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Lujan v. Defenders of Wildlife: The Court Maintains Its Proper Role In Environmental Issues

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Lujan v. Defenders of Wildlife: The Court Maintains Its Proper Role In Environmental Issues

I. INTRODUCTION

In *Lujan v. Defenders of Wildlife*[1] the United States Supreme Court reversed the Eighth Circuit and denied standing to respondent environmental groups challenging a joint regulation[2] interpreting section 7(a)(2) of the Endangered Species Act.[3]

Respondent environmental groups filed suit challenging the Secretary of Interior's interpretation of section 7(a)(2). Respondents sought a declaratory judgment that the joint regulation, promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of Interior and the Secretary of Commerce respectively, not applying section 7(a)(2) of the Endangered Species Act to actions involving United States funding in foreign nations,[4] was incorrect as to the scope of section 7(a)(2). Respondents also sought an injunction requiring the Secretary of Interior to issue a new regulation restoring the broad scope of section 7(a)(2).[5] The Supreme Court held that respondents lacked standing to challenge the interpretation of section 7(a)(2),[6] as respondents failed to show the requisite injury in fact, causation, and redressability. This casenote will summarize the Court's reasoning for properly finding the respondents lacked standing.

II. BACKGROUND

A. *The Endangered Species Act*

Section 7(a)(2) (hereinafter referred to as section 1536(a)(2)) of the Endangered Species Act ("ESA")[7] mandates that all federal agencies shall consult with either the Secretary of Interior or the Secretary of Com-

1. 112 S. Ct. 2130 (1992).
2. 50 C.F.R. § 402.01(a) (1991).
3. Pub. L. No. 93-205, 87 Stat. 892, § 7 (codified at 16 U.S.C. § 1536(a)(2) (1988)).
4. 50 C.F.R. § 402.01(a).
5. 112 S. Ct. at 2135.
6. *Id.* at 2146.
7. 87 Stat. 892, § 7 (codified at 16 U.S.C. § 1536(a)(2) (1988)).

merce "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered . . . and threatened species or result in the destruction or modification of habitat of such species."[8]

In 1978, the Fish and Wildlife Service, on behalf of the Secretary of Interior, and the National Marine Fisheries Service, on behalf of the Secretary of Commerce, promulgated a joint regulation stating the scope of section 1536(a)(2) of the ESA[9] to include federal actions taken in the United States, upon the high seas, and in foreign nations.[10] Thereafter, the Department of Interior began to reexamine the scope of ESA as it applied to actions in foreign nations. In 1986, the Interior Department promulgated a new regulation[11] restricting section 1536(a)(2) to federal actions taken in the United States or upon the high seas and not to government actions taken in foreign nations.[12] It is this limitation that respondents sought to challenge.

B. Lujan v. Defenders of Wildlife

Respondents, Defenders of Wildlife representing various environmental organizations, filed this action against the Secretary of Interior challenging the 1986 joint regulation. Respondents alleged that the United States had funded two projects in foreign nations, the rehabilitation of the Aswan High Dam on the Nile in Egypt and the Mahaweli Project in Sri Lanka, without the consultation required by section 1536(a)(2).[13] Respondents sought a declaratory judgment that the 1986 regulation incorrectly limited section 1536(a)(2)'s geographic scope. Furthermore, respondents sought an injunction requiring the Secretary of Interior to promulgate a new regulation restoring the 1978 geographic scope of section 1536(a)(2).[14] The district court granted the Secretary's motion to dismiss for lack of standing.[15] The Court of Appeals for the Eighth Circuit reversed and remanded.[16]

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8. *Id.* § 1536(a) (2) currently states that "[e]ach [f]ederal agency shall . . . 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).

9. 112 S. Ct. at 2135.

10. 43 Fed. Reg. 874 (1978).

11. 112 S. Ct. at 2135; *see* 50 C.F.R. § 402.01(a).

12. 112 S. Ct. at 2135; *see* 51 Fed. Reg. 19,926 (1986); 50 C.F.R. § 402.01(a).

13. 16 U.S.C. § 1536(a) (2).

14. Defenders of Wildlife v. Hodel, 658 F. Supp. 43, 47-48 (D. Minn. 1987).

15. *Id.*

16. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1037 (8th Cir. 1988).

On remand, the district court granted respondents' motion for summary judgment on the merits and ordered the Secretary of Interior to publish a revised regulation.[17] The Court of Appeals for the Eighth Circuit affirmed.[18] The United States Supreme Court granted certiorari to determine whether the respondents had standing to seek judicial review of the regulation.[19]

III. THE COURT'S DECISION IN *Lujan*

In *Lujan* the United States Supreme Court reversed the Eighth Circuit's holding that respondent environmental groups had standing to challenge the joint regulation defining the scope of section 1536(a)(2).[20] In denying respondents' standing for judicial review of the Secretary's interpretation of section 1536(a)(2), the Court reaffirmed the three basic requirements of standing: (1) injury in fact; (2) causation; and (3) redressability.

First, respondents failed to show that they suffered injury to a legally protected interest which is both "concrete and particularized"[21] and " 'actual or imminent, not "conjectural" or "hypothetical." ' "[22] Second, respondents failed to show a causal connection between the injury complained of and the conduct challenged.[23] Furthermore, the respondents failed to show that the cause of the injury was " 'fairly . . . trace[able] to the challenged action of the defendant.' "[24] This second requirement was not satisfied when the challenged action resulted from " 'the independent action of some third party not before the court.' "[25] Third, the respondents failed to show that a favorable decision by the court would " 'likely' " redress the injury.[26] The third requirement was not satisfied when it was merely " 'speculative' that the injury will be 'redressed by a favorable decision.' "[27]

Moreover, respondents failed to meet their burden of proving these three elements with the "manner and degree of evidence" that the Court

17. Defenders of Wildlife v. Hodel, 707 F. Supp. 1082, 1086 (D. Minn. 1989).
18. Defenders of Wildlife v. Lujan, 911 F.2d 117, 125 (8th Cir. 1990).
19. Lujan v. Defenders of Wildlife, 111 S. Ct. 2008 (1991).
20. 112 S. Ct. at 2136.
21. *Id.* (citing Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16 (1972)).
22. *Id.* (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983))).
23. *Id. See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).
24. 112 S. Ct. at 2136 (quoting *Simon*, 426 U.S. at 41).
25. *Id.* (quoting *Simon*, 426 U.S. at 42).
26. *Id.* (quoting *Simon*, 426 U.S. at 38, 43).
27. *Id.*

required to survive the summary judgment motion filed by the Secretary of Interior.[28] The Court held that the affidavits filed by two respondents' members did not raise facts sufficient to show an "imminent" injury to the members.[29]

A. Injury

The Court found that respondents had not proven an actual injury.[30] Two of respondents' members filed affidavits stating that they were injured due to the detrimental impact of United States funding of the Aswan High Dam rehabilitation and the Mahaweli Project on protected species in the respective areas of those activities. Both affiants stated that their injuries stemmed from the fact that they would return to the areas to view protected species and any detrimental impact on protected species due to United States funding for the foreign activities would reduce their chance of viewing the species and thus work an injury on them.[31] The Court found these potential or speculative injuries insufficient to show the required injury in fact.[32]

Even though the Court was unwilling to accept that the affidavits contained sufficient facts to show that the projects adversely impacted protected species or habitat, they were willing to assume the existence of such facts.[33] However, even assuming that the projects did adversely impact protected species or habitat, neither affidavit contained facts sufficient to show the required actual injury to the affiants.[34] As the Court stated in *O'Shea v. Littleton*,[35] "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[36] In holding the affidavits insufficient to show actual injury, the Court stated:

> the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of when the some day will

28. *Id.* (citing Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883-89 (1990)).
29. *Id.* at 2138.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. 414 U.S. 488 (1974).
36. *Id.* at 495-96.

> be—do not support a finding of the "actual or imminent" injury that our cases require.[37]

In an attempt to provide some basis for standing, absent injury, respondents proposed three other theories.[38] The first of these was the "ecosystem nexus." Under the "ecosystem nexus" theory, respondents argued that anyone who uses "any part of a 'contiguous ecosystem' " detrimentally impacted by activities funded under the ESA should have standing regardless of the distance from the activity of one's interests.[39] However, the Court dismissed this theory as being inconsistent with its requirement that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it."[40] The Court did not have a problem distinguishing the fundamental requirements of standing with the literal language of ESA's section 1531(b).[41] Although 1531(b) states that one purpose of the ESA was to provide protection for entire ecosystems,[42] the Court reasoned that to allow that broad language to create a right of standing for anyone even remotely interested in challenging any activity that "may" affect entire ecosystems circumvents traditional standing doctrine and its impact on regulatory efficiency.[43]

The second and third theories proffered by respondents were the "animal nexus" and the "vocational nexus," respectively.[44] The "animal nexus" theory purports to be extremely far-reaching: it holds that parties interested in a species protected by the ESA should have standing regardless of the species' location and proximity to that party.[45] Presumably, behind this theory is the notion that an affinity for things wild should be sufficient to support standing irrespective of injury. Similar to the "animal nexus" theory is the "vocational nexus" theory. The "vocational nexus" theory holds that a party with a professional interest in a particular species protected by the ESA, supposedly impacted by a particular activity, should have standing to challenge the activity regardless of where the activity is taking place.[46]

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37. 112 S. Ct. at 2138.
38. *Id.* at 2139.
39. *Id.*
40. *Id.* (quoting Lujan v. National Wildlife Fed'n, 497 U.S. at 887-89).
41. 112 S. Ct at 2139; *see* 16 U.S.C. § 1531(b) (1988).
42. 112 S. Ct. at 2139.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 2139-40.

The Court rejected the notion that these theories alone, without any injury to the party, could support standing.[47] The court did recognize that persons in these situations could very well be harmed if their interests in the species were detrimentally affected by the challenged activity. However, the requirement that the party suffer an " 'actual or imminent' " injury must still be satisfied.[48]

B. Causation

Although causation is a required element to be proven by those seeking standing with the Court,[49] the Court in *Lujan* did not focus much on causation in denying respondents' standing. Failure to make the requisite demonstration of injury and redressability was the primary basis for denying standing.[50] However, respondent failed to establish the requisite causal connection between the challenged activity and their alleged injury.[51]

Respondents claimed that the lack of consultation between the Secretary and the federal agencies responsible for the funding activities abroad caused an "increas[e] [in] the rate of extinction of endangered and threatened species."[52] However, the respondents failed to meet the required burden of proving a causal connection.[53] Respondents did not name as parties to this case the particular federal agencies whose funding may or may not have caused the alleged injuries.[54] Furthermore, respondents failed to meet "the burden of . . . adduc[ing] facts showing that those choices [made by the federal agencies to fund the overseas projects] have been or will be made in such a manner as to produce causation . . . ."[55]

C. Redressability

The Court held that the standing doctrine's requirement of redressability was lacking from respondents' case.[56] Respondents chose an overly broad method of attacking governmental action abroad. Instead of challenging each particular foreign activity funded by the United States on the grounds that the activity did, or may, pose a threat to endangered

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47. *Id.* at 2140.
48. *Id.* at 2135.
49. *Id.* at 2136.
50. *Id.* at 2137.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (citing *Warth*, 422 U.S. at 505). *See infra* text accompanying note 70.
56. 112 S. Ct. at 2140.

or threatened species or habitat, respondents chose to challenge all foreign activities based on a violation of the consultation mandate of section 1536(a)(2).[57] The Court noted the advantages to using this approach but stated:

> [t]his programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. ". . . [S]uits challenging, not specifically identifiable [g]overnment violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication."[58]

The major problem the Court found with respondents utilizing this approach in the present case was that redressability by the judiciary was rendered difficult, if not impossible.[59] Respondents named only the Secretary of Interior as a defendant. Even had the lower courts granted the relief sought by respondents and ordered the Secretary of Interior to interpret section 1536(a)(2) to require consultation with respect to funded activities in foreign nations, it remained uncertain whether respondents' alleged injuries would be redressed.[60]

There are two reasons for the lack of redressability. First, the individual agencies that fund the various activities challenged by respondents were not made parties to the case.[61] In order for a favorable court ruling to have redressed respondents' alleged injuries, the ruling would have to have been binding on the individual agencies.[62] By not naming the agencies as defendants, those agencies would not have been bound by the ruling.[63] Second, the plain language of section 1536(a)(2) stated that "[e]ach [f]ederal agency shall . . . insure that any action . . . funded . . . by such agency . . . is not likely" to adversely affect protected species or habitat.[64] It is arguable that redressability could not be accomplished merely by requiring the Secretary of Interior to interpret section 1536(a)(2) so as to require the desired consultation. In fact, there was disagreement between the agencies and the Secretary regarding the Secretary's authority over the agencies' funding ability.[65]

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57. *Id.*
58. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 759-60 (1984)).
59. *Id.* at 2140-41.
60. *Id.*
61. *Id.* at 2140.
62. *Id.*
63. *Id.*
64. 16 U.S.C. § 1536(a)(2).
65. 112 S. Ct. at 2141.

The Court dismissed respondents' argument that the district court could have determined whether the Secretary of Interior had authority to mandate consultation by the individual agencies with the Secretary.[66] The Court stated that it was questionable whether it was "appropriate to resolve an issue of law such as [the Secretary's authority over individual agencies regarding consultation] in connection with a threshold standing inquiry."[67]

In dictum, the Court noted that redress of respondents' alleged injuries, the possible harm caused to endangered or threatened species or their habitat due to foreign projects, may have been beyond even the control of either the Secretary or any particular agency in this case.[68] The reason for this lack of control was that United States' funding accounted for a small percentage of the particular project's funding. Because of the low level of funding for one of the projects to which respondents' challenge was directed, it was questionable whether the agency's funding, if curtailed, would prevent the project from detrimentally impacting a protected species or habitat.[69] "It is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve."[70]

IV. ANALYSIS

Although the ability of private citizens and environmental interest groups to resort to the courts has proved extremely beneficial to the enforcement of environmental statutes, and thus, to the protection of our environmental resources, the standing doctrine remains a prudential limit on access to the courts.[71] Article III of the Constitution has been interpreted to provide that those who seek to use the judicial system to re-

66. *Id.*

67. *Id.*

68. *Id.* at 2142.

69. *Id.*

70. *Id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 43-44 (1976)). It was not altogether clear to what extent the Mahaweli Project was dependent on United States funding for continuation of the project. AID has provided less than 10% of the funding for the Maheweli Project. It is unlikely that this low level of funding would cause the Sri Lankan government to cease the Project. The dissent criticized the majority for disregarding memoranda indicating that the Sri Lankan government needed the assistance of United States funds for the Project. *Id.* at 2156-57 (Blackmun, J., dissenting). However, the majority was correct in its assessment of that memoranda. The majority thought the United States funding of this particular project increased the chances that detrimental effects on protected species would be mitigated, thereby benefiting respondents rather than injuring them. *Id.* at 2156-57 n.6.

71. ROBERT V. PERCIVAL ET AL, ENVIRONMENTAL REGULATION 715-17 (1992).

dress perceived injury must, themselves, be injured.[72] The standing doctrine provides one mechanism for the courts to filter those cases that do not present proper justiciable controversies from those that do.[73] Most cases concern injuries to the plaintiffs that are readily discernible. However, in some cases proving injury is more difficult. In fact, standing is " 'substantially more difficult' to establish" when the plaintiff "is not himself the object of the government action or inaction [that] he challenges."[74]

Respondents failed to adequately show actual injury and failed to convince the Court to expand its analysis under any one of the new theories proferred. Without an actual injury to the party, the bounds of judicial activism would be stretched; any conceivable interest impacted by a challenged activity could serve as the basis for standing. However, standing is not an "ingenious academic exercise in the conceivable."[75]

Lujan should not be viewed as an attempt by the Court to curtail legally-cognizable interests. In *Sierra Club v. Morton* the Court made it clear that "[a]esthetic and environmental well-being" (thought by many to be non-economic interests, although that is being questioned today), like "economic well-being," can provide a basis for a sufficient "injury in fact."[76] The principle that aesthetics, environmental health, and even recreational uses is still a sufficient type of injury for satisfying standing's injury requirement today.[77] What *Lujan* does stand for is the notion that standing is still a prerequisite for access to the courts.

While it can be argued that there was much room for interpretation within the respondents' affidavits as to whether the respondents were in fact injured by the agency action, the Court in *Lujan* certainly made no dramatic movement away from protecting the environment by interpreting the affidavits as not stating an injury in fact. The late 1970s saw courts moving away from the judicial activism of the early environmental movement (characterized by a "Right Answer" approach to regulatory action) to allowing government agencies more discretion (characterized as a "Best Efforts" approach by agencies).[78] *Lujan* can be viewed as the Court merely maintaining its proper role in environmental issues by allowing the agencies, which have more knowledge of the biological and economic

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72. 112 S. Ct. at 2135-36.

73. *Id.* at 2136.

74. *Id.* at 2137 (quoting Allen v. Wright, 468 U.S. 737, 758 (1984)).

75. United States v. Student Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973).

76. 405 U.S. at 734.

77. *National Wildlife Fed'n*, 110 S. Ct. at 3187.

78. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1311-12 (1986).

implications of a particular regulation, discretion in the area of policy-making.

However well-intentioned respondents may have been, they failed to attack the perceived problem of consultation in a way that would have allowed the Court to fashion a remedy. As a cost-efficient approach to challenging, and sometimes effectively stalling, activity perceived to be damaging to the environment, respondents, like other activist groups, chose to attack a very broad provision of the ESA that impacted all foreign projects funded by the United States.[79]

V. CONCLUSION

Lujan presents a good picture of the role that the court should play in matters affecting the environment. The legislative branch and the various agencies charged with implementation of the programs are in a far better position to judge the wisdom of the regulations than are the courts. Any changes sought by environmental groups should take place through the appropriate legislative and administrative procedures set up to monitor the effects of various programs. Although decided, not based on any substantive issues surrounding an environmental policy but rather, on a standing issue, *Lujan* is important for upholding the constitutional and prudential limits placed on access to the courts. To "air out" environmental regulatory policy in an ill-equipped medium such as the courts would make for an inefficient and time consuming decision-making process that would hinder beneficial environmental policy as well as place a check on the irrational policy decisions. Therefore, access to the courts should remain limited to those aggrieved parties with the requisite injury.

Furthermore, environmental concerns are better served through the interpretation and use of the biological and economic data surrounding particular activities rather than a widespread indictment of entire programs. As such, the court was correct not to stretch the bounds of the prudentially permissible standing requirements in order to allow special interests groups to use the judiciary to achieve goals that are better achieved through the other branches of our government.

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79. 112 S. Ct. at 2140.