *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)).

ests are regulated by a statute as to those whose interests are protected by the statute. This would allow standing for parties aggrieved by federal regulatory action while at the same time limiting the potential for frivolous suits. Plaintiffs would, of course, still have to meet the Article III requirements for standing set out in *Lujan*. Since Congress included citizen-suit provisions in statutes because it did not entirely trust executive agencies to carry out its legislative intentions,¹²⁷ a zone of interests test that liberally construes congressional intent would help check regulatory agency arrogance while still providing for both fairness and judicial efficiency.

There is a good chance that the U.S. Supreme Court will overturn the Ninth Circuit's decision in *Bennett*. Justice Antonin Scalia, the Court's leading scholar on the issue of standing, and author of the *Lujan* decision, generally favors standing restrictions such as the zone of interests test, but he has stated that plaintiffs who represent minority interests and have suffered "concrete injury" may be entitled to standing to challenge federal regulatory actions.¹²⁸

Another factor which may play a role in the U.S. Supreme Court's decision concerning *Bennett* is the hostility of the Court's conservatives to liberal holdings from the Ninth Circuit generally, and in particular those written by the author of the *Bennett* opinion, Judge Stephen Reinhardt, a situation described by one observer as "ideological warfare."¹²⁹ Reinhardt has openly criticized the conservative bent of the present U.S. Supreme Court, and has commented as follows on his high reversal rate by the Supreme Court: "Some of them may get reversed, others don't, and we can't worry about that."¹³⁰

POSTSCRIPT

On March 19, 1997, the United States Supreme Court issued its decision in the case of *Bennett v. Spear*.¹³¹ In a unanimous opinion written by Justice Antonin Scalia, the Court reversed the Ninth Circuit's decision in *Bennett v. Plenert*.¹³²

In appealing the Ninth Circuit's decision, the Petitioners raised two issues for the Supreme Court to consider: 1) whether the zone of interests

127. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 193 (1992).

128. See Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894-95 (1983).

129. See David M. O'Brien, *Reinhardt and the Supreme Court: This Time It's Personal*, L.A. TIMES, Dec. 15, 1996, at M2.

130. *Id.*

131. See 117 S. Ct. 1154 (1997) (Michael Spear replaced Marvin Plenert as Director of Region 1 of the USFWS).

132. *Id.* at 1169.

test applies to claims brought under the citizen-suit provision of the ESA, and 2) if the zone of interests test applies, do the Petitioners have standing under that test even though they seek to protect economic rather than environmental interests.¹³³ Justice Scalia noted that the Government, in making its case before the Supreme Court, had made no effort to defend the reasoning of the Ninth Circuit in *Bennett v. Plenert*.¹³⁴ Instead, the Government presented three theories which it claimed supported affirming the Ninth Circuit's decision; these were:

- (1) that petitioners fail to meet the standing requirements imposed by Article III of the Constitution; (2) that the ESA's citizen-suit provision does not authorize judicial review of the types of claims advanced by petitioners; and (3) that judicial review is unavailable under the APA because the Biological Opinion does not constitute final agency action.¹³⁵

The Supreme Court first considered the question of whether the zone of interests test applies to the citizen-suit provision of the ESA, the issue the Ninth Circuit had found dispositive in *Bennett v. Plenert*.¹³⁶ In analyzing this question, Justice Scalia distinguished between constitutional limitations on standing in cases involving federal court jurisdiction, such as the Article III requirements, and prudential limitations on standing, such as the zone of interests test.¹³⁷ Justice Scalia found that despite their similar purpose in limiting the role of the courts in a democratic society, there was a key difference between constitutional limits on standing and prudential limits, such as the zone of interests test—namely that Congress was free to modify or eliminate prudential limitations on standing.¹³⁸ The Court held that Congress had exercised this power when it included the language “any person may commence a civil suit” in the citizen-suit provision of the ESA.¹³⁹ This language contrasted with more restrictive language included in the citizen-suit provisions of some other federal statutes.¹⁴⁰

The Court also cited two reasons to broadly interpret the term “any person” contained in the ESA's citizen-suit provision. First, the ESA is concerned with the environment, a subject which the Court felt that all

133. *Id.* at 1160.

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.* at 1161.

138. *Id.*

139. *Id.* at 1162.

140. *Id.* (citing, *inter alia*, Clean Water Act, 33 U.S.C. § 1365(g) (1994)).

people had an interest in.¹⁴¹ Second, the Court found that the purpose of the ESA's citizen-suit provision was to encourage "private attorneys general," as evidenced by its provisions eliminating the amount in controversy and diversity of citizenship requirements, its provision for the recovery of legal costs, and its provision allowing the Government to take the place of plaintiffs in citizen suits.¹⁴²

Applying this reasoning to the facts of *Bennett*, Justice Scalia found that the ESA's citizen-suit provision granted standing to plaintiffs asserting government "overenforcement" of the ESA, as well as to plaintiffs claiming "underenforcement."¹⁴³ Scalia stated that "there is no textual basis for saying that [the ESA's citizen-suit provision's] expansion of standing requirements applies to environmentalists alone."¹⁴⁴

Next, the Court addressed whether all of Petitioners' claims were reviewable. The Court noted that section 11 of the ESA allows citizen suits seeking to enjoin government officials from violating any provision of the ESA,¹⁴⁵ and also allows citizens to bring actions against the Secretary of the Interior for failure to perform non-discretionary duties under the ESA.¹⁴⁶ However, the Court found that the Petitioners' claim that the Biological Opinion implicitly designated critical habitat for the endangered suckers without taking into consideration the economic impact of such a designation, was the only reviewable claim under the ESA's citizen-suit provision.¹⁴⁷ The Government claimed that the designation of critical habitat under the ESA was a discretionary duty of the Secretary of the Interior (the Secretary), and thus exempted from challenge under the ESA's citizen-suit provision, which requires that the duty sought to be enforced by a citizen suit not be "discretionary with the Secretary."¹⁴⁸ However, Justice Scalia found that the consideration of economic impacts was an obligatory step in making decisions under the ESA, and thus was not discretionary.¹⁴⁹ Therefore, the Court held that the Petitioners had standing to press this claim under the ESA's citizen-suit provision.¹⁵⁰ The Court found that the Petitioners' claims that the USFWS had violated Section 7 of the ESA, by not using the "best scientific and commercial data available" in formulating the Biological Opinion, were "obviously not

141. *Id.*

142. *Id.*

143. *Id.* at 1163.

144. *Id.*

145. 16 U.S.C. § 1540(g)(1)(A) (1994).

146. § 1540(g)(1)(C).

147. 117 S. Ct. at 1165.

148. *Id.*

149. *Id.* at 1166.

150. *Id.*

reviewable” under the ESA’s citizen-suit provision.¹⁵¹

The Court also analyzed the question of whether the zone of interests test would preclude the Petitioners from standing to bring their APA claims.¹⁵² The Court looked to the substantive provisions of the ESA to answer this question.¹⁵³ Justice Scalia concluded that the Ninth Circuit had erred when it held that the Petitioners did not have standing under the APA because they were not directly regulated by the ESA and because they did not seek to further the overall purpose of the ESA, which is species preservation.¹⁵⁴

In analyzing this issue, Justice Scalia used the classic formulation of the zone of interests test as set out in *Data Processing*: “whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”¹⁵⁵ Scalia stated:

Whether a plaintiff’s interest is ‘arguably protected by the statute’ within the meaning of the zone of interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies. It is difficult to see how the Ninth Circuit could have failed to see this from our cases.¹⁵⁶

The Court found that the Petitioners’ claim that the USFWS had not used “the best scientific and commercial data available” in formulating the Biological Opinion, as required by Section 7 of the ESA, fell within the zone of interests protected by that part of the ESA, thus, judicial review was appropriate under the APA.¹⁵⁷ Justice Scalia found that the purpose of the ESA requirement that each agency “use the best scientific and commercial data available” was not only intended to further species preservation, but also “to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”¹⁵⁸ Thus, the Court found that the Petitioners’ claim that they were the victims of such zealous but unintelligent agency action was within the zone of interests protected by Section 7 of the ESA.¹⁵⁹

The Court also found that the Petitioners had established the muni-

151. *Id.* at 1165.

152. *See id.* at 1167.

153. *See id.*

154. *Id.*

155. *Id.* at 1167.

156. *Id.*

157. *Id.* at 1168.

158. *Id.*

159. *Id.*

Article III constitutional standing requirements.¹⁶⁰ They had shown injury in fact because if the Biological Opinion was implemented, the Bureau would have less Klamath Project water to distribute to its customers.¹⁶¹ Therefore, it was likely that the reduction would be distributed pro rata among its customers.¹⁶² The Petitioners also had shown there was a causal connection between the action complained of, the Biological Opinion, and their injury, which was less water available for distribution.¹⁶³ The Court found that the Biological Opinion was not merely “advisory,” but in fact would have a coercive effect on the Bureau’s operation of the Klamath Project.¹⁶⁴ Finally, the Petitioners had shown that it was likely that their injury would be redressed by a favorable decision, since the Bureau had operated the Klamath Project in the same way for nearly a century before the issuance of the Biological Opinion by the USFWS.¹⁶⁵

The United States Supreme Court, in *Bennett v. Spear*, agreed with the Eighth Circuit’s decision in *Defenders of Wildlife v. Hodel*, by holding that Congress had exempted citizens using the ESA’s citizen-suit provision from prudential standing requirements, such as the zone of interests test. The Court also adopted a more flexible zone of interests test for APA claims, requiring only that plaintiffs show that the particular provision of a statute upon which they rely protects their interest. Plaintiffs will no longer have to show that their action will further the overall purpose of the statute, as they would have under the zone of interests test formulated by the Ninth Circuit in *Bennett v. Plenert*. The U.S. Supreme Court’s decision in *Bennett v. Spear* represents another defeat for the Ninth Circuit in its ongoing ideological battle with the Supreme Court.

160. *Id.* at 1163-65.

161. *Id.* at 1164.

162. *Id.*

163. *Id.* at 1165.

164. *Id.* at 1164.

165. *Id.* at 1165.

