COMPETITIVE INJURY AS A BASIS FOR STANDING IN ENDANGERED SPECIES ACT CASES

I. INTRODUCTION

In *Lujan v. Defenders of Wildlife*, the Supreme Court questioned the constitutionality of the "citizen suit" standing provision in the Endangered Species Act. In a concurring opinion, Justices Kennedy and Souter suggested that the provision was constitutionally infirm because Congress had neither identified the injury it sought to vindicate nor related that injury to the class of persons entitled to bring suit. The Justices' point is well taken. This Comment addresses their concerns. First, it suggests that the infirmity is cured when the Endangered Species Act is analyzed as a "competition statute" specifically designed to regulate competitive activity in the market for natural resources on public lands whenever endangered species are involved. Second, competitor standing analysis is then used to resolve one of the greatest dilemmas posed by the vagueness of the citizen suit provision—how courts should resolve the standing of plaintiffs who sue under the Act in order to protect their economic interests in using the natural resource and not for the purpose of protecting the endangered species which are involved.

II. BASIC PRINCIPLES OF STANDING

This Section discusses the basic principles of the standing doctrine. It begins with a general overview of the doctrine. It then discusses the doctrine's application where the plaintiff asserts standing on the basis of an injury to a right created by statute, rather than on an injury legally cognizable under the common law. It concludes with a discussion of the specific objections to the standing provision of the Endangered

Species Act which were raised in the majority and concurring opinions of *Lujan v. Defenders of Wildlife*.[1]

A. The Standing Doctrine

Article III of the Constitution confines federal courts to adjudicating actual "cases" or "controversies."[2] This requirement has been judicially interpreted as defining the limits of the jurisdiction of the judicial branch under the separation of powers doctrine.[3] In response to this interpretation, the Court has developed justiciability doctrines which state fundamental limits on the exercise of federal judicial power.[4] One of the most important and most controversial of these doctrines is the requirement that a litigant must have "standing" to invoke the power of a federal court.[5]

When a federal court asks whether a party has "standing to sue" it is asking whether that party has shown that it has "a sufficient stake in an otherwise justiciable controversy" to invoke the power of a federal court.[6] The "sufficient stake" requirement is satisfied if the party can satisfy the "injury in fact" test.[7] The "injury in fact" test has three elements: concrete and personal injury, causation, and redressability. The test is met where the party alleges facts showing: (1) that the challenged action will actually or imminently injure that party in a concrete and personal way;[8] (2) that the injury is "fairly traceable to the challenged action of the defendant,"[9] and (3) that it is "likely, as opposed to merely speculative," that the injury will be "redressed by a favorable decision."[10] The "injury in fact" test is said to serve two functions: it "preserves the vitality of the adversarial process,"[11] and it "confines the Judicial Branch to its proper, limited role in the constitutional framework of government."[12]

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1. 112 S. Ct. 2130 (1992).
2. Allen v. Wright, 468 U.S. 737, 750 (1984).
3. *Id.*
4. *Id.* (citing Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (1983) (Bork, J., concurring)).
5. *Id.*
6. Sierra Club v. Morton, 405 U.S. 727, 730-31 (1972).
7. Defenders of Wildlife, 112 S. Ct. at 2136.
8. *Id.*
9. *Id.* (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).
10. *Id.* (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38).
11. *Id.* at 2147 (Kennedy, J., concurring).
12. *Id.*

B. Statutory Standing

"Injury in fact," however, does not require that a plaintiff allege an injury cognizable under the common law. It has consistently been recognized that Congress has the power to enact statutes which create legal rights that have no clear analogs under the common law tradition.[13] An invasion of a statutorily created right can also give rise to a legally cognizable injury sufficient to establish standing to bring a suit in federal court.[14] Or, as expressed by Justice Kennedy, Congress has the power to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[15] For example, the Court has held that section 810 of the Fair Housing Act of 1968[16] gives individuals the judicially enforceable right to live in a racially integrated community,[17] and that section 15d of the Tennessee Valley Authority Act of 1933[18] gives privately owned, utility corporations the judicially enforceable right to protect themselves from competition by the Tennessee Valley Authority,[19] although these injuries were previously inadequate at law.[20]

C. The Endangered Species Act Citizen Suit Provision: Lujan v. Defenders of Wildlife

The citizen suit provision of the Endangered Species Act (ESA) expressly grants a right of action to "any person" to file suit on his own behalf to enjoin "violations" of the Act committed by "any person."[21] In *Lujan v. Defenders of Wildlife*,[22] the Court confronted the nature of the standing granted by this provision. Despite the extremely broad language, the Court interpreted the provision as granting a right of action

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13. *Id*. at 2146.

14. Warth v. Seldin, 422 U.S. 490, 500 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

15. *Defenders of Wildlife*, 112 S. Ct. at 2146-47 (Kennedy, J., concurring).

16. 42 U.S.C. § 3610 (1983).

17. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-12 (1972).

18. 16 U.S.C. § 831n-4(a) (1984).

19. Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1968).

20. *Defenders of Wildlife*, 112 S. Ct. at 2145-46.

21. 16 U.S.C. § 1540(g) (1984).

22. *Defenders of Wildlife*, 112 S. Ct. at 2130. The issue in the case was whether an environmental organization had standing to sue the Secretary of the Interior under the Endangered Species Act to reinstate a rule requiring application of the Endangered Species Act to activities of the United States government in foreign countries. *Id*. at 2135.

only to those parties who can satisfy the Article III injury requirement.[23] After ruling that the plaintiffs in the case failed to meet the injury in fact requirement,[24] the Court went on to discuss its objections to the citizen suit provision in general terms. Writing for the majority, Justice Scalia suggested that statutory grants which conferred public rights of action on private individuals were unconstitutional as a violation of the separation of powers doctrine.[25] In his opinion, permitting Congress to convert the undifferentiated public interest in an executive officer's compliance with the law into an "individual right" vindicable in the courts was to permit Congress to transfer from the President to the courts the executive's constitutional duty to take care that the laws are faithfully executed.[26] However, Justices Kennedy and Souter refused to join with Justice Scalia on this issue and explicitly rejected the notion that the outer limit of Congress's power to create a right of action was defined by the number of people who possessed the right.[27]

Instead, in a concurring opinion, Justices Kennedy and Souter raised a different objection. In their view, the provision was constitutionally suspect because Congress had neither identified the injury it sought to vindicate nor related that injury to the class of persons entitled to bring suit.[28] This Comment addresses Justices Kennedy's and

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23. *Id.* at 2135-36.

24. *Id.* at 2138-39.

25. *Id.*

26. *Defenders of Wildlife*, 112 S. Ct. at 2138-39. An analysis of Justice Scalia's separation of powers thesis is beyond the scope of this Comment. Those interested in this issue are directed toward Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); and Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

However, it is worth noting that two district courts have ruled on separation-of-power based challenges to the citizen suit provision contained in the Emergency Planning and Community Right to Know Act. Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (1993); Atlantic States Legal Foundation, Inc. v. Buffalo Envelope, 823 F. Supp. 1065 (1993). Both courts ruled that: (1) Congress could expand or limit the scope of statutory rights it creates, and may vindicate those rights; and (2) that constitutional concerns would only arise where Congress had reserved unto itself the right to control or supervise the enforcement of rights it created. *Delaware Valley Toxics Coalition*, 823 F. Supp. at 1136-38 ("I will not be the first court to hold these provisions unconstitutional. They are not." *Id.* at 1138.); *Atlantic States Legal Foundation*, 823 F. Supp. at 1072-76.

27. *Defenders of Wildlife*, 112 S. Ct. at 2146-47 (1992) (Kennedy, J. concurring). Without Justices Kennedy and Souter, Part IV of the case would not have been a majority opinion.

28. *Id.* at 2147.

Souter's concerns. It suggests that the Endangered Species Act is a "competition statute" which grants certain competitors in the public lands market the right to enforce certain statutory provisions by alleging competitive injury to their economic and noneconomic interests.

III. COMPETITIVE INJURY AS A BASIS FOR STANDING IN THE PRIVATE LAW MODEL

Because the common law tradition is based on "the economic postulate that free competition is worth more to society than it costs,"[29] it is not surprising that the common law has always favored free competition. As a result, in the absence of illegitimate means or other unlawful elements, a competitor seeking to increase his own business can cut rates or prices, allow discounts or rebates, enter into secret negotiations behind a rival's back, refuse to deal with a rival or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with a rival, all without incurring liability.[30] In other words, "it is no tort to beat a business rival to prospective customers."[31]

While it is unquestioned that the losing competitor will suffer *de facto* injury in the form of lost profits, lost competitive opportunity, or even ruination, such injury does not "lay the foundation for an action."[32] Instead, under the common law, competitive injury is described as *damnum absque injuria*, harm without injury in the legal sense.[33] Because no "legal right" has been invaded, no "legal wrong" has occurred.

IV. THE DEVELOPMENT OF COMPETITIVE INJURY AS A BASIS FOR STANDING IN THE PUBLIC LAW MODEL

Congress may undertake to regulate competitive activity in furtherance of some declared public interest. By enacting these "competition statutes," Congress may also create a statutory right to

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29. OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 121 (1921) (footnote omitted).

30. *Id.* at 1012-13 (footnotes omitted). This statement is subject, of course, to the restrictions on such activities created by various antitrust and restraint of trade laws (*id.* at 1013) and by torts associated with economic relations such as injurious falsehood, interference with contractual relations, and interference with prospective advantage. *See id.* at 962-1031.

31. *Id.* at 1012.

32. Alabama Power Co., Inc. v. Ickes, 302 U.S. 464, 479 (1938).

33. BLACK'S LAW DICTIONARY 393 (6th ed. 1990); *Alabama Power Co.*, 302 U.S. at 479.

protection from harm to competitive position where no such right existed at common law.[34] This Section discusses three forms of "competition statutes" and describes the Court's analytical approach to standing questions, when competitive injury is asserted as the basis for standing to challenge a government agency's disregard of the law.

A. Grant of Monopoly to a Class of Individuals

The simplest form of "competition statute" is that which grants a lawful monopoly to a qualified class of private individuals. An example would be the patent laws,[35] which create patent rights that exist solely by virtue of the statute.[36] The public purpose underlying the grant of this particular monopolistic right is the public's interest in the promotion of science, which results from rewarding individuals for their useful inventions.[37]

The holder of a patent is statutorily granted standing to protect his or her patent rights through a suit for patent infringement.[38] However, patent rights are not without restrictions. Although patent laws grant a patent holder the right, for a term of years, to the exclusive use of his invention, the courts have consistently held that "the rights and welfare of the community must be fairly dealt with and effectually guarded"[39] in order to preserve the public's interest in free competition.[40] As a result, the prerequisites to obtaining a patent, and the limitations on the use of the patent are strictly enforced by the courts.[41]

B. Grant of Statutory Power to a Federally Created Agency to Regulate All Competitive Activity Within an Industry: Anti-Competition Statutes

Congress may create a regulatory agency and grant it the power to regulate all competitive activity within a particular field or industry. The purpose underlying this type of statute is usually described as the

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34. *Kentucky Utility Co.*, 390 U.S. at 5-6.

35. 35 U.S.C. §§ 1-293 (1988). Another example of a statutory grant of monopoly would be copyright laws. 17 U.S.C. §§ 1-293 (1988).

36. Wheaton v. Peters, 8 Pet. 591, 658 (1834).

37. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1963).

38. 35 U.S.C. § 271.

39. *Sears*, 376 U.S. at 229.

40. *Id.* at 231.

41. *Id.* at 230.

protection of the interest of the consuming public.[42] Such statutes are designed to curb anti-competitive behavior within a market or industry,[43] and, as such, might properly be described as "anti-competition statutes." One problem inherent in giving a public agency control over competition within an entire industry is that an agency's regulatory decision concerning one market participant has the ability to profoundly affect a rival participant's competitive position within a market. As a result, early "anti-competition" statutes commonly contained "standing" provisions which allowed certain parties to seek judicial review of the actions of the regulatory agency. Not surprisingly, given the treatment of competitive injury under the common law, questions immediately arose whether a party had standing under these provisions where the only injury the party could assert was threatened harm to the party's competitive position within the regulated industry or market.

For example, in 1920 Congress passed the Transportation Act,[44] which amended the Interstate Commerce Act of 1887.[45] The Transportation Act repealed a section of the 1887 act which had condoned free competition within the railroad industry,[46] and added

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42. *See, e.g.*, Western Pacific v. South. Pac. Co., 284 U.S. 47, 50-51 (1931) (explaining that Congress regulated the railroad industry under the Interstate Commerce Act on the basis that "competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss." *Id*. at 51.).

43. The regulated markets often have the characteristics of natural monopolies such as the railroad industry and electric or gas utilities. A natural monopoly market exists when a firm's costs decline as output increases all the way to the market's saturation point. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 31 (1994). In such circumstances, it is possible for a single company to satisfy the market demand at a price sufficient to cover the firm's costs. *Id*. at 32.

44. Ch. 91, 41 Stat. 456 (1920).

45. Act of Feb. 4, 1887, ch. 104, Pt. I, § 1, 24 Stat. 379 (codified as amended at 49 U.S.C. 1-1101 (1988)).

46. The Interstate Commerce Act of 1887 created the Interstate Commerce Commission and directed it to "secure just and reasonable charges for transportation" and to "prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions." Interstate Commerce Comm'n v. Baltimore & O. Ry. Co., 145 U.S. 263, 276 (1892). The 1887 Act was not designed to prevent competition between different railroads or to interfere with the "customary arrangements" made by railroad companies. *Id*. In fact, the Act explicitly stated that it should not be construed "as requiring any such common carrier to give the use of its tracks or terminals facilities to another carrier engaged in like business." Ch. 104, Pt. I, § 3, 24 Stat. 379 (1887) (repealed in 1920). Case law established that railroads could allow for competition from other carriers when fixing their rates "provided only that the competition is genuine, and not a pretense." Interstate Commerce Comm'n v. Chicago Great Western Ry. Co., 209 U.S. 108, 119 (1907). Therefore, suits could not be maintained under the Act solely on the basis of competitive

provisions which restricted or regulated competitive activity in the areas of construction, acquisition, operation, or abandonment of railroad lines. Competitive behavior in these areas was regulated by the Transportation Act in the following manner:

> 1. Section 1, paragraph 18 of the amended Act[47] prohibited construction, abandonment, acquisition, or operation of new lines or extensions of lines unless the railroad obtained a certificate of need from the Commission.[48] Issuance of the certificate was based on "present or future public convenience and necessity."[49]
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> 2. Section 1, paragraph 19 of the amended Act[50] required that application and issuance of certificates of need were governed by Commission rules and regulations as to hearings.[51]
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> 3. Section 1, paragraph 20 of the amended Act[52] gave the Commission discretionary power to issue certificates of need and provided that construction, operation, or abandonment of lines contrary to the provisions of paragraphs (18), (19), and (20) could be enjoined at the suit of "the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest."[53]

The Supreme Court addressed standing requirements under these provisions in *Western Pacific California R.R. v. Southern Pacific*.[54] In

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injury because "the effort of a carrier to obtain more business . . . proceeds from the motive of self-interest, which is recognized as legitimate." United States v. Illinois Central R.R. Co., 263 U.S. 515, 523 (1924).

47. 49 U.S.C. § 1(18) (1995) (repealed).

48. *Id.*

49. *Id.*

50. 49 U.S.C. § 1(19) (1995) (repealed).

51. *Id.*

52. 49 U.S.C. § 1(20) (1995) (repealed) (emphasis added).

53. *Id.*

54. 284 U.S. 47 (1931). In an earlier case, the Court construed paragraphs 18, 19, and 20 of the amended Act as granting a railroad likely to be harmed by diversion of traffic to a new line the right to enjoin the railroad constructing the new line on the theory that such construction required a certificate of need from the Commission. Texas & Pac. Ry. v. Gulf, Col. & St. F. Ry., 270 U.S. 266, 271-74 (1926). The railroad bringing the suit did not need to wait for the question of whether a certificate of need was required to be presented to the Commission. *Id.* at 273-74. The fact that Texas & Pacific was a "party in interest" entitled to bring suit was not challenged. The case is noteworthy because the Court provided an interpretation of the policy underlying paragraphs 18,

Western Pacific, the Western Pacific Railroad Company sought to enjoin the Southern Pacific Railroad Company from extending a line into Western Pacific's territory. The basis for the suit was that Southern Pacific had failed to obtain a certificate of need from the Commission.[55] The issue before the Court was whether a railroad, which could allege only potential competitive injury, qualified as a "party in interest" entitled to enforce the provisions of the Act. The trial court had denied standing because it assumed that a "party in interest" had to possess a legal right cognizable under the common law.[56]

The Court analyzed standing in the following manner. First, it began by identifying the congressional purposes underlying paragraphs (18), (19), and (20). These paragraphs, the Court concluded, were part of a general congressional plan "intended to promote development and maintenance of adequate railroad facilities."[57] In developing this plan, Congress recognized that

> the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. . . . The Act sought, among other things, to avert such losses.[58]

Therefore, the Court interpreted the provisions as promoting an interest in a transportation system free from losses due to unauthorized and harmful competition.

Second, the Court examined the class of persons entitled to enforce the provisions of the Act under the "party in interest" provision. The Court reasoned that if the term "party in interest" was interpreted as requiring a suitor who possessed "some clear legal right for which it might ask protection under the rules commonly accepted by a court of

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19, and 20 of the Transportation Act of 1920 which was relied upon in later cases. *Id.* at 277. In a case preceding *Texas & Pacific*, a district court had ruled that a carrier which would suffer by competition of a proposed extension was a "party in interest" entitled to sue for an injunction under section 1, paragraph 20. Detroit & M. Ry. v. Boyne City, G. & A. R.R., 286 F. 540 (1923).

55. *Western Pacific*, 284 U.S. at 48-49.

56. *Id.* at 51.

57. *Id.* at 50.

58. *Id.* at 51 (citations omitted) (quoting Texas & Pac. Ry. v. Gulf, Col. & St. F. Ry., 270 U.S. 266, 277 (1925)).

equity,"[59] then a railroad would never be able to sue to enjoin an unauthorized competitor because no carrier possessed a "legal right" under the common law to demand exception from honest competition.[60] The Court, therefore, rejected that interpretation since such a construction would not materially aid the congressional plan of averting losses, such as the squandering of resources, due to harmful competition.[61] However, the court also acknowledged that a complainant must possess "something more than a common concern for obedience to the law."[62] After balancing these competing concerns, the Court ruled that the class of plaintiffs entitled to bring suit would be those who could allege that "the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation."[63]

Lastly, the Court held that the injury requirement would be satisfied where a plaintiff alleged unauthorized and potentially harmful competitive activity.[64] In cases subsequent to *Western Pacific*, the Court held that carriers met this standing requirement by simply alleging that the challenged activity threatened harmful competition within the geographic market in which the carriers were competing.[65]

Thus, under "anti-competition" type statutes, an injured competitor should have standing if: (1) the statute reflects a congressional intent to protect against some form of anti-competitive activity within a market or industry; (2) failure to enforce statutory

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59. *Id.*

60. *Western Pacific*, 284 U.S. at 51.

61. *Id.*

62. *Id.*

63. *Id.* at 51-52.

64. *Id.* at 52. *Western Pacific* satisfied this requirement by alleging "the beginning of an unlawful undertaking by [Southern Pacific] which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss." *Western Pacific*, 284 U.S. at 52.

65. In *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382 (1932), an operator of a ferry across Chesapeake Bay was sufficiently "directly and adversely affected" to challenge issuance of a certificate of need where the company alleged that the certificate would allow a railroad company to operate a competing ferry across the bay on a route twenty miles distant from the petitioner's. *Id.* at 385-90. In *Alton R. Co. v. United States*, 315 U.S. 15 (1942), railroads were sufficiently "directly and adversely affected" to challenge the issuance of a certificate of need to a competing motor carrier where the railroads were each common carriers and each was a competitor of the motor carrier in some portion of the extensive territory which the motor carrier was authorized to serve. *Id.* at 19. The motor carrier was entitled to transport from Detroit, Michigan to Arkansas, Alabama, California, Tennessee, Washington, Oregon, Kentucky, North Carolina, Texas, South Carolina, and Georgia. *Id.* at 18.

provisions would bring about a material change in the competition within the market or industry; and (3) the plaintiff can allege that it would be directly and adversely affected by unauthorized competitive activity within its geographic market and thus falls within the class of plaintiffs the provision was designed to protect.

C. Grant of Statutory Right to Protect Competitive Interests

Congress may also enact a statutory provision that reflects a legislative purpose to protect a certain class of individuals against competitive injury. For example, in *Hardin v. Kentucky Utilities Co.*,[66] the Court held that a private utility had standing to challenge a decision by the Tennessee Valley Authority Board of Directors that the Tennessee Valley Authority (TVA) had the right to compete for business within the private utility's service area.[67]

The Court analyzed the plaintiff's basis for standing in the following manner. First, the Court looked at the statutory provision the plaintiff sought to enforce and interpreted it as creating territorial limitations on TVA's service area.[68] Second, the Court examined Congress's intent in imposing these limitations and determined that Congress's primary objective was to protect private utilities from TVA competition.[69] Third, the Court examined the plaintiff to ascertain whether it was one of the class of plaintiffs the provision was designed to protect.[70] The Court then determined that since the plaintiff was a utility, alleging the type of competitive injury which the provision was designed to protect against, the utility had standing to bring the suit, even though the Act had no explicit statutory provision conferring standing.[71]

Thus, an injured competitor who is within the class of plaintiffs which a competition-limiting provision is designed to protect "has standing to require compliance with that provision," and no explicit statutory standing provision will be necessary to confer standing.[72]

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66. 390 U.S. 1 (1968).
67. *Id.* at 5.
68. *Id.* at 6-7.
69. *Id.* at 7.
70. *Id.*
71. *Hardin*, 390 U.S. at 7.
72. *Id.* at 6.

V. PRINCIPLES OF MODERN STATUTORY STANDING: COMPETITOR SUITS UNDER THE JUDICIAL REVIEW PROVISION OF THE ADMINISTRATIVE PROCEDURES ACT

Today, claims that an agency has acted unlawfully will generally be brought under the provisions of the Administrative Procedures Act (APA).[73] The APA was passed by Congress in 1946, in response to the "situation of indescribable confusion" which then existed in the federal administrative process.[74] In furtherance of Congress's goal of providing an assurance of fairness in administrative proceedings, the APA contains a judicial review provision[75] which authorizes review of agency actions, unless the statute precludes judicial review or the agency action is committed to agency discretion by law.[76] The judicial review provision reads as follows: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."[77] Standing under this provision is relevant to this Comment for three reasons: (1) challenges to agency action which are prompted by threats of competitive injury have generally been brought under the APA judicial review provision, and thus the law of competitor standing has largely been developed within that context; (2) some circuits employ portions of the APA standing analysis when challenges are brought under the citizen suit provision of the ESA; and (3) parties alleging violations of the ESA usually allege that the challenged action violates the APA as well.

This Section begins by describing the standing test the Court has developed for determining when a party may challenge agency action under the APA judicial review provision. It then describes the standing analysis in competitor suits brought under the APA. It concludes by addressing the issue of whether portions of the APA standing test should be applied when a plaintiff bases his or her standing on an explicit statutory grant of standing, such as the citizen suit provision of the ESA.

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73. Pub. L. No. 89-554, 80 Stat. 392 (1966) (codified as amended at 5 U.S.C. §§ 701-06 (1988)).

74. H. Rep. No. 1980 (May 3, 1946), reprinted in 1946 U.S.C.C.A.N. 1195 (citing S. Rep. No. 442, 76th Cong., 1st Sess. (1939)).

75. 5 U.S.C. § 702 (1988).

76. *Id.* at § 701(a).

77. *Id.* at § 702. This provision applies unless the statute precludes judicial review or the agency action is committed to agency discretion by law. *Id.* at § 701(a).

A. The Administrative Procedures Act Standing Requirements

The Court has held that a party has standing to bring suit under this provision if the party can show: (1) that the injury is sufficiently personal and concrete to meet the "injury in fact" requirement of Article III;[78] and (2) that he has suffered an injury to an interest which "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[79]

B. Competitor Standing and the Injury in Fact Test

The Article III "injury in fact" test requires a party to allege facts showing: (1) that the challenged action will actually or imminently injure that party in a concrete and personal way;[80] (2) that the injury is fairly traceable to the challenged action of the defendant;[81] and (3) that it is "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[82]

1. The Personal Injury Requirement

In the competitor suit context, potential for injury arises whenever an agency action disrupts currently existing competitive relationships within a regulated market. Such disruptions occur where an agency action: (1) permits a new competitor to enter an existing market; (2) restricts an existing competitor's ability to compete in the market; or (3) allows an existing market competitor to compete more effectively.[83]

As explained in *Western Pacific California R.R. v. Southern Pacific*,[84] where the effect of an agency's action is to permit competition where no competition previously existed, or to increase competition which was previously limited, neither the existence nor the imminence of competitive injury is questionable, if the plaintiff is an actual competitor within the relevant geographic market. As a result, parties alleging

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78. Air Courier Conf. v. American Postal Workers Union, 111 S. Ct. 913, 917 (1991) (citing Allen, 468 U.S. at 751).

79. Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1991) (citing Clarke v. Securities Industry Ass'n, 479 U.S. 388, 396-97 (1987)).

80. *Defenders of Wildlife*, 112 S. Ct. at 2136.

81. *Id*. (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42).

82. *Id*. (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38).

83. This categorization of competitive injury derives from *Note, Competitors' Standing to Challenge Administrative Action under the APA*, 104 U. PENN. L. REV. 843, 844-856 (1956).

84. 284 U.S. 47 (1931).

competitive injury have satisfied the personal injury element of the "injury in fact" test where the party alleged: (1) that the agency action would permit new or increased competition within a market or industry;[85] (2) that the party was a competitor within that market; and (3) that the party would suffer competitive harm as evidenced by possible loss of profits,[86] potential diversion of business,[87] or fear that an existing business would be destroyed.[88]

However, a plaintiff need not allege harm to economic interests in order to satisfy the personal injury requirement. In *Sierra Club v. Morton*,[89] the Court held that a party could also seek standing on the basis of harm to aesthetic or environmental interests, if the party could allege that he or she personally used and enjoyed the area in question, and that his or her aesthetic and recreational enjoyment of the area would be significantly affected by the proposed agency action.[90] Therefore, a plaintiff who claims standing on the basis of competitive harm to his or her environmental interests would need to allege: (1) that the agency action would permit new or increased competition for environmental

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85. Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 152 (1970) (holding that data processing services could challenge ruling by Comptroller of Currency which allowed national banks to provide data processing services); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (holding that travel agents had standing to challenge ruling by Comptroller of Currency which allowed national banks to provide travel services for their customers).

86. *Association of Data Processing Service Orgs.*, 397 U.S. at 152; Securities Industry Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 258 (1983), *aff'd*, 758 F.2d 739 (1985), *aff'd*, 479 U.S. 388 (1987).

87. *Association of Data Processing Service Orgs*., 397 U.S. at 152; Environmental Defense Fund v. Marsh, 651 F.2d 983, 1003-04 (1981) (holding that railroad had standing to challenge Corps of Engineers use of improperly low interest rate in calculating the cost-benefit ratio of a water project that would divert traffic from railroad); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1977) (holding that association of landlords had standing to challenge federal award of financial assistance which would allow conversion of factory building into low-income housing because of claim that prospective tenants would be diverted to the new project).

88. Westport Taxi Serv. Inc. v. Adams, 571 F.2d 697, 700-01 (1978), *cert. denied*, 439 U.S. 829 (1978) (holding that operators of "exclusive-ride" taxi service had standing to challenge federal grant which would support, as a demonstration project, a competing "shared-ride" taxi service because they asserted a well founded fear their business would be destroyed).

89. 405 U.S. 727 (1972).

90. *Id*. at 736. The Court's holding in this case confirmed dicta in *Association of Data Processing Service Orgs.*, 397 U.S. 150 (1970), a competitor suit in which the Court granted standing on the basis of competitive injury. The Supreme Court had noted that under the APA judicial review provision, standing would also be afforded to those whose noneconomic interests were injured if those interests were protected or regulated by the statute in question. *Id*. at 153-54. Such interests could reflect "aesthetic, conservational, and recreational values" as well as interests in values protected by the Constitution. *Id*. at 154.

resources within a market or industry;[91] (2) that he or she was a competitor within that market and had "direct contact with the environmental subject matter threatened by an adverse decision;"[92] and (3) that he or she would suffer competitive harm as evidenced by a diminishment in his or her use or enjoyment of the environmental resource in question.

2. The Causation and Redressability Requirements

Similar to the personal injury "imminence" requirement, where standing is based on competitive injury and the party alleging standing is an actual competitor within the relevant market, questions of causation and redressability rarely arise. First, an agency action which permits new or increased competition obviously is the cause of any threatened competitive injury which might result from disruption of the existing competitive relationships. Second, if the competition cannot occur without the proposed agency action, such injury will obviously be redressed if a successful challenge results in the action's invalidation. In fact, when a party alleges competitive injury, the Article III injury requirement may not even be called into question.[93]

Diminished redressability and imminence requirements are also supported by the Court's analysis of procedural injury as a basis for standing. The Court has held that a plaintiff can assert procedural injury by alleging that agency procedures are designed to protect some threatened concrete interest which forms the ultimate basis of the plaintiff's standing.[94] Successful assertion of procedural injury entitles a plaintiff to standing without the need to meet normal standards of redressability and immediacy.[95] The reason underlying the liberal grant of standing for procedural interests is that a procedural right is granted in

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91. *Association of Data Processing Service Orgs.*, 397 U.S. at 152; *Arnold Tours, Inc.*, 400 U.S. at 45.

92. Idaho Farm Bureau Federation v. Babbit, 58 F.3d 1392, 1398 (9th Cir. 1995).

93. First Nat'l Bank & Trust Co. v. Nat'l Credit Union; 988 F.2d 1272, 1275 (D.C. Cir. 1993) (Article III injury requirement not in question when appellant suffers competitive injury); *see also* Clarke v. Securities Industry Ass'n, 479 U.S. 388, 396-97 (1987), in which the issue was the standing of a trade association representing securities brokers, dealers and underwriters to challenge the Comptroller of the Currency's approval of applications for national banks to establish discount brokerage offices. In the lower court, the Comptroller had unsuccessfully argued that the trade association could show no injury; at the Supreme Court level the Comptroller simply abandoned the argument. *Id*. at 393 n.5.

94. *Defenders of Wildlife*, 112 S. Ct. at 2143 n.8.

95. *Id*. at 2142 n.7.

order to create pressures that Congress has deemed important to effective regulation and not to yield a particular outcome.[96]

Claims of competitive injury will also often qualify as claims of procedural injury under circumstances where the plaintiff seeks to enforce a statutory procedure which he asserts is designed to protect him from the competitive injury which forms the ultimate basis for his or her standing. Therefore, many competitor suits will also be procedural injury suits and qualify for the reduced redressability and immediacy requirements.

C. Competitor Standing and the Zone of Interests Test

The zone of interests test derives from the language in the APA judicial review provision requirement that a party must be aggrieved "within the meaning of the relevant statute."[97] The test is not an element of constitutional standing. Instead, it is generally considered to be a component of "prudential standing"[98]—a judicially self-imposed limit on the exercise of federal jurisdiction.[99]

The test is relevant "only where the action under attack is that of a government agency."[100] It is applied where Congress "fails to specify who may and who may not invoke the power of the courts."[101] The "essential inquiry" under the test is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.[102] In general, parties will satisfy this inquiry if: (1) they are among the class that the law regulates since those parties have "the incentive to guard against any administrative attempt to impose a greater burden than that contemplated by Congress";[103] or (2) they are among the class "the agency was supposed to protect" since those parties will have "the incentive to ensure that the agency protects them to the full

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96. Pacific Northwest Generating Cooperative v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994) (citing Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 226 (1992)).

97. *Association of Data Processing Service Orgs.*, 397 U.S. at 153 (quoting 5 U.S.C. § 702).

98. *Id.*

99. *Allen*, 468 U.S. at 750-51.

100. 2 AM. JUR. 2d *Administrative Law* § 450 (1994).

101. Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 921-22 (D.C. Cir. 1989).

102. *Securities Industry Ass'n*, 479 U.S. at 399.

103. *Hazardous Waste Treatment Council*, 885 F.2d at 922.

extent intended by Congress."[104] A party is "protected" if Congress has either expressly or indirectly indicated that the party is an "intended beneficiary" of a statute, or if a party qualifies as a "suitable challenger" because his interests coincide with the interests protected.[105] The Supreme Court has interpreted the "suitable challenger" requirement generously.[106] It will deny a right of review only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[107] Whether an act protects a particular interest can be determined from legislative history,[108] the policies underlying a statute,[109] as well as the text of the statute itself.

Within the competitor suit context, the critical question answered by the zone of interests test is whether a plaintiff who has a competitive interest in confining a regulated entity within certain congressionally imposed limitations will be able to sue to prevent an agency from loosening those restrictions.

D. Application of the Zone of Interest Test in Claims Brought Under an Explicit Statutory Grant of Standing

Because the zone of interests test is not an element of constitutional standing, questions have arisen whether the test should be imposed when a plaintiff challenges agency action under a statute which contains an explicit standing provision, such as the citizen suit provision in the Endangered Species Act. There is a division between the circuits on this issue.[110] Opponents of application of the zone of interest test can base their claims on language in Supreme Court cases which suggests that prudential standing requirements can be waived by express rights of

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104. *Id.*

105. *Id.*

106. *Association of Data Processing Service Orgs.*, 397 U.S. at 156.

107. *Securities Industry Ass'n*, 479 U.S. at 399.

108. *See Association of Data Processing Service Orgs.*, 397 U.S. at 155; *Air Courier Conf.*, 111 S. Ct. at 921.

109. *See Securities Industry Ass'n*, 479 U.S. at 403.

110. Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988) (rejecting application of test), *opinion after remand*, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds sub nom., Defenders of Wildlife*, 112 S. Ct. at 2130; Pacific Northwest Generating Cooperative v. Brown, 38 F.3d 1058, 1065 (9th Cir. 1994) (requiring application of the test); Bennett v. Plenert, 63 F.3d 915, 919 (9th Cir. 1995) (requiring application of the test).

action granted by Congress,[111] and that the test is not one of universal application.[112] Proponents of the test can cite language from Supreme Court cases that some form of zone test applies even in cases not brought under the APA.[113]

In the competitor suit context, the rationale underlying the grant of standing on the basis of competitive injury strongly counsels that a zone of interests test should be applied. Since competitive injury is not a legally cognizable injury under the common law, a statutory basis for relief from competitive injury must be alleged.[114] Whether a statutory basis exists can only be determined by an inquiry into the interests protected or regulated by the statute.[115] The same rationale supports a zone of interests test when a plaintiff alleges competitive injury to a noneconomic environmental or aesthetic interest.

VI. THE ENDANGERED SPECIES ACT AS A COMPETITION STATUTE

The modern and historical approaches to competitor standing described above suggest that a plaintiff can assert standing on the basis of competitive injury if three requirements are met. First, the statutory provision relied upon by the plaintiff must reflect a congressional purpose to protect a competitive interest. Second, the plaintiff must allege a constitutionally sufficient injury as evidenced by: (1) disruption of current competitive relationships within a relevant geographic market; and (2) harm to the plaintiff's competitive position as a result of this disruption as evidenced by a potential for noneconomic or economic injury in the form of lost profits or loss of use or enjoyment of the resource. Third, the plaintiff's interests must fall within the zone of interests regulated or protected by the statute in question.

This Section uses the above analysis to evaluate the Endangered Species Act as a form of competition statute which regulates competitive activity within the market for public lands. The Section begins by exploring the history and development of the public lands market. The Section then examines the Act's language, legislative history, and judicial interpretations in light of the law of competitor standing. The objective

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111. *See, e.g., Warth*, 422 U.S. at 501; *Association of Data Processing Service Orgs.*, 397 U.S. at 154.

112. *Securities Industry Ass'n*, 479 U.S. at 400 n.16.

113. *Id.*; *Bennett*, 63 F.3d at 917.

114. 2 AM. JUR. *Administrative Law* § 442 (1994).

115. *Id.*

of this examination is to determine underlying statutory purposes and to evaluate whether those purposes reflect a congressional intent to give certain plaintiffs the right to protect themselves from certain forms of harmful competitive injury within the public lands market.

A. The Public Lands Market

A threshold question is whether the ESA regulates within a definable market. Such a market does exist and may be described as "the public lands market." This market involves competition between private interest groups for the right to use or enjoy a publicly owned natural resource. Such groups may seek to use and enjoy the resource for either economic or noneconomic purposes. Federally-created resource management agencies control this market through planning, permitting, and licensing decisions. Which interest groups can compete in this market, and the extent to which those groups can challenge resource management decisions adverse to their interests has been a gradually evolving process. This Section of the Comment examines the history and development of the public lands market by using the category of public lands known as national forests as an illustrative example.[116]

1. The Organic Administration Act of 1897

The Organic Administration Act of 1897[117] created the United States Forest Service and established national forests as lands set aside for the purposes of timber production and watershed protection.[118] Legislative history clearly indicated this intent: "They are not parks set aside for nonuse, but have been established for economic reasons."[119] The Forest Service followed this legislative mandate. For example, of the 4,555,000 acres of commercial forest land in the Tongass National Forest

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116. Although this section deals with the public lands market, identical issues arise in the competition for use of water resources. *See, e.g.,* Scenic Hudson Preservation Conf. v. Federal Power Commission, 354 F.2d 608 (1965). Navigable waters are not owned by the United States but have been statutorily placed under the federal government's regulatory control through the valid exercise of the commerce power by Congress. *See, e.g.,* Alabama Power Co. v. Gulf Power Co., 283 F. 606 (D.C. Ala. 1922) (regulation of navigable waters by Federal Power Commission in interest of developing water power); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (1972) (regulation of navigable waters by United States Army Corps of Engineers in interest of flood control and drainage).

117. Ch. 2, § 1, 30 Stat. 34 (1897).

118. United States v. New Mexico, 438 U.S. 696, 707 (1978).

119. *Id*. at 708 (citing 30 CONG. REC. 966 (1897)).

in Alaska, only 6/10 of 1% were reserved from logging as of 1958.[120] As a consequence of this statutory mandate, parties asserting that national forest lands should also be managed for recreation or conservation lacked a statutory basis for their claims.

2. The Multiple-Use Sustained-Yield Act of 1960

In response to demands by the public that national forest lands be managed for other purposes,[121] Congress passed the Multiple-Use Sustained-Yield Act[122] (MUSY) in 1960. This Act statutorily established that national forests must be administered for five broad categories of uses: outdoor recreation, range, timber, watershed, and wildlife and fish purposes.[123] No one use was given statutory priority over another use, and the Secretary of Agriculture was required to consider all uses when making management decisions.[124] Legislative history reveals that the legislative intent was to protect national forest resources from over-utilization as a result of economic or single-interest pressures.[125] MUSY, however, posed no substantive limitations on agency discretion. Interest groups attempting to compete with the dominant timber industry for use of national forest lands found that MUSY's requirements were easily met, so long as the Forest Service could show that it had "considered" other uses in making its management decision the statutory mandate was satisfied.

Nor did anything in MUSY prevent the Forest Service from continuing to practice "even-aged management," whereby the Forest Service allowed the clearcutting of national forests by timber interests.[126] This practice was particularly disturbing to interests other than the timber industry since it destroyed the land for most other uses and particularly for use as wildlife habitat.[127]

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120. Sierra Club v. Hardin, 325 F. Supp. 99, 122 (1971).

121. H.R. Rep. No. 1551, *reprinted in* 1960 U.S.C.C.A.N. 2377, 2380-81.

122. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 475-531 (1988)).

123. *Id.* at § 475.

124. 1960 U.S.C.C.A.N. at 2382.

125. *Id.*

126. Sierra Club v. Espy, 822 F. Supp. 356, 364 (1993).

127. *Id.* at 364-65.

3. National Forest Management Act of 1976

Public outcry over continuing abuses of managerial discretion led to further legislation.[128] Congress enacted the Forest and Rangeland Renewable Resources Planning Act[129] (FRRRPA) in 1974, which was amended by the National Forest Management Act[130] (NFMA) in 1976. Provisions in these statutes have been judicially interpreted as imposing substantive "outer boundaries" on the Forest Service's discretion, in terms of forest management evaluations and agency practices.[131] Specifically, NFMA imposed a substantive forest resource protection requirement.[132] Under NFMA, the Forest Service must "insure" that clearcutting practices be used only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resources."[133]

As a result of NFMA, recreational or conservation interest groups seeking to compete with timber interest groups for use of national forests now have a statutory right to seek judicial review of management decisions which adversely affect their interests (usually under the APA judicial review provision). They are also able, at least in some measure, to assert substantive claims. However, NFMA did no more than require that the Forest Service "treat the natural resources of our national forests as controlling, co-equal factors in forest management."[134] Neither NFMA nor similar statutes regulating management of other public lands resources[135] required that the management agency give priority of one

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128. *Id*.

129. Pub. L. No. 93-378, 88 Stat. 476 (1974) (codified as amended at 16 U.S.C. §§ 1600-76 (1988)).

130. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended at 16 U.S.C. §§ 1600-76 (1988)).

131. *Sierra Club*, 822 F. Supp. at 363.

132. 16 U.S.C. § 1640(g)(3)(F)(v).

133. *Sierra Club*, 822 F. Supp. at 363-64.

134. *Id*. at 364.

135. The National Environmental Policy Act of 1969 requires that any major federal proposal for action be accompanied by a consideration of its impacts on the environment. 42 U.S.C. §§ 4321-61. The Federal Land Policy and Management Act (FLPMA) of 1976 created a comprehensive land management statute for the 170,000,000 acres of public rangelands regulated by the Bureau of Land Management. 43 U.S.C. §§ 1701-1784 (1988); Natural Resources Defense Council Inc. v. Hodel, 618 F. Supp. 848, 848 (1985). Livestock grazing is authorized on 150,000,000 of those 170,000,000 acres. *Natural Resources Defense Council*, 618 F. Supp. at 848. FLPMA requires that public lands be managed in a manner that will "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archeological values; that, where appropriate, will preserve and protect certain public lands in their

interest over another, and, as late as 1987, it was still possible for the Forest Service to have one hundred percent of the timber base of a national forest (constituting 82% of the entire forest) under an "even-aged" management scheme.[136]

B. Regulation of Competition Within the Public Lands Market Under the Endangered Species Act

This Section examines the Act's language, legislative history, and it's judicial interpretation in light of the law of competitor standing in order to evaluate: (1) whether Congress intended to protect against competitive activity through provisions in the original Act and its subsequent amendments; (2) whether specific statutory provisions give certain plaintiffs the right to protect themselves from harmful competitive injury; and (3) the class of plaintiffs who can sue to require compliance with those provisions.

1. The Endangered Species Act of 1973

The legislative scheme by which Congress provided for the conservation of endangered and threatened species is simple and clearcut. The Secretaries of Interior and Commerce were instructed[137] to compile lists[138] of plants and animals that qualified as endangered and threatened species[139] based upon the best scientific and commercial data available.[140] Attainment of the status of a "listed species" entitled members of that species to special protections. The most important of those protections were: (1) a prohibition on the "taking"[141] of a listed species (defined very broadly as meaning to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any

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natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." 43 U.S.C. § 1701(a)(8). It also provided for judicial review of public land adjudication decisions. *Id.* at § 1701(a)(6). An excellent historical, legislative, and judicial history of the management of public rangelands may be found in *Natural Resources Defense Council.*, 618 F. Supp. at 848.

136. *Sierra Club*, 822 F. Supp. at 364 (citing Sierra Club v. Lyng, 694 F. Supp. 1260, 1263 n.2 (E.D. Tex. 1988)).

137. Pub. L. No. 93-205, § 4, 87 Stat. 884, 886-89, (1973) (codified as amended at 16 U.S.C. § 1533 (1988 & Supp. 1994)).

138. *Id.* at § (4)(c).

139. *Id.* at § 4(a).

140. *Id.* at § 4(b).

141. *Id.* at § 9(a)(1)(B).

such conduct")[142] under section 9 of the Act;[143] (2) a prohibition on violation of any regulation pertaining to listed species under section 9 of the Act[144]; and (3) the protections afforded by a duty of care imposed on federal agencies under section 7 of the Act.[145] The duty imposed by section 7 was the Act's primary protection mechanism, and required federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in destruction or modification of habitat of such species which is determined . . . to be critical."[146] These protections were qualified by only three limited exceptions: (1) a permit could be issued for the taking of listed species for scientific purposes or for propagation of the species in a controlled habitat; (2) a limited hardship exception could be granted to persons who had entered into contracts prior to the date a species was listed; and (3) an exception for Alaskan natives.[147] Enforcement of statutory and regulatory protections was guaranteed by the citizen suit provision[148] which granted "any person:" (1) the right to enjoin violations of these statutory provisions and their implementing regulations committed by any person including federal agencies;[149] and (2) the right to compel the Secretary to apply the prohibitions of the Act.[150]

a. Statutory Purposes

The congressional purposes underlying passage of the original Act in 1973 are articulated in section 2.[151] First, Congress finds that animal and plant species labor under a competitive disadvantage in the competition for use of natural resources: "fish, wildlife, and plants in the

142. Pub. L. No. 93-205, § 3(14), 87 Stat. 884, 886, (1973) (codified as amended at 16 U.S.C. § 1532 (1988 & Supp. 1994)).

143. *Id.* at § 9(a)(1)(B).

144. *Id.* at § 9(a)(1)(G).

145. Pub. L. No. 93-205, § 7, 87 Stat. 884, 892, (1973) (codified as amended at 16 U.S.C. § 1536 (1988 & Supp. 1994)).

146. *Id.* at § 7.

147. Pub. L. No. 93-205, § 10, 87 Stat. 884, 896-97, (1973) (codified as amended at 16 U.S.C. § 1539 (1988 & Supp. 1994)).

148. Pub. L. No. 93-205, § 11(g), 87 Stat. 884, 900-901, (1973) (codified as amended at 16 U.S.C. § 1540(g) (1988 & Supp. 1994)).

149. *Id.* at § 11(g)(1)(A).

150. *Id.* at § 11(g)(1)(B).

151. Pub. L. No. 93-205, § 2, 87 Stat. 884, 884-85, (1973) (codified as amended at 16 U.S.C. § 1531 (1988 & Supp. 1994)).

United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation."[152] Second, Congress finds that endangered or threatened animal and plant species are a matter of public interest and concern: "these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[153] Third, Congress states that the purposes of the Act are: (1) to provide a *means* whereby ecosystems upon which endangered and threatened species may be conserved; and (2) to provide a *program* for the conservation of such endangered and threatened species.[154] Fourth, as a matter of congressional policy, Congress places upon all federal agencies and departments a duty of care to protect endangered and threatened species: "[A]ll Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."[155]

However, for purposes of construing the legislative intent underlying the enactment of section 7, the section which imposes the duty of care of federal management agencies, the most important language is the language which the Act did not contain. Earlier endangered species statutes had qualified this duty of care by stating that agencies needed to seek to conserve endangered species only "insofar as is practicable and consistent with the[ir] primary purpose."[156] This language of discretion was omitted from the final version of the 1973 Act. The legislative history makes it clear that the omission was neither casual nor inadvertent. The House manager of the bill explained the bill's new mandatory requirement;

> [Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act. . . . The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and every agency of government is committed to see that those purposes are carried out. . . . [T]he agencies of Government can no

152. *Id.* at § 2(a)(1).
153. *Id.* at 2(a)(3).
154. *Id.* at § (2)(b).
155. *Id.* at § 2(c).
156. Endangered Species Act of 1966, § 1(b), 80 Stat. 926 (1966) (repealed).

> longer plead that they can do nothing about it. They can, and they must. The law is clear.[157]

Section 7 was judicially interpreted by the Court in *Tennessee Valley Authority v. Hill*.[158] The question before the Court was whether the Endangered Species Act of 1973 required a court to enjoin the operation of the virtually completed Tellico Dam, where the Secretary of Interior had determined that operation of the dam would eradicate the snail darter, an endangered species of fish.[159] After examining the language, history, and structure of the legislation, the Court found that it revealed, "beyond doubt,"[160] "an explicit congressional decision to require agencies to afford *first priority* to the declared national policy of saving endangered species."[161] Based on this finding, the Supreme Court held that the Endangered Species Act "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[162] The continuing vitality of the statutory policy underlying the *Hill* decision was recently confirmed in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*.[163]

Given the explicit language of the statute, the legislative history, and judicial interpretations, it is clear that Congress's intent was to protect listed species by giving them a competitive advantage in the public lands market. The competitive advantage is established by removing a federal agency's discretionary power to favor competing interests in the public lands market, even where an agency's "primary mission" is involved.[164] In essence, this advantage is analogous to the monopolistic grant of competitive advantage given holders of patents under the patent laws. Here, however, the public interest underlying the monopolistic grant is the public interest in protecting endangered and threatened species from competitive injury due to the species' inherent aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. The Act also is analogous to anti-

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157. 119 CONG. REC. 42913 (1973).
158. 437 U.S. 153 (1978).
159. *Id.* at 156.
160. *Id.* at 174.
161. *Id.* at 185 (emphasis added).
162. *Id.*
163. 115 S. Ct. at 2413.
164. *See Sierra Club*, 822 F. Supp. at 364 (describing the Endangered Species Act as setting "mandatory constraints on all land use decisions that might adversely affect the habitat of endangered species").

competition statutes in that it regulates all competitive activity in the public lands market whenever endangered species are involved.

b. Rights Created by Statute

Following the reasoning of *Western Pacific California R.R. v. Southern Pacific*[165] and *Hardin v. Kentucky Utilities Co.*,[166] since the primary objective of the Act in general, and section 7 in particular, is to protect listed species from competitive injury within the public lands market; the Act and section 7 should be interpreted as allowing qualified plaintiffs to challenge agency actions by asserting that the action threatens to diminish or eliminate the competitive advantage granted by statute. Examples of agency actions which would have the effect of diminishing or eliminating the competitive advantage would include the failure of the Secretary to properly designate a listed species, since the failure to list completely removes the ability of a species to compete effectively, and the failure of a federal agency to give listed species first priority when decisions regarding the use of public lands are involved.

c. Plaintiffs Who May Enforce Statutory Rights

A plaintiff will be able to enforce these statutory rights if he or she has suffered a constitutionally sufficient injury and can meet the zone of interests test. A plaintiff should be found to have asserted a constitutionally sufficient injury if he or she alleges: (1) that the agency action would permit new or increased competition for the natural resources within the public lands market; (2) that he or she is a competitor within that market; and (3) that he or she would suffer competitive harm as evidenced by a diminishment in his or her ability to use or enjoy the public lands in question.

Plaintiffs will be able to meet the zone of interests test only if their interests fall within the zone of interests protected by the Endangered Species Act. As the Act was originally enacted in 1973, it is clear that plaintiffs with an aesthetic, ecological, educational, historical, recreational, or scientific interest in the preservation of listed species, or their critical habitat, are protected under the Act as "intended beneficiaries." As such, they would have standing to enforce the

165. 284 U.S. 47 (1931).
166. 390 U.S. 1.

provisions of the statute on the basis of competitive injury to those interests. However, suing on the basis of competitive injury to economic interests is problematic.

Nothing in the Act or its legislative history indicates an intent to protect economic interests from competitive injury caused by competition with endangered species for the use of public lands. Therefore, such parties cannot claim to be "intended beneficiaries" under the Act and should be denied standing on that basis. However, a party claiming injury to economic interests could attempt to assert that he or she has standing on the basis that he or she is a "suitable challenger" because his or her interests coincide with the interests protected by the statute. In other words, he could claim standing on the basis that he has an economic interest in the preservation of the species.

2. The Endangered Species Act Amendments of 1978 and 1979

Following the Court's decision in *Tennessee Valley Authority v. Hill*, Congress substantially amended the Endangered Species Act in 1978.[167] First, Congress added "exemption" provisions to deal with "unresolvable conflicts."[168] These provisions create an avenue for an agency to proceed with a project even when the Secretary had determined that the agency would violate its statutory duty by going forward.[169] Under these provisions, a review board studies the data and prepares a report for the Endangered Species Committee which was composed of seven cabinet level officials.[170] Five votes were required to grant an exemption to the federal agency in question.[171] Second, section 7 was also amended to include "consultation" procedures.[172] These procedures are designed to insure that a federal agency did not violate its duty by taking an action which would jeopardize the existence, or a species or result in destruction, or adverse modification of the species' critical

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167. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §§ 1531-40 (1988 & Supp. 1994)).

168. Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752 (1978) (codified as amended at 16 U.S.C. §§ 1531-40 (1988 & Supp. 1994)).

169. *Id.*

170. *Id.*

171. *Id.* Lastly, as a matter of historical interest, in the section of the amendments titled "Certain Antique Articles," Congress authorized an exemption which allowed the Tennessee Valley Authority to operate the Tellico Dam. Pub. L. No. 95-632, § 5, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. § 1539 (1988 & Supp. 1994)).

172. *Id.* at § 3.

habitat.[173] The consultation process begins when a development (action) agency is advised by a biological agency that a listed species resides in the area of an intended project.[174] Either the agency responsible for the project or the applicant for a federal permit or license then becomes responsible for preparation of a biological assessment.[175] Based on this and other information, the Secretary issues a biological opinion as to whether or not a project would be likely to jeopardize a species or adversely modify its critical habitat.[176] If the project would do so, the Secretary suggests reasonable and prudent alternatives to the project to avoid the threat.[177] Third, Congress amended section 4 to include requirements for designation of critical habitat,[178] with a specific provision that required the Secretary to consider "the economic impact . . . of specifying any particular area as critical habitat."[179] Finally in 1979, the language of section 7, was amended as follows:

> 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 (hereinafter in this section referred to as an "agency action") *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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, *unless such agency has been granted an exemption for such action by the Committee* . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.[180]

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173. *Id.*

174. H.R. Rep. No. 563, 97th Cong., 2nd Sess. 10-11 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810.

175. *Id.*

176. *Id.*

177. *Id.*

178. Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764-3766 (1978) (codified as amended at 16 U.S.C. §§ 1533 (1988 & Supp. 1994)).

179. *Id.* at § 11(7). The Secretary was also directed to develop and implement recovery plans designed to return endangered and threatened species to healthy population levels. *Id.* at § 11(5).

180. Pub. L. No. 96-159, § 4, 93 Stat. 1225, 1226 (1979) (codified as amended at 16 U.S.C. § 1536 (1988 & Supp. 1994)) (emphasis added).

a. Statutory Purposes

Legislative history indicates that the primary congressional purpose underlying these amendments was to introduce "some flexibility into the Act."[181] In particular, this "flexibility" was to be accomplished through the exemption procedures whereby "[f]ederal agencies may be considered for an exemption from the Act's mandate that they not jeopardize the continued of any endangered species or adversely modify the critical habitat of such species."[182] Furthermore, a balance between conservation and development interests during the exemption process was achieved by allowing the exemption committee to consider economic considerations when choosing between alternatives.[183]

"Flexibility" was also increased by the amendments to section 4 which gave the Secretary the discretion to alter a critical habitat designation based upon the designation's economic impact.[184] Legislative history indicates that this provision was triggered by the holding in *Tennessee Valley Authority v. Hill,* which stated that listed species must be given priority over primary missions of federal agencies.[185] The purpose of the new provision was to ameliorate the effect of the Court's holding by giving the Secretary the power to balance conservation and development interests when making critical habitat designations.[186] Specifically, the provision was intended to allow the Secretary to make critical habitat designations based upon whether "the economic benefits of excluding a portion of critical habitat outweigh the benefits of designating the area as part of critical habitat."[187] Essentially, the amendments empowered the Secretary to exclude all or part of a biologically critical area on purely economic grounds.

However, legislative history also indicates that Congress intended for the consultation process to remain a purely biological assessment.

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181. H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9453.

182. *Id.*

183. H.R. Conf. Rep. No. 1804, 95th Cong., 2nd Sess. 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9487.

184. Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764-66 (1978) (codified as amended at 16 U.S.C. §§ 1533 (1988 & Supp. 1994)).

185. H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 7-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9457-61.

186. H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 16 (1978), 16 (1978) *reprinted in* 1978 U.S.C.C.A.N. 9453, 9466.

187. *Id.*

The consultation procedures adopted by Congress simply restated the existing law regarding section 7.[188] Under that law, the determination that a particular activity violates the mandate of section 7 "is made irrespective of the economic importance of the activity."[189]

b. Rights Created by Statute

Again applying the analysis of *Hardin v. Kentucky Utilities Co.*,[190] the amendments concerning the critical habitat designation process and the exemption process are clearly intended as competition, limiting provisions designed to protect competitors who have economic interests in using public lands. As such, these provisions should be interpreted as allowing qualified plaintiffs to challenge either critical habitat designations or the exemption process on the basis that the agency failed to properly consider economic impacts.

c. Plaintiffs Who May Enforce Statutory Rights

A plaintiff seeking to challenge either a critical habitat designation or an exemption process should be found to have asserted a constitutionally sufficient injury if he or she alleges: (1) that the agency action would permit new or increased competition within the relevant geographic public lands market;[191] (2) that he or she is a competitor within that market; and (3) that he or she would suffer competitive harm as evidenced by the possibility of future economic injury such as loss of profits or fear that an existing business will be destroyed.[192] Such plaintiffs should have no difficulty in satisfying the zone of interests test

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188. H.R. Conf. Rep. No. 1804, 95th Cong., 2nd Sess. 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486.

189. H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9461. Congress also noted that while an adverse biological opinion did not necessarily mandate any particular action by the acting agency, judicial decisions interpreting Section 7 indicated that the biological opinion would ordinarily be given great weight by the courts. *Id*. at 12. "Federal agencies proceeding with an action in the face of an adverse biological opinion will be doing so at their peril." *Id*.

190. 390 U.S. 1 (1968).

191. *Association of Data Processing Service Orgs.*, 397 U.S. at 152; *Arnold Tours, Inc.* 400 U.S. at 45.

192. Westport Taxi Serv. Inc. v. Adams, 571 F.2d 697, 700-01 (1978), *cert. denied*, 439 U.S. 829 (1978) (holding that operators of "exclusive-ride" taxi service had standing to challenge federal grant which would support, as a demonstration project, a competing "shared-ride" taxi service because they asserted a well founded fear their business would be destroyed).

because their interest in protecting themselves from competitive injury is explicitly protected under the new provisions of the Act.

However, it should be noted that nothing in the amendments or the legislative history indicates that Congress intended for such plaintiffs to be able to challenge the consultation process on the basis of competitive injury to economic interests.

3. The Endangered Species Act Amendments of 1982

Four years later[193] the Act was amended again in response to environmental and industry concerns.[194] First, section 4 was amended to require: (1) that determinations regarding listing or delisting of sections must be made "solely" on the basis of the best scientific and commercial data available; and (2) that action on listing and delisting proposals taken place within a certain time frame.[195] To promote enforcement of these provisions, the Secretary's duties were specifically made subject to judicial review to determine whether the Secretary's action was arbitrary or capricious in light of scientific and commercial evidence available.[196] Furthermore, the citizen suit provision was amended to authorize private actions "against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary . . . ."[197] Second, amendments streamlined both the consultation and exemption procedures. One set of amendments provided for an early consultation during the planning stages of a process, which would signal to a prospective applicant whether a conflict was likely to occur.[198] Other amendments streamlined the exemption process by making it possible for applicants to enter the exemption process upon denial of a permit.[199]

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193. Pub. L. No. 97-304, 96 Stat. 1411 (1982) (codified as amended in 16 U.S.C. § 1533 (1988 & Supp. 1994)).

194. H.R. Rep. No. 567, 97th Cong., 2nd Sess. 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2809.

195. Pub. L. No. 97-304, § 2, 96 Stat. 1411-1416 (1982) (codified as amended in 16 U.S.C. § 1533 (1988 & Supp. 1994)).

196. *Id.*

197. Pub. L. No. 97-304, § 7, 96 Stat. 1411, 1425 (1982) (codified as amended in 16 U.S.C. § 1540(g)(1)(C) (1988 & Supp. 1994)).

198. Pub. L. No. 97-304, § 4, 96 Stat. 1411, 1417-20 (1982) (codified as amended in 16 U.S.C. § 1538 (1988 & Supp. 1994)).

199. *Id.*

a. Statutory Purposes

Legislative history indicates that Congress had two purposes in amending section 4. First, Congress intended to ensure that decisions in every phase of the listing or delisting would be based "solely" on biological and not economic criteria.[200] Congress specifically noted that "economic considerations have no relevance to determinations regarding the status of species."[201] Second, Congress intended to ensure that prompt action would be taken to determine whether a species required protection.[202] Furthermore, these amendments to section 4 were intended to replace the Secretary's prior discretionary authority with mandatory, nondiscretionary duties[203] that could be enforced by private parties.

Legislative history also indicates that the consultation procedures in section 7 came under strong attack from industry interests.[204] Industry groups described the consultation procedures as "an obstacle to development."[205] Industry spokesman urged that they should be given the opportunity to "pit the value of protecting a species against the cost of stopping development" during the consultation process, and that the decision whether or not to proceed should rest in the hands of the development agency and not the biological agency.[206] These arguments were unpersuasive. The committee made an affirmative decision "not to change" the substantive duty of section 7.[207] Therefore, endangered species retain their competitive advantage within the public lands market whenever federal agency action is involved.

b. Rights Created by Statute

Since Congress has specifically indicated that the Secretary's new mandatory listing duties are enforceable by private parties, qualified plaintiffs should have standing to sue on the basis that the Secretary has failed to comply with these procedural provisions.

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200. H.R. Con. Rep. No. 835, 97th Cong., 2nd Sess. 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2860.

201. *Id.*

202. *Id.*

203. H.R. Conf. Rep. No. 835, 97th Cong., 2nd Sess. 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2860.

204. H.R. Rep. No. 567, 97th Cong., 2nd Sess. 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2813.

205. *Id.*

206. *Id.*

207. *Id.*

c. Plaintiffs Who May Enforce Statutory Rights

Since Congress has clarified that listing and delisting determinations are to be based "solely" on biological criteria, and that economic considerations are irrelevant, plaintiffs claiming competitive injury to economic interests are not "intended beneficiaries" of the statutory provisions. Therefore, such plaintiffs should fail the zone of interests test unless they can show that they are suitable challengers on the basis that they have an economic interest in the preservation of the species.

VII. COMMENTARY

Increasingly, courts are encountering plaintiffs who claim that economic injury should confer standing to allege that the government has violated provisions of the Endangered Species Act. Courts have struggled with this politically charged issue and have reached profoundly divergent results.[208] By suggesting that the Endangered Species Act is a "competition statute," and that the citizen suit provision confers standing on plaintiffs alleging competitive injury to economic and noneconomic interests, this author offers a principled and doctrinally sound means for reaching decisions in these cases.

Summarizing the findings of this Comment's analysis, plaintiffs who qualify as "intended beneficiaries" or "suitable challengers" under the Act will have standing to enforce certain of the Act's provisions.

Specifically, plaintiffs can qualify as "intended beneficiaries" of the Act if they have an aesthetic, ecological, educational, historical, recreational, or scientific interest in the preservation of listed species or their critical habitat. Those who qualify as "intended beneficiaries" should have standing to challenge any agency action which will harm the species or have the effect of destroying or diminishing the competitive advantage granted to listed species by virtue of the Act.

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208. *Compare* Alabama-Tombigbee Coalition v. Fish and Wildlife Service, 1993 WL 646409 (N.D. Ala. 1993) (holding that plaintiffs had standing to challenge listing decision because "to limit standing to public interest groups who complain of the possible endangerment of a species, asserting an aesthetic, or a moral, or a scientific, or a philosophical interest, is both unfair and one-sided, and invites disingenuous pleadings by parties who have legitimate interests of whatever kind") *with* Idaho Farm Bureau Federation, 1995 WL 548335 (D. Idaho 1995) (holding that plaintiffs asserting economic injury lacked standing to challenge listing decision because the plaintiff's economic interests were not protected by the Endangered Species Act because they had no genuine interest in protecting the species).

Plaintiffs can qualify as "suitable challengers" under two circumstances. First, they may qualify if they can show that: (1) they have an economic interest in confining a listed species competitive advantage within congressionally imposed limitations; and (2) that they are challenging an agency's action under a provision of the Act which specifically protects the interests of economic competitors. The provisions which protect economic competitive interests are those regulating: (1) critical habitat designations; and (2) the exemption process. However, in critical habitat designation cases, this type of "suitable challenger" has standing only to challenge the Secretary's failure to "consider" economic impacts; he cannot challenge the Secretary's decision to include area within critical habitat even though the decision will result in severe economic impacts since that decision is committed to agency discretion by law.

The second circumstance under which a plaintiff alleging competitive economic injury might be able to qualify as "suitable challenger" is if he or she: (1) alleges an economic interest in the preservation of the species; and (2) challenges an agency's action on the basis that it will harm the endangered species in question. This type of "suitable challenger" will have standing to attack any agency action which he alleges will harm the species; however, he or she will not have standing to complain about his or her economic injury because nothing in the Endangered Species Act or its legislative history indicates that Congress intended to confer a cause of action for that purpose.

Acceptance of this analysis is supported by a number of considerations. First, and most importantly, it answers Justices Kennedy's and Souter's concern that the Act failed to identify the injury the Act sought to vindicate and failed to relate that injury to the class of persons entitled to bring suit. In fact, legislative history clearly indicates that Congress: (1) primarily sought to protect endangered species from competitive injury by allowing "intended beneficiaries" to challenge agency actions that would diminish the competitive advantage granted by the Act; and (2) secondarily sought to allow users of public lands with economic interests to protect those interests from competition with endangered species in certain narrowly defined circumstances. Second, a large and well-established body of case law governing competitor suits disputes already exists. This body of law provides a logical and reasonable framework for standing analyses in Endangered Species Act cases. Third, the analysis suggested by this comment requires courts to

look to congressional intent underlying specific statutory provisions and thereby legitimizes the process by which standing decisions are made. Courts will no longer be able to issue broad brush denials of standing which prevent legitimate plaintiffs from protecting interests that Congress undeniably sought to protect.[209] These broad brush denials have had the deleterious effect of opening courts to the charge that standing was denied simply because the court disliked a particular plaintiff's motivation.[210] Fourth, this methodology injects an element of much needed certainty into decisions regarding the status of plaintiffs alleging economic injury in Endangered Species Act cases. Fifth, this analysis does not conflict with current Endangered Species Act jurisprudence but merely refines that jurisprudence by requiring courts to focus on congressional intent underlying specific statutory provisions.[211]

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209. *See, e.g.*, *Bennett*, 63 F.3d at 915 (holding that ranch operators and irrigation districts who made use of reservoirs from commercial purposes lacked standing to challenge the government's violation of *any* provision of the Act including the provision which required that economic impacts be considered when the agency made its determination that the reservoirs constituted critical habitat for endangered species of fish).

210. Jeffrey W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345 (1993).

211. *See, e.g.*, *Bennett*, 63 F.3d at 915 (holding that plaintiffs with competing commercial interests in the use of natural resources who allege only an interest in avoiding the burdens of the preservation effort are denied standing under the Endangered Species act because such suits are more likely to frustrate rather than further the Act's statutory objectives); *Idaho Farm Bureau Federation*, 1995 WL 548335, at *14 (holding that nonprofit organizations representing agricultural interests of farmers and ranchers lacked standing to challenge listing decision on basis of economic injury to their competing economic interests); *Pacific Northwest Generating Cooperative*, 38 F.3d at 1058 (holding that hydropower purchasers had standing to allege that the government's recommended water flow regulations would be of dubious benefit to endangered salmon species where the plaintiffs asserted a genuine economic interest in preserving the salmon; however, plaintiffs lacked standing to complain about the additional costs resulting from the regulated water flows because nothing in the Endangered Species Act conferred a cause of action for that purpose).