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## Citizen Suits under the Endangered Species Act: The United States Supreme Court Expands the Zone of Interests Test. *Bennett v. Spear*

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**CITIZEN SUITS UNDER  
THE ENDANGERED SPECIES ACT:  
THE UNITED STATES SUPREME COURT EXPANDS  
THE ZONE OF INTERESTS TEST**

*Bennett v. Spear*<sup>1</sup>

by Stacy Nagel

**I. INTRODUCTION**

The Klamath Project, located in northern California and southern Oregon, consists of a series of lakes, rivers, dams, and irrigation canals.<sup>2</sup> The Project is one of the federal government's oldest reclamation schemes and is home to the Lost River Sucker and Shortnose Sucker, two species of endangered fish.<sup>3</sup> These fish are at the center of a controversy that has ranch operators and irrigation districts claiming a competing interest in waters which the Fish and Wildlife Service (FWS) has determined are necessary for the preservation of endangered species.<sup>4</sup>

The Endangered Species Act (ESA) was promulgated in 1973 to recognize endangered and threatened species and to determine their critical habitats in order to prevent extinction.<sup>5</sup> The ESA requires any federal agency that proposes a

course of action that may affect a threatened or endangered species to first consult with the FWS before taking such action.<sup>6</sup> If the FWS finds that the species will be adversely affected by the agency action, a biological opinion will be issued which details the "reasonable and prudent alternatives" which the agency might take to avoid such harm.<sup>7</sup>

In *Bennett v. Spear*, the United States Supreme Court examined the issue of standing to question a biological opinion which may affect economic, commercial, and aesthetic interests.<sup>8</sup> The Supreme Court sought to resolve a conflict among the circuits over the ESA's citizen-suit provision and its application to the zone-of-interests test.

**II. FACTS AND HOLDING**

In 1992, the Bureau of Recla-

mation ("Bureau"), following the ESA guidelines, notified the Fish and Wildlife Service ("FWS") that the operation of the Klamath Project might adversely affect the Lost River Sucker and the Shortnose Sucker ("suckers").<sup>9</sup> The FWS issued a biological opinion that found that long-term operation of the Klamath Project might endanger the suckers and their habitat.<sup>10</sup> Consequently, the FWS recommended that the Bureau of Reclamation maintain a minimum water level in specific reservoirs in order to protect the species.<sup>11</sup>

Petitioners,<sup>12</sup> ranchers and water districts in Oregon, concerned that the FWS's recommendations might adversely affect their interests, brought suit against the regional director and director of the FWS, as well as the Secretary of the Interior ("Secretary").<sup>13</sup> They contended that the drastic reduction in available irrigation water would irreparably harm their use of the waterways for recreational, aesthetic, and commercial purposes.<sup>14</sup> Further, petitioners asserted that there was no need to implement minimum water levels as the suckers were not endangered by the Project.<sup>15</sup> Petitioners claimed "there [was] no commercially or scientifically avail-

<sup>1</sup> 117 S.Ct. 1154 (1997).

<sup>2</sup> *Id.* at 1159.

<sup>3</sup> *Id.* The Shortnose Sucker and Lost River Sucker were listed as endangered by the Secretary of the Interior in 1988. See 53 Fed.Reg. 27130-27133 (1988).

<sup>4</sup> *Bennett*, 117 S.Ct. at 1159-60.

<sup>5</sup> See 16 U.S.C. § 1531 (1973).

<sup>6</sup> See 16 U.S.C. § 1536(a)(2).

<sup>7</sup> See 16 U.S.C. § 1536(b)(3)(A).

<sup>8</sup> *Bennett*, 117 S.Ct. at 1158-59.

<sup>9</sup> *Id.* at 1159.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Two Oregon water districts, Langell Valley and Horsefly, that receive water from the Klamath Project and two ranch operators, Bennett and Giordano, filed suit under the citizen-suit provision of the ESA for declaratory and injunctive relief. Petitioners' Brief at \*ii, 1996 WL 277131.

<sup>13</sup> *Bennett*, 117 S.Ct. at 1159.

<sup>14</sup> *Id.* at 1160.

<sup>15</sup> *Id.* at 1159-60.

able evidence indicating that the restrictions on lake levels imposed in the Biological Opinion [would] have any beneficial effect on the . . . population of suckers."<sup>16</sup>

In their complaint, petitioners asserted three claims for relief. The first two claims alleged that the minimum water levels imposed by the FWS violated § 7 of the ESA.<sup>17</sup> The third claim alleged that the imposition of minimum water levels constituted an "implicit determination of critical habitat" for the endangered suckers, which violated § 4 of the ESA,<sup>18</sup> in that it did not account for the possible economic impact.<sup>19</sup> In each of their claims, petitioners asserted that the FWS's actions violated the Administrative Procedure Act's ("APA") prohibition against agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>20</sup>

The District Court of Oregon dismissed the claim, finding that the petitioners lacked standing since

their commercial and recreational interests did not fall within the zone-of-interests protected by the ESA.<sup>21</sup> The Court of Appeals for the Ninth Circuit affirmed.<sup>22</sup> The Ninth Circuit stated that the zone-of-interests test limited review under the citizen-suit provision of the ESA,<sup>23</sup> as well as the APA, to those individuals who had an environmental interest in the preservation of endangered species.<sup>24</sup>

The United States Supreme Court granted certiorari to determine whether the petitioners lacked standing under the zone-of-interests test.<sup>25</sup> After reviewing the petitioners' claims, the Supreme Court reversed the Court of Appeals.<sup>26</sup> The Court concluded that the zone-of-interests test allowed any person to bring a claim under the citizen-suit provision of the ESA, as well as under the APA, if Article III requirements were met.<sup>27</sup> The Court concluded that the petitioners had claimed sufficient injury in fact as a result of the

FWS's biological opinion to bring a claim against the respondents.<sup>28</sup>

### III. LEGAL BACKGROUND

The requirements of standing have their origins in Article III of the U.S. Constitution.<sup>29</sup> Article III requires a plaintiff to show that (1) he or she has suffered an "injury in fact;" (2) "a causal connection [exists] between the injury and the conduct," in other words, the injury must be "fairly traceable" to the acts of the defendant; and (3) the injury will likely be "redressed by a favorable decision."<sup>30</sup>

While Article III provides the minimum standing requirement, courts have often applied other prudential requirements to grant or deny standing to plaintiffs.<sup>31</sup> One such prudential standing test is the zone-of-interests doctrine, first employed in *Association of Data Processing Serv. Org. v. Camp*.<sup>32</sup> *Data Processing* requires a court to inquire into "whether the interest sought to be protected by

<sup>16</sup> *Id.* at 1160.

<sup>17</sup> *Id.* See 16 U.S.C. § 1536(a)(2), which details the procedure which federal agencies must follow in order to insure that any action "authorized, funded, or carried out by such agency" does not threaten an endangered species. The petitioners contended that the biological opinion violated the ESA as there was no direct evidence to support the Secretary's finding that the suckers were placed at a greater risk of extinction as a result of fluctuating water levels. *Bennett v. Plenert*, 63 F.3d 915, 916 (9th Cir. 1995).

<sup>18</sup> See 16 U.S.C. § 1533(b)(2). (requiring that the economic impact of the determination in the biological opinion be considered).

<sup>19</sup> *Bennett*, 117 S.Ct. at 1160.

<sup>20</sup> *Id.* See 5 U.S.C. § 706(2)(A), (1994).

<sup>21</sup> *Bennett*, 117 S.Ct. at 1160.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* See 16 U.S.C. § 1540(g). Section 1540(g) states in relevant part that "any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under authority thereof." *Id.*

<sup>24</sup> *Bennett*, 117 S.Ct. at 1160.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1169.

<sup>27</sup> *Id.* "Person" means "an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." See 16 U.S.C. § 1532(13).

<sup>28</sup> *Bennett*, 117 S.Ct. at 1169.

<sup>29</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>30</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>31</sup> *Bennett*, 117 S.Ct. at 1161. Prudential requirements are "judicially self-imposed limits" and are capable of being altered by Congress. *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751).

<sup>32</sup> 397 U.S. 150 (1970).

the complainant is arguably within the zone-of-interest to be protected or regulated by the statute or constitutional guarantee in question.<sup>33</sup>

In *Data Processing*, the plaintiffs challenged a ruling by the Comptroller of the Currency that allowed national banks to sell data-processing services to other banks and bank customers.<sup>34</sup> The Court of Appeals held that the plaintiffs had suffered an injury but denied them standing to complain of such injury under § 4 of the Bank Service Corporation Act.<sup>35</sup> The Court interpreted § 10 of the APA as requiring either a showing of a legal interest<sup>36</sup> or an explicit provision in the relevant statute permitting suit by the affected party.<sup>37</sup>

The Supreme Court did not construe the provision so narrowly, instead it found the association to be "within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of

'agency action.'"<sup>38</sup> In doing so, the Court noted that the National Bank Act itself made no mention of judicial review or aggrieved individuals<sup>39</sup> but decided there need not be an explicit statement of congressional purpose in the statute in order to confer standing upon economically-injured plaintiffs.<sup>40</sup>

The Court concluded that Congress had not desired that every individual suffering an injury in fact be allowed to bring suit.<sup>41</sup> The Court suggested that Congress should devise the zone-of-interests test to limit standing to those individuals whose interests were within the statute in dispute.<sup>42</sup> Those interests may be economic, as well as "aesthetic, conservational, and recreational."<sup>43</sup> In considering such interests, the Court expanded the class of persons who could seek review under the APA.<sup>44</sup>

After its initial introduction in 1970, the zone-of-interests test was infrequently applied.<sup>45</sup> However,

the test gained new life in 1987 when the United States Supreme Court, in *Clarke v. Securities Indus. Ass'n*,<sup>46</sup> attempted to further clarify the prudential requirement. In *Clarke*, a trade association, which represented securities dealers and brokers, brought suit alleging violations of the McFadden Act.<sup>47</sup> These violations resulted from the Comptroller of the Currency's approval of the requests of two national banks to open discount brokerage offices in their branch locations.<sup>48</sup>

The Court in *Clarke*, following the zone-of-interests test set out in *Data Processing*, held that the trade association had standing to bring a claim under the Act.<sup>49</sup> The Court dismissed petitioner's argument that the congressional purpose of the Act was not to safeguard those involved in the securities market.<sup>50</sup> The Court stated that the essential inquiry in determining standing under the APA is "whether Congress 'intended for [a particular]

<sup>33</sup> *Id.* at 153.

<sup>34</sup> *Id.* at 151.

<sup>35</sup> *Id.* at 153.

<sup>36</sup> *Id.* at 153-54. The legal interest test evolved out of cases such as *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), in which power companies sought to enjoin TVA from operating, claiming that the statute from which it derived its existence was unconstitutional. The Supreme Court denied standing because the right invaded was not classified as a legal one. Such legal rights included those claims based on property, contract, tort, or statutory privilege. *Tennessee Electric*, 306 U.S. at 137-38. The Court in *Data Processing* determined that the legal interest test went to the merits of the case, not to the question of standing. *Data Processing*, 397 U.S. at 153-54.

<sup>37</sup> *Data Processing*, 397 U.S. at 153. The APA grants standing to a person "aggrieved by an agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1964 ed., Supp IV.).

<sup>38</sup> *Data Processing*, 397 U.S. at 157.

<sup>39</sup> *Id.* at 154. The idea that no explicit statutory language is needed to confer standing has been upheld in other cases. See *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 (1986). ("A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review.") *Id.*

<sup>40</sup> *Data Processing*, 397 U.S. at 154.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 153.

<sup>43</sup> *Id.* at 154.

<sup>44</sup> *Id.*

<sup>45</sup> *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995).

<sup>46</sup> 479 U.S. 388 (1987).

<sup>47</sup> *Id.* at 390-91. The McFadden Act, which restricts the activities in which national banks are specifically authorized to engage, is codified at 12 U.S.C. §§ 36 & 81.

<sup>48</sup> *Clarke*, 479 U.S. at 403.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 399.

class [of plaintiffs] to be relied upon to challenge agency disregard of the law<sup>51</sup> and that review should be denied under the APA 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 to permit the suit.”<sup>52</sup> Ultimately, the Court stated its desire to have the test remain a flexible requirement for determining standing, with no need for explicit congressional action.<sup>53</sup>

Beyond applying the zone-of-interests test as expressed in *Data Processing*, the *Clarke* Court broadened the zone-of-interests test, holding that it was applicable to claims under statutes other than the APA.<sup>54</sup> However, it cautioned that the test should not be employed in every case, as other statutes do not have such generous review provisions.<sup>55</sup> The Court doubted the possibility of providing a single standard, as it would become too generalized to provide any probative value.<sup>56</sup> Therefore, the Court declined to comment on precisely how the test might apply to non-APA claims.<sup>57</sup>

Minimal guidance from the Supreme Court on the application of the zone-of-interests test to non-APA claims led to confusion among

the circuit courts on how and if the zone-of-interests test should be used in conjunction with the citizen-suit provision of the ESA. Some courts have held that the test does apply to determine standing under the ESA, while others have declined to apply the test, opting to look only to Article III to determine standing.<sup>58</sup>

One circuit that has declined to apply the zone-of-interests test to the citizen-suit provision of the ESA is the Eighth Circuit. The Eighth Circuit, in *Defenders of Wildlife v. Hodel*,<sup>59</sup> decided that a plaintiff must meet only the requirements of Article III to possess standing. In *Hodel*, the plaintiffs brought an action challenging a Department of the Interior regulation which did not require United States agencies funding projects in foreign countries to seek advice from the Secretary of the Interior on the impact such project may have on endangered species.<sup>60</sup> The District Court of Minnesota dismissed the case for lack of standing.<sup>61</sup> The Court of Appeals for the Eighth Circuit reversed, holding that the citizen-suit provision of the ESA allowed any person to commence a suit against one who is allegedly in violation of the ESA.<sup>62</sup> The Court found plaintiffs could bring such a claim under the ESA if they met Article III

requirements of injury in fact, causation, and redressability, as the “any person” language in the statute indicated congressional intent to eliminate any further prudential requirements.<sup>63</sup>

Other circuit courts have held that the zone-of-interests test does apply to the citizen-suit provision of the ESA. The Ninth Circuit addressed this issue in *Mt. Graham Red Squirrel v. Espy*<sup>64</sup> and *Pac. N.W. Generating Coop. v. Brown*.<sup>65</sup> The Circuit Court of the District of Columbia also applied the test in *Idaho v. Interstate Commerce Comm’n*.<sup>66</sup>

In *Mt. Graham*, plaintiffs sought an injunction to stop construction of an observatory on the University of Arizona campus, fearing it might endanger the habitat of the red squirrel.<sup>67</sup> The Ninth Circuit reversed the findings of both lower court decisions and held that the plaintiffs had standing under the zone-of-interests test of the Arizona-Idaho Conservation Act, as they asserted an interest in the preservation of endangered species.<sup>68</sup>

In *Pacific Northwest*, plaintiffs who purchased hydropower challenged an action that listed three species of salmon as endangered.<sup>69</sup> The United States District Court of

<sup>51</sup> *Id.* (citing *Barlow v. Collins*, 397 U.S. 159, 167 (1970)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 400.

<sup>57</sup> *Id.*

<sup>58</sup> See *supra* note 30 and accompanying text.

<sup>59</sup> 851 F.2d 1035, 1038 (8<sup>th</sup> Cir. 1988).

<sup>60</sup> *Id.* at 1036.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1039.

<sup>63</sup> *Id.* at 1039, n.2.

<sup>64</sup> 986 F.2d 1568 (9<sup>th</sup> Cir. 1993).

<sup>65</sup> 38 F.3d 1058 (9<sup>th</sup> Cir. 1994).

<sup>66</sup> 35 F.3d 585 (D.C. Cir. 1994).

<sup>67</sup> *Mt. Graham*, 986 F.2d at 1569.

<sup>68</sup> *Id.* at 1570.

<sup>69</sup> *Pacific Northwest*, 38 F.3d at 1060.

Oregon held that plaintiffs lacked standing to bring suit under the ESA.<sup>70</sup> The Court of Appeals, however, held that the plaintiffs had an economic stake in whether the species was classified as endangered, and reversed.<sup>71</sup>

In *Interstate Commerce Comm'n*, three mining companies and the state invoked the ESA to challenge an order by the ICC that allowed a company to abandon a portion of track without first cleaning up pollution left by the railroad.<sup>72</sup> The Circuit Court for the District of Columbia held that plaintiffs (mining companies) had standing under the ESA to bring suit, as they fell within that class of individuals whom the APA seeks to protect.<sup>73</sup> The Court found that the plaintiff (state of Idaho) had a proprietary interest in the affected land, as well as an interest in the preservation of endangered species.<sup>74</sup>

In *Bennett v. Spear*,<sup>75</sup> the United States Supreme Court granted certiorari to resolve the conflicting holdings of the Circuit Courts.

#### IV. THE INSTANT DECISION

In *Bennett*, the Supreme Court

of the United States clarified the citizen-suit provision of the ESA and held the zone-of-interests test applied to claims brought under the ESA provision, allowing petitioners to seek judicial review of a biological opinion if they asserted a competing economic interest in the protected areas.<sup>76</sup>

The Court began its analysis with the question of standing.<sup>77</sup> In its unanimous opinion written by Justice Scalia, the Court determined that standing is both a constitutional and a prudentially self-imposed limitation on jurisdiction.<sup>78</sup> According to the Court, Article III is the "irreducible constitutional minimum of standing" and cannot be modified or abrogated by law.<sup>79</sup> Unlike their constitutional equivalent, prudential requirements, which are judicially self-imposed limits on the exercise of federal jurisdiction, can be altered by Congress.<sup>80</sup> The Court stated that the prudential standing requirement included the issue in dispute in this case, specifically, whether the petitioner's complaint must be within the zone-of-interests to be regulated or protected by statute or constitutional guarantee.<sup>81</sup>

The Court explained that the ESA's citizen-suit provision ex-

panded the zone-of-interests test to include the economic, recreational, and aesthetic interests of the ranchers and irrigation districts.<sup>82</sup> In its analysis, the Court turned to the wording of the citizen-suit provision of the ESA.<sup>83</sup> The Court observed the pertinent portion of the provision clearly states that "any person may commence a civil suit."<sup>84</sup> According to the Court, this wording is quite broad, in that it does not clearly set out any restrictions on who may bring a suit under the ESA provision.<sup>85</sup> The Court explained its willingness to take the words "any person" for their face value by turning to legislative intent.<sup>86</sup> Since the subject matter turned on environmental issues in which most people would have an interest, and because the purpose of the provision was to encourage enforcement, the Court determined that the "any person" provision applied to all causes of action under § 1540(g).<sup>87</sup> This included the petitioner's action to prevent implementation of environmental restrictions.<sup>88</sup> The Court concluded that the lower courts had erred in holding that the petitioners lacked standing to bring a claim under the ESA.<sup>89</sup>

Because the lower courts found

<sup>70</sup> *Id.* at 1062-63.

<sup>71</sup> *Id.* at 1066.

<sup>72</sup> *Interstate Commerce*, 35 F.3d at 588.

<sup>73</sup> *Id.* at 591.

<sup>74</sup> *Id.* at 592.

<sup>75</sup> 117 S.Ct. 1154 (1997).

<sup>76</sup> *Id.* at 1154, 1169.

<sup>77</sup> *Id.* at 1160.

<sup>78</sup> *Id.* at 1161. (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

<sup>79</sup> *Id.* See *supra* note 30.

<sup>80</sup> *Bennett*, 117 S.Ct. at 1161. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

<sup>81</sup> *Id.* at 1161, 1163.

<sup>82</sup> *Id.* at 1160.

<sup>83</sup> *Id.* at 1162. See 16 U.S.C. § 1540(g)(1).

<sup>84</sup> *Bennett*, 117 S.Ct. at 1162.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (The provision encourages enforcement by eliminating the amount-in-controversy requirement and the diversity-of-citizenship requirement. It also provides for recovering litigation fees).

<sup>88</sup> *Id.* at 1163.

<sup>89</sup> *Id.*

the government's zone-of-interests ground to be dispositive, they did not review the respondent's other grounds for dismissal. The Supreme Court, though, after reviewing the lower courts' decision on standing under the ESA, turned to these alternatives.<sup>90</sup> The government first contended that the petitioners did not meet Article III requirements for standing and, therefore, lacked the ability to seek judicial review.<sup>91</sup>

The Supreme Court ruled that petitioners had sufficient standing in this case to seek judicial review.<sup>92</sup> First, petitioners alleged general facts that at the pleading stage were sufficient to presume that they had specific facts to support the injury claim.<sup>93</sup> In the Court's view, the general claim that the amount of available water would be reduced was specific enough to show that the petitioners could later produce further details of precisely how they would be impacted.<sup>94</sup> Second, the petitioner's injury was "fairly traceable" to the FWS's biological opinion.<sup>95</sup> Although the government argued that the Bureau had ultimate responsibility for determining how actions should proceed, the

Court found that the FWS's biological opinion had a strong coercive effect on the Bureau, as an agency which disregards the opinion and proceeds with its action does so at its own peril.<sup>96</sup> Third, the plaintiff's injury could likely be redressed because the Bureau would not impose water restrictions if the opinion would be set aside.<sup>97</sup>

The Court also reviewed the Government's claim that the ESA's citizen-suit provision does not allow judicial review of the petitioners' claims.<sup>98</sup> The Court found that the petitioners' 16 U.S.C. § 1533 claim could be reviewed under 16 U.S.C. § 1540, as the Secretary had an obligation to consider the economic impact of defining an area as a critical habitat.<sup>99</sup> Although the ultimate decision was discretionary, the decision-making procedures which led up to the final determination were not, as he was required to use all of the available scientific data to determine relevant impact.<sup>100</sup>

The Supreme Court next analyzed the government's argument that a violation of § 7 of the ESA, codified at 16 U.S.C. § 1536, cannot be reviewed under the ESA citizen-suit provision.<sup>101</sup> The Court looked to

§ 1540 to determine if it permitted suit against the Secretary of the Interior for any violation of the ESA.<sup>102</sup> The Court concluded that it did not. It interpreted the reference to "violation" in § 1540(g)(1)(A) to exclude a Secretary's maladministration, as it applied not to violations by those who administer the law but to violations by those who are regulated by such law.<sup>103</sup> Further, the Court asserted that it was unlikely that the legislature's intent was to impose criminal liability on those in the administrative agency.<sup>104</sup>

Although the petitioners' claim under § 1536 may not be brought under the ESA, the Court examined whether such claims may be authorized under the Administrative Procedure Act (APA).<sup>105</sup> Under the APA, 5 U.S.C. § 704, an individual has a right to judicial review of final agency action for which there is no other adequate remedy in a court.<sup>106</sup> A court can "set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>107</sup>

Looking to the APA, the Court held that the petitioners' claim of a

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* See *supra* note 30 and accompanying text for Article III requirements.

<sup>92</sup> *Bennett*, 117 S.Ct. at 1165.

<sup>93</sup> *Id.* at 1164. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)) for the proposition that "on a motion to dismiss [a court] presumes that the general allegations embrace those specific facts that are necessary to support the claim").

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1165.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1166.

<sup>100</sup> *Id.* "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." See *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

<sup>101</sup> *Bennett*, 117 S.Ct. at 1166.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* See *supra* note 23.

<sup>104</sup> *Bennett*, 117 S.Ct. at 1166. Criminal liability is imposed under § 1540(b), which makes it a crime for "[a]ny person [to] knowingly violat[e] any provision of [the ESA]," or under § 1540(e)(3), which "authorizes law enforcement personnel to 'make arrests without a warrant for any violation of [the ESA].'" See 16 U.S.C. § 1540.

<sup>105</sup> *Bennett*, 117 S.Ct. at 1167.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

violation of 16 U.S.C. § 1536 falls within the APA and is subject to judicial review.<sup>108</sup> The Court found that the petitioners' contention that the FWS failed to use the best available scientific evidence was within the zone-of-interests sought to be protected, as it safeguarded individuals from economical jeopardy determinations due to erroneous information.<sup>109</sup>

The Court further rejected the government's contention that a biological opinion was not "final agency action" under the APA.<sup>110</sup> Concluding that the opinion had direct legal consequences and was not merely advisory, the Court found the opinion to be the end result of the agency's decision-making process and thus a final action.<sup>111</sup>

Accordingly, the Supreme Court found that the petitioners fell within the zone-of-interests sought to be protected and could seek judicial review of their claims under the ESA and the APA.<sup>112</sup>

## V. COMMENT

As a result of the decision in *Bennett*, a party bringing a claim under the citizen-suit provision of the ESA can allege an interest that is contrary to the preservation of endangered species and still enjoy standing.<sup>113</sup> The Supreme Court's interpretation provides a forum for

an aggrieved individual to protect an interest harmed by an environmental determination.

In examining 16 U.S.C. § 1540(g), the statutory language seems to confer upon any person the ability to bring suit if he or she alleges any interest in the environment, whether or not it is protective.<sup>114</sup> The Supreme Court took such an **expansive approach in *Bennett***, but other courts have not been so willing to take the words "any person" at face value. The Ninth Circuit has refused in numerous cases to expand environmental statutory language to include those parties whose injuries did not arise from an interest in the environment.<sup>115</sup> In *Dan Caputo Co. v. Russian River County Sanitation District*, the plaintiff was denied standing because he did not seek to vindicate environmental concerns when he asserted that the government's noncompliance with the Clean Water Act resulted in the loss of his grant funds.<sup>116</sup> In that statute, the operative words were "any citizen."<sup>117</sup>

Circuit courts, as well as many respondents, argue that standing should be granted only to those parties with environmental concerns. They contend that extending the zone-of-interests to those who have competing economic, com-

mercial, or aesthetic interests would defeat the purpose of the ESA, which is to protect threatened and endangered species.<sup>118</sup> The Supreme Court in *Bennett*, however, in its expansion of the zone-of-interests test, took the approach of serving and protecting the rights of parties bringing suit under the environmental statute. The citizen-suit provision should not be so narrowly construed to include only those who seek to implement restrictions.

The Supreme Court in *Bennett* stressed the importance of a liberal reading of the provision, since the subject matter of the suit is the environment, an area that should be of interest to all individuals.<sup>119</sup> The citizen-suit provision of the ESA eliminates the amount-in-controversy requirement and the diversity-of-citizenship requirement.<sup>120</sup> The provision also provides for the recovery of litigation fees.<sup>121</sup> Further, the government has a right of first refusal, in terms of discretionary prosecution of claims.<sup>122</sup> According to the Court, these factors are strong evidence that "the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'."<sup>123</sup>

Allowing a party who meets Article III standing and alleges a competing interest to have the case

<sup>108</sup> *Id.* at 1167-69.

<sup>109</sup> *Id.* at 1168.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1168-69.

<sup>112</sup> *Id.* at 1169.

<sup>113</sup> *Id.*

<sup>114</sup> See 16 U.S.C. § 1540(g).

<sup>115</sup> See *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713 (9th Cir. 1993) (Court held plaintiffs lacked standing under NEPA as the environmental purpose of the Act would not be served if suits based on purely economic claims were allowed).

<sup>116</sup> 749 F.2d 571, 575 (9th Cir. 1984).

<sup>117</sup> *Id.*

<sup>118</sup> See *Dan Caputo*, 749 F.2d 571 (9th Cir. 1984); *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995).

<sup>119</sup> *Bennett*, 117 S.Ct. at 1163.

<sup>120</sup> *Id.* at 1162.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*



decided on the merits would not interfere with the enforcement of the statutory scheme developed under the ESA. Instead, it might encourage more careful inspection and diligence in issuing biological opinions. Greater judicial scrutiny of agencies' ESA decision-making powers in cases of overregulation would provide a check on governmental power. If individuals are given a forum to question the basis of an environmental opinion, there will be further preservation of personal rights, a safeguard from erroneous agency decisions. More cases may be brought under the ESA with the expansion of the zone-of-interests test, but Article III will ensure that such cases have a solid foundation for trial.

This expansive view of the zone-of-interests test may have implications beyond the environmental arena in the future. Several circuits have already applied the Court's decision to contexts beyond the ESA. For instance, in *Davis v. Philadelphia Housing Authority*, the Third Circuit reexamined the *Bennett* decision in the area of the Lead-Based Poisoning and Prevention Act.<sup>124</sup> The Court of Appeals held

that the family of a young boy, who had suffered brain damage as a result of lead-based paint in the home, had standing under the zone-of-interests test to bring a claim against the Federal Housing Authority.<sup>125</sup>

In *Davis*, the specific statutory language of the Act did not directly confer standing upon the plaintiffs.<sup>126</sup> However, the Court determined they had a sufficient basis on which to proceed, as their claims were closely related to the purpose of the Act.<sup>127</sup> In addition, the family's claims would promote enforcement of the Act, rather than interfere with statutory schemes.<sup>128</sup> Moreover, their specific rights could only be protected by bringing suit under this Act.<sup>129</sup> The Court cited *Bennett* as the primary authority for its expansive view of the zone-of-interests test.<sup>130</sup>

The scope of *Bennett* has not been clearly defined. How much of an impact the case will have on future statutory applications of the zone-of-interests test is difficult to determine. The Supreme Court does caution that some limits must be placed on the prudential standing requirement. Beyond the ESA

setting, however, the situations in which the test may be invoked are too varied to outline a workable set of guidelines. Further direction can only come from judicial application of the zone-of-interests test in future environmental cases and other contexts. If courts in other statutory contexts follow the *Bennett* decision, deserving plaintiffs who have been injured by agency action may be granted the opportunity to seek judicial review, whereas before they were left without remedy.

## VI. CONCLUSION

In the environmental context and beyond, the Supreme Court's holding in *Bennett* is receiving a great deal of attention. In the area of the environment, it may have a profound effect on the variety of economic, commercial, and aesthetic claims brought under the ESA. Even claims that are not capable of being brought under the citizen-suit provision of the ESA may be enforceable under the APA, as the Court found the citizen-suit provision does not preclude such review. The Supreme Court's expansive decision in *Bennett v. Spear* broadens the plaintiff's path to judicial review.

<sup>124</sup> 121 F.3d 92 (3<sup>rd</sup> Cir. 1997).

<sup>125</sup> *Id.* at 101.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 97-98.