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## Cases to Watch

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# Cases to Watch

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*Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 21, 1995) (No. 95-813)

After the United States Fish and Wildlife Service (Service) issued a biological opinion concerning certain reservoirs located in Oregon, Bennett filed a citizen suit under the Endangered Species Act (ESA) to prevent the government from pursuing any of the Service's recommendations. The Service's opinion concluded that to protect several fish species living within the reservoirs, it was necessary to take steps that included raising the minimum lake level. The plaintiffs, who included ranch owners and several irrigation districts, used the reservoir water for commercial and recreational purposes.

Bennett alleged that the Service had not adequately shown the fish would suffer from continued use of the reservoirs, and that evidence showed the fish were

thriving. Therefore, Bennett argued, the government violated ESA by improperly determining that the reservoirs' levels needed to be adjusted. The United States District Court for the District of Oregon dismissed the case for lack of standing. The Ninth Circuit Court of Appeals affirmed, holding that Bennett did not assert an interest sufficient to sue under the citizen suit provision of ESA.

The court of appeals determined that the main issue the case presented was not one of standing to sue, but whether Bennett was within the "zone of protected interests" Congress envisioned when drafting the ESA. Basing his argument on a split in circuits that had emerged, Bennett argued that the zone of interest requirement did not apply to citizen suits under the ESA. The court, however, held that citizen suit provisions do not automatically confer standing, even to those plaintiffs who can meet other standing requirements, if the

plaintiffs sue because of interests that are inconsistent with those of the act in question. Here, the court found that Bennett alleged interests that were plainly at odds with ESA, since he did not assert an interest in preserving the reservoirs' threatened fish species. Finally, the court stated that the government's failure to consider the economic impact associated with changing the reservoirs' water levels was also not enough to guarantee standing.

This case presents three issues on appeal. The first is whether a citizen suit plaintiff must be in the zone of interest to sue under the ESA. The second is whether Bennett was within the zone of interest, based on the fact that his concerns centered on his use of the reservoirs, rather than the fish. The last issue on appeal is whether the Service's lack of assessment of economic factors impliedly granted standing to Bennett. Bennett filed petition for certiorari to the United States Supreme Court on November 21, 1995.