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1998

## Endangered Species Act: Standing to Sue. *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

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### Recommended Citation

R. Margaret Dobson, *Endangered Species Act: Standing to Sue. Bennett v. Spear*, 117 S. Ct. 1154 (1997), 20 U. ARK. LITTLE ROCK L. REV. 1003 (1998).

Available at: <https://lawrepository.ualr.edu/lawreview/vol20/iss4/5>

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## I. INTRODUCTION

The requirements of standing to sue under the citizen suit provision of the Endangered Species Act (ESA), and the proper application of the prudential “zone of interest” test for standing, have been the subject of much debate and disagreement.<sup>1</sup> In fact, standing has been a hotly contested issue throughout the history of modern environmental laws and citizen suit provisions.<sup>2</sup> The United States Supreme Court seized an opportunity to address these issues in *Bennett v. Spear*.<sup>3</sup>

Part II of this note briefly reviews the facts of *Bennett v. Spear*. Part III examines the background of both constitutional and prudential theories of standing. It also examines the issues of standing under the citizen suit provision of the ESA and under the Administrative Procedures Act. Part IV then analyzes the Court’s reasoning in *Bennett*. Finally, Part V of the note considers the significance of the Court’s decision in *Bennett*.

## II. FACTS

Around the beginning of the twentieth century, the Bureau of Reclamation (Bureau)<sup>4</sup> constructed the Klamath Project<sup>5</sup> along the Oregon and California border in order to provide irrigation water and control flooding.<sup>6</sup> Lake bed lands were drained and reclaimed and reservoirs were created for these purposes.<sup>7</sup> The sale of rights to the water in the reservoirs covered the costs of the project.<sup>8</sup> Petitioners, two Oregon irrigation districts and the operators of two ranches within those districts, contracted for part of these water rights.<sup>9</sup> Petitioners used the water for both irrigation purposes and recreational

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1. See Kathleen C. Becker, *Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interest Test*, 26 ENVTL. L. 1071, 1077-81 (1996).

2. See Sanford A. Church, *A Defense of the “Zone of Interests” Standing Test*, DUKE L.J., Apr. 1983, at 447, 448.

3. 117 S. Ct. 1154 (1997).

4. The Bureau of Reclamation is a part of the United States Department of the Interior. See Brief for the Respondents at 6, *Bennett v. Spear*, 117 S. Ct. 1154 (1997) (No. 95-813).

5. The Klamath Project was constructed under the authority of the Reclamation Act of 1902, 43 U.S.C. § 371. See Brief for Petitioners at 2, *Bennett v. Spear*, 117 S. Ct. 1154 (1997) (No. 95-813).

6. See Brief for Petitioners, at 3 n.1, *Bennett* (No. 95-813).

7. See *id.* Oregon and California gave title to these lands to the United States for project development. See *id.*

8. See *id.*

9. See *id.*

activities.<sup>10</sup> In 1988, the government listed two species of sucker fish found in parts of the Klamath Project reservoirs as endangered.<sup>11</sup>

Under the ESA,<sup>12</sup> if an agency determines its actions may adversely affect an endangered species, it must consult the Fish and Wildlife Service (FWS).<sup>13</sup> In 1992, the Bureau notified the FWS that long-term operation of the Klamath Project might adversely affect the endangered sucker fish.<sup>14</sup> The FWS issued a Biological Opinion which concluded the adverse effect was likely to occur.<sup>15</sup> As required by the ESA, the FWS suggested "reasonable and prudent alternatives" that the agency could take to avoid the adverse affect.<sup>16</sup> Among other things, the FWS suggested the maintenance of certain minimum levels of water.<sup>17</sup> The Bureau notified the FWS that it would comply with the suggestions and opinions contained in the Biological Opinion.<sup>18</sup>

Subsequently, in 1992, the Klamath Project area experienced a drought. As a result of the minimum lake level requirements, the Bureau restricted irrigation waters. Petitioners claimed the imposition of these minimum water levels caused crop and cattle losses of seventy-five million dollars<sup>19</sup> and implicitly determined a critical habitat.<sup>20</sup> They alleged the Biological Opinion

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10. See Becker, *supra* note 1, at 1077.

11. See Brief for Petitioners at 3, *Bennett* (No. 95-813). The Lost River Sucker (*Deltistes luxatus*) and Shortnose Sucker (*Chasmistes brevirostris*) were listed as endangered species pursuant to the ESA, 16 U.S.C. § 1533 (1994). See 53 Fed. Reg. 27,130 (1988); see also Brief for Petitioners at 3, *Bennett* (No. 95-813).

12. 16 U.S.C. §§ 1531-1544 (1994).

13. See 50 C.F.R. § 402.14 (1995). The Secretary of the Interior and the Secretary of Commerce share duties under the ESA. See 16 U.S.C. § 1532(15) (1994). The Secretary of the Interior has delegated administration of its duties to the FWS. See 50 C.F.R. § 402.01(b) (1995). The Secretary of Commerce has delegated administration of its duties to the National Marine Fisheries Service. See *id.* The sucker fish involved in *Bennett* fall within the responsibilities of the Secretary of the Interior. See *id.*

14. See *Bennett*, 117 S. Ct. at 1159.

15. See *id.*

16. See *id.* The ESA provides that if an agency's action may adversely affect the critical habitat of an endangered species, the Biological Opinion shall suggest "reasonable and prudent alternatives" that the agency can take in implementing the action. See 16 U.S.C. § 1536(b)(3)(A) (1994).

17. See *Bennett*, 117 S. Ct. at 1159. The FWS suggested maintaining a minimum of 4524.0 feet of water in the Clear Lake Reservoir from February 1 to April 15 of each year "to allow access to Willow Creek for spawning and dispersal of returning larval suckers" and a minimum of 4523.0 feet for the rest of the year "to provide areas of adequate depths to reduce desiccation, predation and freezing risks." Brief for Petitioners at 6 n.2, *Bennett* (No. 95-813). For the Gerber Reservoir, the FWS suggested maintaining a minimum of 4799.6 feet of water throughout the year "to maintain adequate water quantity and quality for summer and winter survival of shortnose suckers." Brief for Petitioners at 6 n.2, *Bennett* (No. 95-813).

18. See *Bennett*, 117 S. Ct. at 1159.

19. See Joseph Perkins, *Injecting Some Fairness into the Law*, THE SAN DIEGO UNION-TRIB., March 28, 1997, at B7, available in 1997 WL 3124641.

20. See *Bennett*, 117 S. Ct. at 1160. Critical habitat is the term used to describe

and suggested alternatives were not based on the "best scientific" data available<sup>21</sup> and did not consider economic impact as required by the ESA.<sup>22</sup> Petitioners also alleged these actions were an abuse of discretion which could be set aside pursuant to the Administrative Procedure Act (APA).<sup>23</sup>

Petitioners filed suit under both the APA and the citizen suit provision of the ESA in the United States District Court of Oregon.<sup>24</sup> Petitioners named as defendants the director and regional director of the FWS and the Secretary of the Interior.<sup>25</sup> Petitioners did not name the Bureau or any of its officials.<sup>26</sup>

The district court dismissed Petitioners' claim, finding they lacked standing to sue under the "zone of interests" test.<sup>27</sup> The Ninth Circuit Court of Appeals affirmed this decision, holding that Plaintiffs must allege an interest in the preservation of an endangered species in order to fall within the zone of interests protected by the ESA.<sup>28</sup> The Ninth Circuit characterized Petitioners' interests as economic.<sup>29</sup> The United States Supreme Court reversed the Ninth Circuit, holding Petitioners had standing to sue under both the requirements of Article III<sup>30</sup> and the zone of interests test.<sup>31</sup>

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geographic areas that are determined to be "essential for the conservation of a species." See 16 U.S.C. § 1532(5)(A)(ii) (1994). The designation of critical habitat has both legal and political implications. Legally, the habitat cannot be modified or impaired. Politically, it creates servitudes upon the land for the benefit of the protected species. See WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW § 9.9(4)(a)(ii) (2d ed. 1994).

21. See Brief for Petitioners at 8, *Bennett* (No. 95-813) (quoting 16 U.S.C. § 1536(a)(2) (1994)). Petitioners stated, "[T]he restrictions were imposed in the absence of any scientific evidence that the withdrawal of irrigation water . . . was damaging to the fish or that retaining irrigation water in the reservoirs would help them." *Id.*

22. See *Bennett*, 117 S. Ct. at 1160. The ESA provides that "[t]he Secretary shall designate critical habitat . . . after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (1994).

23. See *Bennett*, 117 S. Ct. at 1160. The APA, 5 U.S.C. §§ 701-706 (1994), provides for judicial review of "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704 (1994). Under the APA, a court shall "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A) (1994).

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

25. See *id.* at 1159. The Bureau of Reclamation administers the Klamath Project under the jurisdiction of the Secretary of the Interior. See *id.*

26. See *id.*

27. See *Bennett v. Plenert*, No. 93-6076-HO, 1993 WL 669429, at \*4 (D. Or. Nov. 18, 1993), *rev'd sub nom.*, *Bennett v. Spear*, 117 S. Ct. 1154 (1997). The "zone of interests" test limits the class of persons who may obtain judicial review to those plaintiffs whose grievance falls within the zone of interests Congress intended to be protected by the statute. See *Bennett*, 117 S. Ct. at 1161. This is a judicially developed and self-imposed prudential test which can be modified by Congress. See *id.*

28. See *Bennett*, 63 F.3d at 919. "[O]nly plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA." *Id.*

29. See *id.* at 919-920.

30. U.S. CONST. art. III. Article III provides in pertinent part: "The judicial power shall

### III. BACKGROUND

Standing to sue refers to an individual's right to bring a lawsuit<sup>32</sup> and is separate from the merits of the case.<sup>33</sup> Before the court may consider the merits of a case, the party bringing the suit must first demonstrate that he has standing.<sup>34</sup> Article III of the United States Constitution,<sup>35</sup> which established the federal judicial system, sets up certain irreducible minimums that must be met for a party to have standing.<sup>36</sup> In addition, the Court has developed certain prudential theories of standing.<sup>37</sup> Part A of this section will consider the irreducible minimums set by Article III. Part B will discuss prudential theories of standing. Parts C and D will discuss standing under the ESA and the APA, respectively.

#### A. Article III Standing

Article III limits the power of the courts to adjudicating "cases" and "controversies."<sup>38</sup> The Supreme Court has interpreted this language to require that a party must demonstrate an actual or threatened injury exists,<sup>39</sup> the cause of the injury is fairly traceable to the defendant's actions,<sup>40</sup> and a favorable decision will likely redress the injury.<sup>41</sup>

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extend to all Cases, in Law and Equity, arising under this Constitution . . . [and] to Controversies between two or more States; between a State and Citizens of another State[.]" U.S. CONST. art. III, § 2, cl. 1. For a discussion of Article III requirements, *see infra* notes 34-42 and accompanying text.

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

32. "Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." BLACK'S LAW DICTIONARY 1260 (6th ed. 1990).

33. *See* DAVID D. GREGORY, STANDING TO SUE IN ENVIRONMENTAL LITIGATION IN THE UNITED STATES OF AMERICA 11, 30 n.2 (1972).

34. *See id.*

35. U.S. CONST. art. III.

36. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

37. *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.7 (2d ed. 1984).

38. *See* U.S. CONST. art. III, § 2.

39. *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (holding where real estate brokers were "steering" prospective home buyers to different areas based on race, deprivation of benefits of living in an integrated society was sufficient allegation of injury for residents of the described area, but not for residents of other neighborhoods).

40. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (holding plaintiffs did not have standing to sue the Internal Revenue Service (IRS) because it was pure speculation as to whether the IRS had caused plaintiffs' injuries, the denial of benefits by various hospitals).

41. *See id.* at 38.

The plaintiff's injury must be an injury in fact, and it must be personal to the plaintiff.<sup>42</sup> The Court in *Allen v. Wright*<sup>43</sup> stated that to hold otherwise would allow a resident in Hawaii to challenge a tax exemption in Maine.<sup>44</sup> Courts would be flooded by litigation from plaintiffs with a value interest in the situation, but no personal stake.<sup>45</sup> Such disputes are better handled before other branches of the government.<sup>46</sup> Standing limits the cases heard by the courts to those that are best addressed in that forum.<sup>47</sup>

Proving an injury in fact is an essential element of the plaintiff's case.<sup>48</sup> It is not necessary at the pleading stage, however, for the plaintiff to actually prove his injury.<sup>49</sup> A general factual allegation is presumed to include all facts necessary to prove the allegation.<sup>50</sup> Actual proof of injury is not required until later in the litigation.<sup>51</sup>

The second and third parts of Article III standing deal with causation and were initially treated as two parts of a single causation requirement.<sup>52</sup> The second part of Article III standing requires the plaintiff prove the cause of the injury is fairly traceable to the defendant's actions.<sup>53</sup> The Court has defined what is fairly traceable in the negative, stating an injury is not fairly traceable if it results from the independent actions of a party not involved in the lawsuit.<sup>54</sup> The third part of Article III standing requires that the judicial remedy the plaintiff seeks be likely to redress the injury.<sup>55</sup> The Court has noted that the

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42. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[T]he plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical,' . . ." *Id.* (citations omitted).

43. 468 U.S. 737 (1984).

44. See *id.* at 756.

45. See *id.*

46. See generally *Defenders of Wildlife*, 504 U.S. at 560 (discussing powers and purpose of legislative, executive and judicial branches).

47. See *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990) (stating "[t]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.").

48. See *Defenders of Wildlife*, 504 U.S. at 561.

49. See *id.*

50. See *id.*

51. See *id.*

52. See *Allen*, 468 U.S. at 753 n.19.

53. See *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42.

54. See *id.* In *Eastern Kentucky Welfare Rights Org.*, plaintiffs, low income individuals, sued the IRS, claiming that an IRS ruling discouraged hospitals from providing services to indigents. See *id.* at 28. The Court held plaintiffs did not have standing because it was pure speculation as to whether the actions of the hospitals were the result of the IRS ruling. The hospitals could have made their decisions without regard to the tax implications. See *id.* at 42-43. The injury was not fairly traceable to the defendant's actions. See *id.*

55. See *Defenders of Wildlife*, 504 U.S. at 561.

likelihood of the decision redressing the injury must be more than speculative; it must be likely.<sup>56</sup>

## B. Prudential Theories of Standing

In addition to the requirements of Article III, the Court has used various prudential theories of standing over the years.<sup>57</sup> These court developed policy-based limitations<sup>58</sup> are judicially self imposed<sup>59</sup> for the purpose of further distinguishing and limiting the types of cases courts will hear.<sup>60</sup>

The Court originally used a "legal interest" test under which parties had to show invasion of a legal right.<sup>61</sup> Where the action was not based in contract, property, or tort, plaintiffs had to show their interests were actually founded on a statute.<sup>62</sup> This involved difficult and time consuming statutory analysis.<sup>63</sup> The Court later modified this test and liberalized standing requirements in *Hardin v. Kentucky Utilities Co.*<sup>64</sup> to allow standing where the statute reflected a legislative purpose to protect the interest.<sup>65</sup> This revised test, however, still required time consuming statutory analysis.<sup>66</sup>

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56. See *id.* In *Eastern Kentucky Welfare Rights Org.*, another ground the Court used to deny standing was the lack of a likelihood that the decision would redress the injury. The Court stated it was "speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to [plaintiffs] of such services." *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 43.

57. See WRIGHT, *supra* note 37, § 3531.7.

58. See Becker, *supra* note 1, at 1073. "Prudential standing inquiries have traditionally been limited to three policy requirements: 1) that the injury relate to the plaintiff personally, 2) that the plaintiff not bring generalized grievances, and 3) that the litigant's complaint be 'within the zone of interests to be protected or regulated by the statute . . . in question.'" Becker, *supra* note 1, at 1074.

59. See *Allen*, 468 U.S. at 751.

60. See Becker, *supra* note 1, at 1073; see also *Allen*, 468 U.S. at 751.

61. See Church, *supra* note 2, at 449.

62. See Church, *supra* note 2, at 449-50.

63. See Church, *supra* note 2, at 449-50.

64. 390 U.S. 1 (1968). The Tennessee Valley Authority (TVA) expanded its service to two towns in which Kentucky Utilities was the primary power provider. See *id.* at 4-5. These towns were located within a county in which TVA was the primary power provider. See *id.* at 4-5. Respondent, Kentucky Utilities, sued TVA and the mayors of the two towns for conspiracy to destroy its business. See *id.* at 5. It alleged TVA's provision of service to these two towns violated an act which barred TVA from expanding its services to areas in which it was not already the "primary" provider. See *id.* at 2-3.

65. See *id.* at 6. The Court noted several previous decisions had held that economic injury caused by lawful competition was not sufficient to confer standing. See *id.* at 5-6. The Court stated, however, that "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." *Id.* at 6. See also Church, *supra* note 2, at 450.

66. See generally Church, *supra* note 2, at 451-52.

In *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>67</sup> the Court greatly liberalized prudential standing requirements.<sup>68</sup> There, the petitioners, who were in the business of selling data processing services, contested a ruling by the Comptroller of the Currency that national banks could provide data processing services.<sup>69</sup> The Court held that the legal interest test should be applied to the merits of the case, not the issue of standing.<sup>70</sup> The Court introduced and applied a “zone of interests” test for standing.<sup>71</sup> Under the zone of interests test, the plaintiff’s grievance must arguably fall within the zone of interests the statute protects or regulates.<sup>72</sup>

While *Data Processing* applied the zone of interests test to a suit brought under the APA,<sup>73</sup> the Court has listed the test as a general prudential consideration.<sup>74</sup> Despite the ease with which the test can be articulated, courts have had difficulty in determining when and how to apply it.<sup>75</sup> The test has been applied to suits not involving the APA, but the Court has indicated that the application of the test in these situations will not be the same as it is under the APA.<sup>76</sup>

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67. 397 U.S. 150 (1970).

68. See Church, *supra* note 2, at 450.

69. See *Association of Data Processing*, 397 U.S. at 151. Petitioners claimed this violated the Bank Service Corporation Act, 12 U.S.C. § 1864, which provided “[n]o bank service corporation may engage in any activity other than the performance of bank services for banks.” See *Association of Data Processing*, 397 U.S. at 155.

70. See *Association of Data Processing*, 397 U.S. at 153.

71. See *id.* See also *Barlow v. Collins*, 397 U.S. 159 (1970). In *Barlow*, issued on the same day as *Association of Data Processing*, the Court also applied the zone-of-interests test stating, “[t]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.” *Id.* at 167.

72. See *Association of Data Processing*, 397 U.S. at 153. The Court stated the applicable prudential standing requirement was “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.” *Id.* See also *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 474-75; *Barlow*, 397 U.S. 159.

73. See generally *Association of Data Processing*, 397 U.S. 150.

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

75. See Church, *supra* note 2, at 452-56. See also *Dialysis Center, Ltd. v. Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981) (applying the test by examining “objectives and obvious purposes”); *Nash v. Califano*, 613 F.2d 10, 14 (2d Cir. 1980) (applying the test by considering only allegations in the complaint); *National State Bank v. Smith*, 591 F.2d 223, 233 (3d Cir. 1979) (applying the test by deciding whether it may reasonably be argued the interests are protected).

76. See *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 400 n.16 (1987). The Court noted that the application of the test to cases not involving the APA “should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the ‘generous review provisions’ of the APA apply . . . .” *Id.*

To further complicate matters, Congress can alter the prudential limitations applied by the Court.<sup>77</sup> Congress can negate the zone of interests test and expand standing or it can create a more strict standard and limit standing.<sup>78</sup> Congress has exercised this authority on several occasions, particularly within the realm of environmental statutes, by incorporating provisions for citizen suits.<sup>79</sup> Congress can expand standing all the way to, but no further than, the limits of Article III.<sup>80</sup> Without a specific indication by Congress that it desires to expand or limit standing, the Court will apply the zone of interests test.<sup>81</sup>

### C. Standing Under the Endangered Species Act's Citizen Suit Provision

Beginning with the Clean Air Act<sup>82</sup> in 1970, Congress has included citizen suit provisions in environmental statutes.<sup>83</sup> These provisions allow private

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77. See *Warth*, 422 U.S. at 501. "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Id.*

78. See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 2.13(f)(2), at 205-06 (2d ed. 1992). "In other words, if Congress speaks, either explicitly or implicitly, the Court will accept Congress' decision to confer standing to litigate constitutional or statutory claims." *Id.*

79. See Robert B. June, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 762 (1994). Congress has incorporated citizen suit enforcement provisions into environmental statutes to allow "private individuals and organizations to file civil actions to remedy statutory violations or to compel the performance of federal agency actions made mandatory by those statutes." *Id.* In its opinion in *Bennett*, the Court cited several examples where Congress has altered standing requirements. See *Bennett*, 117 S. Ct. at 1162 (citing ESA Citizen Suit provision, "any person," 16 U.S.C. § 1540(g)(1) (1994); Clean Water Act, "[any person] having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g)(1994); Surface Mining Control and Reclamation Act, "any person having an interest which is or may be adversely affected[,]" 30 U.S.C. § 1270(a) (1994); Energy Supply and Environmental Coordination Act, "[a]ny person suffering legal wrong," 15 U.S.C. § 797(b)(5) (1994); Ocean Thermal Energy Conversion Act, "any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy[,]" 42 U.S.C. § 9124(a) (1994)).

80. See *Gladstone*, 441 U.S. at 100. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Id.* (quoting *Warth*, 422 U.S. at 501). "In no event, however, may Congress abrogate the Art. III minima . . ." *Id.* See, e.g., *Defenders of Wildlife*, 504 U.S. at 578.

81. See ROTUNDA & NOWAK, *supra* note 78, § 2.13(f)(2), at 205-06. "If Congress has not so spoken, the plaintiff alleging a constitutional injury must not only overcome the Article III standing requirements but also the use of standing as a tool of judicial self-restraint." ROTUNDA & NOWAK, *supra* note 78, § 2.13(f)(2), at 205-06. See also *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984).

82. 42 U.S.C. § 7604 (1994).

83. See June, *supra* note 79, at 765. For a general discussion of the origin and basic structure of citizen suit provisions, see June, *supra* note 79, at 764-67 and nn.11-30. For examples of statutes where Congress has included citizen suit provisions, see *supra* note 79 and

individuals and organizations to enforce the statutes,<sup>84</sup> and were the result of the government's perceived failure to enforce the statutes.<sup>85</sup> Congress has set some limits on these citizen suits, however.<sup>86</sup> Congress defines who may bring actions<sup>87</sup> and under what circumstances they may do so.<sup>88</sup>

In 1973, Congress passed the ESA and included in it a citizen suit provision which provides in part that "any person" may bring an action to enforce certain provisions of the Act.<sup>89</sup> Despite what seems to be a clear grant of authority to any person, there has been much confusion and litigation about the application of this section.<sup>90</sup> One concern has been how and to what extent this grant affected the application of the zone of interests test. This confusion is evident in the split that occurred between the Eighth and Ninth Circuit Courts of Appeal.<sup>91</sup>

The Eighth Circuit, in *Defenders of Wildlife v. Hodel*,<sup>92</sup> held that "any person" under the ESA citizen suit provision meant the plaintiff need only meet the requirements of Article III.<sup>93</sup> On the other hand, the Ninth Circuit determined in *Bennett v. Plenert*<sup>94</sup> that the zone of interests test should apply to the ESA.<sup>95</sup> It held that the plaintiffs did not have standing because their commercial interests were plainly inconsistent with the species preservation interests protected by the ESA.<sup>96</sup>

The United States Supreme Court took an opportunity to address these issues when the plaintiffs in *Bennett v. Plenert*<sup>97</sup> appealed the Ninth Circuit's ruling.

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accompanying text.

84. See June, *supra* note 79, at 762.

85. See June, *supra* note 79, at 764.

86. See June, *supra* note 79, at 764.

87. For example, under the Clean Water Act, Congress provided standing for "[any person] having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (1994).

88. See June, *supra* note 79, at 765-67. For example, most citizen suit provisions require that the citizen provide 60 days notice prior to filing in order to allow the government a chance to begin enforcement proceedings. See June, *supra* note 79, at 765; see, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1365(b) (1994).

89. See 16 U.S.C. § 1540(g) (1994).

90. See Becker, *supra* note 1, at 1072.

91. See Becker, *supra* note 1, at 1077-80.

92. 851 F.2d 1035 (8th Cir. 1988), *rev'd on other grounds sub nom.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

93. See *id.* at 1039.

94. 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.*, *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

95. See *id.* at 919.

96. See *id.* at 921.

97. 63 F.3d 915 (9th Cir. 1995), *rev'd sub nom.*, *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

#### D. Standing Under the Administrative Procedures Act

Many cases involving environmental issues are brought under the auspices of the APA because environmental actions frequently involve administrative decisions.<sup>98</sup> In order to have standing to bring an action under the APA, the plaintiff must show three things<sup>99</sup> in addition to meeting the requirements of Article III.<sup>100</sup> First, he must show his claim falls within the zone of interests protected or regulated by the statute. Second, he must show he has suffered an adverse effect. Third, he must show the adverse effect was caused by a final agency action.<sup>101</sup>

In *Clarke*, a 1987 case arising under the APA, the Court broadened the application of the zone of interests test to actions arising under the APA.<sup>102</sup> After this, standing under the APA became easy to establish.<sup>103</sup> For a plaintiff to have standing, his injury need only arguably fall within the zone of interests protected by the particular provision of the statute which forms the basis for his action.<sup>104</sup>

The APA only provides for review of actions that are considered final agency actions.<sup>105</sup> In defining what is considered final, the Court has stated that the action must complete the decision making process.<sup>106</sup> This means that

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98. See Linda B. Zeit, *Standing in Environmental Litigation Under the Administrative Procedure Act*, 5 U. BALT. J. ENVTL. L. 112, 115 (1995). See, e.g., *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget*, 400 U.S. 62 (1970); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

99. See Edward B. Sears, Note, *Lujan v. National Wildlife Federation: Environmental Plaintiffs are Tripped up on Standing*, 24 CONN. L. REV. 293, 308 (1991).

100. See Zeit, *supra* note 98, at 115; see, e.g., *Association of Data Processing v. Camp*, 397 U.S. 150 (1970). For a discussion of the standing requirements of Article III, see *supra* notes 38-56 and accompanying text.

101. See Sears, *supra* note 99, at 308. For a discussion of the development of the zone of interests test, see *supra* notes 57-81 and accompanying text.

102. See *Clarke*, 479 U.S. at 399. The Court held that a right of review would be denied only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding . . ." *Id.* See also Sheldon K. Rennie, *Bennett v. Plenert: Using the Zone-Of-Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375, 382-83 (1996).

103. See Rennie, *supra* note 102, at 382-83.

104. See *National Wildlife Fed'n*, 497 U.S. at 883.

105. See 5 U.S.C. § 704 (1994).

106. See *Chicago & Southern Air Lines, Inc.*, 333 U.S. at 112-13. Plaintiffs sought review of an order by the Civil Aeronautics Board denying an application to provide overseas air transportation. See *id.* at 104-05. The order required the approval of the President. See *id.* at 105-06. The Court held there was no final agency action until after the President's review. See *id.* at 112.

rights are granted or denied or obligations are incurred from which legal consequences will flow.<sup>107</sup>

#### IV. REASONING OF THE COURT

In determining Petitioners had standing to sue under the ESA and APA, the Court focused on four issues. It considered whether Petitioners fell within the zone of interests protected by the ESA,<sup>108</sup> whether Petitioners met the Article III standing requirements;<sup>109</sup> whether the ESA provided for review of Petitioners' claims;<sup>110</sup> and whether the APA provided for review of Petitioners' claims.<sup>111</sup>

First, the Court determined that Congress expanded the zone of interests test in the ESA's citizen suit provision.<sup>112</sup> It compared the expansive wording of the ESA to other statutes<sup>113</sup> and looked at the subject matter and provisions of the ESA.<sup>114</sup> The Court noted that the environment is a subject in which all persons have an interest,<sup>115</sup> and it determined that the obvious purpose of the statute is to encourage private enforcement.<sup>116</sup>

The Court found no basis in the Ninth Circuit's ruling that this expanded right applied only to those environmentalists bringing actions alleging under-enforcement.<sup>117</sup> The Court analyzed the text of the statute and determined that "any person" applies not only to actions against private parties for violations

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107. *See id.* at 112-13. The Civil Aeronautics Board's order was unconditionally subject to the President's review. *See id.* at 105-06. The Court held that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id.* at 112-13. *See also Port of Boston*, 400 U.S. at 71 (holding "the relevant considerations in determining finality are whether the process . . . has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action.").

108. *See Bennett*, 117 S. Ct. at 1160-63.

109. *See id.* at 1163-65.

110. *See id.* at 1165-67.

111. *See id.* at 1167-69.

112. *See id.* at 1162.

113. *See id.* The Court commented that the ESA's provision that "any person may commence a civil suit" is an authorization of "remarkable breadth when compared with the language Congress ordinarily uses." *Id.*

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

115. *See id.*

116. *See id.* The Court examined the textual construction of the statute and determined this intent from the absence of diversity jurisdiction requirements; the provision for recovery of costs of litigation, including expert witness fees; and the reservation to the government of both a right of first refusal to pursue the action and a right to intervene. *See id.*

117. *See id.* at 1163. The Ninth Circuit's holding in effect required that a party must seek to protect endangered species, thus alleging under-enforcement, in order to have standing under the zone of interests test. *See Bennett*, 63 F.3d at 921.

and the Secretary for under-enforcement, but also to actions against the Secretary for over-enforcement.<sup>118</sup> Therefore, the Ninth Circuit Court of Appeals erred in holding plaintiffs must allege an interest in the preservation of endangered species in order to have standing under the citizen suit provision of the ESA.<sup>119</sup>

Second, the Court examined Article III standing requirements which require an injury in fact that is fairly traceable and redressable.<sup>120</sup> Since general factual allegations at the pleading stage are treated as though they include the facts necessary to support the allegation, Petitioners' complaint alleged the required injury in fact.<sup>121</sup>

The government argued that any injury Petitioners might have suffered was not fairly traceable to the Biological Opinion because the Biological Opinion was advisory in nature, and the Bureau had the final responsibility for determining what, if any, action would occur.<sup>122</sup> The Court stated that there must be a causal connection between the injury in fact and the defendants' actions which is not the result of the actions of an independent third party.<sup>123</sup> The Court noted, however, that this does not exclude injuries that result from the determinative or coercive effect of a third party.<sup>124</sup> While agencies like the Bureau theoretically may choose not to follow recommendations in the FWS's opinions, they rarely do so.<sup>125</sup> The Biological Opinion's Incidental Take Statement<sup>126</sup> protects the agencies and their employees from civil and criminal liabilities.<sup>127</sup> Therefore, the Court concluded the Biological Opinion had a coercive effect on the Bureau and the injury is thus fairly traceable.<sup>128</sup>

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118. See *Bennett*, 117 S. Ct. at 1163. "[T]he 'any person' formulation applies to all the causes of action authorized by § 1540(g) . . ." *Id.* This includes actions alleging over-enforcement under § 1533. See *id.* "[T]here is no textual basis for saying that [Congress's] expansion of standing requirements applies to environmentalists alone." *Id.*

119. See *id.*

120. See *id.* For a discussion of Article III requirements, see *supra* notes 38-56 and accompanying text.

121. See *Bennett*, 117 S. Ct. at 1164 (citing *Defenders of Wildlife*, 504 U.S. at 561).

122. See *id.* "Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. § 402.15(a) (1995).

123. See *Bennett*, 117 S. Ct. at 1163 (citing *Defenders of Wildlife*, 504 U.S. at 560-61).

124. See *id.* at 1164.

125. See Brief for the Respondents at 20-21, *Bennett* (No. 95-813).

126. The Incidental Take Statement essentially operates like a permit, allowing the "taking" of endangered species as long as the agency respects the statement's terms and conditions. See *Bennett*, 117 S. Ct. at 1165.

127. See *Bennett*, 117 S. Ct. at 1165. Civil penalties for violating the ESA are set forth in 16 U.S.C. § 1540(a) (1994). Criminal penalties are set forth in 16 U.S.C. § 1540(b) (1994).

128. See *Bennett*, 117 S. Ct. at 1164.

The Court also concluded that the Bureau would be unlikely to impose the minimum water level requirements if the Biological Opinion was set aside; therefore, the injury would likely be redressed by a favorable decision.<sup>129</sup> Finding an injury in fact which was traceable and redressable, the Court held Petitioners alleged sufficient facts to meet the Article III requirements for standing.<sup>130</sup>

Third, the Court examined two types of judicial review available under the ESA's citizen suit provision.<sup>131</sup> The first type, set forth in § 1540(g)(1)(C),<sup>132</sup> allows an action against the Secretary of Interior for failure to perform non-discretionary duties required under § 1533.<sup>133</sup> Section 1533(b)(2)<sup>134</sup> requires the Secretary to consider economic impact in making determinations about critical habitat.<sup>135</sup> Petitioners alleged the Biological Opinion determined critical habitat without considering economic impact.<sup>136</sup> The Court concluded that while the Secretary's ultimate determination would be reviewable only under an abuse of discretion standard, that does not change the fact that the Secretary is required to consider economic impact.<sup>137</sup> Thus, Petitioners' allegation that the Secretary did not consider the economic impact of its decision falls within the ESA citizen suit provision and is a reviewable action under this provision.<sup>138</sup>

The second type of judicial review under the ESA, set forth in § 1540(g)(1)(A), provides an action to enjoin any person who violates any provision of the Act.<sup>139</sup> The Court determined that this provides an action against those who violate the statute, but it does not provide another means for judicial review of the Secretary's administration of the statute.<sup>140</sup> The Court

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129. *See id.* at 1165.

130. *See id.* at 1169.

131. *See id.* at 1165.

132. 16 U.S.C. § 1540(g)(1)(C) (1994).

133. *See* 16 U.S.C. § 1540(g)(1) (1994). "[A]ny person may commence a civil suit on his own behalf . . . (C) against the Secretary [of the Interior] where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary." *Id.*

134. 16 U.S.C. § 1533(b)(2) (1994).

135. *See id.* For a discussion regarding the purpose and significance of establishing critical habitat, see *supra* note 20.

136. *See Bennett*, 117 S. Ct. at 1165.

137. *See id.* at 1166. The Court stated, "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 decision making." *Id.*

138. *See id.*

139. *See* 16 U.S.C. § 1540(g)(1)(A) (1994). "[A]ny person may commence a civil suit on his own behalf—(A) to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . ." 16 U.S.C. § 1540(g)(1) (1994).

140. *See Bennett*, 117 S. Ct. at 1166.

determined that to hold otherwise would conflict with the specific limitation in § 1540(g)(1)(C) to actions involving a failure to perform non-discretionary duties required under § 1533.<sup>141</sup>

Finally, the Court determined the APA<sup>142</sup> allowed review of Petitioners' § 1536<sup>143</sup> claims which alleged the Secretary did not use the best scientific data and that its alternatives were not reasonable or prudent.<sup>144</sup> In deciding this, the Court considered whether Petitioners fell within the zone of interests protected and whether the Biological Opinion was a final agency action.<sup>145</sup>

The Court concluded that for purposes of review under the APA, the zone of interests was determined not by looking at the overall purpose of the ESA, but by considering the specific provision on which the Petitioners relied.<sup>146</sup> The Court stated the obvious intention of the requirement to use the best scientific data was to insure that implementation of the ESA was not haphazard and that unnecessary economic hardship was avoided.<sup>147</sup> Therefore, Petitioners fell within the zone of interests protected by § 1536.<sup>148</sup>

Finally, the Court concluded the Biological Opinion was a final agency action.<sup>149</sup> The opinion met the two conditions generally required for an action to be considered final.<sup>150</sup> First, the opinion was the completion of the agency's decision making process.<sup>151</sup> Second, legal consequences, rights, and obligations resulted from the opinion because the Bureau was protected from potential criminal and civil penalties only if it complied with the Incidental Take Statement.<sup>152</sup>

Thus, the Court determined that Petitioners had standing under Article III and none of their claims were barred by the zone of interests test.<sup>153</sup> The Court held the ESA's citizen suit provision provided review for Petitioners' § 1533 claim, and the APA provided review for Petitioners' § 1536 claims.<sup>154</sup>

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141. *See id.*

142. For a discussion of the purpose of the APA, see *supra* note 23.

143. 16 U.S.C. § 1536 (1994).

144. *See Bennett*, 117 S. Ct. at 1167. For a discussion of Petitioners' allegations regarding "best available scientific data," see *supra* note 21.

145. *See Bennett*, 117 S. Ct. at 1167-68.

146. *See id.* at 1167. "It is difficult to understand how the Ninth Circuit could have failed to see this from our cases." *Id.*

147. *See id.* at 1168.

148. *See id.* at 1167.

149. *See id.* at 1168. The APA provides for judicial review of "final agency actions." *See* 5 U.S.C. § 704 (1994).

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

151. *See id.* This point was uncontested by the respondents. *See id.*

152. *See id.* For a discussion of the protection provided by the Incidental Take Statement, see *supra* notes 126-27 and accompanying text.

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

154. *See id.*

## V. SIGNIFICANCE

*Bennett v. Spear*<sup>155</sup> has been described as one of the most important decisions issued by the Supreme Court in the last twenty-five years.<sup>156</sup> This unanimous decision<sup>157</sup> was a rare loss in the realm of environmental regulation for the government.<sup>158</sup> Environmentalists expect to benefit from the ruling,<sup>159</sup> but it has been heralded as a victory for business.<sup>160</sup>

Before *Bennett*, plaintiffs with an economic interest had difficulty obtaining judicial review of actions governed by the ESA.<sup>161</sup> Now, the door has been opened to literally "any person" who can meet the minimal requirements of Article III. Thus, "any person" includes not only private attorneys-general wishing to enforce the provisions of the Act, but also those who assert over enforcement or mal-enforcement and can show the existence of an Article III controversy.<sup>162</sup>

Through its decision in *Bennett v. Spear*,<sup>163</sup> the Supreme Court also has further defined and refined the application of the zone of interests test. The Court has given clearer guidance in how to determine whether one falls within the zone of interests protected by any given statute.<sup>164</sup> Because the Court has opened its doors to plaintiffs under the citizen suit provision of the ESA, the

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155. 117 S. Ct. 1154 (1997).

156. See Perkins, *supra* note 19, at B7.

157. See W. Henson Moore, *Endangered Species Act Must Be Enforced for the Benefit of All*, CHRISTIAN SCI. MONITOR 19, Apr. 21, 1997, available in 1997 WL 2800629. "It is most instructive that the court's ruling was unanimous. When justices as philosophically and politically diverse as those sitting on the Supreme Court reach the same conclusion, it is not simply a decision — it's a mandate." *Id.*

158. See Joan Biskupic & Joby Warrick, *Court Rules Landowners Can Use Endangered Species Act to Fight Protections*, THE WASH. POST, Mar. 20, 1997, at A11, available in 1997 WL 10008317.

159. See Marianne Lavelle, *Businesses Gain Ground on Standing — Endangered Species Act Ruling Will Affect Many Suits*, NAT'L L.J., Apr. 7, 1997, at B1. "[T]he green groups decided not to fight the ranchers on standing, because they, too, want a broad interpretation of standing . . ." *Id.*

160. See Edward Felsenthal, *Legal Beat*, WALL ST. J., Mar. 20, 1997, at B12, available in 1997 WL-WSJ 2413737.

161. See Becker, *supra* note 1, at 1071.

162. See Lavelle, *supra* note 159, at B1. "It has always been clear . . . that citizens can sue the government for failure to protect threatened flora or fauna. But . . . [*Bennett*] clarifies that citizens also can sue if they feel the government has gone too far." Lavelle, *supra* note 159, at B1. "[T]he Supreme Court has done no more than give landowners the same standing in the court as short-nosed suckers, snail darters and gnatcatchers." Perkins, *supra* note 19, at B7. "Humans, not just suckers, will have their day in court." *Endangered Humans*, WASH. TIMES, Mar. 21, 1997, at A20, available in 1997 WL 3666884.

163. 117 S. Ct. 1154 (1997).

164. See *id.* at 1160-63.

APA, and possibly other statutes as well,<sup>165</sup> some scholars have suggested that this ruling will lead to a surge in litigation.<sup>166</sup>

Standing is a threshold issue that every plaintiff must face.<sup>167</sup> Therefore, the Court's detailed analysis of the proper application of the doctrine of standing and the tests to be applied to measure standing, is significant to every potential plaintiff in the federal court system. The Court's decision, broadening the tests used to determine standing, has made it easier for persons to have their day in court.<sup>168</sup>

*R. Margaret Dobson*

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165. See Lavelle, *supra* note 159, at B1. "The broad interpretation of the right to sue also likely will have an impact on actions under other federal regulatory laws — virtually all of which have explicit or implicit citizen suit provisions . . . . The Bennett decision could also affect a case with no environmental issues." Lavelle, *supra* note 159, at B1.

166. See Felsenthal, *supra* note 160, at B12. "'There's going to be a surge of litigation under the Endangered Species Act as a result of this,' predicted Patrick Parenteau, director of the Environmental Law Center at Vermont Law School." *Id.*

167. See GREGORY, *supra* note 33, at 11, 30 n.2.

168. See Perkins, *supra* note 19, at B7.