NOTES

MOUNTAIN STATES LEGAL FOUNDATION V. GLICKMAN: ENVIRONMENTAL STANDING CONTINUES ITS TREK AS A MOVING TARGET

I. OVERVIEW

In 1972, the Forest Service discovered that a number of lodgepole pine stands in the Upper Yaak River Drainage Region of Montana's Kootenai National Forest were infested by mountain pine beetles which were killing the trees.[1] The Forest Service sought to accelerate the region's timber harvesting on the grounds that dead trees add to wildfire risk and rapidly lose their commercial value.[2] After beginning construction and reconstruction of logging roads, the Forest Service was enjoined from proceeding by the Ninth Circuit Court of Appeals until such time as the Forest Service completed an environmental impact statement (EIS).[3] The final EIS, completed in 1990, considered fourteen alternate plans, all with different levels of timber harvesting and road construction.[4] The EIS recommended Alternative 9B, which contained the lowest level of logging, but the Forest Supervisor picked Alternative 9A.[5] The Forest Service justified its choice on the grounds that it would allow the highest level of timber harvesting while meeting the requirements of the Endangered Species Act (ESA).[6]

The plaintiffs, two nonprofit corporations, several Montana and Idaho municipalities, and a lumber company filed suit in the United States District Court for the District of Columbia after the Regional Forester upheld the Forest Supervisor's choice of Alternative 9A.[7] The plaintiffs attacked the choice of the Forest Supervisor, asserting that Alternative 6 should have been chosen.[8] The plaintiffs claimed that the

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1. *See* Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1231 (D.C. Cir. 1996).
2. *See id.*
3. *See id.*; Save the Yaak Comm. v. Block, 840 F.2d 714 (9th Cir. 1988). The EIS requirement mandated by the Ninth Circuit is a requirement enumerated in the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332 (1994).
4. *See Mountain States Legal Found.*, 92 F.3d at 1231.
5. *See id.*
6. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)). *Mountain States Legal Found.*, 92 F.3d at 1231.
7. Mountain States Legal Found. v. Glickman, 922 F. Supp. 628, 630 (D.D.C. 1995).
8. Alternative 6 projected sales of 151 million board feet (MMBF) of lumber, while Alternative 9A projected only 90 MMBF. *See Mountain States Legal Found.*, 92 F.3d at 1231.

government acted arbitrarily and capriciously by rejecting alternatives with higher levels of timber harvesting, disregarding necessary procedures, and that the Forest Service did not sufficiently consider important factors.[9] The plaintiffs based their claim on the Administrative Procedure Act (APA), the ESA, the National Environmental Policy Act (NEPA), and three federal forest management statutes: the Organic Act, the Multiple-Use Sustained-Yield Act, and the Resources Planning Act.[10]

The district court dismissed most of the plaintiffs' pleadings for want of standing, and the rest on summary judgment for want of standing, and in the alternative, on the merits.[11] The District of Columbia Circuit Court of Appeals held that: (1) the plaintiffs had constitutional standing based on the grounds of injuries against their economic, aesthetic, and environmental interests; (2) the plaintiffs, who use the national forests for recreational purposes, are within the zone of interests protected by NEPA and the forest management statutes,[12] and; (3) plaintiffs whose economic interests are impacted by the decision of the Forest Service are within the zone of interests protected by the ESA.[13] *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996).

II. BACKGROUND

Article III of the United States Constitution provides the basis for limiting federal judicial power to adjudication of "cases" and "controversies."[14] This provision has given rise to the standing doctrine, which places a critical limitation on judicial authority.[15] Standing is designed to control access to the federal courts by creating necessary prerequisites claimants must meet before the federal courts will adjudicate the merits of a case. The Constitution provides little help in defining the standing doctrine, leaving the courts broad freedom to

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9. *See id*. at 1232.

10. *Mountain States Legal Found.*, 92 F.3d at 1231-32 (citing Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1994); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994); Organic Act, 16 U.S.C. §§ 473-482, 551 (1994); Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1994); Resources Planning Act, 16 U.S.C. §§ 1600-1614 (1994)).

11. Mountain States Legal Found. v. Glickman, 922 F. Supp. 628, 631-35 (D.D.C. 1995).

12. In the alternative, the court found that since the plaintiffs use the national forests as their primary source of lumber, they are within the zone of interests protected by the forest management statutes. *Mountain States Legal Found.*, 92 F.3d at 1236.

13. After finding that the plaintiffs had standing, the court concluded that the plaintiffs' meritorious challenges based on the forest management statutes, the ESA, and NEPA failed. *Mountain States Legal Found.*, 92 F.3d at 1228.

14. U.S. CONST. art. III, § 2.

15. *See* Allen v. Wright, 468 U.S. 737, 737-38 (1984).

interpret what is justiciable and what is not.[16] Standing consists of both constitutionally mandated requirements[17] and prudential limitations developed by the courts.[18]

In *Lujan v. Defenders of Wildlife*, the Supreme Court placed a damper on standing in environmental cases by interpreting standing's imminence of injury requirement very narrowly.[19] The plaintiffs in *Lujan* challenged a regulation of the Secretary of the Interior, who promulgated a rule which limited the coverage of Section 7(a)(2) of the ESA.[20] The plaintiffs asserted that they had standing on the basis of the ESA's citizen suit provision.[21] The court held that although the plaintiffs had visited an area protected by the regulation, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'"[22] The Court further held that the ESA's citizen suit provision, to the extent it provides standing to any citizen, is unconstitutional.[23] By

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16. *See* Martha Colhoun & Timothy S. Hamill, *Environmental Standing in the Ninth Circuit: Wading through the Quagmire*, 15 PUB. LAND L. REV. 249, 250 (1994); *see generally* Monica Reimer, Comment, *Competitive Injury as a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109, 111 (1995).

17. To fulfill constitutional standing requirements, a plaintiff must show that (1) he has personally suffered an actual or threatened injury, (2) the injury must be fairly traceable to the challenged action, and (3) the injury is likely to be redressed by a favorable decision from the court. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). The "injury in fact" component requires that the injury is "(a) concrete and particularized, and (b) actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The injury can be an economic, aesthetic, environmental, conservational, or recreational injury. *See* Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Causation, the second necessary element of constitutional standing, will be met only if the injury is "fairly traceable" to the defendant's allegedly unlawful conduct. *Allen*, 468 U.S. at 751. There is, however, no requirement that the challenged action directly affect the plaintiff, but the causation element will be satisfied only when the alleged action can be logically tied with the injury. *See* Flast v. Cohen, 392 U.S. 83, 102 (1968); *Allen*, 468 U.S. at 757. The final component of constitutional standing, redressability, requires the plaintiffs to show that the alleged injury is "likely" to be redressed by the requested relief, and that it is not merely a "speculative" supposition. Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); *see also Lujan*, 504 U.S. at 561.

18. Prudential limitations, on the other hand, are based on prudent judicial concerns requiring a plaintiff to assert his own rights relating to a personalized interest which is within the *zone of interests* protected or regulated by the statute in question. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). *See* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

19. *Lujan*, 504 U.S. at 562-67.

20. *Id.* at 588-59. *See* 16 U.S.C. § 1536(a)(2).

21. *See Lujan*, 504 U.S. at 558-60; 16 U.S.C. § 1540(g).

22. *Lujan*, 504 U.S. at 564 (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

23. *Id.* The Court stated that "under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights. . . ." *Lujan*, 504 U.S. at 577 (quoting Stark v. Wickard, 321 U.S. 288, 310 (1944)). The Court noted that individual rights are not rights that can be legislatively conferred to the public at large. *Id*. at 578.

interpreting injury in fact narrowly, the *Lujan* Court has made environmental claims increasingly difficult to adjudicate.

In the wake of *Lujan*'s seemingly decisive language regarding the unconstitutionality of citizen suit provisions, courts appear to continue to recognize the validity of these provisions, relying primarily on congressional intent.[24] *Lujan*'s effect on standing in general, however, has prompted mixed results. Some courts have followed *Lujan* almost verbatim,[25] while other courts appear to discount the impact of *Lujan*.[26]

After jumping the hurdle of constitutional standing requirements, a plaintiff must then satisfy prudential standing requirements, which are entirely judicially imposed.[27] To withstand prudential standing scrutiny, a claimant must fall within the zone of interests protected by the statute challenged.[28] The claim must involve the claimant personally, not as a third party.[29] Nor may the claim be a generalized grievance shared by all citizens.[30] Courts assert these conditions to "avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[31]

The zone of interests limitation was first introduced in *Association of Data Processing Service Organizations v. Camp*, where the Court held that in addition to constitutional limitations, the inquiry into standing involves the "question [of] whether the interest sought to be protected by the complainant is arguably within the zone of interests to be

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24. There have been at least three cases since *Lujan* that have rejected contentions that citizen suit provisions are unconstitutional. *See* Atlantic States Legal Found. v. Buffalo Envelope, 823 F. Supp. 1065, 1072-77 (W.D.N.Y. 1993); *see also* Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1136-38 (E.D. Pa. 1993); Atlantic States Legal Found. v. Whiting Roll-Up Door Mfg. Corp., No. 90-CV-11095, 1993 WL 114676, at *10 (W.D.N.Y. Mar. 31, 1993).

25. Sierra Club v. Robertson, 28 F.3d 753, 759 (8th Cir. 1993) (rejecting standing on the grounds that the Sierra Club could not show that the land and resource management plan that plaintiffs challenged threatened "imminent environmental harm."). *See also* Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 810 (11th Cir. 1993).

26. *See* Alaska Ctr. for the Env't v. Browner, 20 F.3d 981, 985 (9th Cir. 1994). In *Alaska Center for the Environment*, the plaintiffs sought statewide compliance with the Clean Water Act. The defendants claimed that the plaintiffs' injury was limited to the streams the plaintiffs actually used. The court granted standing to the plaintiffs based upon all of the waters in Alaska on the grounds that to deal only with a portion of the waters would be contrary to congressional intent and would be placing the court's own priorities on the ESA by limiting the scope of the remedy. *Id.*

27. *See* Allen v. Wright, 468 U.S. 757, 751 (1984).

28. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990); *see also* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

29. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975).

30. *See Lujan*, 504 U.S. at 576-77; *see also Camp*, 397 U.S. at 153.

31. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979).

protected or regulated by the statute or constitutional guarantee in question."[32] The Court emphasized that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action."[33] The courts look to the text, structure, and legislative history of the challenged statute to determine whether the interest asserted by the claimant is within the zone of interests protected.[34] The courts have taken this approach because the zone of interests issue turns on congressional intent.[35]

The Supreme Court revisited the zone of interests question in *Clarke v. Securities Industry Association*.[36] The Court, finding that there is a presumption that agency action is reviewable, broadened the scope of the zone of interests test by denying review only when "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."[37] In determining the purposes of the statute, the Court pointed out that there is no need to limit the inquiry to the specific provision invoked by the plaintiffs; instead, the Court can look at any provision bearing on the overall purpose of the statute.[38] The Court concluded that the test is not meant to be particularly demanding and that "there need be no indication of congressional purpose to benefit the would-be plaintiff."[39] Four years later, the Supreme Court narrowed the *Clarke* interpretation in *Air Courier Conference v. American Postal Workers Union*, where it declared that the zone of interests test requires some affirmative showing that the would-be plaintiff was intended by Congress to be a beneficiary of the challenged statute.[40]

III. THE COURT'S DECISION

In the noted case, the District of Columbia Circuit Court of Appeals first identified the need to establish both constitutional and prudential standing and stated that the injury examined in the constitutional standing inquiry must be the same injury examined in the

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32. *Camp*, 397 U.S. at 153.
33. *Id.* at 154.
34. *See* Clarke v. Securities Indus. Assoc., 479 U.S. 388, 400 (1987).
35. *Id.*
36. *Id.* at 388-417.
37. *Id.* at 399.
38. *Clarke*, 479 U.S. at 401.
39. *Id.* at 399-400.
40. Air Courier Conference v. American Postal Workers Union, 498 U.S. 517, 524-27 (1991).

prudential standing inquiry.[41] The court defined the three factors of constitutional standing: injury in fact, causation, and redressability.[42] The court then determined that the plaintiffs sufficiently fulfilled these elements to withstand summary judgment in two distinct ways.[43]

The evidence at trial established that plaintiff Owens & Hurst Lumber Company obtained one-third of its timber from the Upper Yaak River Drainage Region, and that after the Forest Service announced plans to allow logging of 300 million board feet of lumber from the region, the announced plans were postponed.[44] As a result, the company's mill was temporarily shut down and twenty-five workers were laid off.[45] Relying on *Lujan*, the circuit court held that the evidence was sufficient for constitutional standing purposes since the cutbacks clearly inflicted injury on the lumber company's economic health and would be redressed by a court order reducing the cutbacks.[46] The circuit court rejected the district court's analysis that the forest management statutes do not recognize economic injuries in a specified level of timber harvesting.[47] The district court interpreted *Lujan*'s use of the phrase "legally cognizable"[48] to reinstate the now defunct legal right test.[49] The district court ruled against standing because the plaintiffs did not have a legal right to a specified level of timber.[50] The circuit court rejected this conclusion, citing the *Camp* Court's rejection of the legal right test and adding that the plaintiff's right to federal timber contracts was no less of a right than the right of the *Lujan* plaintiffs to view crocodiles, which the *Lujan* Court found unnecessary for standing purposes.[51] The circuit court then rejected the district court's conclusion that the injury is not redressable.[52] The district court held that since the region in question was designated a critical habitat, the requested relief of Alternative 6 was not a viable remedy because the ESA prohibited its implementation.[53] After acknowledging that there is some confusion in the case law concerning

41. Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1232 (D.C. Cir. 1996).
42. *Id.*
43. *Id.*
44. *See id.*
45. *See Mountain States Legal Found.*, 92 F.3d at 1232.
46. *Id.* at 1232-33.
47. *Id.* at 1233.
48. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).
49. Mountain States Legal Found. v. Glickman, 922 F. Supp. 628, 631-32 (D.D.C. 1995).
50. *Id.*
51. *Mountain States Legal Found.*, 92 F.3d at 1233; Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); *Lujan*, 504 U.S. at 562-63.
52. *Mountain States Legal Found.*, 92 F.3d at 1233-34.
53. *Mountain States Legal Found.*, 922 F. Supp. at 633.

whether legal limits are part of the redressability calculation, the circuit court disagreed with the district court's holding, finding that:

> the alleged impediment to redress stems not from a defect in the court's institutional power to order a specific remedy but merely from the interplay of various statutes bearing on the substantive validity of the Forest Service decision. . . . [T]o treat it as an impairment of redressability would seemingly allow any merits defect . . . to defeat their standing.[54]

The court justified this distinction by relying on the rule enumerated in *In re Thornburgh*, in which the District of Columbia Circuit Court of Appeals held that the redressability inquiry is simply a matter of whether the relief sought would redress the injury.[55] Applying this rule, the court in *Mountain States* answered the inquiry in the affirmative.[56]

Plaintiffs also established constitutional standing on the basis of damage to aesthetic and environmental interests from increased risk of wildfire in the Kootenai National Forest.[57] At least one member of the plaintiff organization Communities for a Great Northwest resided in a community in the middle of the Kootenai National Forest and used the forest for activities such as hiking, camping, and fishing.[58] The court, relying on *Sierra Club v. Morton*,[59] found that the "[p]laintiffs' aesthetic and environmental interests in having such areas free of devastating forest fire are clearly sufficient for Article III standing."[60] However, the court did require the plaintiffs to show that the Forest Service's decision posed a threat to those interests.[61] After an analysis of probabilities of increased risk of wildfires resulting from the choice of Alternative 9A over Alternative 6 by the Forest Service, the court found it determinative that the Forest Service went to great lengths in considering the different risks of wildfire among the alternate plans:

> [W]hen an agency has devoted a large portion of its decisionmaking resources to comparing alternatives' different effects on wildfire, and pointed to non-trivial variations in risk, it would take some rather dramatic

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54. *Mountain States Legal Found.*, 92 F.3d at 1234.
55. *Id.* at 1233. *In re* Thornburgh, 869 F.2d 1503, 1511 (D.C. Cir. 1989).
56. *Mountain States Legal Found.*, 92 F.3d at 1234.
57. *See id.* at 1234-35.
58. *See id.* at 1234.
59. 405 U.S. 727, 734 (1972).
60. *Mountain States Legal Found.*, 92 F.3d at 1234.
61. *Id.*

> piece of information to persuade us that the difference is so trivial that persons physically close to the potential fire cannot question the decision.[62]

Because at least one of the plaintiffs' members hikes and camps in the Kootenai and lives in the town adjoining the area, the court concluded that if there was a wildfire, the plaintiffs had sufficiently established that they would be injured by the fire.[63]

After determining that the plaintiffs had constitutional standing, the circuit court considered the prudential standing requirements.[64] The court acknowledged that the plaintiffs had to fall within the zone of interests that the challenged statutes were intended to protect.[65] In finding that the plaintiffs fell within the zone of interests protected by NEPA, the court noted that hiking was clearly an interest NEPA was intended to protect, and that simply because plaintiffs had economic interests at stake does not preclude NEPA protection.[66] Because some of the plaintiffs did regularly hike in the region in question, and thus fell within the zone of interests protected by NEPA, the court found it unnecessary to determine whether economic interests were protected by NEPA.[67]

The court also found that the plaintiffs fell within the zone of interests of the forest management statutes on two separate grounds. First, Congress clearly intended for the national forests to play a large role in supplying commercial lumber.[68] Because the plaintiffs relied on the national forests as their primary source of lumber, their interests are clearly among the interests the forest management statutes were designed to protect.[69] Second, the forest management statutes reflect an intention to advance outdoor recreation, an interest which encompasses activities that plaintiffs engaged in, including hiking and camping.[70]

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62. *Id.* at 1234-35.
63. *Id*. at 1235.
64. *Mountain States Legal Found.*, 92 F.3d at 1235.
65. *Id*.
66. *Id*. at 1235-36.
67. *Id*. at 1236.
68. *Mountain States Legal Found.*, 92 F.3d at 1236. *See* 16 U.S.C. § 475 (1994). The Organic Act provides in part: "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flow, and to *furnish a continuous supply of timber* for the use and necessities of citizens of the United States. . . ." *Id.* (emphasis added).
69. *See Mountain States Legal Found.*, 92 F.3d at 1236.
70. *See id*.; *see also* 16 U.S.C. § 528 (1994). The Multiple-Use Sustained-Yield Act declares in part: "that the national forests . . . shall be administered for *outdoor recreation*, range, timber, watershed, and wildlife and fish purposes." *Id.* (emphasis added).

Perhaps the most controversial portion of *Mountain States* is the court's analysis of the ESA for prudential standing purposes. The plaintiffs asserted two separate claims under the ESA in an effort to satisfy prudential standing.[71] First, they contended that the Forest Service's choice of Alternative 9A threatens the continued longevity of the grizzly bear and its habitat.[72] The court noted that protecting the grizzly bear clearly falls within the zone of interests of the ESA, but that such protection was not an interest asserted by the plaintiffs.[73] According to the court, the plaintiffs have at best only expressed a desire to observe wildlife generally, and in fact the district court record reflects that the plaintiffs asserted that there is "no evidence that [a] grizzly bear habitat exists in the Decision Area."[74] Relying on *Lujan*, the court concluded that "[i]n the absence of any reference to past (and anticipated future) enjoyment of the grizzly bear's presence, a mere expression of enjoyment of all things sylvan is inadequate to show a 'directly affected' interest with adequate specificity."[75]

The plaintiffs' second assertion of prudential standing under the ESA is one of economics.[76] They asserted that the ESA provides that a designation of critical habitat can only be made after considering the designation's economic impact.[77] The court diverges from the Ninth Circuit Court of Appeals[78] by finding that an economic interest alone is enough to fall within the zone of interests of the ESA.[79] The court rationalizes this interpretation by relying on the *Camp* Court's definition of prudential standing. In *Camp*, the Court stated that once it is determined that the plaintiff has constitutional standing, the remaining standing question is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or

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71. *Mountain States Legal Found.*, 92 F.3d at 1236.

72. *Id.*

73. *Id.*

74. *Id.* at 1237 (internal quotations omitted).

75. *Mountain States Legal Found.*, 92 F.3d at 1236-37; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992).

76. *See Mountain States Legal Found.*, 92 F.3d at 1237.

77. *Id.* The ESA states in relevant part: "The Secretary shall designate critical habitat . . . 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." 16 U.S.C. § 1533(b)(2) (emphasis added).

78. *See* Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (U.S. Mar. 25, 1996) (No. 95-813).

79. *Mountain States Legal Found.*, 92 F.3d at 1237.

regulated by the statute or constitutional guarantee in question."[80] The circuit court focused on the *Camp* Court's distinction of regulated interests, holding that the zone of interests test applies not only to those interests protected by the statute, but also those interests regulated by the statute.[81] The court further justified the *Camp* Court's regulated interests distinction by noting that extending prudential standing to include only those parties whose interests are the primary objective of the statute would frustrate legislative intent.[82] The court concluded that in situations where the regulated entity and the decisionmaking agency are one and the same, "denial of standing to private parties adversely affected by excessive agency zeal would leave the countervailing values with no conceivable champion in the courts."[83] This position, the court was certain, was contrary to the intent of Congress.[84]

Although the plaintiffs proceeded past the standing barriers, their claims failed on the merits.[85] First, the court held that the Forest Service did not act arbitrarily or capriciously in its choice of Alternative 9A under the forest management statutes.[86] Although the court acknowledged timber harvesting as a significant goal of the forest management statutes, timber harvesting was not the only factor the Forest Service had to consider.[87] Next, the court found that the Forest Service can make a decision to limit timber harvesting based on a grizzly bear jeopardy analysis without designating the area a critical habitat.[88] In fact, as the court pointed out, the ESA required the Forest Service to consider the continued existence of the grizzly bear, even if the area is not designated critical.[89] The plaintiffs final assertion, that the government failed to file EISs for a grizzly bear recovery plan and for a Memorandum of Understanding with Montana regarding water issues, failed because: (1) the "plaintiffs have neither identified this alleged [grizzly bear recovery] plan, nor shown what role it may have played in the framing of the Biological Opinion or any other agency decision."[90]; and (2) the

80. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added).

81. *Mountain States Legal Found.*, 92 F.3d at 1237.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See Mountain States Legal Found.*, 92 F.3d at 1238-39.

86. *Id.* at 1238.

87. *Id.*

88. *Id.* at 1239.

89. *Mountain States Legal Found.*, 92 F.3d at 1238.

90. *Id.* at 1239. The biological opinion ruled out Alternative 6 because of the risk it placed on the recovery of the grizzly bear. *Id.*

water quality would have had to be the only real factor the Forest Service considered in selecting Alternative 9A to give rise to an EIS requirement.[91]

IV. ANALYSIS

The District of Columbia Circuit Court of Appeals is clearly the most prominent court to go against the grain and recognize economic interests to be within the zone of interests protected by the ESA for standing purposes. Its impact on future ESA jurisprudence cannot be overstated, particularly in light of the Supreme Court's upcoming review of the issue in *Bennett v. Plenert*.[92]

In determining whether a claim falls within the zone of interests of a statute, the court must look at the statute itself and the underlying purposes of the statute. Nevertheless, in finding that economic interests do in fact fall within the zone of interests of the ESA, the circuit court delves into the relevant intent of Congress tenuously at best.[93] By looking at the statute and not the intent of Congress, the court concludes that the "plaintiffs have shown an eminently plausible relationship between their interests and policy values that play an important constraining role in the statutes at issue. . . ."[94] In discussing the interplay of the interests regulated and protected by the statute, the court relies heavily on *Camp*, a case decided twenty-six years ago. The court gives little consideration to the more recent holding in *Clarke* and no consideration to *Air Courier Conference*, the most recent Supreme Court case discussing the zone of interests.[95]

The Supreme Court interpreted the congressional intent behind the ESA in *Tennessee Valley Authority v. Hill*.[96] The Court in that case found that the clear intent of Congress in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost."[97] The Court relied on the underlying policy of the ESA and the observation that the Act reflected this policy in every section of the statute.[98] The

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91. *Id.* The court noted that the Forest Service considered numerous factors, including the continued existence of the grizzly bear. *Id.*

92. *See id.* at 1237-38 (noting that *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996), a case dealing with whether economic interests fall within the zone of interests protected by the ESA, has been granted certiorari by the Supreme Court).

93. *Mountain States Legal Found.*, 92 F.3d at 1237.

94. *Id.*

95. *Id.*

96. 437 U.S. 153, 184-86 (1978).

97. *Id.* at 184.

98. *Id.*

Court went on to note that the legislative history reflects a primary priority to declare a national policy of saving endangered species that overrides the primary mission of all federal agencies.[99] In 1978 and 1979, in reaction to the *Tennessee Valley Authority* holding, Congress amended the ESA.[100] The relevant legislative history of the amendments reflects Congress's intent to allow the Secretary of the Interior to consider economic considerations in determining whether an area should be designated a critical habitat.[101] While *Tennessee Valley Authority* remains useful in interpreting the ESA, it is necessary to review the post-amendments jurisprudence in answering zone of interests questions. The overwhelming majority of cases do not recognize economic interests as within the zone of interests protected by the ESA.[102] However, *Mountain States* is not the only case that does recognize economic interests as sufficient.[103]

The most recently adjudicated case on the issue, *Bennett v. Plenert*, directly addresses the same issue as the noted case and comes to the opposite conclusion.[104] In *Bennett v. Plenert*, the Ninth Circuit Court of Appeals held that the underlying goal of the ESA is to ensure the preservation of animal species.[105] In rejecting standing, the court concluded that economic interests are at best marginally related to the

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99. *Id*. at 185.

100. Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

101. H.R. Rep. No. 1625, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9466 ("The committee adopted a provision, which while continuing full protection for all listed species, does give the Secretary the discretion to alter a critical habitat designation . . . if he determines that the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat.").

102. *See, e.g.*, Bennett v. Plenert, 63 F.3d 915, 919-22 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (holding that while the ESA does require the government to consider economic factors in an ESA decision, only a plaintiff who alleges an interest in the *preservation* of an endangered species falls within the zone of interests protected by the ESA); Idaho Farm Bureau Fed'n v. Babbitt, 900 F. Supp. 1349, 1358 (D. Idaho 1995) (holding that when the only injury the plaintiffs assert in challenging an action under the ESA is additional costs to their business and where such harm cannot be relieved by preserving the species, such a claim is not within the zone of interests protected by the ESA); Allied-Signal, Inc. v. Lujan, 736 F. Supp. 1558, 1560 n.3 (N.D. Cal. 1990) (noting that since Allied's interest in the endangered species is purely economic, and nothing in the corporate structure, purpose, or history of Allied suggests that they have ever been concerned with protecting the endangered species, Allied's goals are clearly unrelated to the goals Congress sought to advance in enacting the ESA).

103. *See generally* Alabama-Tombigbee Rivers Coalition v. Fish & Wildlife Service, No. CIV.A.93-AR-2322-S, 1993 WL 646409 (N.D. Ala. 1993) (holding that scrutiny of the ESA is part of the legislative design of access by all persons interested in the outcome, including those whose interest is purely economic).

104. *Bennett*, 63 F.3d at 919-22.

105. *Id*. at 920.

purposes of the ESA.[106] The court went through a traditional zone of interests analysis.[107] The court reviewed the relevant zone of interests cases, including *Clarke v. Securities Industry Association*,[108] and considered the *Tennessee Valley Authority* Court's interpretation of the underlying goals of the ESA.[109] It concluded its analysis by looking at the statute and Congress's intent in passing the statute.[110] The *Bennett* court appears to have completed a much more traditional and thorough analysis than the court in *Mountain States*.

One compromise position, recognized by some courts and commentators, is that economic interests can fall within the zone of interests protected by the ESA if the plaintiff's economic interests are related to the preservation of the species.[111] The commentary points out, however, that the plaintiffs will not have standing to complain *about* an economic injury since nothing in the ESA or its legislative history confers such a right.[112]

V. CONCLUSION

Mountain States is indirectly up for review by the Supreme Court. The outcome in *Bennett* will affect the validity of the holding in *Mountain States*, leaving a number of uncertainties. First, the circuit court suggests that had *Bennett* not been granted certiorari, the outcome of the case as it relates to whether economic interests are within the zone of interests of the ESA might have been different.[113] What the court seems to overlook is that the case is now on the books, making it binding law in its circuit, persuasive law in other circuits. More important, the

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106. *Id.* at 921.

107. *Id.* at 917-18.

108. The court in *Bennett v. Plenert*, like the court in *Mountain States Legal Foundation v. Glickman*, overlooked the rule established by *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991).

109. *Bennett*, 63 F.3d at 920-21.

110. *Id.*

111. *See* Idaho Farm Bureau Fed'n v. Babbitt, 900 F. Supp. 1349, 1358 (D. Idaho 1995); Reimer, s*upra* note 16, at 143-44.

112. *See* Reimer, *supra* note 16, at 143-44.

113. The court noted:

> [w]hile ordinarily we would be most reluctant to create a circuit split, in this case the usual reasons for hesitation are absent: thanks to the Supreme Court's having already granted certiorari in Bennett, any error we make will be corrected not only swiftly but cheaply—with no additional burden on the [c]ourt.

Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1237-38 (D.C. Cir. 1996).

Supreme Court has no choice but to consider the noted case's holding when it reviews *Bennett*.

The circuit court's holding is troublesome when considered in conjunction with *Lujan*. *Lujan* has clearly limited who can bring a suit asserting an environmental injury, narrowing the population of potential litigants.[114] At the same time, if the Supreme Court decides to reverse *Bennett*, making *Mountain States* valid law, the *Mountain States* holding would significantly tip the balance in favor of standing for those with economic injuries. Not only would there be a narrow group of litigants that could pursue an environmental claim because of *Lujan*, but *Mountain States* would significantly expand the number of potential litigants who could bring a suit on the basis of an ESA decision adversely affecting their business. The result would obviously be contrary to the interests of threatened and endangered species.

Furthermore, the circuit court arguably misinterprets the *Bennett* holding to deprive entitled plaintiffs from challenging the decisions of "excessive agency zeal."[115] The question is not whether the acts of a governmental agency can be challenged, but *who* may challenge those acts. By holding that plaintiffs with purely economic interests in the ESA agency decision have standing to challenge the decision, the court gives a great deal of influence to parties whose economic interests are contrary to the interests of the threatened and endangered species the ESA was intended to protect.[116]

Finally, the circuit court seems to make an unprecedented leap in the realm of redressability. The court holds that redressability is not an obstacle when the relief requested is prohibited by law.[117] The normal understanding of redressability is that the relief would be likely rather than speculative with a favorable decision from the court.[118] If the relief requested is unlawful, it is far from likely; in fact, such relief is not even speculative.

The District of Columbia Circuit Court of Appeals made a giant leap in ESA standing law, giving the Supreme Court firm ground to overturn *Bennett* and landing yet one more blow against environmental

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114. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-78 (1992).

115. *Mountain States Legal Found.*, 92 F.3d at 1237.

116. *Id.*; *see* Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996).

117. *Mountain States Legal Found.*, 92 F.3d at 1234.

118. *See Lujan*, 504 U.S. at 561.

protection. While standing law is an evolving doctrine, the circuit court moves it in a disappointing direction for environmentalists.

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