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A Hot Debate: Application of the Zone of Interests Test to the Endangered Species Act
Bennett v. Plenert
by Lynette McCloud

I. INTRODUCTION
In 1973, concerns for environmental and wildlife protection prompted the creation of the Endangered Species Act (ESA). Because individuals have become more conscious and protective of their surroundings, complaints brought pursuant to the ESA have increased in recent years. The large amount of resulting litigation raises the issue of who has standing to sue under the statute. The Supreme Court has developed and refined a "prudential zone of interests" test to answer the standing issue. However, many lower courts remain uncertain of the proper application of the test to environmental statutes, including the ESA. Consequently, the issue of standing under the ESA is hotly debated among federal courts. The courts are currently split as to whether minimum Article III requirements or additional prudential tests should regulate a plaintiff's judiciary access. While many opponents articulate numerous reasons against employment of the zone of interests test, proponents are equally adamant for the test's usage. In Bennett v. Plenert, the Ninth Circuit adopted the later viewpoint. Recently, the Supreme Court granted certiorari in order to eliminate some confusion, and hopefully bring solidarity to the splintered approaches taken by the lower courts.

II. FACTS AND HOLDING
In Bennett v. Plenert the Ninth Circuit addressed the issue of whether plaintiffs who assert no interest in preserving endangered species may sue the government for violating the procedures established in the ESA. Moreover, the court examined the question of whether the prudential zone of interests test should be applied when determining who has standing to sue under the ESA. The Ninth Circuit found the zone of interests test applicable under the ESA, holding that the plaintiffs lacked standing to sue absent an interest in wildlife preservation.

Two Oregon ranchers, Bennett and Giordano, and two Oregon irrigation districts, Langell Valley and Horsefly, filed suit against the government under the citizen-suit provision of the ESA for declaratory and injunctive relief. The plaintiff claims that a biological opinion issued by the United States Fishery and Wildlife Service (FWS) on July 22, 1992 violated the Endangered Species Act (ESA).

The biological opinion examined the effects of the federal government's Klamath Project (hereafter the "Project") on the plight of two endangered species, the Lost River sucker and Shortnose sucker. The Project, which was administered by the Bureau of Reclamation (hereafter the "Bureau"), involved the commercial and recreational uses of two reservoirs, the Clear Lake reservoir in northern California and

1 Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995).
3 Sanford A. Church, Note, A Defense of the 'Zone of Interests' Standing Test, 1983 DUKE L.J. 447, 448 (1983).
5 Bennett, 63 F.3d 915.
6 Id. at 918. Supreme Court granted certiorari on March 25, 1996 to decide the issue of standing under the ESA.
7 Id. at 916.
8 Id. at 917.
9 Id. at 919.
12 Id. Section 7 of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). To fulfill this obligation agencies are required to consult with the Secretary of the Interior (through the FWS) or the Secretary of Commerce (through the National Marine Fisheries Service) depending on the species involved. See 50 CFR § 402. If necessary, formal consultation must follow. See 50 CFR § 402.14(a). Subsequent to formal consultation, the Service issues a biological "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536 (b)(3)(A).
13 Id. See The Official World Wildlife Fund Guide to Endangered Species of North America (David W. Lowe, John R. Matthews, Charles J. Moseley, 1990). Shortnose sucker fish, Chasmistes brevirostris, were placed on the endangered species list July 18, 1988. Although they were once found throughout the Klamath Basin of Oregon, most were eliminated during in 1952. Today, their biggest threats are...
the Gerber reservoir in southern Oregon. The ESA required the FWS to engage in formal consultation with the Secretary of Interior, based on a preliminary finding by the Bureau, which concluded that extended operation of the Project would “adversely affect” the two species. After consultation, the FWS concluded that the “long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers.” The FWS’s determination was detailed in the challenged biological opinion. One suggestion by the FWS to the Bureau for protecting the species was that a minimum water level in the two reservoirs be maintained. The Bureau endorsed this recommendation on August 19, 1992, and informed the FWS that it was in agreement with the opinion’s conclusions.

The plaintiffs alleged that the government’s biological opinion violated the ESA because no direct evidence substantiated the FWS’s finding that the Project endangered the survival of the suckers. In support of their position, the plaintiffs produced contrary data which indicated that the fish were “reproducing successfully.”

Moreover, the complaint stated that the government violated provisions of the ESA by neglecting to acknowledge the opinion’s economic effects. Therefore, the plaintiffs argued that portions of the opinion should be repealed, allowing them to utilize the reservoirs’ water for both commercial and recreational purposes.

The government moved to dismiss the suit, arguing that the plaintiffs lacked standing under the ESA. Their reasoning was that because the biological opinion was non-binding, it failed to cause any injury to the plaintiffs. Moreover, the defendants asserted that the plaintiffs lacked standing because the supposed harm was not “a result of the Secretary’s failure to conserve the two species of fish,” nor could it “be fairly traced to an alleged violation of the Secretary’s obligations under ESA section 7(a)(1)."

The United States District Court for the District of Oregon set forth the three elements necessary for standing: (1) an injury in fact—an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical, (2) a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of some third party not before the court, and (3) the injury will be redressed by a favorable decision.

The court concluded that the “...Lost River and shortnose suckers’ interest in using water for habitat” clashed with the plaintiffs’ intention to consume the Project’s water for both recreational and commercial uses. Therefore, the court held that the plaintiffs lacked standing under the ESA based on “an interest which conflicted with the interests sought to be protected by the Act.” The plaintiffs appealed.

The Ninth Circuit Court of Appeals affirmed the decision. First, the Ninth Circuit noted that the issue before it was not a question of whether the plaintiffs had met the constitutional standing requirements to file suit under the ESA, but whether their action was allowed under the prudential zone of interests test. Examination of both case precedent, and legislative history, led to the

*1 Bennett, 1993 WL 669429 at *1.
*2 Bennett, 63 F.3d at 916.
*3 Bennett, 1993 WL 669429 at *3.
*4 Bennett, 63 F.3d at 916.
*5 Bennett, 1993 WL 669429 at *1.
*6 Bennett, 1993 WL 669429 at *1. Section 4 of ESA, 16 U.S.C. § 1533(b)(2) requires that the economic impact of the determination stated in the Service’s biological opinion must be considered.
*7 Bennett, 63 F.3d at 916.
*8 Id. at 917.
*9 Bennett, 1993 WL 669429 at *1.
*10 Id.
*11 Id. at *3.
*12 Bennett, 63 F.3d at 917.
*13 Id.
*14 Id. at 915.
*15 Id. at 922.
*16 Id. at 917.
The court found the overall objective of the ESA was to further species preservation. The court determined that the congressional intent behind the enactment of the statute was to stop and reverse the current movement toward species extinction at whatever cost. Moreover, the court found that the citizen-suit provision of the ESA was designed to achieve the purpose of species protection by allowing "interested persons" to bring suit under the Act. Therefore, the court held that because the plaintiffs' sought only economic and recreational benefits from the water, their interests were only "marginally related" to the underlying purposes of the ESA, and their interests were inconsistent with the Act's purposes, thus they lacked standing. On March 25, 1996, the Supreme Court granted certiorari.

III. Legal History

Determining whether an individual is a proper party plaintiff, possessing standing to sue, is regulated by Article III of the Constitution. The Article III case and controversy requirement sets forth three elements of standing: an injury in fact, causation, and redressability. However, courts have adopted and applied additional prudential standing requirements in certain situations. Prudential limitations include the denial of standing if the injury is a generalized grievance, if the plaintiff is asserting the rights of a third party, or if the injury is not within the zone of interests of a statute. Although the Supreme Court has never established guidelines for the utilization of prudential standing tests, lower courts employ the various prudential standing tests frequently. The prudential test applied by the Ninth Circuit in *Bennett v. Plenert* was the zone of interests test.

The origin and development of the zone of interests test consisted of a liberalizing trend toward standing requirements for "competitors' suits," in which complainants challenge agency actions that allegedly injure competitors' ability to compete. Before 1968, the courts employed a legal interests test to determine the issue of standing. The legal interests test held that individuals were granted standing only when a legal right was violated. Legal rights included rights based on property or contract, rights based on protection from tortious invasion, or rights based on a statute which conferred a privilege. In 1968, the Supreme Court removed some of the obstacles which prohibited standing, holding that a plaintiff need only demonstrate that a statute reflected a legislative purpose to protect the competitor's interest. The Court, in 1970, further liberalized competitor standing by introducing the zone of interests test in *Ass'n of Data Processing Serv. Orgs. v. Camp.*

In *Data Processing,* a data processors' association and data processing corporation filed suit under the APA against the Comptroller of Currency challenging a ruling which allowed national banks to offer data processing services to other banks and bank customers. Both the District Court and Court of Appeals denied standing to the plaintiffs, relying on the legal interests test. The Supreme Court, stating that the legal interests test went to the merits, replaced the test with a two-step standing analysis.

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23Id.
24Id. at 919.
25Id.
26Id. at 920.
27Id.
28Id. at 921.
29Bennett, 1995 WL 699127.
33Id. at 474.
35Church, supra note 6, at 449.
36Bennett, 63 F.3d at 917.
37Church, supra note 6, at 449.
39Id. at 137-138.
40Id.
42Data Processing, 397 U.S. at 153.
43Id. at 152.
44Id. at 152-153.
45Church, supra note 6, at 452.
First, the Supreme Court held that a court must determine whether a plaintiff had stated an injury in fact, as required by Article III constitutional standing requirements. Here, the petitioners clearly met the first prong, alleging that future revenue loss, in addition to a decrease in customer numbers, would result from respondents' competition. Second, an essential inquiry must be made to resolve whether Congress intended a particular plaintiff to bring suit against agency rulings. Although the APA, which grants standing to an aggrieved person, should be interpreted to serve a broad, remedial purpose, the Court found that Congress had not intended to allow every individual suffering injury in fact to bring suit. The Court provided a gloss on the meaning of aggrieved, requiring that "...the interest sought to be protected by the complainant [wa]s arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." However, where a statute existed, the Court noted a trend toward expanding those individuals able to bring suit. Because the Court found that the petitioners were aggrieved persons as competitors of the national banks, and no evidence existed that Congress intended to limit judicial review of administrative rulings under the APA, the Court held that the plaintiffs had standing to sue.

In the decade following the Data Processing decision, it appeared that the zone of interests test had been deserted. However, in 1987, the Court revived the doctrine, attempting to clarify when and how to apply the test. In Clarke v. Securities Indus. Ass'n, the respondent trade association, representing securities brokers, underwriters, and investment bankers, filed suit against both the Comptroller of the Currency and the Securities Industry Association. The trade association alleged that the Comptroller's determination, indicating that Security Pacific's operation of discount brokerage services to the public would not violate the National Bank Act's branching provisions, violated the McFadden Act. The Comptroller disagreed, first on the merits of the position, and second, on standing grounds. The petitioner argued that respondents lacked standing because the congressional intent behind the Act was to establish competitive equality between state and national banks, not to protect securities dealers. The District and Appellate Court held that the respondent had standing.

In deciding Clarke, the Supreme Court sought guidance from Data Processing's initial formulation of the zone of interests test. First, the Court followed the 1970 decision by defining "a relevant statute" in section 702 very broadly. Second,
the Court approved of expanding the number of individuals able to bring suits. Moreover, the Court reaffirmed the test as 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. The Supreme Court went further than its decision in Data Processing as it attempted to develop the zone of interest test into a workable doctrine.

In order to eliminate the confusion and unpredictability of applying the test, the Court indicated that the doctrine was applicable to suits filed under other statutes, despite the fact that the principle cases had applied the test to the APA. However, the Court quickly warned that the zone of interest inquiry under the APA should not be employed universally. Thus, where a plaintiff was not the direct subject of the contested regulatory action, “the test deny[d] a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it [could not] be reasonably assumed that Congress intended to permit the suit.”

Once interests were arguably within the zone of interest to be protected by the Act, the Court concluded that congressional intent must also be examined. This included the intent of the statute under which the plaintiffs sued, additional provisions which help courts understand Congress’ overall purpose, and all other indicators valuable when interpreting intent. In addition, the courts must closely scrutinize statutory construction, giving great weight to any reasonable construction of a regulatory statute adopted by the agency actually charged with the statute’s enforcement.

Despite the guidance by the Supreme Court, federal courts are currently split as to whether the zone of interests analysis applies to ESA suits. Both the Ninth Circuit and the District of Columbia have expressly held that the zone of interests test applies to the Act. However, the Eight Circuit has held that the Act’s citizen-suit provision renders the zone of interests test inapplicable. Other courts have yet to address the issue.

The Ninth Circuit addressed the issue of standing under the ESA in Pacific Northwest Generating Co-Op v. Brown. In Pacific Northwest, plaintiffs challenged a biological opinion’s projected impact of hydropower operations upon three listed species of salmon, alleging violations of the ESA’s consultation clause and the APA. The federal defendants argued that all plaintiffs lacked standing. The Appellate Court recognized three elements necessary for constitutional standing. First, the plaintiffs must have suffered an injury in fact. Second, there must be a causal relationship between the injury and the conduct complained of by the plaintiffs. Third, it must be

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73Clarke, 479 U.S. at 397 (citing Data Processing, 397 U.S. at 154).
74Id. at 399.
75Id. at 397-409.
76Id. at 400-401.
77Id. at 403-408.
78Bennett, 63 F.3d at 918, n.3.
81Bennett, 63 F.3d at 918.
82Pacific Northwest, 38 F.3d at 1063-1068.
83Id. at 1062.
84Id.
85Id. at 1063 (citing Lujan v. Defenders of Wildlife, 504 U.S. at 560.).
86Id. Injury in fact constituted an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.
87Lujan v. Defenders of Wildlife, 504 U.S. at 560. A causal connection is established when the injury is “fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court.” Simon v. Eastern Kentucky Welfare Rights Orgns., 426 U.S. 26, 41-42 (1976).
likely as opposed to merely speculative, that the injury will be redressed by a favorable decision.97 The plaintiffs failed to prove all three elements, injury in fact, causation, and redressability.98 Although the plaintiffs were unable to satisfy Article III constitutional requirements, the court found that they satisfied footnote seven standing99 due to their economic interest in the salmon.99 However, in addition to Article III standing requirements, the court applied the prudential zone of interests test under the ESA.100 The court held that the plaintiffs met the zone of interests test due to their economic interests in salmon preservation, including the benefits they would receive from healthy waterways and fish and improved public image from the restoration.97

In 1993, the Ninth Circuit again addressed the issue of standing under the ESA.100 In Mount Graham, the Mount Graham International Observatory project was designed to erect sophisticated telescopes on Mt. Graham.99 The ESA required the plan be examined by the FWS because the land was administered by the Forest Service.100 Despite a FWS Biological Opinion, concluding that the construction would increase the likelihood of harm to the red squirrel, congressional passage of Title VI of the Arizona-Idaho Conservation Act (AICA) allowed the construction to continue due to issuance of a special use permit.101 Environmental groups (Sierra Club) filed suit, seeking an injunction to stop the construction of the project in the habitat of the endangered red squirrel.102 The defendants alleged that the plaintiffs lacked standing to seek judicial review under the ESA.103 The court granted standing to Sierra Club.104 First, the plaintiffs proved injury in fact, alleging that individuals' scientific, recreational, and aesthetic enjoyment in the red squirrel would disappear if the animal went extinct.115 Second, Sierra Club's alleged interests fell within the zone of interests protected under the AICA.116 Although the defendant argued that the sole purpose of the AICA was to further observatory construction, the court found that an additional AICA purpose was to amass data on the red squirrel which was to be used during the FWS consultation process.117 Because a monitoring device was included in the AICA, the court concluded that Congress was concerned with the possible extinction of the red squirrel.118 Therefore, the plaintiffs' interests fell within the zone of interests protected by the statute.119 The District of Columbia Circuit has also applied the zone of interest test to suits brought under the ESA.110 In State of Idaho, respondent Union Pacific attempted to abandon

97Id. at 561 (citing Simon, 426 U.S. at 38).
98Pacific Northwest, 38 F.3d at 1063-1064.
99Id. at 1065. Footnote seven standing is described by illustration of the hypothetical plaintiff in Lujan v. Defenders of Wildlife, 504 U.S. 555 n. 7. There, the Court stated the "under our caselaw, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." One so situated can proceed "without meeting all the normal standards of redressability and immediacy. Id. The plaintiffs in Pacific Northwest can be compared to the person living next to the proposed dam, and, thus, satisfies footnote seven standing. Pacific Northwest, 38 F.3d at 1065.
100Lujan v. Defenders of Wildlife, 504 U.S. at 573. The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal stands for redressability and immediacy.
101Pacific Northwest, 38 F.3d at 1065.
102Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1580 (9th Cir. 1993).
103Id. at 1569.
105Mt. Graham, 986 F.2d at 1570.
106Id.
107Id. at 1581.
108Id. at 1580-1581.
109Id. at 1581.
110Id. at 1582.
111Id.
112Id.
113Id. at 1582-1583. The Ninth Circuit lowered the barrier for standing in Mt. Graham by indicating that they would have to conclude "not only that the 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 permit Congress intended to permit Sierra Club to bring suit."
Wallace Branch, a portion of railroad track in northern Idaho. Petitioners raised environmental and economic objections to the potential abandonment. Although the Interstate Commerce Commission (ICC) granted Union Pacific’s application, they placed six conditions upon respondent in order to safeguard the environment against salvage operation. The petitioners, Coeur d’Alene Tribe, several shippers, and the State of Idaho, argued that the ICC’s ruling violated the Interstate Commerce Act, and that the Commission should have prepared an Environmental Impact Statement under NEPA, and a Biological Assessment under ESA. Respondents claimed that the plaintiffs lacked standing to bring suit.

The Court of Appeals first applied the three minimum requirements for standing under Article III, injury in fact, causation, and redressability. In addition, the court employed prudential standing requirements, particularly the zone of interests test. First, the court concluded that the petitioner shippers had standing to bring suit against the ICC’s allowance of abandonment because the petitioners experienced an injury by having to find substitute shipping methods, and their interests fell within the zone of interests protected by the Interstate Commerce Act. Therefore, the State of Idaho also had standing. Second, the court concluded that Idaho had standing to challenge the Commission’s conditional authorization of salvage activities, given that Union Pacific’s actions would cause injurious pollution to Idaho’s land. Therefore, the shippers also had standing. Third, the court found that the State had prudential standing to assert an ESA claim due to its dedication of state-owned land for the management of water fowl, hunting, and fishing. Moreover, the court noted that the statute specifically authorized State claims. Because of this, the petitioners met the zone of interests test, allowing them to bring suit under the ESA.

Despite application of the zone of interests test to ESA actions by the Ninth Circuit and the District of Columbia Circuit, the Eight Circuit has held that the Act’s citizen-suit provision eliminated the utilization of prudential standing requirements. In Defenders of Wildlife, the plaintiffs (hearafter “Defenders”) filed suit against the Department of Interior, alleging a violation of the ESA’s consultation clause. This was due to the government’s conclusion that United States agencies which were funding foreign projects had no obligation to consult with the Secretary of the Interior about the projects’ impact on endangered species. The defendants challenged...
Defender's standing under the ESA. On review, the Eighth Circuit first applied Article III standing requirements, injury in fact, causation, and redressability. Before determining whether the three criteria had been met by Defenders, the Eighth Circuit noted that some courts had imposed additional prudential standing requirements on a plaintiff's ability to bring a claim. However, the court only required that the Defenders satisfy the three constitutional requirements for standing under the ESA. Because Congress could eliminate these limitations by legislation, the ESA specifically allows any person the ability to file suit for a violation of the Act. Therefore, the court held that the statute's citizen-suit provision eliminated the application of the zone of interests test. Because the plaintiffs had proven injury in fact, causation and redressability, they had standing to bring suit.

The application of the zone of interests test to ESA suits has been met with both criticism and support. The Ninth Circuit, in both Pacific Northwest and Mount Graham, and the District of Columbia Circuit, in State of Idaho, support its usage in ESA suits. The prudential requirements result in limiting access to the federal court system to those plaintiffs Congress intended to protect. However, the Eight Circuit's ruling in Defenders of Wildlife refuses to apply standing requirements in addition to the Article III elements.

IV. The Instant Decision

The plaintiffs first argued that the biological opinion issued by the FWS, which found that the long-term operations of the Klamath Project would adversely affect the sucker fishes, lacked adequate evidence to support its conclusion. The ranch operators and irrigation districts produced data indicating that the fish were reproducing successfully, needing no special protection. The plaintiffs demanded that the portions of the opinion mandating increased minimum water levels be vacated. They stated that due to the biological opinion's incorrect conclusion, the government attempted to institute unnecessary limitations on the reservoirs.

The defendants moved to dismiss the complaint, contending that plaintiffs lacked standing to sue. They argued there was no standing because plaintiff's desire to utilize the water for commercial and recreational purposes was inconsistent with the sucker's interest in the water for habitat.

Before addressing the merits of the plaintiffs' suit, the court first examined the standing issue under the zone of interests test. Although the court acknowledged that it had previously applied the test to actions brought under the ESA, it did note the plaintiff's suggestion that case precedent was inconclusive as to whether the test must be currently applied. Their reasoning suggested that because the prior cases failed to

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128Id.
129Id. at 1038-1039 (citing Valley Forge, 45 U.S. at 464).
130Id. at 1039.
131Defenders of Wildlife, 851 F.2d at 1039.
13316 U.S.C. § 1540(g). See also 16 U.S.C. § 1532(13) (Environmental associations are "person" and may bring suit in their own name.).
134Id. See e.g., Sierra Club v. Morton, 405 U.S. at 733 (Although the Eight Circuit held that Defenders need not satisfy the zone of interests test for standing under the ESA, the zone of interests test does apply to actions brought under § 702 of the APA.).
135Id. at 1039-1044.
136Church, supra note 6, at 455-469.
138Mt. Graham, 986 F.2d at 1582.
139State of Idaho, 33 F.3d at 590-591.
140Lujan v. Defenders of Wildlife, 504 U.S. at 1039.
141Bennett, 63 F.3d at 916.
142Id.
143Id.
144Id. 1993 WL 669429 at *1.
145Bennett, 63 F.3d at 917.
146Id.
147Id. at 917-19.
148See Pacific Northwest, 38 F.3d at 1065; Mt. Graham, 986 F.2d at 1581 & n.8. In both decisions, the Ninth Circuit applied the zone of interests tests, holding that plaintiffs were not entitled to standing because they failed to assert an interest in preserving a threatened or endangered species.
149Bennett, 63 F.3d at 918.
address whether the ESA’s citizen-suit provision overrode the test’s standing limitations, the court was not required to apply the test. Moreover, plaintiffs alleged that the provision’s broad language granted them standing to sue under the ESA.

The court, in rejecting the plaintiffs’ argument, noted that many federal district and appellate courts had frequently applied the test in similar situations, despite the presence of broad citizen-suit provisions in the ESA, the Clean Water Act (CWA), and the Farm Laborer Contractor Registration Act (FLCRA). For instance, the Eleventh Circuit applied the zone of interest test to a citizen-suit brought under the FLCRA. The Ninth Circuit held that the existence of a citizen-suit provision in a statute was not dispositive as to whether Congress intended for any plaintiff to have standing to sue under the FLCRA. This court followed the Eleventh Circuit’s decision and applied the prudential standing limitation, the zone of interests test, to a citizen-suit.

After concluding that employment of the zone of interest test was warranted, the court next addressed whether the plaintiffs’ interests were protected under the ESA. The court examined the purpose of the legislation to determine whether Congress intended to protect the plaintiffs’ interests. In determining the ESA’s purpose, the court explored both the statutory language and judicial history of the Act. The following provision, 16 U.S.C. § 1531(b), set forth the legislation’s purposes:

- to provide a means whereby the ecosystems upon which the endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

In order to interpret the section the court sought guidance from its recent decision in Pacific Northwest. There, the Ninth Circuit concluded that because the plaintiffs’ interests in maintaining current hydropower costs failed to state a desire to preserve an endangered or threatened species, they were not protected interests. The court interpreted the statute similarly in the present case, holding that the plaintiffs’ recreational and commercial interests in the reservoir water were unprotected. The court found that the plaintiffs failed to raise any allegations that the defendant’s biological opinion would injure the Lost River sucker or shortnose sucker, contending only that the opinion was unnecessary to preserve the fish. Moreover, the court determined that the ranchers and irrigation districts asserted no commonality of interests between themselves and the fish. Instead, the court concluded that the plaintiffs only alleged that the fish

154 Id.
155 Id. The Act’s citizen-suit provision allowed “any person [to] commence a civil suit on his own behalf— a) to enjoin any person, including the United States [and its agencies], who is alleged to be in a violation of any provision of this chapter or regulation issued under the authority thereof.”
156 Id. The court noted a division between the circuits regarding the application of the zone of interests test to ESA suits.
157 See Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1328 (11th Cir. 1983). Because farm labor contractors filed suits in order to injure competitors, not lessen the atrocities suffered by migrant workers, the court concluded that the contractors’ injuries fell outside the zone of interests safeguarded by the FLCRA.
158 Bennett, 63 F.3d at 919. See Lujan v. Defenders of Wildlife, 504 U.S. at 570-580, 112 S.Ct at 2142-2146 (Lujan v. Defenders of Wildlife makes it clear that Congress did not intend to permit suits by those who fail to satisfy the constitutionally-mandated standing requirements. Therefore, “any person” is clearly not able to sue under the ESA).
159 Id.
160 Id.
161 Id. The Ninth Circuit denied standing under the CWA to a plaintiff who sought grant funds, but did not assert an interest that “arose from an interest in the environment” or “vindication of environmental concerns.”); Nevada Land Action Ass’n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (The Ninth Circuit similarly held that plaintiffs do not have standing under NEPA to protect “purely economic interest, because the environmental purposes of the act would not be furthered by permitting suits premised on such interests.).
162 Bennett, 63 F.3d at 920-21.
163 16 U.S.C. § 1531(b) (1973). The citizen-suit provision existing in the ESA is similar to one found in NEPA. See Nevada Land Action, 8 F.3d at 716 (quoting the purposes section of NEPA).
165 Id.
166 Bennett, 63 F.3d at 920-21.
167 Id. at 921.
were viable at previous water levels.\textsuperscript{166} The Ninth Circuit also examined judicial authority in its quest to identify the true purposes of the ESA. The focus was placed mainly on the Supreme Court decision in \textit{Tennessee Valley Authority}, which completed an extensive analysis of the Act’s purposes.\textsuperscript{167} There, the Court found the congressional intent of the statute to be the prevention and reversal of species elimination.\textsuperscript{168} The Ninth Circuit agreed with this interpretation.\textsuperscript{169}

Next the court addressed the plaintiffs’ final argument that because the government violated the ESA by failing to recognize the biological opinion’s economic impact in designating a critical habitat for a species, that plaintiffs were adversely affected, giving them standing to sue.\textsuperscript{170} The court, although acknowledging the existence of numerous factors to be weighed by the government when establishing a critical habitat, deemed the considerations merely instructive.\textsuperscript{171} The court found that the legislature’s intent was simply to supply direction to the government in order to guarantee rational decision-making.\textsuperscript{172} The court concluded that because the plaintiffs’ interpretation contradicted the Act’s very goals\textsuperscript{173} by granting standing to individuals whose interests failed to further species protection, their analysis was flawed.\textsuperscript{174} Therefore, the court held that the ranch operators and irrigation districts lacked standing because the zone of interest test applied to the ESA. Statutory interpretation and judicial authority concluded that the Act’s purpose was the protection of endangered species, and the plaintiffs’ commercial and recreational interests fell outside the ESA’s zone of interest.\textsuperscript{175}

\textbf{V. Comment}

The use of a zone of interests test to limit standing in federal courts has been criticized by many as a disturbing trend toward limiting broad citizen suit provisions developed by Congress.\textsuperscript{176} The primary arguments against utilization of the prudential standing test are threefold. First, Congress has the power to expand standing under Article III, allowing the legislature to statutorily create broad citizen suit provisions in environmental statutes.\textsuperscript{177} Second, prudential standing requirements are irrelevant given congressional expansion of standing through citizen suit provisions.\textsuperscript{178} Third, both legal and policy considerations discourage the use of the zone of interests test.\textsuperscript{179}

The determination of the proper party plaintiff to bring a cause of action is a power held by Congress, subject only to Article III limitations.\textsuperscript{180} Through the legislative creation of citizen suit provisions, Congress has extended standing “to the full limits of Article III.”\textsuperscript{181} Such broad standing under the ESA was designed to guarantee citizens’ rights to protect their environment, and to facilitate the enforcement of laws by federal agencies.\textsuperscript{182} Therefore, critics argue that the new statutory framework can best be carried out by applying the minimum Article III requirements, not additional prudential tests, to plaintiffs who bring an environmental claim under a citizen suit provision.\textsuperscript{183}

The second argument raised against the use of a plaintiff motivation test\textsuperscript{184} suggests that because citizen suit provisions expand standing only to Article III limits, courts lack the power to impose prudential barriers to citizen suits.\textsuperscript{185} Therefore, allowing the judicial branch to assume congressional powers, through the court’s application of prudential standing limitations to citizen suit claims, violates both the


\textsuperscript{167}Tennessee Valley Authority, 437 U.S. at 184.

\textsuperscript{168}Bennett, 63 F.3d at 920.

\textsuperscript{169}Id. at 921.

\textsuperscript{170}Id.

\textsuperscript{171}Id. See Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922 (D.C. Cir. 1989) (holding that the fact that Congress mandates that certain methods be used to achieve its goals does not express its intent to benefit every person who has an interest in those methods being followed).


\textsuperscript{173}Bennett, 63 F.3d at 922.

\textsuperscript{174}Id. at 921-22.

\textsuperscript{175}Ring and Behrend, supra note 4, at 347.

\textsuperscript{176}Id. at 350.

\textsuperscript{177}Id. at 352-53.

\textsuperscript{178}Id. at 354.

\textsuperscript{179}Sierra Club v. Morton, 405 U.S. at 732 n.3.

\textsuperscript{180}Gladstone, Realtors, v. Village of Bellwood, 441 U.S. 91, 103 n.9 (1979).

\textsuperscript{181}Ring and Behrend, supra note 4, at 351.

\textsuperscript{182}Id. at 348.

\textsuperscript{183}Id. at 346. The authors refer to the zone of interests test as a plaintiff motivation test for the purposes of the article.

\textsuperscript{184}Havens Realty Corp. v. Coleman, 455 U.S. 363, 372 (1982).
separation of powers doctrine and infringes upon the legislature's traditional role of setting regulatory policy.\(^\text{106}\)

The third criticism of the zone of interests test proffers policy considerations for invalidating the motivation test.\(^\text{107}\) First, additional standing requirements will disallow deserving complainants access to the judiciary.\(^\text{108}\) Second, a zone of interests test will cause the judiciary to make arbitrary decisions.\(^\text{109}\) Second, a zone of interests test will disallow deserving complainants access to the federal courts.\(^\text{108}\) Individuals will be forced to meet the plaintiff motivation test to gain entrance into the courts, while the additional requirements will cause the judiciary to make arbitrary decisions.\(^\text{109}\) Second, a zone of interests test requires the plaintiff to make two separate showings of facts; one showing of facts is necessary to overcome the proper motivation hurdle, and another showing is required during a trial on the merits.\(^\text{110}\) This will harm the judicial economy, depleting resources and causing needless delays.\(^\text{111}\) Moreover, presenting the necessary facts in order to meet the zone of interests test will result in decisions on the merits without both parties being fully heard on the issues.\(^\text{112}\)

Third, a motivation test forces courts to determine issues on which they lack competency, namely a plaintiff's motivation.\(^\text{113}\) The speculative nature of determining a person's true motive for filing suit is legally impermissible.\(^\text{114}\) Not only will judicial speculation lead to arbitrary standing decisions, but it will also reduce individuals' confidence in the judiciary.\(^\text{115}\) Fourth, congressional power to create protected interests through regulatory statutes is thwarted if the legislature lacks the power to enforce pronouncements through citizen suit provisions.\(^\text{116}\) Given that Congress can establish interests through regulatory statutes, they should also be able to guarantee effective enforcement of these interests.\(^\text{117}\) This is best achieved by the elimination of prudential standing requirements, which seriously threaten judicial restraint.\(^\text{118}\) Finally, environmental laws could become skewed, reflecting only the viewpoints of those granted access to the federal court system.\(^\text{119}\) If the judiciary controls access to the courts through the plaintiff motivation test, they could encourage "an unbalanced scheme of regulatory review [since] courts can protect the interests of regulated entities, but the interests of 'regulatory beneficiaries' are left to the political process."\(^\text{120}\)

Given the criticisms against utilization of a plaintiff motivation standing test, many conclude that only Article III requirements should determine issues of standing.\(^\text{201}\) Therefore, they disagree with the court's application of the zone of interest test to an ESA citizen suit in Bennett v. Plenert.\(^\text{202}\) However, many legal scholars, as well as federal district and appellate courts support the usage of the prudential zone of interests test.\(^\text{203}\) Support for the application of the zone of interests test outweighs the criticisms.

According to its many advocates, the zone of interests test forestalls unwarranted judicial involvement in executive branch decisionmaking, while permitting private individuals to file complaints where Congress arguably intended to protect plaintiffs' interests.\(^\text{204}\) Without such prudential limitations, the courts would be left to resolve diverse legal questions despite the fact that other governmental bodies would be more competent to resolve such questions.\(^\text{205}\) Therefore, supporters contend the test is beneficial when it is utilized properly.\(^\text{206}\)

Correct application of the prudential zone of interest test raises

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\(^\text{106}\) Ring and Behrend, supra note 4, at 353. The Eight Circuit clearly supports this analysis, given its holding in Lujan v. Defenders of Wildlife. There, the court concluded that the prudential zone of interests test should not be used in ESA citizen suits.

\(^\text{107}\) Id. at 358.

\(^\text{108}\) Id. at 359.

\(^\text{109}\) Id.

\(^\text{110}\) Id. at 360.

\(^\text{111}\) Id.

\(^\text{112}\) Id. at 361.

\(^\text{113}\) Id. at 361-62.

\(^\text{114}\) Id. at 362.

\(^\text{115}\) Id. at 363.

\(^\text{116}\) Id.

\(^\text{117}\) Id. at 364.

\(^\text{118}\) Id. at 365.

\(^\text{119}\) Id.

\(^\text{120}\) Bennett, 63 F.3d at 915.

\(^\text{201}\) Church, supra note 6, at 464-70.

\(^\text{202}\) Id. at 464.

\(^\text{203}\) Id. at 465. In Warth v. Seldin, the Court stated that "Without such limitations—closely related to Article III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions..." 422 U.S. 490, 500 (1975).

\(^\text{206}\) Church, supra note 6, at 464.
two questions, how and when it should be employed.207 With respect to how the test should be applied, ideally only the words of the statute should be interpreted to avoid addressing the merits of a lawsuit.208 For example, the Court of Appeals for the District of Columbia Circuit, in determining whether the plaintiff's interest was arguably protected by statutory language, examined legislative history only if it articulated an intent to protect or ignore the interest.209 Therefore, legislative history need not be consulted as it is when addressing a case's merits.210

The second question, when to utilize the zone of interests test, has been addressed by the Supreme Court.211 The prudential analysis applies in competitor suits against the government where the plaintiff relies on a statute, given that economic, aesthetic, conservational, or recreational interests are set forth in the complaint.212 Therefore, supporters contend that the zone of interest test is very useful if courts remember four simple rules: (1) the test applies only where a statutory law is relied on for legal protection of an asserted interest, (2) legislative history is not required under the test, (3) standing should be easily conferred under the prudential zone of interests analysis, and (4) the test is irrelevant in situations where standing is congressionally approved in the statutory language.213

VI. CONCLUSION

Given both the strong criticisms and supporting arguments regarding utilization of the zone of interests test under the ESA, the question raised is whether the Supreme Court will apply the zone of interests test to issues of standing under the ESA. The Supreme Court's recent decision to grant certiorari in Bennett v. Plenert makes a decision on ESA standing requirements forthcoming.214 However, an analysis of the Court's composition, coupled with its recent pronouncements regarding standing, foreshadow the future ruling. Given the conservative majority of the current Supreme Court, who support decreasing judicial access, the zone of interests test will likely be applied to claims brought under the ESA.215 Moreover, the Court's recent decisions illustrate an effort to limit a plaintiff's ability to file suit in the federal court system.216 Both Justice Scalia, in Lujan,217 and Justice Rehnquist, in Air Courier,218 decrease the number of proper party plaintiffs through strict interpretation of the zone of interest test.219 These rulings encompass conservative viewpoints, specifically judicial deference to the legislature and separation of powers doctrine.220 Therefore, the Supreme Court will likely refuse to grant standing to plaintiffs' citizen suit under the ESA.

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207Id. at 465-69.
208Id. at 465.
210Church, supra note 6, at 466.
211Id. at 467.
212Id.
213Church, supra note 6, at 469-70.
216Id. at 18.
219Mansfield, supra note 215, at 18.
220Id. at 3.