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Casenotes

Bennett v. Plenert: The Ninth Circuit's Application of the Zone of Interests Test to Citizen Suits under the Endangered Species Act

The Ninth Circuit, in Bennett v. Plenert, ruled that plaintiffs' economic injury did not satisfy the requirements for standing under the citizen-suit provision of the Endangered Species Act ("ESA"). The Ninth Circuit imposed the zone of interests test in addition to Article III standing requirements. Under the ESA's citizen-suit provision, the zone of interests test means that plaintiffs must assert "an interest in the preservation of endangered species" to have standing. Plaintiffs appealed the Ninth Circuit's decision, and the Supreme Court has granted certiorari. The Court will likely resolve a division among the circuits in applying or not applying the zone of interests test to ESA citizen suits.

1. 63 F.3d 915 (9th Cir. 1995), cert. granted, 116 S. Ct. 1316 (1996).
3. 63 F.3d at 919.
4. Id.
5. Id.
I. FACTUAL BACKGROUND

Two Oregon ranchers and two Oregon irrigation districts opposed a biological opinion, which concluded that the water level in two reservoirs should be kept at a certain minimum level to ensure the survival of the endangered species of Lost River sucker and shortnose sucker fish. The reservoirs in question, Clear Lake and Gerber reservoirs, are part of the Klamath Project. The Bureau of Reclamation ("Bureau"), an agency within the Department of the Interior, administers the project, which lies along the Oregon-California border and provides water to farms and ranches in Oregon.

In 1988, the United States-Fish and Wildlife Service ("USFWS") added the Lost River and shortnose suckers to the list of endangered species of fish. The Bureau consulted with the USFWS to determine how the Klamath Project was impacting the endangered species of fish. This inquiry resulted in the USFWS issuing a biological opinion, which

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7. 63 F.3d at 916. Plaintiffs Brad Bennett, Mario Giordana, Horsefly Irrigation District, and Langell Valley Irrigation District, are suing Marvin L. Plenert as Regional Director, Region One, Fish and Wildlife Service; John Turner as Director of the Fish and Wildlife Service; and Bruce Babbitt as Secretary of the Interior. Id. at 915.
8. Brief for Petitioner, at 2-3, Bennett, 63 F.3d 915 (9th Cir. 1995) (No. 95-813) [hereinafter Petitioner's Brief]. The Klamath Project is a federal reclamation project begun in 1905 when the Secretary of the Interior authorized the draining and reclamation of lakebed lands in the area of the Lower Klamath and Tule lakes. The project is used to store waters of the Klamath and Lost rivers for irrigation and flood control of the reclaimed lands. Id. at 2-3 & n.1.
9. Id. at 3. This listing is pursuant to 16 U.S.C. § 1533(c)(1) (1994) which states: The Secretary of the Interior shall publish . . . a list of all species determined . . . to be endangered species and a list of all species determined . . . to be threatened species. Each list shall refer to the species . . . by scientific and common name, . . . specify . . . over what portion of its range it is endangered or threatened, . . . and specify any critical habitat within such range. The endangered species list is reviewed every five years, Id. § 1533(c)(2)(A), and the status of each species reviewed. Id. § 1533(c)(2)(B). The Secretary is required to issue protective regulations for the conservation of endangered species, Id. § 1533(d), develop recovery plans, Id. § 1533(f) (Supp. 1996), and publish agency guidelines to insure the ESA's purposes are "achieved efficiently and effectively." Id. § 1533(h).
10. 63 F.3d at 916. The formal consultation was made pursuant to section 7 of the Endangered Species Act, found at 16 U.S.C. § 1536(a)(2) (1994) which states: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . us[ing] the best scientific and commercial data available."
11. 63 F.3d at 916. The opinion was prepared pursuant to 16 U.S.C. § 1536(b)(3)(A) (1994) which states:
concluded that, without intervention, the Klamath Project's long-term operation "was likely to jeopardize the continued existence of the Lost River and shortnose suckers." The USFWS also suggested maintaining a minimum lake level as one of a number of possible solutions.

Plaintiffs used the reservoirs for recreational and commercial purposes. They alleged that restrictions on the amount of water withdrawn from the reservoirs violated section 7 of the ESA, as well as the Administrative Procedure Act ("APA") because the restrictions were imposed without consideration of the impact on plaintiffs and without sound scientific data. Plaintiffs further alleged that the restrictions on water withdrawal from the reservoirs were "an implicit determination of critical habitat" for the suckers made without proper consideration of the economic impact on plaintiffs, in violation of section 4(b)(2) of the ESA and the APA.

Plaintiffs sought declaratory and injunctive relief to force the government to remove the minimum lake level portion of the biological opinion. Defendants moved to dismiss the complaint for lack of standing. The District Court for the District of Oregon granted the

Promptly after conclusion of a consultation . . . the Secretary shall provide . . . a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat . . . [and] the Secretary shall suggest those reasonable and prudent alternatives.

12. 63 F.3d at 916.
13. Id.
14. Id.
16. 5 U.S.C. §§ 701-706 (1994). Section 702 of the APA provides that persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" can sue to challenge a final agency action. Id. § 702. The APA requires plaintiffs to show that "the challenged action[ ] caused them 'injury in fact,' and that the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 n.2 (8th Cir. 1988) (quoting Sierra Club v. Morton, 405 U.S. 727, 733 (1972)).
17. 63 F.3d at 916-17. Petitioner's Brief, supra note 8, at 7, 8.
18. 16 U.S.C. § 1533(b)(2) (1994) states: "The Secretary shall designate critical habitat, and make revisions thereto . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."
19. Petitioner's Brief, supra note 8, at 8, 9.
20. 63 F.3d at 916.
21. Id. at 917.
motion to dismiss, stating that plaintiffs lacked standing because their interests conflicted with the interests to be protected by the ESA.22

Plaintiffs appealed to the Ninth Circuit, arguing that the language of section 11(g) of the ESA23 eliminated prudential limits on standing.24 section 11(g) says in part, "[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter . . . [or] against the Secretary where there is alleged a failure . . . to perform any act or duty . . . which is not discretionary."25

Prudential limits to standing, such as the zone of interests test, assume that standing under Article III is established, but nevertheless limit the class of potential plaintiffs to those who fall within the interests the particular statute protects.26 The conventional wisdom holds that Congress can overcome prudential standing limits as it pleases.27 Plaintiffs argued the "any person" language of the ESA citizen-suit provision eliminates prudential standing requirements and means what it says: that any person may bring suit, subject only to Article III standing requirements of injury in fact, a causal connection between defendant's conduct and plaintiff's harm, and redressability.28 The Ninth Circuit affirmed the district court, stating that the citizen suit language of section 11(g) of the ESA did not eliminate prudential limits on standing, and that plaintiffs lacked standing because they failed to fall within the zone of interests the statute protected.29 Plaintiffs appealed, and the Supreme Court granted certiorari March 25, 1996, for the October 1996 term.30

II. LEGAL BACKGROUND

The Supreme Court first used the zone of interests test in Association of Data Processing Service Organizations, Inc. v. Camp.31 In that case,
plaintiffs sold data processing services to businesses. They sued under the APA to challenge the Comptroller of the Currency's ruling that national banks could offer data processing services to other banks and to bank customers as an incident to providing banking services.

Considering whether plaintiffs had standing, the Court asked whether they alleged an injury in fact, economic or otherwise. The Court also stated that the prudential standing issue did not address the merits of a case, but rather "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

The interests of a plaintiff may center on "aesthetic, conservational, and recreational" values, as well as economic values, if those values are sought to be protected by the statute.

According to the Court in Data Processing, in 1970 the trend in standing law was to enlarge the class of people who would be allowed to challenge administrative action. The Court also pointed out that Congress could resolve the question of prudential limitations on standing by expanding standing to the limits of Article III. It was clear to the Court that plaintiffs, as competitors of the banks, were aggrieved and therefore entitled to review of the Comptroller of the Currency's ruling.

In the decade after Data Processing, use of the zone of interests test declined. However, the Supreme Court resurrected the test in Clarke v. Securities Industry Ass'n. Like Data Processing, Clarke dealt with an APA claim. The Court, relying on the Data Processing opinion, stated that the zone of interests test serves as a guide to whether Congress intended a plaintiff to have standing to complain of an agency decision. The Court also stated that the zone of interests test was not universally applicable to questions of prudential standing involving

32. Id. at 151.
33. Id.
34. Id. at 152.
35. Id. at 153.
36. Id. at 154.
37. Id.
38. Id.
39. Id. at 157.
40. 63 F.3d at 917.
42. Id. at 399. When the plaintiff is not the direct subject of the agency action, the zone of interests test precludes standing if "plaintiff's interests are so marginally related to or inconsistent with" the statute's purposes that Congress cannot "reasonably be assumed to have intended the suit." Id. at 400.
claims other than those brought under the APA. Unfortunately, the Court in Clarke failed to articulate what test, if not the zone of interests, would apply to actions seeking review of agency decisions under a statute other than the APA. In the absence of further guidance, many courts, including the Ninth Circuit, use the zone of interests test to determine prudential standing under APA and non-APA actions.

The circuit courts do not agree, however, on whether the zone of interests test applies to citizen suits under the ESA. The D.C. Circuit applied the zone of interests test to an ESA citizen suit in Idaho v. Interstate Commerce Commission. In that 1994 case, the state of Idaho and three mining companies, citing environmental and economic provisions under the ESA, challenged an Interstate Commerce Commission order that authorized a railroad to abandon a portion of track without requiring the railroad to clean up alleged pollution. The D.C. Circuit held that the petitioners had the burden of showing that they fell within the zone of interests protected by the ESA to have standing. The court cited Clarke and stressed that the essential question was whether Congress intended to permit a particular class of plaintiffs to challenge agency violations of a statute. Under this analysis, Idaho had standing because its proprietary interest in the land was affected by the agency action; it also had an interest in the long-term preservation of wildlife.

43. Id. at 400 n.16.
44. 63 F.3d at 917.
45. Id. (citing Central Arizona Water Conservation Dist. v. EPA, 990 F.2d 1531, 1538-39 (9th Cir. 1993) (Clean Air Act); Self-Insurance Inst. v. Korioth, 993 F.2d 479, 484 (5th Cir. 1993) (preemption); ANR Pipeline v. Corporation Comm'n, 860 F.2d 1571, 1579 (10th Cir. 1988) (same)).
46. Id. at 918 n.3 (citing Idaho Public Utils. Comm'n v. ICC, 35 F.3d 585 (D.C. Cir. 1994); Humane Soc'y v. Hodel, 840 F.2d 45 (D.C. Cir. 1988); National Audubon Soc'y v. Hester, 801 F.2d 405 (D.C. Cir. 1986)).
47. 35 F.3d 585 (D.C. Cir. 1994).
48. Id. at 588.
49. Id. at 590 (citing PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)).
50. Id. at 591.
51. Id. at 592. Application of the zone of interest test, however, was arguably unnecessary. The court of appeals, noting both the property interest and an interest in the protection of wildlife, stated "that the State's property interest in the Wildlife Management Area brings it within the ESA's zone of interests." Id. This statement could indicate that an interest in protecting wildlife is not necessary under the citizen-suit provision, at least as long as the plaintiff has a proprietary interest in the land affected by the administrative action in question. Petitioner's Brief, supra note 8, at 24 n.14.
In contrast, the Eighth Circuit has held that the zone of interests test does not apply to citizen suits under the ESA. In Defenders of Wildlife v. Hodel, the Eighth Circuit said that for standing to be proper, a plaintiff must satisfy only Article III standing requirements. Under Article III, the plaintiff must show that the injury resulted from the agency's action and is likely to be redressed if the plaintiff prevails. Prudential limits, such as the zone of interests test, are not required by Article III, and Congress may choose by statute to eliminate them completely. The ESA states that "any person" may sue for an ESA violation, and the Eighth Circuit held that "any person" means any person, thereby eliminating prudential standing requirements. The Supreme Court reversed because plaintiffs failed to meet the injury-in-fact and redressability requirements of Article III. Thus, the Court did not address the circuit court's conclusion that the "any person" language of section 11(g) of the ESA removed prudential limitations to standing.

As with the cases under the APA, cases dealing with the National Environmental Policy Act ("NEPA") have applied the zone of interests test to plaintiffs. In Nevada Land Action Ass'n v. United States Forest Service, for instance, the Ninth Circuit applied the zone of interests test to plaintiffs asserting a purely economic injury from the Forest Service's plan to decrease livestock grazing in Toiyabe National Forest. The Ninth Circuit held that plaintiffs must have alleged an injury within the zone of interests protected by NEPA, and that a

53. Id. at 1038 (citing Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)).
54. Id. at 1039 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).
55. Id.
56. Id. (citing Gladstone Realtors, 441 U.S. at 100).
58. 851 F.2d at 1039.
60. Petitioner's Brief, supra note 8, at 23.
61. 42 U.S.C. §§ 4321-47 (1994). NEPA's purpose is "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." Id. § 4321.
63. 8 F.3d 713 (9th Cir. 1993).
64. Id. at 715-16.
plaintiff who asserted a purely economic injury had no standing to challenge government agency action under NEPA.65

Unfortunately, the Supreme Court's view of the applicability of the zone of interests test to ESA citizen suits remains difficult to determine, even after Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,66 a case brought in 1995 in the D.C. Circuit by "small landowners, logging companies, and families dependent on the forest products industries" against the Secretary of the Interior and the Director of the Fish and Wildlife Service.67 The Supreme Court granted certiorari, but the question of plaintiff's standing was not raised even though they alleged purely economic injury as a result of the Secretary's regulation regarding habitat modification. Babbitt could indicate that if the Supreme Court applies the zone of interests test to ESA actions, the zone is broad enough to encompass plaintiffs with a purely economic interest and with no interest in preserving wildlife,68 but because the standing issue was not adjudicated, there is no opinion on the issue.69 Therefore, the circuit court law regarding the application of the zone of interests test to ESA citizen suits remains inconsistent. This question should be resolved by the Supreme Court's review of Bennett.

III. RATIONALE OF THE COURT

In reviewing the district court's decision in Bennett, the Ninth Circuit articulated the issue as "not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation that the district court deemed dispositive."70 The Ninth Circuit referred to Clarke's holding regarding plaintiffs who were not directly regulated by the agency action plaintiffs seek to challenge, and stated that such plaintiffs had to satisfy the zone of interests test as a method of discerning whether Congress intended to permit a particular plaintiff to bring an action.71

65. Id. at 716.
67. Id. at 2410. The Court assumed plaintiffs had no motive to harm the red-cockaded woodpecker or the spotted owl, and also that plaintiffs' logging activities would have the effect of harming both species' natural habitat. Id. at 2412.
68. Petitioner's Brief, supra note 8, at 25.
69. Id.
70. 63 F.3d at 917. The court noted that the zone of interests test applied even when standing is premised on a procedural injury. Id. at 917 n.1; see also Douglas County v. Babbitt, 48 F.3d 1495, 1500-01 (9th Cir. 1995); Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 447 (9th Cir. 1994).
71. 63 F.3d at 918.
The Ninth Circuit had applied the zone of interests test to claims under the ESA in cases decided prior to Bennett. In Pacific Northwest Generating Cooperative v. Brown, the court held that direct purchasers of hydroelectric power had sufficient economic stake in challenging the listing of certain salmon species as endangered to qualify for standing. In Mount Graham Red Squirrel v. Espy, environmental groups sued the United States Forest Service for allowing the construction of an observatory that allegedly would harm the endangered red squirrel. The Ninth Circuit held that environmental groups had standing under the APA and the Arizona Idaho Conservation Act ("AICA") based on a finding that the aesthetic, recreational, and scientific interests of the environmental groups were within the AICA's zone of interests.

Plaintiffs in Bennett attempted to distinguish Pacific Northwest and Mount Graham, arguing that neither was applicable because neither considered whether the ESA citizen-suit language abrogated the prudential limitation on standing imposed by the zone of interests test. The Ninth Circuit, however, did not need to rely on Mount Graham or Pacific Northwest to reject plaintiffs' argument that the "any person" language of the ESA's citizen-suit provision abrogates the zone of interests test. Rather, the court justified its conclusion based on a series of earlier decisions in which it used the zone of interests test to determine standing in cases with broad citizen-suit provisions.

72. Id. (citing Pacific Northwest Generating Coop. v. Brown, 38 F.3d at 1058, 1065 (9th Cir. 1994); Mount Graham Red Squirrel v. Espy, 986 F.2d at 1568, 1581 (9th Cir. 1993)).
73. 38 F.3d 1058 (9th Cir. 1994).
74. Id. at 1066. "We see no reason why that economic interest is not convertible into a legal interest." Id.
75. 986 F.2d 1568 (9th Cir. 1993).
76. Id. at 1569-70.
77. Pub. L. No. 100-696, 102 Stat. 4571. Title VI of the Arizona Idaho Conservation Act allowed the construction of three telescopes on Mt. Graham, and conditionally provided for the construction of four more telescopes in the future. 986 F.2d at 1570.
78. 986 F.2d at 1582.
79. Bennett, 63 F.3d at 918.
80. Id.
81. Id. at 918-19; see also Gonzales v. Gorsuch, 688 F.2d 1263 (9th Cir. 1982) (concluding citizen-suit provision of the Clean Water Act granted standing to nationwide class of citizens with an interest in clean water); Dan Caputo Co. v. Russian River County Sanitation, 749 F.2d 571 (9th Cir. 1984) (concluding the Clean Water Act's citizen-suit provision did not give standing to plaintiff whose injury did not arise from an environmental interest and who did not act out of environmental concern); Alvarez v. Longboy, 697 F.2d 1333 (9th Cir. 1983) (concluding the Farm Laborer Contractor Registration Act ("FLCRA") did confer standing on plaintiffs after careful consideration of the act's overall purposes to determine if plaintiffs were in the statute's zone of interests); Davis Forestry
Considering its consistent use of the zone of interests test to decide plaintiffs' standing under citizen-suit provisions, the court applied the test to ESA citizen suits. The court specifically held that "the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures." If it had held otherwise, the court reasoned, plaintiffs could sue when their purposes were opposed to or just marginally related to the purposes of the ESA.

Having decided that the zone of interests test applied, the court next looked at whether the zone of interests of the ESA included plaintiffs' interests. The court, following its approach in construing NEPA and the Clean Water Act, concluded that the ESA did not protect plaintiffs because they alleged no interest in protecting the suckers. The court held that the purposes of the ESA focused on the goal of species preservation, not economic and recreational interests. In fact, this finding was supported by the ESA section that declares the Act's purpose to be the protection of endangered species. The court reasoned that plaintiffs not only fell outside the ESA's zone of interests, but that their claims were more likely to hinder than to promote this objective. Plaintiffs failed to assert that the government's proposed minimum lake level would endanger the suckers, or that they shared a community of

Corp. v. Smith, 707 F.2d 1325 (11th Cir. 1983) (concluding plaintiffs' interests were not within the zone of interests protected by the FLCRA).

82. Bennett, 63 F.3d at 919.
83. Id.
84. Id. (quoting Clarke, 479 U.S. at 399).
85. Id. at 919-20; see also Nevada Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993) (holding plaintiffs have no standing under NEPA to assert purely economic interests because this would not further the environmental purposes of the act); Dan Caputo Co., 749 F.2d at 571.
86. 63 F.3d at 920. This conclusion is partly based on the Supreme Court's review of the ESA's purposes in Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978), where the Court found Congress's intent in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost." 63 F.3d at 920; see also Babbitt, 115 S. Ct. at 2413 (quoting same).
87. 63 F.3d at 921. 16 U.S.C. § 1531(b) (1994) states the ESA's purposes are "to provide a means whereby the ecosystems upon which 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 . . . in subsection (a)." 63 F.3d at 921.
88. 63 F.3d at 915; see also Nevada Land Action Ass'n, 8 F.3d at 716 (quoting Clarke, 479 U.S. at 397 n.12). This conclusion mirrors the court's finding in Pacific Northwest, a case in which plaintiffs were denied standing because they did not assert an interest in protecting an endangered or threatened species. 38 F.3d at 1067.
interests with the suckers. To the contrary, plaintiffs alleged an interest that was solely economic and possibly at odds with the interest of preserving the suckers.

Finally, the court concluded that the ESA's inclusion of economic factors in designating critical habitat did not impliedly confer standing on every plaintiff who alleged agency failure to consider an economic factor. If plaintiffs' interpretation prevailed, the court reasoned, the provisions of the ESA designed to promote species protection would become the vehicle for hindering, rather than furthering, its goal.

The Ninth Circuit's holding appears more restrictive than the Supreme Court's holding in Clarke, which the circuit court relied on to support its conclusion. In Clarke, the Supreme Court described the zone of interests test as a guide in APA cases that was "not meant to be especially demanding." The Ninth Circuit quoted Clarke's view that the "test [zone of interests] denies 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 cannot be reasonably assumed that Congress intended to permit the suit." In applying that language, however, the Ninth Circuit demanded a stronger showing; standing would be denied if plaintiffs' claim was inconsistent with or only marginally related to the purposes of the statute, or if it did not affirmatively further the goal of preserving endangered species.

A zone of interests test applied that narrowly cannot be characterized as not especially demanding.

IV. IMPLICATIONS

The implications of the Ninth Circuit's opinion in Bennett depend in large part upon what the Supreme Court decides. Plaintiffs argue that the Ninth Circuit was wrong to apply the zone of interests test because

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89. 63 F.3d at 921.
90. Id.
91. See 16 U.S.C. § 1533(b)(3)(A) (1994) which states: "To the maximum extent practicable... the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information..."
92. Bennett, 63 F.3d at 921-22; see also Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922 (D.C. Cir. 1989).
93. 63 F.3d at 922; see also Clarke, 479 U.S. at 397 n.12.
94. Petitioner's Brief, supra note 8, at 26-27.
95. 479 U.S. at 399.
96. Bennett, 63 F.3d at 917-18 (quoting Clarke, 479 U.S. at 399).
97. Id. at 919.
98. Petitioner's Brief, supra note 8, at 27-28.
Congress intended to expand standing under the ESA's citizen-suit provision to the limits of Article III. Plaintiffs also argue that if the zone of interests test applies, their economic interests are within the zone of interests regulated by the ESA.

However, it is possible that the Court will not reach the issue of prudential standing, but will decide the case on one of the issues articulated by the government. The government articulates three issues on appeal, none having to do with the zone of interests test. The government argues first that plaintiffs lack standing under Article III because they have suffered no injury in fact, no injury that is traceable to the USFWS, and no injury that is redressable if plaintiffs prevail.

Second, the government argues that suit is inappropriate under the APA because the opinion was not a "final agency action" as required by 5 U.S.C. § 704. Third, the government argues that the suit is inappropriate under the ESA because issuing the opinion was not a "failure to perform a nondiscretionary duty" under 16 U.S.C. § 1533, nor would issuing an erroneous opinion place the government "in violation of" the ESA under 16 U.S.C. § 1540(g)(1)(A).

If the Supreme Court decides Bennett on one of the government's issues and does not address the zone of interests issue, the Ninth Circuit's opinion will mean that, at least within that circuit, a plaintiff in an ESA citizen suit must show not only Article III standing, but also that the interest sought to be advanced is one within the zone of interests of the ESA, narrowly described. That would require plaintiffs who are not directly regulated by the challenged agency action to allege an interest in preserving endangered species to have standing to sue under the ESA.

This result arguably creates some tension with the Supreme Court's refusal to address the issue of standing in Babbitt, a case in which plaintiffs asserted a purely economic interest that was adverse to the preservation of endangered species. However, because the landowners and logging company plaintiffs in Babbitt were directly subject to the agency action they were challenging, the case may be fairly distinguishable from the Ninth Circuit's decision in Bennett. On the other

99. Id. at 17.
100. Id. at 30.
101. Brief for Respondent at 11-12, Bennett, 63 F.3d 915 (9th Cir. 1995) (No. 95-813).
102. Id. at 30.
103. Id. at 44-46.
104. 63 F.3d at 919.
105. 115 S. Ct. at 2412.
106. The Ninth Circuit specifically stated, "We do not consider here when a directly regulated entity, or a party standing in the shoes of such an entity, would have standing."
hand, a ruling in favor of plaintiffs could lead to changes in the way the zone of interests test has been applied to plaintiffs under other environmental statutes, such as NEPA. Either way the Court decides Bennett, some circuits may change the way they apply, or do not apply, the zone of interests test to citizen-suits under the ESA.

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63 F.3d at 918 n.2.

107. Cases such as Nevada Land Action Ass'n, 8 F.3d 713, may be questioned for denying standing to plaintiffs with economic interests.