

**EQUAL ACCESS TO COURTS UNDER ESA AND
CITIZEN'S FAIR HEARING ACT**

HEARING

BEFORE THE

**COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES**

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

**EQUAL ACCESS TO COURTS UNDER THE
ENDANGERED SPECIES ACT**

AND

H.R. 3862

**A BILL TO AMEND THE ENDANGERED SPECIES ACT
OF 1973 TO CLARIFY THE INTENT OF CONGRESS
AND ENSURE THAT ANY PERSON HAVING ANY ECO-
NOMIC INTEREST THAT IS DIRECTLY OR INDI-
RECTLY HARMED BY A DESIGNATION OF CRITICAL
HABITAT MAY BRING A CITIZEN'S SUIT UNDER THAT
ACT**

SEPTEMBER 17, 1996—WASHINGTON, DC

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CONTENTS

	Page
Hearing held September 17, 1996	1
H.R. 3862	37
Statement of Members:	
Chenoweth, Hon. Helen, a U.S. Representative from Idaho	2
Young, Hon. Don, a U.S. Representative from Alaska, Chairman, Committee on Resources	1
Statement of Witnesses:	
Carr, John, Executive Director, Direct Service Industries, Inc	26
Prepraed Statement	87
Christensen, Earl, Idaho Farm Bureau	8
Prepraed Statement	56
Hays, David, Commissioner, Williamson County, Georgetown, TX	23
Kazman, Sam, General Counsel, Competitive Enterprise Institute in Washington	22
Prepraed Statement	77
Leshy, John., Solicitor, Department of Interior	9
Prepraed Statement	59
Macleod, John A., Crowell and Moring	6
Prepraed Statement	40
Marzulla, Nancie G., President, Chief Legal Counsel, Defenders of Property Rights	11
Prepraed Statement	61
Torgerson, John, Alaska State Senator	5
Additional material supplied:	
American Farm Bureau Federation	93
National Association of Home Builders	98
Communications submitted:	
Letter dated September 24, 1996, from Arthur L. Godi to Hon. Don Young	102
Due to the high cost of printing, a copy of Supreme Court of the United States No. 95-813 Bennett v. Plenert, may be found in the Committee files.	72

EQUAL ACCESS TO COURTS UNDER ESA AND CITIZEN'S FAIR HEARING ACT

TUESDAY, SEPTEMBER 17, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES
Washington, DC.

The Committee met, pursuant to call, at 2 p.m., in room 1324, Longworth House Office Building, Washington, D.C., Hon. Don Young (Chairman of the Committee) presiding.

STATEMENT OF HON. DON YOUNG, A U.S. REPRESENTATIVE FROM ALASKA; AND CHAIRMAN, COMMITTEE ON RESOURCES

Mr. YOUNG. Good afternoon. Welcome to the hearing for the Committee of Resources on the implementation of the Endangered Species Act. This hearing will take a close look at how the Federal courts are deciding who can seek judicial review of decisions made by the 9th Circuit's decision on ESA. To put it in a layman's language, the courts have opened the door of the courthouse to the environmental community, paid their attorneys' fees, and invited them to keep coming back, while at the same time they have closed the doors of the courthouse to the average citizen just trying to protect themselves from abuse by the government. To say this is unfair is a gross understatement. It is unfair to an extreme; in addition, it is resulting in an unreasonable and unbalanced public policy. And when we lose the support of the public, we lose the intent of legislation.

It is no secret that Federal judges are playing a key role in implementing in the ESA, people that were not elected, people that were appointed are now writing the legislation in their decision-making. When the Secretary of the Interior adopts new rules, he is required by law to receive public comment from any member of the public. When Federal judges interpret the law, they can exclude the general public and allow only the limited viewpoint to be heard. It is no wonder that we end up with judge made law that is so unbalanced and unreasonable in so many cases. Not all judges would turn away those citizens who wish to sue to protect our economic, social, or recreational interests. Judge Rosenbaum of the U.S. District Court in Minnesota had this to say when the government lawyers asked him to dismiss a suit filed by a group of snowmobilers: he scolded the government because they could not identify a single person who would have been qualified to complain about the government's overprotection of endangered species. Judge Rosenbaum said the court is not willing to adopt the view that the Fish and Wildlife Service is "unrestrained in any of its

acts in the lawful role of endangered and threatened species protection. This is a form of totalitarianism in virtue, a concept for which no precedent has been advanced, and we should conform to the rule of law." He apparently does not agree with the Secretary's view that under the law the Federal Government can never go too far in protecting endangered species.

In their brief to the Supreme Court the government says that no one can sue them if they go too far. This is our government in action. No one can sue them if they go too far, even though they've admitted that they've gone too far. According to the Federal Government's lawyers, if the government violates the constitution, legal rights of the citizen, if it has failed to follow the requirements in the ESA designed to protect citizens rights, there is no citizen who can sue to stop such government overreaching. Again, the government has overreached. This incredible statement by our Justice Department lawyers sworn to uphold our Constitution—not their Constitution—our Constitution and our Bill of Rights. I agree with Judge Rosenbaum that allowing only professional environmentalists to use the ESA to further their agenda, whatever that agenda may be, is foreign to the principles of fairness and due process of forty-some years.

We need to let the citizens who are directly impacted by the ESA, into the courthouse so that the courts can hear all of the facts, all of the evidence and let the truth guide their decision. When only one side is allowed to present the facts, the truth becomes a victim of injustice. I want to thank all of the witnesses who have agreed to appear before the committee today. I also want to comment that we've asked a number of environmental representatives to provide testimony, but again they declined participation, utilizing the courts to their exclusive use.

I also want to point out that we invited the attorney for the Bennett's—defending the claimant, but since he is handling the case without charge for the plaintiffs, he cannot afford to accept our invitation. Again, thank all of you who participated in this process. This is a process that will continue until we've finally reached a ratification and a solution to the ESA problems. First, I'd like to have Senator John—oh, excuse me, Mr. Kildee?

Mr. KILDEE. Thank you very much, Mr. Chairman, however I may submit a statement later, for the record.

[H.R. 3862 may be found at end of hearing.]

Mr. CHAIRMAN. Mrs. Chenoweth? I'm sorry. Thank you for your vision.

Mrs. CHENOWETH. Mr. Chairman, I do have a statement.

Mr. CHAIRMAN. Please. Your record.

**STATEMENT OF HON. HELEN CHENOWETH, A U.S.
REPRESENTATIVE FROM IDAHO**

Mrs. CHENOWETH. I want to thank you, Mr. Chairman, for holding this hearings on my bill, H.R. 3862, the Citizen's Fair Hearing of 1996. I want you to know how much I appreciate your work and the work of Representative Pombo on the Endangered Species Act in general and on the standing issue, specifically.

But before I continue, I would like to extend a welcome to the—from the committee today, to a fellow Idahoan, Mr. Earl

Christensen. Mr. Christensen is a farmer from Burley, Idaho, and is testifying on behalf of the Idaho Farm Bureau Federation. Mr. Christensen has experienced first hand the inherent unfairness of the Endangered Species Act. He, like many others, have been denied a fair hearing in the courts when questioning an agency's application of the ESA. He was denied a fair hearing not because his claim was without merit, but because he is not within the so-called "zone of interest." The purpose of my bill, H.R. 3862, is to remedy this inherent unfairness, and I look forward to his testimony.

Mr. Chairman, I doubt there is a person in America who doesn't applaud the goal of the Endangered Species Act, which is to save species of animals from extinction.

I remember in the early days of the debate of the Act that we were trying to save the bald eagle—the very symbol of America. However, in crafting the Act, Congress understood that several factors must be considered. Among these factors must be the economic impact. In fact, the Endangered Species Act specifically states that the "Secretary shall designate critical habitat after taking into consideration the economic impact," at 16 U.S.C. section 1533(b)(2).

Unfortunately, Mr. Chairman, that aspect of the law has been ignored and the courts have adopted a hard line approach that appears to have gone away from Congress's original intent. The Ninth Circuit is denying standing to anyone unless their interest is to broaden the application of the ESA. My bill fixes this misinterpretation of the law by clarifying the original intent of the Act.

I introduced H.R. 3862 July 22nd, 1996, with 44 of my colleagues from both sides of the aisle and it now has 49 co-sponsors. Richard Pombo, of California is the major co-sponsor. The purpose of the measure is simple: to provide standing to individuals who can demonstrate having suffered an economic or other injury resulting from the violation of the ESA. That's it. The bill is straightforward and very simple. It makes no changes to the listing process, the designation of critical habitat provisions, or any other provision of the ESA. It merely reasserts the Fifth Amendment's guarantee that "no person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Chairman Young, some place along the line, the Federal Government has gone awry and the courts have appeared to condone this. After it became clear to me that we weren't going to be able to address the Endangered Species Act in its entirety, I became convinced that we must set out to fix the most egregious problem of the ESA. And that, to me, is the standing issue.

Right now, Mr. Chairman, as the law is being interpreted, plants and animals have standing to sue under the ESA; flesh and blood humans do not. In fact, the Ninth Circuit Court of Appeals held in *Bennett v. Plenert* that "only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA." And that is a quote from *Bennett v. Plenert*, from the Ninth Circuit decision.

The message the court is sending, therefore, is that unless you want more land locked up or more water reserved as designated critical habitat, you have no place in the court and cannot challenge the agency's action. Only those who think the agency didn't

go far enough and are suing for broader Federal action are welcome in court. Never mind the fact that the ESA specifically states that the "Secretary shall designate critical habitat after taking into consideration the economic impact."

I cannot understand why it is the Ninth Circuit Court refuses to recognize that because the ESA confers upon the Secretary an affirmative duty to consider the economic impact of critical habitat designation, those who are economically impacted therefore have standing to sue the Secretary.

Fortunately, Mr. Chairman, there is a split in the Circuits, as to whether economics plays a role in the Endangered Species Act. Other Circuits recognize that recreationists, outfitters and municipalities and other users of the public lands and resources have an economic interest in agency decisions and therefore have standing. Why the Ninth Circuit does not comprehend this seemingly very simple concept, I do not know.

My bill, The Fair Citizen's Hearing Act, 1996, gives standing to those flesh and blood people who were economically damaged from application of the rules and regulations of the ESA. As the ESA is currently interpreted by the Ninth Circuit, economically injured families do not have standing to sue.

Because humans are not allowed to sue, the United States Forest Service does not need to negotiate with humans who have been adversely impacted. They only are forced by the law, in the interpretation of the law, to negotiate with the environmental groups. Then that effect is that the environmental group decides what is and what isn't critical habitat. My bill simply restores to the people their seat at the negotiation table and access to the courts.

Last, Mr. Chairman, I would like to note that in its brief for the Ninth Circuit case, the government clearly spelled out, in the government's opinion, that plaintiff Bennett, as an irrigator and municipality, did not have standing to sue because Bennett was not within the zone of interest. Yet, in the government's brief to the Supreme Court, the zone of interest argument is nowhere to be found. I find that strange.

And in addition, Mr. Chairman, I would like to note that after repeated invitations to the environmental groups, none accepted our invitations to testify against this common sense bill.

With that being said, Mr. Chairman, I thank you for allowing this time for me to enter my statement into the record.

Mr. CHAIRMAN. I thank the good lady, and as soon as I recognize Mr. Pombo and bring the witnesses to the table, I'm going to ask you to take the chair too. Mr. Pombo?

Mr. POMBO. I have no opening statement.

Mr. CHAIRMAN. Now we'll bring the first panel to the floor. I'm proud to introduce first witness, Senator John Torgerson, Alaska State Senate, Kasilof, Alaska; Mr. John Macleod, Crowell and Moring, D.C.; Mr. Earl Christensen, Idaho Farm Bureau; Mr. John Leshy, Solicitor, U.S. Department of the Interior; Ms. Nancy Marzulla, President and Chief Legal Counsel, Defenders of Property Rights. Before you all sit down I'm going to ask you to stand and we're going to issue the oath today.

And I'll have you Senator, please, you'll be first testimony. And then I do apologize—the rest of you—I have to go to a meeting in

the back of the room here, and then I'll come back as soon as possible. Senator, you're up.

[Whereupon Mrs. Chenoweth assumed the Chair.]

STATEMENT OF SENATOR JOHN TORGERSON, ALASKA STATE SENATE, KASLOF, ALASKA

Mr. TORGERSON. Thank you, Mr. Chairman, members of the committee. I'd like to thank you for the opportunity to be heard today on this legislation H.R. 3862, and on the issue of endangered species in general. I am John Torgerson, a member of the Alaska State Senate and I Chair the Senate Community and Regional Affairs Committee. I'm testifying today on behalf of Senate President Drue Pearce, Speaker of the House Gail Phillips, and the majority members of the Alaska Legislature.

The legislation before you today, H.R. 3862, addresses an important and needed reform to the Endangered Species Act, and does so in a straight forward and effective manner. The Alaska Legislature supports this legislation. In the same straight-forward fashion, I will not tax you with over-lengthy testimony.

Mr. Chairman, from your leadership on this issue, this committee, I am sure, has a highly developed sense for the concerns of Alaskans regarding the application of the Endangered Species Act. Its original intent is one most everyone embraces: the use of rational measures to conserve species and related habitat. In practice, however, the ESA has often drifted far beyond the rational and necessary. The result has been undue hardships for everyone from private property owners to local and state governments.

In Alaska we have kept abreast of developments in this issue and have evaluated each of the ESA reforms that have been put forward and been considered by this committee. As you will recall, we have spoken in favor of H.R. 2275, encouraged by its sensibility, the breadth of its reform and its attempt to recapture the original intent of Congress. We remain hopeful that the most important elements of that legislation will eventually be worked out and enacted.

H.R. 3862 puts forward one measure of reform that will allow more balance in the judicial consideration of conflicts involving the ESA. It is an especially important reform that warrants immediate attention: citizens whose property or livelihoods are threatened by actions to implement the ESA must have recourse to the Federal courts.

This legislation will reverse the course taken by the U.S. Ninth Circuit Court of Appeals, which deemed that property owners have no right to protect their property interests through judicial review. The court held, incorrectly in our view, that even though a landowner could demonstrate harm to his interests from an ESA action, he had no standing under the ESA to ask for court review of that action. Now, without recognition of standing under the ESA for economic injury, there is no balance in the system. Anyone may sue on behalf of other species—and as we see today, it is done with great frequency—but none may bring an action related to adversely affected human interests. The Ninth Circuit decision blocks the court house door to our citizens—a decision that must be countermanded by Congress. H.R. 3682 does just that.

After the consideration of H.R. 3862, when Congress again focuses on amending the Endangered Species Act, it is our hope that those reforms do the following: Create an effective partnership arrangement between states and the Federal Government; base listing actions on findings which have undergone appropriate peer review; replace the court-imposed standard of "complete recovery regardless of costs or consequences" with a more rational standard of conservation and protection; enable comprehensive voluntary species conservation agreements with private landowners; consider and protect private property rights when adopting Endangered Species Actions.

Mr. Chairman, we have appreciated the opportunity to present to Congress and the Nation the problems of the State of Alaska and its citizens have experienced lately, in terms of ESA based regulation, enforcement and judicial action. Recognition of citizen interests and fair and open processes have been guiding principles behind ESA reform. H.R. 3862 is consistent with these principles and it ensures that those citizens who have economic or other interests adversely affected by the ESA will have redress to their courts.

Thank you again for hearing our views. I welcome any questions you may have.

Mrs. CHENOWETH. I thank you, Senator. You've come a long ways, and thank you very much for your testimony. Next, we'd like to hear from Mr. John Macleod. You're up, Mr. Macleod.

**STATEMENT OF JOHN A. MACLEOD, CROWELL AND MORING,
WASHINGTON, DC**

Mr. MACLEOD. Mr. Chairman and members of the Committee, thank you for the opportunity to testify today in support of H.R. 3862.

I am John Macleod and I'm testifying on behalf of the American Forest & Paper Association.

I have represented the interests of the forest products industry and other owners and users of land in a number of cases under the Endangered Species Act. Last year, for example, I represented a group of economically affected interests in an important ESA case, called Sweet Home, that was decided by the U.S. Supreme Court. A couple of months ago, my law firm filed an Amicus Brief in another important ESA case, *Bennett v. Plenert*, that will be considered by the Supreme Court this term.

Like H.R. 3862, the Bennett case involves the question of prudential standing under the Endangered Species Act. In Bennett, two ranchers and irrigation districts in Oregon were economically hurt by a decision under the ESA, that had the effect of restricting the water they could use in their operation. They filed a lawsuit challenging that decision, claiming that it didn't comply with the ESA's requirements. The Ninth Circuit said they had no right to be heard. It said the only people with standing to sue under the ESA are those who seek the preservation of listed species. In other words, if your complaint is that regulation under the ESA does not go far enough, we will hear you. But if your complaint is that it goes too far, we will not. Fortunately, the Ninth Circuit's view was not the law of the land. The Eighth Circuit and the D.C. Circuit

have read Congress's intent on ESA standing differently and have both ruled that economically injured persons do in fact have standing to sue under the ESA.

But there is uncertainty in the courts about what Congress does intend. And so there is a need for Congress to be clear. H.R. 3862 would do that. It would make clear that those who are economically injured by regulatory excesses under the ESA have the right to sue to curb those excesses.

The bottom line must be the law and what Congress intended in enacting it. Those who enforce the ESA must be true to its terms. They must be accountable if they regulate too little and they must be accountable if they regulate too much.

I support H.R. 3862 because I think Congress, and not individual judges, should say what Congress intends on this important issue and because it will level the playing field. It will avoid a situation in which the law moves incrementally but inevitably in the direction of the only interest group that is given standing to complain about the way that it is being applied. It will give meaning to the economic protection that Congress built into the ESA. For while it's true that the law's purpose is to protect species, it is not without limits. The Supreme Court recognized, in *Sweet Home*, that the ESA encompasses a vast range of economic and social enterprises and endeavors, and that all who comply with it will face difficult questions that must be resolved in individual cases.

Finally, I support H.R. 3862 because fundamental fairness and the important public interest in government accountability require it. As the D.C. Circuit explained only last month, in a case on ESA standing, "Denial of standing to private parties adversely affected by excessive agency zeal would leave the countervailing values with no conceivable champion in the courts."

And so if those suffering economic injury are barred from the courts, there would be no suits to assure, for example, the integrity of the listing process, under Section 4 of the ESA, or that critical habitats are properly designated through the public participation processes laid out by the Congress and only after considering the economic impact of a designation. There would be no suits, for example, to assure that the consultation requirements of Section 7 are met or that jeopardy findings are properly made, or that reasonable and prudent alternatives are economically reasonable, as the law requires. And finally, there would be no judicial review to assure that under Section 9 the government is not stretching the prohibition on "take" beyond permissible limits, either programmatically, or in individual applications. That was what the *Sweet Home* suit was all about—a check to be sure that the government wasn't going too far. It is ironic that the Supreme Court in *Sweet Home* welcomed the plaintiff's economically based challenge and thought it worthwhile, and yet, under the *Bennett* standard, that case could never have been brought.

We support H.R. 3862 because it would prevent such a silencing of legitimate points of view.

Thanks again for the opportunity to testify. I'd be delighted to answer any questions the Committee might have.

[The prepared statement of John Macleod may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you, Mr. Macleod. Mr. Christensen? Good luck on your testimony.

**STATEMENT OF EARL CHRISTENSEN, IDAHO FARM BUREAU,
BURLEY, IDAHO**

Mr. CHRISTENSEN. Mr. Chairman, Congressman Chenoweth, members of the committee, greetings from Idaho. I am Earl Christensen, a farmer and member of the Idaho Farm Bureau Federation from Burley, in the southern Idaho area, where I raise a variety of agricultural products. Some of my farm is along the banks of the Snake River and the irrigation water which is vital to my farm comes from that river. I truly appreciate this opportunity to appear before the committee and am particularly pleased to be able to support Congressman Helen Chenoweth's bill of the Citizen's Fair Hearing Act of 1996, that will provide standing to challenge abuses of the Endangered Species Act.

The intent of the ESA is noble in its design to protect threatened and endangered species; however, the Act has become a double-edged sword, creating enormous financial and economic burdens on the citizens generally and individually, in regards to their private property rights and economic well being. As it is presently being interpreted by the courts, these same citizens are even being denied standing to bring judicial review over decisions and actions; therefore, H.R. 3862 is badly needed, so as to prevent the disenfranchisement of the citizens. The Idaho Farm Bureau Federation of which I am a member has some firsthand experience and knowledge in this area of having no recourse in a suit to de-list five Snake River snail species. In his summary and observations on page 35 of the Memorandum Decision and Order, Judge Boyle; explains and states—and I quote, "The Court's conclusion that plaintiffs do not have standing to assert their claims in this action is compelled by the recent U.S. Supreme Court and Ninth Circuit Court of Appeals rulings on the doctrine of standing, which this court is bound to follow. Moreover, the court's ruling is required by specific language of the ESA as interpreted by the Federal appellate courts that compels this conclusion. Any other decision made by this court would not be based on controlling legal principles or precedent, and would be judicial legislation which is not the role of the judiciary in resolving disputes. Consequently, the relief plaintiffs seek is best directed to Congress and committed to the political process, wherein such issues and debates are handled most consistently within our constitutional and democratic form of government. In the court's view, it is Congress and the legislative process, and not the judiciary that has the authority and is in the best position to remedy the inequities presented in the Endangered Species Act that have been so aptly demonstrated in this case."

The Idaho Farm Bureau lawsuit attempted to point out the economic impacts and the cultural challenges as being vast and far-reaching people impacts. Certainly, these items should be major discussion and consideration points, but they cannot be made because of the no-standing situation via the zone of interest requirement in the citizen suits. H.R. 3862 will correct this injustice. It will restore due process considerations granted by the Constitution.

We applaud you, Congressman Chenoweth, and your efforts and pledge our support and urge this committee ;and the House to approve this much needed amendment to the Endangered Species Act. And I thank you.

[The prepared statement of Earl Christensen may be found at the end of hearing.]

Mrs. CHENOWETH. Mr. Christensen, and I thank you very much for your testimony. I'd like to now call on Mr. John Leshy, Solicitor, U.S. Department of Interior. Mr. Leshy?

STATEMENT OF JOHN LESHY, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. LESHY.

Thank you, Madam Chairman. I am pleased to be here today. Let me begin with a little bit of caution, concerning the fact that there are some pending court cases, particularly the Bennett case in the Supreme Court, involved here. The Solicitor General of the United States, as you probably know, sets the litigating position of the U.S. Government. And the Solicitor General has a wise and long standing policy about not commenting on the details of pending cases. That's why he doesn't give press conferences and the like. He doesn't want to be accused of trying our cases in the Congress or in the newspapers. So I'll have to be very cautious about commenting on details of pending litigation. I'm certainly happy to be here to share our views on this legislation and our views on the general approach about how the ESA ought to be applied in litigation under the government, but I do want to put that caution in the record.

The basic position of the United States is simple: that litigants who meet the Constitutional standards for going to court ought to be able to take us to court, to challenge our decisions implementing the ESA or any other statute. And the playing field should be as level as possible, so that no matter where you come from, or what property interest you have or don't have, whether you're environmentalist, regulated industry or whatever, you ought to be able to and, generally speaking, are able to take us to court to challenge our actions. In fact, we're involved at any one time in about 2,000 different lawsuits challenging our decisions under various laws, and the vast majority of those are brought by people with economic interests. In the Endangered Species Act in particular, there have been any number of important recent cases that have been brought by regulated industry. Mr. Macleod referred specifically to the Sweet Home case. That's probably the most important case ever litigated on the Endangered Species Act, and was brought by local governments and timber industry associations, and litigated on the merits to conclusion in the U.S. Supreme Court.

Let me say a few words specifically about the pending legislation. In our view this is a flawed solution to a problem that doesn't exist. That is, as I just said, people with economic interests have been able to take us to court in all sorts of contexts, challenging decisions we have made under the Endangered Species Act. People are not having the court house door shut in their faces all over the country. In the 30 year history of the Endangered Species Act this is not a significant problem. It hardly happens at all. To the extent

that the lower court in *Bennett v. Plenert* (now *Bennett v. Spear*), did that, it was an aberrant decision. As Mr. Macleod just pointed out, it is not the law of the land. The U.S. Supreme Court has agreed to review that lower court decision and the decision in the Supreme Court is expected quite shortly.

Second, this bill reflects a good deal of confusion, I think, about the relative roles of Congress and the higher courts. Congress has plenty to do, as we all know. Among other things, it still needs to pass an Interior Department appropriation for the fiscal year that starts in a couple of weeks. And it has to deal with other fundamental problems. It's unusual, to say the least, for Congress to be in the position of policing an occasional aberrant lower court decision, especially one that the Supreme Court has already granted review in and is actively considering. If Congress wants to sit as some sort of intermediate court of appeals, it would do little else. We have dozens of lower court decisions kicking around we think the courts have decided them wrongly, and we think it would be a mistake to start taking those cases to the Congress, instead of to higher courts.

Third, if the Supreme Court does decide *Bennett v. Spear* in a way that creates some sort of problem, there's ample opportunity to address it once the decision comes down. To try to fix a possible problem and anticipate a problem coming out of that decision is a bit like playing Pin the Tail on the Donkey. We don't know what the problem is because it hasn't really been created yet; so how do we know how to fix it?

The ESA, as you know, is up for reauthorization. Presumably, next spring there will be a lot of activity in Congress, looking at the ESA, and plenty of opportunity at that time to deal with any problems that might come up.

Finally, let me say that H.R. 3862 is not well crafted. I think it's going to create confusion and likely muddy the legal waters considerably, and ultimately won't accomplish, I think, what its sponsors apparently want to accomplish.

Let me give you a couple of examples. The title of H.R. 3862 says its purpose is to amend the Endangered Species Act, to insure that any person having any economic interest directly or indirectly "harmed by designation of critical habitat" may bring a citizen's suit under the Act. Now, there's nothing else in the body of the bill that deals with critical habitat, and it's very confusing. Is the bill limited to critical habitat designation? Is the bill in effect creating some new definition of critical habitat from the one now in law? If that's the case, it will certainly create a gold mine of litigation for skilled lawyers.

Second, Section II of the bill has Congress making a finding that persons have sought to bring civil actions for recovery of damages imposed by the Act, and says that the Ninth Circuit decision came up in one of those cases. To the best of our knowledge, this is wrong. No such suit for recovery of damages under the Endangered Species Act has ever been brought. The *Bennett v. Spear* case that has been discussed here did not seek the recovery of damages. If that's the purpose of the bill—to essentially amend the Endangered Species Act to authorize damages under that Act, it would be a very major change. We can't tell whether that is the purpose of the

bill or not. Again, if it were enacted it would create a great deal of confusion and instability.

For those reasons we oppose the legislation. We think it is premature. We think it is probably unnecessary.

Thank you for the opportunity to testify. I'll be happy to answer questions.

[The prepared statement of John D. Leshy may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you General, and I'd like to call on Nancy Marzulla for her testimony.

STATEMENT OF NANCIE G. MARZULLA, PRESIDENT AND CHIEF LEGAL COUNSEL, DEFENDERS OF PROPERTY RIGHTS, WASHINGTON, DC

Mrs. MARZULLA. Thank you very much for the opportunity to testify before you here today. I will limit my comments to two chiefs point, but ask that my written testimony be made part of the formal record.

My name is Nancie Marzulla and I am President and Chief Legal Counsel of Defenders of Property Rights. Defenders is a Washington, D.C., based national public interest legal foundation. We represent property owners from all across the country in courts across the country, whose property rights have been taken due to operation and application of government regulatory programs, including the Endangered Species Act.

Most recently we filed a Friend of the Court Amicus Curiae Brief in the *Bennett v. Plenert*, or as it's now known, *Bennett v. Spears* case, in the U.S. Supreme Court on behalf of our members as well as a number of other property rights groups across the country.

Defenders national membership consists of property owners who are interested in and direct beneficiaries of our nation's rich heritage and tradition of private property rights. Defenders is dedicated to the proposition that property owners are the best stewards of our natural and environmental resources. At the same time, we believe that government should accomplish its objectives by the Constitutional way of paying for its—for what it takes because as the Supreme Court has repeatedly held, the fundamental purpose of the Fifth Amendment's Just Compensation Clause is to insure that the cost of achieving social good is not fairly placed on an individual singled out to bear the burden of achieving that social good.

My first point is that our Constitutional form of government indicates that the court is to interpret and apply the law as it is written by Congress. Judges are not free to make up the law as they think it should be. Legislators, not judges, write the law. The reasons for this division of power should be obvious. The legislative process allows for the accommodation of a number of competing interests which is usually reflected in any statute. When a court reads out of existence certain provisions of a statute or fails to apply the law as it is written, then the balancing of interests, which takes place in the legislative process is destroyed. The Endangered Species Act is a classic example of a complex regulatory scheme and it reflects a balancing of various interests; however, in *Bennett v. Plenert*, the Ninth Circuit read the title of the statute and decided for itself, at the outset of the case, what it, meaning

the court, thought is protective of endangered species, and held that only people suing to protect an endangered species get standing. And the court further held that in the courts—that it was the court itself who gets to decide who really wants to protect endangered species and therefore, has standing.

In point of fact, we all want to protect endangered species. That is why the Endangered Species Act citizen's suit provision is written so broadly—to allow any person to enforce that statute. Deciding how endangered species are to be protected and who has standing to enforce the Act is the role for Congress; not for the court. The Ninth Circuit also completely ignored the fact that there are 11 different provisions of the Act. These Sections, or provisions, reflect an attempt by Congress to balance the interest of the property owners and economic interest while achieving the overarching goal of protecting species on the brink of extinction. Part of how Congress intended to insure that competing interests were to be protected in its scheme to protect endangered species was to give any person, including those with economic or constitutional injury, due to application of the Act, a right to sue to enforce the Act.

Now the Ninth Circuit's decision has read those interests out of the statute, thus rendering the ESA unique among environmental statutes. Persons with an economic or constitutional injury have a right to sue to enforce the Clean Water Act, the Clean Air Act, SMFRA, FIFRA, TSCA, EFRA, CERCLA, RCRA to name a few. Under the Bennett decision, those same persons cannot sue to enforce the ESA. Although the current Citizen's Suit provision in the Act, Section L (11)(g)(1) is as plainly written as one can imagine to confer standing on all persons affected by application of the Act. Apparently legislation is needed to insure that courts, like the Ninth Circuit, can get it right.

And although statutory construction is not a complex issue, the issue in the Bennett case is the intent of Congress; so therefore, I think it's not only highly appropriate, but it's absolutely essential that Congress clarify what it meant by this Citizen's Suit Provision.

My second point is that protecting property rights and economic interests is an integral aspect of achieving protection of endangered species. The irony of the Ninth Circuit decision is that the end result is that less, rather than more, environmental protection will result if that decision is not reversed. That is because that decision reads the few provisions in the Act, such as the Habitat Conservation Plan and the Authority to Acquire Privately Owned Water or Property Rights out of existence.

With no venue for relief, property owners are left with no choice but to be sworn enemies of the ESA. However, as we all know, no conservation policy can survive without the support of the regulated community.

Experience with the Endangered Species Act is already borne that out. That is why so many in the regulated community, particularly landowners who have habitat on their property, strongly believe that the Endangered Species Act should be reformed to provide even greater protection for private property rights.

We highly support this effort to bring clarity to this issue and I'd be happy to answer any further questions.

[The prepared statement of Nancie G. Marzulla may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you, Mrs. Marzulla. I do want to state for the record that we already have technical amendments prepared to change the language that Mr. Leshy pointed out and I thank him for his vigilance but we had already picked up on that. Thank you, Nancie, that was very good testimony. Thank you very much. I'd like to call on the senior member first for questioning, Richard Pombo.

Mr. POMBO. Thank you. Mr. Leshy, the couple of points that you picked out in the bill, dealing with critical habitat and recovery of damages, in Section II, are there any other problems that the Administration sees with this legislation, other than those two—the first one in the title of the bill and the second in the findings? Are there any problems in Section III, which is the main part of the bill?

Mr. LESHY. In terms of technical problems? I think there's probably some confusion in section three (about the relationship between the—let me back up). Section III would say that any person who suffers or is threatened with economic or other injury resulting from violation of the Act is deemed to be within the zone of interests, provided that person satisfies the requirements of the Constitution. That is actually an important issue. I am simply not sure whether this language is clear enough because as you undoubtedly know, there are Constitutional requirements for standing and there are statutory requirements for standing, and the line between the two is somewhat blurry. The courts have never made it entirely clear. So that to say that we are changing the Endangered Species Act, but preserving the constitutional requirements of standing, may lead to some further confusion I think. I'm not sure there's an easy way to address that, but I'm suggesting that the meaning of this Section in relation to the constitutional requirements will be probably the subject of some litigation, if this were to become law.

Mr. POMBO. In this section of the bill, the first requirement is that any person that satisfies the requirements of the Constitution—you wouldn't have any problem with that?

Mr. LESHY. No, I mean, obviously Congress can't change the requirements of the Constitution as far as the law is concerned. I think the difficulty comes in saying "and demonstrates that you are threatened with economic or other injury." Well, if the bill provides standing if you're only threatened with injury and haven't suffered injury, you may create a confusion in relation to the Constitutional requirement, which is that you must have an injury in fact. The Supreme Court has said that the Constitution says you have to have an injury in fact; this says you only have to show that you are threatened with injury. I think that is going to be confusing for the courts because the Constitution seems to say one thing and the statute seems to say another, but also says you have to comply with the Constitution. That's the source of potential confusion here.

Mr. POMBO. Mrs. Marzulla, in that provision, do you see a confusion in that provision on Section III?

Mrs. MARZULLA. Well, I'm not confused. It seems clear to me. It seems to me because the word and is used—that you've got the Article III requirement, injury in fact, and then on top of that you're

adding the statutory requirement, so that you're clarifying that those who have—present the economic injury and the threatened, I think, goes to the fact that the person doesn't have to be wiped out before he can sue. Rather, he can show that he is in danger of being wiped out.

Mr. POMBO. So what you're telling us is that the person doesn't have to be bankrupted before they can file a lawsuit. They can just show the court that if the regulation is put in place, that they could be bankrupted by that, or they could be economically damaged by that.

Mrs. MARZULLA. Precisely. That is the way I read it.

Mr. POMBO. Mr. Macleod, again, on Section III, is there a confusing part on that? Is there a way that that should be changed, that would be more correct?

Mr. MACLEOD. I share Ms. Marzulla's view that it's not confusing to me, Congressman Pombo, and I would take some slight issue with my brother, Leshy. The Constitutional requirements do in fact address injury in fact, but that has been interpreted by the Supreme Court in *Lujan v. Defenders of Wildlife* to include threatened imminent injury. So in that sense, the language of Section III seems to track and is consistent with the Constitutional requirements for standing, and I shouldn't think that there would be any basis for confusion as a result of that. It does not impose an additional test.

Mr. POMBO. Thank you. Mr. Leshy, other than the specifics that you brought out so far on this, the overall idea of citizens having standing, property owners having standing under the Endangered Species Act, what would the Administration's position be on that, in general?

Mr. LESHY. We think the existing law is basically adequate because we think, properly interpreted, it authorizes anyone who can show injury of any kind to be able to take us to court, whether under the Endangered Species Act or the Administrative Procedure Act. That is the position we are taking in the Bennett case.

Mr. POMBO. I think the key word in what you said is "if properly administered" and that seems to be the problem that we are having—not just in this instance, but in other instances with ESA—is if properly administered, then we don't have a problem. And it is Congress's job to fix a law that does not seem to be working, where the courts may have interpreted it a different way than what Congressional intent would be. After all, we do that all the time. I mean, that's most of our time is spent making laws and that's kind of what we do, and it's—in your statement you say that it's premature, but it's my understanding that in the Supreme Court case you're not arguing this specific part of it, so I don't know if it is premature in that aspect. and in the other aspect, there are a number of people that have not only contacted me and other Members of Congress, but that are testifying her today, that they have a real problem in finding standing under the current law, that many times that that's not the case. How would you respond to Mr. Christensen or others that have brought out cases that say that they felt that they were injured, but were told that they didn't have standing to sue?

Mr. LESHY. Madam Chairman, Mr. Pombo, I would respond this way. Congress does make laws, but Congress usually doesn't fix what ain't broke—that's an expression we hear around here all the time and it's a good one. There has been 30 years of litigating history on the Endangered Species Act and as I said earlier, many of the biggest court decisions construing the Act have been brought by industry plaintiffs. The problem of people with economic injuries getting into court really hasn't proved to be a problem. They get into court all the time. There is one major decision, of one court, this *Bennett v. Plenert* decision, that has seemed to—after 30 years of history—cast doubt on the ability of people with economic interests to get to court under the Endangered Species Act.

There are, I think two other major courts, one, as Mr. Macleod pointed out, the D.C. Circuit here, that issued a decision a few weeks ago, saying *Bennett* is wrong. And most important, the Supreme Court has granted review in the *Bennett* case, and as most court observers know, that is usually a signal that the Justices don't like a lower court decision. The court is going to hear argument in that case in the next few weeks. I won't predict the outcome but I would suggest that it would be very prudent for Congress to await the outcome of that case to see if there is indeed a problem.

Again, until we see that there is a problem, we don't know how to fix it because the Supreme Court could decide that case in any number of different ways. And this Congress can try to legislate now to anticipate a problem that the court might create, but until you see the decision, you don't know what it is going to say. Frankly, we expect that there will be a favorable outcome to that case, in the sense that the 30 year history of opening up the decisions of the Federal agencies under the ESA to judicial review will continue.

Mr. POMBO. My time has expired but I would venture to say that it is not one case that is being tried before our courts today; that there's been testimony about a number of cases where standing was not granted. Just in this hearing right here there has been a number of cases that have been brought out. So it is not just one case that we're dealing with. If it was only one case it would be much simpler. This is an effort to fix a problem with current law and it has been compounded by a number of cases. There is one case that I know that you can't comment on directly, but there is one case that is in the courts right now. There are a number of cases that are out there, where individuals, because of a lack of money or ability to take a case all the way to the Supreme Court, haven't had that opportunity to do that. And I think that it's not an anticipation of court decision; it's reaction to a problem that definitely exist. But thank you.

Mrs. CHENOWETH. Thank you, Mr. Pombo. Mr. Leshy, you always are a very interesting witness and I just wanted to ask you, with regards to the Sweet Home case that the U.S. Supreme Court decided, didn't the court state that Congress had not been specific enough in drafting legislation to make sure that there was protection for private property owners?

Mr. LESHY. I'm sorry. It's been many months since I read the Sweet Home case and I think you had probably better ask that of

Mr. Macleod. The Sweet Home case did, however, certainly hold that the industry plaintiffs could challenge the Interior Department's regulations interpreting and applying the Endangered Species Act in that case. So there was a clear cut example of why I say this has not proved to be a problem under the Act.

Mrs. CHENOWETH. Mr. Leshy, you made a very interesting comment about injury in fact, versus the threat of injury. Isn't it true that many timber sales are halted before a tree is cut because the cutting of that tree—the threat and danger of cutting of that tree may create imminent harm, that is irreplaceable?

Mr. LESHY. Yes, and I don't contest Mr. Macleod's view that the injury in fact requirement of the Constitution can be satisfied with some threat of injury. I think, though, when you write a statute that says—or propose a bill that says, "you may bring a court action if you satisfy the requirements of the Constitution," and then go on to say—"and show threatened economic or other injury," you're creating the possibility of confusion. I mean, it may be clear to a lot of people, but I could almost guarantee you that if this became law, there would be a lot of litigation about it. We all know how lawyers are.

Mrs. CHENOWETH. Setting aside the many acres because of the spotted owl designation and stopping logging because of the spotted owl designation, wasn't that in fact pretty well based on the threat of injury to the species?

Mr. LESHY. I guess that is right, to the best of my recollection. I'm not thoroughly familiar with all of the spotted owl litigation.

Mrs. CHENOWETH. Mr. Leshy, I wanted to ask you personally, do you really—do you or do you not believe that the *Bennett v. Plenert* decision is wrong, since in your testimony you implied that it would be wrong? Do you personally believe that that Ninth Circuit decision is wrong?

Mr. LESHY. I hesitate to inject personal beliefs into this. I would say this: my view and the United States view in general is the same, which is that people should be able to take the government to court, to have their decisions reviewed. I think that is a very healthy thing. I think that judicial review promotes better government decisions. Anybody who has worked in government knows that if you're involved in the decisionmaking process and you have the possibility of the courts looking over your shoulder, you're frankly going to do a better job. And the position the government is taking in the Supreme Court in *Bennett* is consistent with that; that is, the decisions taken by government agencies, if you satisfy the Constitutional requirements and sue the right people and conform to the technical requirements that apply to everybody, in terms of bringing litigation, then you can review the government's decision. So in that sense, my firm belief in the importance of judicial review is, I think, validated by the government's position here.

Mrs. CHENOWETH. Thank you, Mr. Leshy. I wanted to call on Mr. Macleod for his opinion on Sweet Home, and then I do want to ask Mr. Christensen about injury. Mr. Macleod, could you elaborate for us on what the court said about whether Congress was specific enough?

Mr. MACLEOD. Yes, Congressman Chenoweth. I think that what you're referring to was in the concurring opinion of Justice O'Con-

nor. The majority opinion itself was very clear—it recognized first of all, that the plaintiffs were there because of economic injury to the plaintiffs. Now, courts have an independent duty to examine standing and the Supreme Court apparently had no difficulty with the plaintiffs' economically based standing in that case. The majority of the court did say that there were very difficult questions of proximity and degree presented by the Act, that would have to be resolved on a case by case basis. It recognized the broad sweep of the Act in affecting various kinds of social and economic behavior. And indeed, in her concurring opinion, Justice O'Connor did very strongly suggest—I believe her exact words were, "Congress may wish to revisit this issue."

Mrs. CHENOWETH. Thank you, Mr. Macleod. And Mr. Christensen, I think that the government may have some doubt about whether individuals out there are suffering injury or threatened injury, with regards to their not being able to be—have standing in court. I wonder if very briefly you could let us know what your personal experience has been with that?

Mr. CHRISTENSEN. Thank you, Madam Chairman. In response to that, I'm a farmer and I belong to several different units of government: the county government; the irrigation district that provides the water, maintains the system; and the Idaho Farm Bureau. From each of those areas now, injury in anticipation of the needed or demanded changes to facilitate clear, cool water in the Five Snail case, the local irrigation district then had to allocate moneys to projects to accommodate whatever was necessary that the Interior was going to lay upon them to take care of the water that it would be clean enough and cool enough to re-enter the river and not harm the snail. And they started. So I end up paying money in addition to—or they increase or they have to allocate, or cut back somewhere else to fund this activity. The county likewise had to do the same thing because of the effects of the Act or the designation on them and the anticipation of where they may have to go. This is all getting prepared for after watching some of the other cases that have gone through the court and the necessary activities that go on, so we end up paying money for these projects, financially, I mean. Through the Farm Bureau, as far as having some standing, personally, I donated a lot of time and some money to the case that we were involved in and I think as an organization we have spent in excess of \$100,000 to \$150,000 to find out we didn't have standing. Now that's—as far as I'm concerned, under a limited resource situation—that's injury to me, to spend all of that money to be told you don't have standing; you shouldn't even be in court. And so I would rely upon the good judge's comment—that he felt like that our case particularly—and he was basing his decisions upon the traditions and precedence of the Ninth Circuit court—he indicated that Congress needed to clarify this. And our case "aptly demonstrated"—was his words—the necessity of this.

Mrs. CHENOWETH. So this was a case in point, where there was economic damage and there's no remedy because you've been rejected by the court.

Mr. CHRISTENSEN. That's right. That is correct, madam.

Mrs. CHENOWETH. And the snails are still listed and the case is—or the government is pursuing the listing of critical habitats?

Mr. CHRISTENSEN. Yes, the snails are still listed and I just found out yesterday, one of the—malacologists which we used to do a lot of findings, in the past summer was doing work and has found additional colonies in an expanded area. But I didn't know until just yesterday that he has passed away, Dr. Konapake. He drowned. Of course, that news from Boise doesn't come to Burley in our papers, you know. We can't print all of the obituaries in the local paper, so I just learned that just yesterday in preparation for coming here. So, yes, he spent a lot of time and we spent a lot of money helping him, paying him to find some of these and he did find additional colonies of these endangered snails, which U.S. Fish & Wildlife Service said didn't exist in sufficient numbers—they had to be listed.

Mrs. CHENOWETH. Thank you, Mr. Christensen. I want to ask Mr. Pombo for further questions.

Mr. POMBO. Yes, I just had a couple more. Mr. Christensen, in reviewing your testimony, you challenged this based on a lack of scientific evidence—this listing that you had economic damage. But you challenged based on a lack of scientific data, whether it was on the critical habitat or the listing, that they hadn't done sufficient or accurate scientific research on that. But the court did not find that the scientific information that was used in the listing or adopting a critical habitat or anything else was correct. What they found was that you didn't have standing to sue, so they never did determine whether or not it was accurate.

Mr. CHRISTENSEN. Yes, those points were moot because we did not have standing.

Mr. POMBO. So will we indeed find out whether or not you were correct in your assertion that the scientific information was not accurate?

Mr. CHRISTENSEN. This is a limited area of research. An issue, as I understand it, that the whole case grew out of a situation where, there—aren't a lot of malacologists looking for microscopic snails in the Snake River. And the "research" that was done, that was submitted, was done along the borders of the river; not out in the deep waters. It was unscientifically grided. It was sampling. It wasn't scientifically done on a grid scale and sampled as per science would dictate. So that's, I would suggest, some of the reasons why it is listed as unscientifically. In an additional sampling that we commissioned to have done,—the zone of the snails was increased significantly, where they weren't previously, and the conditions that were conducive to the snails as being cool running water, we found snails that were in slack water. There were snails found in slack water areas and so actually, the information relative to the habitat of the snail isn't really complete or totally known either.

Mr. POMBO. Do you think that if you had been granted standing and would have went through the lawsuit, that whether you were right or wrong about what you believed that it should have been listed or should not have been listed, do you think that we would have ended up with knowledge as to whether or not the scientific information was accurate, or whether or not new information would have been developed, which would have substantiated the listing or caused us to de-list?

Mr. CHRISTENSEN. I think that the U.S. Fish & Wildlife Service has done significant additional sampling too, since the lawsuit and we don't know any of those numbers.

Mr. POMBO. You have not gotten any of that information?

Mr. CHRISTENSEN. No, there's no reason to disclose. We don't—it's a moot point because it's—

Mr. POMBO. And without the lawsuit, then you don't know what that information was?

Mr. CHRISTENSEN. That's right.

Mr. POMBO. Mr. Leshy, without commenting directly on the case, if the plaintiffs were to lose at the Supreme Court level, would not the Ninth District Court's opinion stand, nationally, then, because—

Mr. LESHY. Yes, if the Supreme Court affirmed, that is, approved or validated the Ninth Circuit decision, it would become the rule nationwide. Right now it is only the rule in the Ninth Circuit, within the jurisdiction of the Ninth Circuit Court of Appeals. And I might add that in terms of Mr. Christensen's dilemma here, the reason, as I understand it, that the trial court ruled against his standing as plaintiff was because it was following the Ninth Circuit decision; in other words, the District Court in Idaho is in the Ninth Circuit, and is bound by the Court of Appeals' decisions. So it was simply applying the Court of Appeals' decision. Now, it's that Court of Appeals decision which, dictated the result in his case, which is being reviewed by the Supreme Court. So if the Supreme Court does something different with that case it would automatically affect his case. If the Supreme Court, in other words, reversed the Ninth Circuit and said you're wrong, they would also, in effect, be saying in Mr. Christensen's case that the district court in his case was wrong too, because it simply followed the Court of Appeals' decision. So his case, I believe, is still active, pending in the Court of Appeals, sitting there waiting for the Supreme Court to decide the Bennett case that it has in front of it. So he's still in court, trying to make his case.

Mr. CHRISTENSEN. Although I have no standing.

Mr. LESHY. Well, the courts—

Mr. POMBO. As long as he can afford to pay his attorneys, he can keep this going and—I've had attorneys tell me that before: "There's still a hope. Just—as long as you pay your bill there's still a hope."

But the simple matter is if they affirm the lower court case, that would become the law of the land. Even though everyone, including the Administration, seems to believe that that's not a good idea, it could happen?

Mr. LESHY. But the court, if it were to affirm the Ninth Circuit, would have to disagree with a lot of other courts. For example, on the listing question we have been sued several times by people alleging economic injuries as a result of our listing particular plants or animals, and those people have been granted standing by the courts. The most notable example was in California. In the coastal gnatcatcher case, the building industry, of southern California brought a lawsuit in the District of Columbia, here in the Federal courts, challenging our decision to list, whether it was properly made and whether the scientific evidence was there, et cetera.

Mr. POMBO. Just to correct one thing you said. They're not suing based on economic damages. Economic damages gives them standing. They're suing based on faulty scientific information. There's a difference there.

Mr. LESHY. I agree, yes, they are suing, alleging that the listing is causing them economic injury. And they are challenging the listing on scientific grounds; that is, scientific validity. But they got the courts to grant them standing and the courts actually went ahead and reviewed the Fish & Wildlife Service decision as to whether or not it was scientifically credible. In fact it was in that case where the courts said there was some question as to the scientific basis, and asked the Fish & Wildlife Service to take another look. So there's a big example where the Act worked, I think, as it was intended.

Mr. POMBO. But in that particular case, if I'm not mistaken, that would be in the Ninth District Court today and they would not be granted standing today, based on the Ninth District decision. So that case that you would consider a success, that it's working, would be thrown out today because they would not be given standing.

Mr. LESHY. Well, this is where if you're a clever plaintiff you can game the courts. The Building Industry sued in the District of Columbia, which they're entitled to do because the defendant, the United States, is found in the District of Columbia. So they sued here and thereby avoided Ninth Circuit decisions. So any time you're challenging a listing decision, if you want to avoid the Ninth Circuit, just sue us in D.C. and you'll have the courts following the D.C. Circuit Court of Appeals, which has just said the Ninth Circuit, in the Bennett case is wrong. That case could have happened the same way today.

Mr. POMBO. So that helps the Washington lawyers if—

Mr. LESHY. I guess that's right.

Mr. POMBO. Thank you.

Mrs. CHENOWETH. Thank you, Mr. Pombo. I do find it interesting that the Builder's case was brought in D.C., and I thank you for bringing that out. It's very difficult for a single rancher, though, to be able to put up the dollars that it takes to hire Washington lawyers and come in to Washington, D.C., and plead their case. I really think that it is far more valuable for the Congress to be very explicit and precise in its law-making responsibilities. I wanted to ask Nancie Marzulla, if property owners can't challenge the legality of agency actions because they're not in the zone of interest, what are their alternatives to protect their legal interest in their property, and at what expense?

Ms. MARZULLA. Well, I'm glad you asked that question. There aren't many. The avenue of relief that we're talking about here today is of itself a slender reed to rely upon, but it's about all that there is for property owners. We've been talking about cases in which the court has denied standing. I wish I had numbers that could demonstrate all the cases that we have reviewed and have determined that we can't do anything to help property owners, because there is no way we can get into court. We have got two major cases we are looking at right now, both of which I won't specifically identify because we are looking at them. But one we have been

looking at for an entire year, waiting for that magic moment that it might be challengeable under the APA. Likewise, another case that we have started looking at, we're looking to see if we can get an APA challenge because the real issue there is that their property rights have been taken. What we'd really like to do is to be able to go into court and to seek just compensation for the taking of their property rights, but we know we would never be able to do that because the way that the law is structured under the Endangered Species Act, coupled with the way the Fifth Amendment's jurisprudence is, your case is never ripe to get into court, to get a court to review a taking sort of challenge.

So that's why I think this issue—the issue presented in Bennett is so critically important, because there is really no other opportunities for property owners to get relief.

Mrs. CHENOWETH. Thank you, Nancie. Well, if the zone of interest is upheld up by the Supreme Court and applied across the board, what are the future implications for private property rights in this country?

Ms. MARZULLA. Well, as I alluded to in my comments, I think that it does not bode well for the Endangered Species Act because it sets up a direct tension. It really does create a system, which is already somewhat present in the current Endangered Species Act, whereby the property owner is punished if an endangered species is present on his land.

Already the Act is harsh with respect to the restrictions placed on a property owner, of what he can or cannot do with his property under the habitat designation that can be imposed under the Act. And so therefore, if you remove then the only venue that exists in some instances—obviously, not out in the Ninth Circuit—it certainly would not exist at all if the Bennett decision is upheld by the Supreme Court. Then you've got an Act which can be very harsh and often, in some instances, draconian, and the property owner has nowhere to go to for relief. And I just don't think that's the kind of situation any of us want to see because as I said earlier, we all believe endangered species should be protected. But we believe that other interests, such as our civil rights, should be protected as well.

Mrs. CHENOWETH. Thank you, Mrs. Marzulla. Mr. Pombo, do you have any other questions? I want to thank the panel very much. Senator, I thank you very much for coming all the way from Alaska. This panel is dismissed. I'd like to call to the witness table, Mr. Sam Kazman, general Counsel for Competitive Enterprise Institute in Washington, D.C.; Mr. David Hays, Commissioner from Williamson County, Texas, Georgetown, Texas; Mr. John Carr, Executive Director of Direct Service Industries, Inc., in Portland, Oregon.

**STATEMENT OF MR. SAM KAZMAN, GENERAL COUNSEL FOR
COMPETITIVE ENTERPRISE INSTITUTE IN WASHINGTON, DC**

Mr. SAM KAZMAN. Thank you, and thank you on behalf of Competitive Enterprise Institute for this opportunity to testify. I'd like to start with some general observations about the whole notion of the zone of interests test before we get into the specific issue of the Endangered Species Act.

Life is not a sure thing. Many bad things can happen to people—some of them caused by acts of nature, some caused by acts of other people and some caused by acts of government. But at least when it comes to acts of government, there are some basic assurances.

One of those is that if you have a grievance, you'll have your day in court. You'll get your hearing; your arguments will be heard. But for many people, and the *Bennett* case is only one specific example, this turns out not to be so. They do have injuries that meets the Constitutional criteria for standing. Their injuries are concrete. They're caused by the actions that they are complaining about. They're redressable by the relief that they seek in court. They meet the constitutional criteria and they have legal arguments that are valid; that is, they can point to specific provisions of the United States Code that have been violated. But they still do not fall within some alleged zone of interests test, and so they do not have their day in court.

The zone of interest standards is a test, but it is not a test of one's legal arguments. It's really a test involving who you are and where you're trying to go. In a certain way, it can be regarded as a sort of environmental loyalty oath in the case of Endangered Species Act. Now if this sounds like it's an exaggeration, consider some of the language contained in the recently decided D.C. Circuit case of *Mountain States Legal Foundation v. Secretary of Agriculture*. This was decided several weeks ago. It explicitly disagrees with the *Bennett* case but it notes—and here it talks not about the Endangered Species Act, but about NEPA, the National Environmental Policy Act,—“NEPA standing is not limited to those who are pure of heart.” Those are the court's words.

In a certain way, you can regard the *Bennett* case as saying that Endangered Species Act standing is limited to those who are pure of heart. And so the question is, is there any real justification for that reading, by the Ninth Circuit, of that statute? We submit that there isn't.

The zone of interests test is a limitation on who can be heard in court. But remember, it is not the first criterion you've got to pass. The first criterion is a constitutional one. We are all talking about people who already have passed those basic constitutional criteria regarding concreteness of injury. And then all of a sudden, a court brings in zone of interests.

This issue really has to be decided on a case by case basis, or rather on a statute by statute basis. But in the case of the Endangered Species Act, the issue is: are there any good reasons to impose the zone of interests test. Remember, the basic thrust of the Endangered Species Act is regulatory. If you begin to impose a zone of interests test that cuts out those who oppose regulation, you turn it not only into a one-way street, but into a one-way thruway. And this has several results.

First of all, it destroys an attempts that Congress made to impose some checks and balances in the Endangered Species Act itself. It does the equivalent of what Justice Stephen Breyer noted in his classic study of overregulation, *Breaking The Vicious Circle*. He comes up with the notion of tunnel vision, which in the case of regulatory agencies he described as follows: “Tunnel vision, a clas-

sic administrative disease, arises when an agency carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good."

Now, if you look at the ESA as it stands, it's clear that there are some attempts to impose checks on this tendency. Congress does talk about the requirement or the ability of the Secretary to look at economic impact. But under *Bennett*, look at what happens to those attempted checks. And this is aside from all the debate we can have about whether even congressionally inserted checks and balances have any real braking effect on the statute.

Under *Bennett*, you first come up with a single overriding purpose to the Endangered Species Act. Once you've got that, that gives you a perfect reason to begin to disregard the various checks that are in that statute. And so, when someone comes up with an economic interest and points to a specific economic impact provision in the statute, he or she or it is held to be raising a second-rate claim, an interest that does not fall within the zone of interests.

In fact, every provision within the Endangered Species Act has its own purpose. There is no single overriding purpose. The attempt to find one is really a judicial excuse to ignore the balances inserted by Congress.

Second, when you begin to focus on single overriding interestss, you get a very distorting effect in how you construe a statute. Once you find one major purpose, you will bend everything to carry that purpose further and further on. You engage, actually, in the judicial equivalent of tunnel vision.

And finally, you have the fact that the zone of interests test, especially as applied to these cases, ends up being a denial of simple justice; that is, the notion that someone who has a legitimate grievance ought to have the ability to raise those claims in court. Thank you.

[The prepared statement of Sam Kazman may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you Mr. Kazman. I'd like to call on Mr. Hays now for his testimony.

**STATEMENT OF MR. DAVID HAYS, COMMISSIONER,
WILLIAMSON COUNTY, GEORGETOWN, TEXAS**

Mr. HAYS. Thank you. I am an elected Commissioner of Williamson County, Texas, which is located just north of Austin, Texas. The people of Williamson County have a long history of deep ties with the land, and have used time-tested practices of good land stewardship for decades. The people of Williamson County are also interested in having a growing economy with good jobs, good school and the other amenities that come with hard work. Ironically, under the current Endangered Species Act, the people of Williamson County have been too good at achieving both of those goals: our sound land stewardship has made the County home to a number of endangered species, and our vibrant economic growth has made the endangered species issue one of controversy between the County and the Federal Government.

As a public official of the County, I take my responsibility to the environment and the economy of the County very seriously. I want,

and I now the people I represent want a program of environmentally responsible growth. That is why, as the U.S. Fish & Wildlife Service began in the 1980's listing species with habitat in the County as endangered, the County did its best to adjust to the situation as it planned its infrastructure. Eventually, however, the County became aware of information that led to our disillusionment with the Federal Government's lack of fairness with respect to the endangered species in the County. Unfortunately, our story was ignored by the agency and was never heard in the Federal court litigation we filed in Texas, because the courts ruled we hadn't suffered specific enough injury and thus had no standing.

After having been ignored by both the Federal agency and the Federal courts, I can assure you the County was very pleased to hear that someone in the Federal Government, namely your Committee, was willing to hear our cause. And I have come to tell you our story because, even though our litigation was dismissed for somewhat different reasons than the subject matter of H.R. 3862, it positively calls out for Congress to pass H.R. 3862 in order to ensure that others who have suffered the kind of economic injury the County has suffered will not be stifled, suppressed, and shut up by arcane, unfair, and overly restrictive rules of standing. If nothing else is done in this Congress to improve the Act, please at least pass this measure.

Our story has to do with several species of small invertebrate creatures that live in the hundreds of dark, cool caves spread throughout the County. We call them our cave bugs, although I am told that most of them are not true bugs. In 1988 the Fish & Wildlife Service listed five of these species as endangered on the grounds that they existed in a few closely situated caves. At the time, because the area involved was so limited, no one paid attention. We later learned, however, that the agency suppressed the truth before the listing and pulled a sleight of hand afterwards, all designed to spread the regulatory impact of this supposedly limited listing to an area covering about half our County.

Records we later obtained from the agency reveal that a state agency independently wrote the FWS before the final listing to note that caves abound throughout the Williamson County area. The agency asked an obvious question to anyone familiar with the geology of the area: Shouldn't caves other than the few mentioned in the proposed listing document be checked out to see how abundant and widespread these species really are? In a short response letter, FWS dismissed the state agency's concern as simply not of merit. FWS's exact words were that "the potential for significant range extensions is too limited to affect the species' status."

Soon after the listing, however, FWS started finding the species in other caves; then it pressured private landowners to look in their caves, and more were found. This kept going on until today, several of the species are found in scores of caves spanning the western half of the County and are also found in other counties. Whereas before the listing the FWS repeatedly insisted that the six identified caves include the entire known ranges of the species, after the listing the agency has stated that some of the species are found in upwards of 100 caves and the areas where the species are potentially found covers thousands of acres.

By the early 1990's, the situation had become critical. A major development project in the County was halted because one of the species was found there. By the time the development got back on line with its ESA permit, it was out several years and a million plus dollars. The Country's tax revenues were diminished as well. At the same time, the county itself was under increasing pressure to avoid caves, so it hired a staff person in the County Engineer's office to be responsible for ESA compliance. With that person's input, the County plans to investigate the ESA impacts of all of its infrastructure, and to redesign projects to minimize this impact. Naturally, the County was not alone in having to make such expenditures. All landowners in the so-called karst species zone were acting under fear of FWS regulation, spending large sums to poke and probe their land to ensure they were clear.

By 1993, the situation had become intolerable. The last straw was when the agency in June 1993 added two new cave bugs to the endangered list with absolutely no opportunity for public notice and comment, saying the species would have been listed in 1988, had the agency know then about them, so it's o.k. to list them today without following the procedures.

At that point, the County filed a petition to delist. The petition was denied in 1994. We appealed that; that was also denied.

Amazingly, the government defended the suit on the ground that the County had suffered no injury within the meaning of the constitutional requirements.

Our case demonstrates that the deck is already stacked. The constitutional standing requirements are strict and rigid and are used aggressively by government lawyers to keep litigants out of court. We can see the need for a filter, though we believe it worked too well in our case.

The way the Ninth Circuit has applied the zone of interest test, what little will is left in public and private economic interests to speak up in the Endangered Species Act will be lost, and this forum will be lost altogether. In the Ninth Circuit, it would have mattered either way because even with a showing of economic injury, one cannot bring an ESA suit to challenge illegal agency conduct.

In short, the Ninth Circuit has turned standing doctrine into a form of political suppression. It should not be the case that one has to have not only injury, but the correct claim in order to have standing. I therefore urge you to pass H.R. 3862. Thank you.

[The prepared statement of David S. Hays may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you, Mr. Hays. I want to call on Mr. John Carr, for his testimony now.

**STATEMENT OF MR. JOHN CARR, EXECUTIVE DIRECTOR OF
DIRECT SERVICE INDUSTRIES, INC., PORTLAND, OREGON**

Mr. CARR. I am the executive director for Direct Service Industries, Inc.

DSI, Inc. represents eight large industrial entities that purchase electric energy directly from the bulk power market, buying the majority of their power from the Bonneville Power Administration. For most of these companies, the price they pay for power is the

single most important factor that determines their ability to compete successfully in the worldwide markets in which they operate. Traditionally, these companies have purchased between 25 percent and 30 percent of the power that Bonneville sells, and these purchases provide an equivalent share of Bonneville's revenues.

When a decision to alter hydropower operations or spend money to improve Fish & Wildlife is made by the EPA, the DSIs pay for it through an increase in rates. Currently, the DSIs are paying over \$100,000,000 a year for Fish & Wildlife, primarily related to the Endangered Species Act.

We're here today because a decision made by the Ninth Circuit denied our standing to challenge Federal agency decisions to dramatically increase Columbia River flows for salmon, taken under the Endangered Species Act; regardless of the fact that the DSIs have significant economic interest in those actions. This issue does not go to whether an agency decision was right or wrong, or whether it was lawful or unlawful. When a party is denied standing, the court will not even hear whether the party has a valid complaint or whether the party was injured by a Federal agencies violation of the law.

By creating a zone of interest test for standing to seek review of actions taken under the ESA, the Ninth Circuit has prevented parties that suffer huge economic injury, such as the DSIs, any ability to require Federal agencies to act in compliance with the law. Being denied standing in Court greatly erodes our ability to affect agency decisions. The agencies take you much less seriously if your opponents can sue them and you can't.

H.R. 3862 is a positive step toward ensuring the right of full and fair judicial review for all interests, including economic interests under the ESA. It can be improved, however. Rather than declaring economic interests to be within the zone of protected interests of the ESA, it would be preferable to prohibit a Court from using the zone of interest test to impose barriers greater than the showings required by the Constitution.

In addition, the bill's scope should be expanded beyond critical habitat determinations to other Federal actions under ESA.

We're also concerned that the remedy proposed in this bill may not be adequate to allow citizens to protect their economic interests from potentially arbitrary agency action. Judicial review of agency action is based on the administrative record submitted by the agency to the court. Therefore, agency proceedings must be open to all interests. Citizens should be notified and provided an opportunity to participate in any ESA consultation that is likely to affect that citizen's economic interests.

Finally, a citizen's interest may not have been harmed by an agency's initial action, but that interest may be threatened by actions some other citizen is seeking to compel through judicial action. Therefore, it is important that citizens have standing to intervene in lawsuits initiated by others under the ESA whenever that suit threatens their economic or other interests.

On behalf of the members of Direct Service Industries, Inc., I appreciate the opportunity to address this Committee regarding an issue that has significant potential effect on our fundamental economic interests. Thank you.

[The prepared statement of John Carr may be found at the end of hearing.]

Mrs. CHENOWETH. Thank you very much, Mr. Carr. I'd like to turn the hearing over to Mr. Pombo.

[Whereupon Mr. Pombo assumed the Chair.]

Mr. POMBO. Thank you. Mr. Carr, in your particular case, you were denied the right to have your suit heard because you didn't have standing.

Mr. CARR. That is correct. We were not able to bring a suit on agency actions that affected the hydropower operations.

Mr. POMBO. Why didn't you have standing? What was—did you not show that you had economic loss, that the decision was not—

Mr. CARR. It was fundamentally the same argument that other witnesses have made. There was no denial by the Ninth Circuit that we had an economic interest at stake. The argument was made by the Ninth Circuit that, in the case of hydropower operations, economics was our only interest. To the extent we were wishing to bring suit against Federal agencies for misapplication of the law in determining jeopardy requirements, section consultation requirements or even biological determinations to determine the level of hydropower operations, the Court determined our interests were not within the zone of interest of the Endangered Species Act.

Mr. POMBO. So they did not deny that you had an economic interest. They just determined that the provisions of the Endangered Species Act did not give you standing to sue, based on the fact that you weren't—let me put it this way. If you were suing to increase the amount of restrictions under the Act, would you then have standing?

Mr. CARR. Yes, in fact in one of the two averages, the same Ninth Circuit did give us standing to file suit against the Federal agencies for not making enough harvest restrictions.

Mr. POMBO. Mr. Kazman, in your prepared testimony, you state in two hypothetical cases, that if on one side someone was suing because the restrictions weren't tough enough and if someone was suing because they were too tough, one would be given standing and the other wouldn't, just based upon what they were suing on.

Mr. KAZMAN. That's based on *Bennett's* reasoning and it would be especially true if, suppose, it were the case that a designation of critical habitat was at issue and you got one set of plaintiffs arguing that the economic impact had been considered, but that it had been given too much importance, way out of proportion to what the actual impact was. Therefore, the designation was not as wide as it should have been. It didn't encompass as much property as it should have been and therefore it's invalid.

Those types of arguments, which are most typically raised by traditional environmentalist groups, would be heard in court. Those groups would be held to have an interest; namely, the furtherance of preservation or conservation. That is the purpose of ESA, according to the Ninth Circuit.

Now suppose someone else complains about the exact same designation of critical habitat, arguing that not only were economic interests and impact not overemphasized; in fact, they were illegally ignored by the Secretary. That person, that plaintiff would not have standing.

You've got two groups arguing about the exact same act, both raising what are procedurally identical arguments, namely was economic impact given due consideration or not. And yet you've got a totally disparate outcome based on who you are and which way you're pushing.

Mr. POMBO. Is there any justification in common law or written statute or anywhere, that you're familiar with, which would justify giving people standing based upon which side of the argument they're arguing, or which side of the debate they're on?

Mr. KAZMAN. It would only—could only be supported by an incredibly stretched notion of congressional intent. Courts do give Congress quite a bit of leeway in determining just what interests or injuries or interests are cognizably important. And if they really thought that Congress intended to give all the advantages to the pro-preservationists and none to anyone concerned with regulation going too far, yes, you could say there is a rationale for that court decision.

If, for example, you had a citizen's provision that said only those interested in the conservation of the species or in the government activities to conserve the species, and no one else, can file citizen's suit, arguably, that would be upheld. But there is nothing to indicate that that was in fact what Congress intended.

Yeah, you're talking about Congressional intent and I can tell you over the past couple of years I've spent a great deal of time on the Endangered Species Act. I'm reading old Committee hearings, finding out what the debate was, what the Congressional intent was at the time that it was passed, at the time that amendments were adopted.

To the best of my memory, I don't remember this issue every coming up in any one at any time ever testifying or speaking to the effect that if you're on this side of the debate you have standing, but if you're on the other side of the debate you don't. So I think it would be, in your words, quite a stretch to say that there was—that they pulled this out of Congressional intent. I have never read anywhere in anything that anyone has said, coming out of Congress, that this was the intent; so I don't believe that that's the case.

And if they're saying it's based on law, I don't know how it's based on law because it's not what the original Endangered Species Act said. It's not based on any interpretation that has ever come out. It seems like they just decided that they would pick one side that they liked better than the other.

Mr. KAZMAN. I think what happens is that this court believed that—well, it either chose to or felt obligated to come up with a single, overriding purpose for the statute; which means to go from the text of the statute to where you start to divining some overriding purpose. Then you use that divining—that overriding purpose that you've divined to be the definition for a zone of interests. So it's a double jump from the text of the statute itself. And in each of those jumps you get a stretch or a total twisting of what is actually stated in law. And the result you get, because you've got the courts trying to come up with a single purpose, is a real distorted form of statutory construction.

Mr. POMBO. So they take a law and then take court decisions that are made and then re-interpret the law based upon the court decisions that are made and somehow end up in a place that nobody intended for them to go. The administration witness testified—Mr. Leshy testified earlier that he was personally not comfortable with this decision as well. It doesn't seem to me that anybody intended us ever to end up where we are today. And yet, we've had a string of witnesses that have testified that this has become a real problem.

Mr. KAZMAN. And that in a sense is all the more reason for this Committee not really to feel it has to await a Supreme Court ruling here. The entire issue of the Supreme Court ruling will be what did Congress intend? It all comes back to Congress. There is nothing that says when you've got this sort of issue the Supreme Court shall go first or Congress shall go last. If the issue is congressional intent, if this Committee wants to address it, it is perfectly free to do so at this point. And I think that quite a bit of the testimony here indicates that there is good reason for it, in fact, to act.

Mr. POMBO. Mr. Hays, in your testimony, the lawsuit that you talked about was based upon faulty scientific data, that you believed or the County believed that the scientific data that was used for listing was inaccurate and in terms of adopting a critical habitat, originally they said it existed in six caves, and then after it was listed they found it in hundreds of others. That was the basis that you were suing under, that it was faulty scientific data and the attempt was being made on the part of the County to find out whether or not it was endangered, if it was endangered, what its habitat was, but you were not given standing because you did not have an economic loss?

Mr. HAYS. That's correct. That's correct.

Mr. POMBO. In the intervening years, since the late 1980's, up until the more listing of additional species, if I remember your case accurately, they have found that throughout the entire County, that not just your County—throughout that entire region of Texas as well.

Mr. HAYS. That's right.

Mr. POMBO. Do you feel that with the knowledge that you have today, that the science that was originally used was inaccurate in that listing?

Mr. HAYS. We feel like there should have been a longer period of discovery, and time for other governmental entities to participate in the process, before they designated the species endangered. There are seven species. Two of the species we're finding everywhere in the central Texas region—every rock, every crevice has two of the species. The other five probably are extinct but they don't pose a problem necessarily, because preserves can be set up when we find them, that will adequately protect them but will still allow for growth and development. But it's two that were put on there that—

Mr. POMBO. That you're finding everywhere?

Mr. HAYS. That we feel like—that we agree absolutely that the science was not done prior to two of these species being placed on the endangered species list.

Mr. POMBO. The two that you're talking about, were they part of the original listing in 1988, or were they subsequently added?

Mr. HAYS. They were the original—part of the original.

Mr. POMBO. They were a part of the original listing?

Mr. HAYS. And then what they did was they put five species on and then they added sub-species. From these there might be one small component on some of these—bugs that would have created a sub-species and so they were adding.

Mr. POMBO. So some caves have the sub-species of—

Mr. HAYS. Those same species.

Mr. POMBO. But those two are your major problems because you're finding them everywhere?

Mr. HAYS. That's right. And we've looked briefly at the proposed changes in the Endangered Species Act and you know, if they stayed on course, where they currently are, we think they're going to be balanced in the Act. But we also feel like this legislation is essential because if you are economically injured, you have to be able—surely you ought to be able to file a suit.

Mr. POMBO. Your case was not heard because you did not have standing. It had nothing to do with your arguments being meritless?

Mr. HAYS. Correct.

Mr. POMBO. No one has ever said that your argument was meritless, that there was no reason to hear the case based upon your argument. It was only based upon the fact that you had an economic injury and you were not suing on behalf of the bugs.

Mr. HAYS. That's correct, and also, we could not—the court ruled that we could not show the County itself—the governmental entity of the County could not show a specific entity—specific injury; that we couldn't represent the landowners in our County; that they would have to try their case separately and independently. But we could not show that specific injury and therefore, we failed the Constitution.

Mr. POMBO. If you were a scientist looking at your specific case, and you had everything that Fish & Wildlife had given out, and based upon the information that they released publicly, you would determine that it's endangered based upon that information, and as a scientist would determine that yes, they are endangered because this is what the information at Fish & Wildlife has given us. But if you had done further studies and looked at what was really out there, you may come up with a different opinion?

Mr. HAYS. That's right. And we may also have a different opinion on how they should be preserved.

Mr. POMBO. Thank you.

Mrs. CHENOWETH. Thank you, Mr. Pombo. Mr. Hays, I wanted to ask you about these cave bugs. Do they ever come out of the cave?

Mr. HAYS. Well, we've had a hard time determining—we call them cave bugs, but it would actually—we find them under large rocks, crevices. They don't—I don't think they come out. They like dark places below the surface. But I don't think they're wandering around above surface. I think they're all blind.

Mrs. CHENOWETH. They're all what?

Mr. HAYS. I think they're blind.

Mrs. CHENOWETH. Are they blind?

Mr. HAYS. I think they are.

Mrs. CHENOWETH. But you find them only at night. They're nocturnal or?

Mr. HAYS. Well, no, you can find them. When environmentalists or biologists go out and look for them, they go down with flashlights into the caves or these crevices and find them. But they're—

Mrs. CHENOWETH. So what is the logic of listing the surface, that where there's sunlight and so forth, where humans usually exist—outside of the crevices and the caves?

Mr. HAYS. Well, in central Texas there are limestone formations that encompass most of the County, and when it rains it goes through the topsoil and goes through the limestone and creates these caves. So what you have to do, when you're preserving the cave you also have enough land around the cave so that run-off, when it rains, doesn't go into the cave and—or say you had a development going in, you know, street, drainage, anything that could possibly contaminate the entrance into the cave or crevice would go in there and destroy the species.

Mrs. CHENOWETH. You know, I remember early on in this term, Mr. Pombo was heading up the Endangered Species Act task force and we had a couple of hearings in Texas. And I've got to say, aside from Idaho, you have the most incredible cases down there. Blind cave bugs that impact an entire one-half of your County. Interesting. Mr. Kazman, I wanted to ask you some questions and I thank you for your good testimony. In Section G, under Penalties and Enforcements, do you happen to have the Act with you?

Mr. KAZMAN. Yes.

Mrs. CHENOWETH. OK. I'm under Citizen's Suits, Section D, and I just want to read this because it is quite broad. But then it narrows up the application of the Act it appears, "Except as provided in paragraph two of this subsection," are you with me?

Mr. KAZMAN. Yes.

Mrs. CHENOWETH. OK. "Except as provided in paragraph two of this subsection, any person may commence a civil suit on his own behalf." And then it narrows it down: "To enjoin any person, including the United States and any other governmental instrumentality or agency who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof."

And Section B and C also seem to take the tail of this little animal right back and put it in its mouth. So it appears that the Ninth Circuit decision in *Bennett v. Plenert* may be a strict interpretation of this provision. Do you see it this way?

Mr. KAZMAN. Are you asking if the Ninth Circuit engaged in a misinterpretation of this?

Mrs. CHENOWETH. Do you believe this is where they got their decision that humans are outside of the zone of interest? Where it talks about citizen suits, and yet, takes it right back into the Endangered Species Act in enforcement and in process.

Mr. KAZMAN. I think really the error is this, and I ought to mention, it's not as if just because a court takes a zone of interests approach to the Endangered Species Act that you get this sort of very bad decision, because the D.C. Circuit's *Mountain States Legal*

Foundation case also adopts the zone of interest test. The big distinction is that in the Ninth Circuit *Bennett* case, the court looks at ESA and—I have to say does not look at it very carefully—says its overriding purpose is that of conservation, preservation of species. And from there it basically adopts a twisted of interpretation of language. It figures, here's a citizen suit provision, we understand Congress to be creating a whole set of interests which citizens can pursue through court action, but it's got to be read in accordance with the whole statute. For the Ninth Circuit, that means in accordance with this one overriding purpose. The D.C. Circuit's interpretation, on the other hand, is yes, the ESA is primarily concerned with preservation, conservation of species, but no statute pursues its objective at all costs, or in total disregard to costs. And for that reason, the balancing references to economic impact that are contained in the ESA can't be read out of the statute. They've got their own purposes. And even though those purposes might not make it into the very title of the Act, they nonetheless represent a specific congressional intent as well. And in a sense you've got some checks here. We've got to give recognition to those checks, and so we're not going to construe zone of interests in the same one dimensional manner that the Ninth Circuit did.

And in a sense, even though there is a lot of talk about congressional intent, it really has to do with fidelity to the language of the statute. If you find references to economic impacts, it means that Congress wanted economic impacts to be considered.

And that means that Congress almost certainly wanted people who have suffered those impacts, and who can state a claim that those impacts were not adequately considered, to have redress under the statute.

Mrs. CHENOWETH. Mr. Kazman, isn't NEPA made a part of the law by reference in the Endangered Species Act?

Mr. KAZMAN. Yes, it is but I mentioned NEPA in terms of NEPA not applying solely to those who are pure of heart. Quite a few cases, especially cases involving interest in information—information that might have been contained in environmental assessment, in an environmental impact statement—these are called informational interest cases—quite a few of those cases have been brought under NEPA. And there, even though NEPA itself is very wide-ranging, the interpretation adopted under zone of interests is that it's not enough to have an interest in the information. Your interest has to be of an environmental nature. If your interest in the information that might be produced regarding NEPA has to do with something else, then you're out of luck.

And we, ourselves, ran into this situation in connection with a series of court cases that we filed against the National Highway Traffic Safety Administration on what are known as the CAFE rules—the government's new car fuel economy standards. Our claim was that CAFE kills people by causing cars to be downsized. And all other things being equal, small cars are less safe than large cars. NHTSA claimed that this was not so.

We ended up winning on the merits. The court held that NHTSA's claim of no safety impact from CAFE was based on "bureaucratic mumbo-jumbo." Those were the court's words—not ours.

But specifically, we also had a NEPA claim. We argued that under NHTSA's own NEPA regulations, which talk about social and human impacts, NHTSA should have looked at the fact that CAFE was going to kill people, and considered it just the way it considered whether CAFE would affect wetlands, air quality, wildlife and 50 other different environmental factors.

NHTSA did not do that. The court held that we did not have standing to pursue that claim. We were lucky because we succeeded in getting standing under the CAFE statute. But if we had been limited to NEPA, it would have had the effect that an agency could examine CAFE's effect on everything in the world except humans, and realizing that humans might be killed still get away with that omission.

Mrs. CHENOWETH. Mr. Kazman, let me ask you. I'm sort of reaching back quite a ways, back into the 1970's. And the Supreme Court decision, I believe entitled *Zero Club v. Morton*. It involved a ski hill or a proposed ski hill. And suit was brought to enjoin the Secretary from moving ahead, and allowing this ski hill to be developed. And they brought it on the basis of that it would cause aesthetic damage. It would ruin the view. As I remember right, the court ruled that because there was no economic injury to the plaintiffs, they were outside the zone of interest. And while they did not use the term, the zone of interest, I do remember that decision. I would like to discuss it further with you, but right now, assuming that what I'm trying to remember is true, wouldn't, then, *Bennett v. Plenert* have overturned the zone of interest doctrine that was already established by NEPA, and in fact, came in to the whole picture of the Endangered Species Act because NEPA has been made a part of the law by reference?

Mr. KAZMAN. I ought to mention first, the fact that NEPA is referred to in the ESA does not necessarily mean that any claim brought under the ESA is going to be subject to the NEPA zone of interests, or vice-versa. But my recollection of the *Sierra Club* case was that the purely generalized allegation of aesthetic injury—and as I recall, the court harped on the fact that there were no particulars given, no specific members were identified, no specific items of beauty or geographic locations giving rise to that aesthetic value were identified. It was just about as broad a generalization as you could get. I think also it was something that was done deliberately, in an attempt to widen environmentalist standing. And the court found that insufficient. But I think it was based on the Constitution; that is, it just did not meet the constitutional criteria. But I've got to admit my memory of that case is somewhat foggy. But since then you have had a general expansion of environmentalist standing. It is an expansion that is treated very critically in a book that we cite in our testimony, by Michael S. Greve, only recently published by AEI, entitled, *The Demise of Environmentalism in American Law*.

But really, that expansion had to do with very, very nebulous sorts of injuries and what is interesting, with respect to *Bennett*, is here you have a court taking the most concrete form of injury imaginable—a pocketbook impact, an impact on your bottom operating line—and saying that's not good enough. Whereas, these incredibly nebulous allegations generally do continue to suffice.

Mrs. CHENOWETH. Thank you, Mr. Kazman. That's very interesting. Mr. Carr, I wanted to ask you, with regards to your clients in the Pacific northwest, how much economic injury can you estimate has occurred because of spilling water at the dams, because of the endangered species in the rivers?

Mr. CARR. Well, there's something like \$400 million a year spent on salmon. It's funded through the BPA rates. Our fundamental view is a lot of that money is being spent on things that aren't doing the fish much good. It could be spent much better on other things. The \$20-30 million a year that's involved with spilling water over dams probably does more harm than good. As I said in my testimony, on those type of issues we don't have standing to raise in court. But, of course, like everyone else has been talking about, the environmentalists do have the opportunity to raise those issues once a decision is made by the Federal Government and can argue that the Federal restrictions don't go far enough. Of course, we don't get our day in court to be able to argue that either the science or the statutory interpretation underlying the restrictions are faulty. But the spill program has cost certainly, over the last few years, tens of millions of dollars.

Mrs. CHENOWETH. I think that if your company had a \$435 million cap to explore what it may take to save the salmon, I think you could probably accomplish that task maybe, couldn't you?

Mr. CARR. We probably could.

Mrs. CHENOWETH. Mr. Pombo, do you have any other questions?

Mr. POMBO. Yeah, just a couple more. One, Mr. Kazman, maybe you can explain to me why can an environmental group sue on behalf of its members in one of these cases, but the County can't sue on behalf of its constituents?

Mr. KAZMAN. I'd like to look at the court decision but my hunch is that in the court's view, the connection between what landowners would do under this regulation and how that in turn might affect tax revenues of the County was judged to be too speculative. And so that was the killer; whereas, the traditional environmentalist groups suing on behalf of their members, you know, it's pretty well established in terms of standing.

Mr. POMBO. Would a home owners group or a property rights group have standing then?

Mr. KAZMAN. I would guess that they should but once again, this tends to be so dependent upon the actual facts. And also, to the extent that the environmentalist standing is viewed with this eye toward promoting one set of interests and not really having any balances that create their own citizen's suit enforcement provisions as a betting person, I'd bet against it.

Mr. POMBO. Unless...

Mr. KAZMAN. I'm not sure what the betting line would be, though. Maybe you could help me with what the proper odds would be.

Mr. POMBO. Unless legislation like this were to pass.

Mr. KAZMAN. That's right. I think legislation will—at least expressly mentioning the words “economic injury” puts it on a totally different footing than it otherwise would be.

Mr. POMBO. I have a press release here that was put out by the defenders of wildlife, that lists the Pacific Northwest Generating

Co-op v. Brown as one of the successes under the ESA, that shows that individuals, private industries can and do sue the Federal Government. Mr. Carr, in your testimony, you referenced that specific case and said that you were not—that you were a co-plaintiff in that, but that you were not allowed to sue. Why were they allowed to sue and you weren't?

Mr. CARR. Well, it's one of these difficult decisions to explain. We and the other plaintiffs were asking for standing not only to challenge the decisions that the Federal Government was making regarding hydropower operations, but also challenging decisions they were making about how much commercial harvest should be allowed; how much hatchery production should be allowed, and habitat type issues.

The initial decision by the district court was that we and the other plaintiffs didn't have standing to sue on any of those issues. The Ninth Circuit, on reflection, on appeal, decided that we had the right to sue on the non-hydropower related issues; that is, harvest, hatchery production, things of that nature, because they decided it was probably in our best economic interests to obtain recovery of the fish. That was the court's decision. For us to pursue additional harvest restrictions or challenge hatchery operations would probably lead to a zone of interest, which would derive more fish. If there were more fish, then we would probably be economically benefited. That was their logic on that case, basically.

Regarding hydropower operations, they said that there was a direct economic connection. If we argued against the Federal Government's determination on hydropower operation, our only goal was to cut back on restrictions on hydropower operations. They then leaped to basically a factual decision and said that, now this is my interpretation, more flows for fish was good. The only thing we would be in court arguing, they thought, was less flows for fish to save money to us. Therefore, we only had this pure economic interest and that fell outside the zone of interest of the Endangered Species Act. So on the bottom line, we were able to get standing for pursuing cases on harvest and things of that nature. But we were not able to get into court and challenge the things really most basic to our long-term economic vitality.

Mr. POMBO. When you say, "we" are you referring to Pacific Northwest as well?

Mr. CARR. I'm referring to the DSIs. That's my organization. There's also two other umbrella groups involved in this: the Pacific Northwest Generating Co-op and the Public Power Council.

Mr. POMBO. So they were not allowed standing on the issues. They were only allowed standing if they wanted to restrict more harvesting of the salmon?

Mr. CARR. That's correct. The decision applied to all three of us.

Mr. POMBO. So this is not exactly accurate. They were allowed only if they were arguing that side of the issue. If they were arguing the other side of the issue, they were not allowed.

Mr. CARR. That's correct. None of us were allowed under that decision to challenge the Federal Government's determinations about hydropower operations, the very thing that basically determined our economic livelihood.

Mr. POMBO. OK. Thank you very much.

Mrs. CHENOWETH. Thank you, Mr. Pombo. I just want to conclude this hearing by putting in the record some very interesting information. Both Mr. Pombo and I were concerned about the cost that it takes for individuals to see justice if they ever could get standing under the ESA. Endangered Species Act allows for attorneys to be paid attorneys fees and under the Fund for Animals v. Lujan, the environmental attorneys received \$67,500. Under Dioxin Organo-chlorine Center and Columbia River United v. Rasmussen, the environmental attorneys received \$61,500. And Defenders of Wildlife v. Thomas, the attorneys were \$122,500. Natural Resource Defense Council v. Hodell, they received \$18,000—oh, \$518,000. I thought that was a \$ sign. \$5198,000. Defenders of Wildlife v. Thomas, \$122,500. And Greenpeace v. Bridge Baldrige, NYE, they received \$88,794. And there's many pages of these; so there is an economic reason to keep these suits going, suits that very often stop us from pursuing our way of life and our work. So I want to thank all of you for joining us. All of you who have joined us to listen to the hearing and those of you who have participated. Just a moment. Oh, all of these numbers that I have read in the settlements of the attorneys fees was information submitted by the Department of Justice, in their records.

And so with that I'd like to call this hearing to a close, thanking you gentlemen for your participation.

The hearing record will remain open for ten working days. With that, this hearing is adjourned.

[Whereupon, at 4:12 p.m., the Committee was adjourned; and the following was submitted for the record:]

104TH CONGRESS
2D SESSION

H. R. 3862

To amend the Endangered Species Act of 1973 to clarify the intent of Congress and ensure that any person having any economic interest that is directly or indirectly harmed by a designation of critical habitat may bring a citizen's suit under that Act.

IN THE HOUSE OF REPRESENTATIVES

JULY 22, 1996

Mrs. CHENOWETH (for herself, Mr. POMBO, Mr. YOUNG of Alaska, Mr. DOOLITTLE, Mr. SMITH of Texas, Mr. CALVERT, Mr. STOCKMAN, Mr. BREWSTER, Mr. COOLEY of Oregon, Mr. STUMP, Mrs. CUBIN, Mr. RADANOVICH, Mr. TAUZIN, Mr. CUNNINGHAM, Mr. BARTLETT of Maryland, Mr. DORNAN, Mr. HASTINGS of Washington, Mrs. VUCANOVICH, Mrs. SEASTRAND, Mr. FIELDS of Texas, Mr. BARTON of Texas, Mr. STENHOLM, Mr. ROHRBACHER, Mr. BAKER of Louisiana, Mr. SOLOMON, Mr. LAUGHLIN, Mr. HUNTER, Mr. HERGER, Mrs. MYRICK, Mr. DICKEY, Mr. CRAPO, Mr. ISTOOK, Mr. MCKEON, Mr. HILLEARY, Mr. BURTON of Indiana, Mr. COMBEST, Mr. FUNDERBURK, Mr. BARR of Georgia, Mr. MCINTOSH, Mr. METCALF, Mr. COX of California, Mr. LUCAS of Oklahoma, Mr. RIGGS, Mr. SAM JOHNSON of Texas, and Mr. HANSEN) introduced the following bill; which was referred to the Committee on Resources

A BILL

To amend the Endangered Species Act of 1973 to clarify the intent of Congress and ensure that any person having any economic interest that is directly or indirectly harmed by a designation of critical habitat may bring a citizen's suit under that Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Citizen’s Fair Hearing
5 Act of 1996”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) The Endangered Species Act of 1973 grants
9 broad regulatory authority to various agencies to
10 take actions to protect, preserve, and recover species
11 of plants and animals determined to be in danger of
12 extinction or threatened with becoming so within the
13 foreseeable future.

14 (2) Recently, private property owners and other
15 persons that have been adversely impacted by Fed-
16 eral agency actions under the Endangered Species
17 Act of 1973 have sought to bring civil actions for re-
18 covery of damages imposed by the Act. The United
19 States Circuit Court of Appeals for the 9th Circuit
20 has found that plaintiffs in those actions do not have
21 standing to bring the suits, because they do not fall
22 into the zone of interests protected by the Endan-
23 gered Species Act of 1973.

1 **SEC. 3. GIVING PERSONS WITH AFFECTED ECONOMIC IN-**
2 **TERESTS EQUAL STANDING TO SUE UNDER**
3 **THE ENDANGERED SPECIES ACT OF 1973.**

4 Section 11(g)(1) of the Endangered Species Act of
5 1973 (16 U.S.C. 1540(g)(1)) is amended by striking so
6 much as precedes subparagraph (A) and inserting the fol-
7 lowing:

8 “(g) CITIZEN SUITS.—(1) Except as provided in
9 paragraph (2), any person that satisfies the requirements
10 of the Constitution and demonstrates having suffered or
11 being threatened with economic or other injury resulting
12 from a violation of the Act or a failure of the Secretary
13 to act in accordance with the Act is deemed to be within
14 the zone of protected interests of this Act and shall have
15 standing to commence a civil suit on his or her own be-
16 half—”.

○

PREPARED STATEMENT OF JOHN MACLEOD

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today in support of H.R. 3862, the Citizen's Fair Hearing Act of 1996.

I am John Macleod. I am a partner in the law firm of Crowell & Moring LLP in Washington, D.C., and am testifying today on behalf of the American Forest & Paper Association ("AF&PA"), the national trade association of the forest, pulp, paper, paperboard and wood products industry.

I have represented the interests of the forest products industry and other owners and users of land in a number of cases under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* ("ESA"). Last year, for example, I represented a group of civic organizations, small landowners, and contract loggers in an important ESA case -- called *Sweet Home* -- that was decided by the United States Supreme Court. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995). And only a few months ago, my firm filed an *amicus* brief on behalf of the American Forest & Paper Association, the American Petroleum Institute and other groups in another important ESA case -- called *Bennett v. Plenert* -- that will be considered by the Supreme Court this term. See *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), *cert. granted and before the Supreme Court as Bennett v. Spear*, No. 95-813.

Like H.R. 3862, the *Bennett* case involves the question of "standing" under the ESA. "Standing" is a rather technical legal term, but in essence it boils down to the right to have a complaint heard by the courts. The Ninth Circuit decision that the Supreme Court will review in *Bennett* held that landowners and others who are economically hurt by regulatory excesses in enforcing the ESA have no right -- or "standing" -- to go to court to challenge those excesses. Such a proposition is both unnecessary and unfair.

The American Forest & Paper Association supports H.R. 3862 because it stands for the fairer and more sensible proposition that the courthouse doors should be open to all who are aggrieved by regulation under the ESA.

I would like to address the benefits of providing fair and even access to the courts under the ESA, as H.R. 3862 would. Of necessity, I begin by laying the legal framework.

I. WHAT IS "STANDING"?

"Standing" is the name given to the set of tests for deciding whether a particular person is a proper person to invoke the court's jurisdiction. There is, first, a requirement of "constitutional standing" that derives from the limitation of judicial authority in Article III of the United States Constitution to active "Cases or Controversies." An active controversy requires that the plaintiff be injured; it is well-established that constitutional standing is only

satisfied when it is shown that the plaintiff has suffered: (1) an injury in fact or imminent threatened injury; (2) which is fairly traceable to the action being challenged; and (3) which is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992).

Economic injury satisfies the constitutional aspects of standing, as "palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972).

A second aspect -- "prudential standing" -- consists of judge-made law or prudential principles that can be altered by Congress. "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

Prudential standing principles have been significantly influenced by the Supreme Court's interpretation of the Administrative Procedure Act ("APA") requirement that a plaintiff be "adversely affected or aggrieved within the meaning of a relevant statute". *See* 5 U.S.C. § 702. Based on that requirement, the Supreme Court has held that, in a suit brought under the APA, "the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the

statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Although the Supreme Court has stated that the "zone of interests" test generally applies only to suits brought under the APA, and that the test is not especially demanding, *Clarke v. Securities Industries Association*, 479 U.S. 388, 395-401 (1987), some lower courts have applied the test aggressively to deny standing to economically-injured plaintiffs even where suits are brought under broad citizen suit provisions in organic statutes, not the APA.

II. THE ESA'S CITIZEN SUIT PROVISION

Under the ESA, "any person" may bring a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation" of the Act or a regulation implementing it. 16 U.S.C. § 1540(g)(1). This provision is routinely used by environmental groups and others who seek to maximize protection for endangered and threatened species, not just to allege that certain actions by governmental or private persons may be causing injury to given species but also to allege procedural violations. Suits are brought, for example, to force more aggressive and far-reaching regulation by federal agencies.

The citizen suit provision has also been used by landowners and development interests who have been injured economically by what they see as

excess regulation under the ESA. While these interests have no quarrel with the ESA's objective, they believe the government should be true to the procedural and substantive dictates that Congress set forth in the ESA.

Bennett was such a case. Two ranchers and two irrigation districts in Oregon sued to enjoin a government biological opinion that would effectively restrict their water use in order to protect two species of fish. The complaint challenged the science underlying the government's opinion and asserted both procedural and substantive violations of the ESA in developing the opinion.

But the Ninth Circuit declined to consider those issues. It held that economically-injured persons lack standing to bring ESA claims because economic injuries purportedly are outside the "zone of interests" protected by the ESA. In the Ninth Circuit's view, only plaintiffs who are trying to maximize the protection for ESA-listed species are within the ESA's "zone of interests" and have standing to enjoin claimed ESA violations. Under this interpretation, economically-injured plaintiffs -- such as the rancher-irrigator plaintiffs in *Bennett* and the timber industry plaintiffs I often represent -- are denied standing and left without a remedy for ESA violations. As a result, for example, the *Sweet Home* case, which resulted in an important clarification and narrowing of the law of ESA "take" of wildlife, would not have been considered because the *Sweet Home* plaintiffs were economically injured and were advocating less-burdensome ESA regulation of their activities.

III. H.R. 3862 GUARANTEES ALL CITIZENS A FAIR HEARING

H.R. 3862 would clarify that economically-injured "persons" have standing to sue under the ESA. It provides that a citizen who is "being threatened with economic or other injury" due to an alleged violation of the ESA by the "Secretary" of the Interior (or any other person) -- and, of course, who meets the constitutional standing requirements -- "is deemed to be within the zone of protected interests of this Act and shall have standing to commence a civil suit on his or her own behalf."

This language would ensure that economically-injured plaintiffs have standing to bring ESA claims. It would specifically override the binding precedent in the Ninth Circuit that economic interests are outside the "zone of interests" protected by the ESA.

IV. THE REASONS WHY H.R. 3862 SHOULD BE ADOPTED

I urge the enactment of H.R. 3862 for several common-sense reasons.

H.R. 3862 Would Promote Fairness And A Level Playing Field -

H.R. 3862 is aptly named the "Citizens' Fair Hearing Act of 1996." It would provide for fair judicial hearings on claimed ESA violations by all potential citizen-plaintiffs. Economically-injured citizens would have standing on their ESA grievances to the same extent that environmental group plaintiffs have

standing. H.R. 3862 thus meets an elemental test for fairness: a level playing field.

H.R. 3862 Would Avoid Unfairly Skewed Interpretations Of The ESA - If only one interest group (here, environmental groups) has standing, the inevitable result is that the law in question (here, the ESA) will move in the direction of that interest group. The nature of the judicial process is such that, when only one side of a continuing public controversy has access to the courts, the law moves incrementally towards legitimizing the position of the interest group that can invoke the courts' jurisdiction. The position of the party barred from the courts is never heard, is never embraced by the courts, and receives no recognition in judicial opinions. Moreover, this can produce substantive changes in agency behavior, as an agency evaluates its obligations against the backdrop of judicial decisions construing those obligations and with an eye towards who can sue the agency.

Thus, a one-sided standing doctrine unfairly skews the interpretation of the ESA. While providing for citizen watchdogs to assure that the government does not fall short in its regulatory duty under the ESA, a one-sided doctrine silences the voices of any that might point out that the government has gone too far -- beyond what the statute says, or what Congress intended. H.R. 3862 encourages balanced and fair interpretations of the ESA by providing standing

to economically-injured citizens, thereby ensuring that their voices and arguments too will be heard in court.

If H.R. 3862 is enacted, there would be no question that courts have jurisdiction to consider claims that the government has engaged in overzealous regulation which violates the limits or protections in the ESA. Over-regulation by the government can establish inappropriate and unlawful standards that Congress never intended; if unchecked, it will inevitably and improperly constrain private property owners and other citizens from pursuing their economic livelihoods, because the government's unreviewable interpretations are backed up by the ESA's potent criminal and civil sanctions and injunctions. See 16 U.S.C. § 1540(a), (b), (e)(6), and (g).

H.R. 3862 Would Resolve Uncertainty On ESA Standing - The enactment of H.R. 3862 would end the current legal uncertainty over whether economic interests have standing to raise ESA claims. The federal appellate courts, at present, are taking at least three different approaches to that question:

1. In the Ninth Circuit, under the precedent established in *Bennett*, there is a stringent "zone of interests" barrier to ESA standing which prevents economically-injured citizens from being able to claim that the government has engaged in over-regulation that violates the ESA.
2. In contrast, the Eighth Circuit has held that the "any person" may sue any other "person" language in the ESA's citizen suit provision, 16 U.S.C.

§ 1540(g)(1), eliminates any judge-made barrier to ESA standing (such as the "zone of interests" test) and expands standing to its Article III constitutional limits. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1039 (8th Cir. 1988).

3. The District of Columbia Circuit has recently introduced a third variant. Looking not at the ESA as a whole but at individual provisions, it held that economic interests have standing on critical habitat claims because they are within the "zone of interests" protected by the ESA, in light of the explicit mention of economic concerns in the ESA's critical habitat provision (16 U.S.C. § 1533(b)(2)). *Mountain States Legal Foundation v. Glickman*, __ F.3d __, 1996 WL 475794 (D.C. Cir. Aug. 23, 1996).

This confusion and conflict in the courts on the proper tests for standing under the ESA's broad citizen suit provision creates an unhealthy atmosphere of uncertainty. It is expensive and it encourages forum-shopping and procedural wrangling. Courts may not reach meritorious ESA claims due to a misapplication of standing law. It is appropriate and efficient for Congress to end this uncertainty by legislating an explicit test for ESA standing.

H.R. 3862 Would Reassert The Legislative Prerogative To Waive Judge-Made Barriers To Standing - Congress, and not individual judges, should decide whose claims are entitled to be heard under the ESA. It is, of course,

Congress's prerogative to say what the law is as regards the prudential barriers to standing.

As *Bennett* illustrates, some courts are establishing judge-made barriers to standing that go well beyond the standing requirements of the Constitution. The courts are doing so under the guise of carrying out the ESA legislative intent (though the case results sometimes seem to reflect, instead, the philosophical bents of the individual judges). Since the courts are attempting to understand and apply the legislative intent, Congress should make clear what its intent is on ESA standing.

In the pending appeal to the Supreme Court, the Plaintiffs-Petitioners in *Bennett* have argued that the ESA citizen suit provision should be interpreted as eliminating the prudential "zone of interests" barrier to standing and as allowing standing to the full Article III constitutional limits. In the *amicus* brief we filed on behalf of various natural resource groups, my law firm supported that petition.

Congress should not delay action on H.R. 3862 based on the expectation that the Supreme Court will resolve all ESA standing problems in *Bennett v. Spear*. Although the Ninth Circuit's ruling in the case prohibits economic interests from having ESA standing anywhere within the Circuit, and although the government's briefs below supported and encouraged that ruling, the government is now taking the position that the Supreme Court should not

reach the prudential "zone of interests" standing issue. It urges, instead, that the Supreme Court should dispose of the appeal on constitutional standing or other technical grounds. See Brief For the Respondents in *Bennett v. Spear*, No. 95-813 (S.Ct. filed July 1996). Accordingly, it is quite possible that the Supreme Court will not reach the bottom-line issue addressed by H.R. 3862 -- that economic interests have standing to raise ESA claims. Alternatively, the Court might not resolve ESA standing in accordance with H.R. 3862's principles.

Congress has control over the scope of the citizen suit provision it created in the ESA. By enacting H.R. 3862, Congress can make its intent clear and assure that individual judges will no longer deny fair hearings to economically aggrieved citizens under the ESA.

By Clarifying that Economically-Affected Interests Have ESA Standing, H.R. 3862 Gives Meaning to the Economic Protections in the ESA - While the ESA is designed to protect and recover endangered and threatened species, it does not do so regardless of economic and social costs. Instead, the ESA builds in consideration of economics and protection of economic interests at several points -- and this justifies the conclusion that adversely affected economic interests should have standing to challenge regulatory excesses under the ESA.

For example, ESA § 4 explicitly requires "consideration [of] the economic impact" and "any other relevant impact" in deciding how much acreage to

designate as critical habitat. 16 U.S.C. § 1533(b)(2). If the Fish & Wildlife Service ("FWS"), the agency primarily charged with administering the ESA, determines that a federally-assisted action would cause jeopardy, it must identify "reasonable and prudent alternatives" that are "economically and technologically feasible" that would avoid jeopardy impacts and still allow a project to be "implemented in a manner consistent with the intended purpose of the action." 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02.

Similarly, economic factors are significant in FWS's design of the "reasonable and prudent measures" that may be imposed in issuing incidental take statements under ESA § 7(b)(4). 16 U.S.C. § 1536(b)(4). The reasonable and prudent measures must be economically reasonable -- "they should be minor changes that do not alter the basic design, location, duration, or timing of the action." 51 Fed. Reg. 19937 (June 3, 1986) (preamble to the final ESA § 7 regulations).

As these examples illustrate, economic interests are recognized and protected by the ESA. Accordingly, H.R. 3862's explicit statement that economic interests are protected by the ESA for standing purposes faithfully implements the ESA legislative intent.

V. UNDER A STRINGENT "ZONE OF INTERESTS" TEST FOR ESA STANDING, MANY MERITORIOUS SUITS WOULD NOT BE HEARD

Under a standing test that would only allow ESA suits by environmental groups, many important claims would never be considered by the courts.

Without giving economically-affected interests access to the courts, the ESA is devoid of any safeguard against regulatory excesses and abuses. I thought it might be useful to review some of the types of cases that would be precluded by a one-way approach to standing:

1. **ESA § 4 Listing Cases** - The *Bennett* precedent could bar suits by economically-injured plaintiffs alleging that FWS violated the ESA in listing a particular species as endangered or threatened. Thus, there would be no judicial review to assure that: (1) the listed entity is in fact a "species" within the meaning of 16 U.S.C. § 1532(16); (2) substantively, the listed entity is in fact "endangered" or "threatened" under the standards in § 1533(a); or (3) the listing decision was not based on junk science, instead of the "best scientific and commercial data available" as required by § 1533(b)(1). Examples of such challenges to ESA listings include *Idaho Farm Bureau Federation v. Babbitt*, 900 F. Supp. 1349 (D. Id. 1995) (dismissed for lack of standing due to the controlling Ninth Circuit precedent in *Bennett*); *Alabama-Tombigbee Rivers v. Department of the Interior*, 26 F.3d 1103 (11th Cir. 1994) (successfully challenging a report used in listing the Alabama sturgeon); and *Endangered Species*

Committee of the Building Industry Association v. Babbitt, 852 F. Supp. 32 (D.D.C. 1992) (finding that the Service erred in not disclosing data that called into question whether the California gnatcatcher was a "species").

2. **ESA § 4 Critical Habitat Cases** - The *Bennett* precedent could bar suits by economically-injured plaintiffs alleging that FWS violated the ESA in designating critical habitat. Thus, there would be no judicial review to assure that: (1) "consideration [of] the economic impact" and "any other relevant impact" of designating an area as critical habitat was in fact given, as required by 16 U.S.C. § 1533(b)(2); (2) the designation was based on the "best scientific and commercial data available," as required by § 1533(b)(1); or (3) the designation was made in accordance with the public participation requirements and other procedural mandates of § 1533(b). Examples of such challenges to critical habitat designations include *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) (standing denied), and *Mountain States Legal Foundation v. Glickman*, __ F.3d __, 1996 WL 475794 (D.C. Cir. Aug. 23, 1996) (standing found).
3. **ESA § 7 Cases** - The *Bennett* precedent could bar suits by economically-injured plaintiffs alleging that FWS violated ESA § 7 in its biological opinion on a federally-assisted action. This would preclude judicial review, for example, of arguments that the ESA was violated because:

(1) the action in question is not subject to ESA § 7, *see, e.g., Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985); (2) the agency took an economically-damaging action without conducting the formal consultation required by 16 U.S.C. § 1536(b) and without involving the "applicant," *see, e.g., Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800 (11th Cir. 1993) (standing denied); (3) FWS improperly found jeopardy under the 16 U.S.C. § 1536 standards, *see, e.g., Bennett v. Plenert* (standing denied); (4) the "reasonable and prudent alternatives" that the agency imposed to avoid jeopardy are not economically reasonable as required by § 1536(b)(3), *see, e.g., Westlands Water District v. U.S. Department of the Interior*, 850 F. Supp. 1388 (E.D. Cal. 1994); or (5) the "incidental take statement" included in the agency's biological opinion imposed land use restrictions for activities that are not in fact "takes" under the ESA, *see, e.g., Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996).

4. **ESA § 9 Take Cases** - The *Bennett* precedent could bar suits by economically-injured plaintiffs alleging that FWS violated the ESA in asserting that particular land uses were "takes" of wildlife under 16 U.S.C. § 1538(a). In that situation, the important contribution that the Supreme Court made in *Sweet Home*, by clarifying what constitutes a "take" of wildlife and narrowing FWS's interpretation of that term, would

never have occurred. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (1995).

Thus, there are many types of ESA citizen suits where plaintiffs can allege over-regulation in violation of ESA limitations or protections. I believe that such suits perform a valuable public service. They are an important check to ensure that zealous regulators do not overstep their legal authority when regulating private property and economically-productive activity. As such, they assure a critically needed balance in the administration of the ESA. H.R. 3862 would guarantee that such suits are not dismissed for lack of standing, and would allow them to be considered and decided on their own merits.

VI. CONCLUSION

Thank you for the opportunity to present the views of the American Forest & Paper Association and to voice our support for H.R. 3862. I would be delighted to answer any questions you might have.



PREPARED STATEMENT OF EARL CHRISTENSEN

AMERICAN FARM BUREAU FEDERATION®

225 TOUHY AVENUE • PARK RIDGE • ILLINOIS • 60068 • (312) 399-5700 • FAX (312) 399-5896
600 MARYLAND AVENUE S.W. • SUITE 800 • WASHINGTON, D.C. • 20024 • (202) 484-3600 • FAX (202) 484-3604

**STATEMENT OF EARL CHRISTENSEN
IDAHO FARM BUREAU FEDERATION MEMBER
BEFORE THE HOUSE RESOURCES COMMITTEE
ON THE ENDANGERED SPECIES ACT**

September 17, 1996

**STATEMENT OF EARL CHRISTENSEN
IDAHO FARM BUREAU FEDERATION MEMBER
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September 17, 1996

Mr Chairman, Congressman Chenoweth and members of the committee. I am Earl Christensen, a farmer and Idaho Farm Bureau member from the Burley, Idaho, area of southern Idaho, where I raise a wide variety of agriculture products including sugarbeets, hay, grain, beans, sheep and cattle. My farm is on the banks of the Snake River and the irrigation water which is vital to my existence comes from the Snake River. I truly appreciate the opportunity to appear before the committee and am particularly pleased to be able to support Congressman Helen Chenoweth's bill to have standing to challenge abuses of the Endangered Species Act.

H.R. 3862 is a simple bill that is badly needed by any citizen in the United States that is adversely affected by the Endangered Species Act. The intent of the ESA is noble in that it is designed to protect threatened and endangered species. However, the act is a double-edged sword in that in trying to protect a species, we end up creating enormous financial and economic burdens for vast numbers of American citizens. These citizens simply do not have any recourse to such actions under the ESA, as it is now being interpreted by the courts, for they are denied standing to bring judicial review over such decisions and actions. The end result of this is to disenfranchise affected private citizens by giving them no way to appeal agency decisions regarding their private property and economic well-being.

The Idaho Farm Bureau Federation, of which I am a member, has some first-hand knowledge in this area of "having no recourse" in attempts to de-list five Snake River snail species; the Bliss Rapids snail, Utah Valvata snail, Idaho Springs snail, Banbury Springs limpet and Snake River Physa snail. The Idaho Farm Bureau Federation did file a suit in Federal District Court on behalf of our members, challenging the listing of the above five snails. The basis of our suit was as follows:

- a. The final rule did not have scientific evidence supporting the range, population, distribution, or habitat of the mollusks. This has been substantiated this year in that additional populations of these snails have been found in the Snake River. The USFWS based the listing on very limited evidence and extremely limited knowledge of the species. The listing nonetheless proceeded, and the Farm Bureau Lawsuit was dismissed on the basis of no standing.
- b. The final rule and USFWS recovery plan targeted farming practices and irrigation projects and activities as being activities that could threaten the existence of the snails. With no real scientific knowledge of the habitat or needs of the snail, targeting traditional uses of the river from irrigation to recreation was subjective, non-scientific and speculative. Nonetheless, USFWS proceeded with listing and the Idaho Farm Bureau Federation suit was dismissed on the basis of no standing.

c. The final rule was not adopted in a timely manner and gave no time or consideration for review by county officials, thus depriving them of the ability to ascertain customs, cultural and economic consequences to said county. Again, the listing proceeded and the suit was dismissed as having no standing.

The listing of the five snails still has the potential to eliminate farming, ranching, hunting, rock climbing, sightseeing, picnicking, rafting, kayaking, canoeing, scuba diving, fishing, water skiing and modern irrigation. The Idaho Farm Bureau lawsuit attempted to point out these economic impacts, cultural challenges and recreational closures as being vast and far-reaching "people" impacts in the middle segment of the Snake River. Certainly, the loss of these economies and activities should be a major discussion and consideration point utilized in whether or not a species should or could be listed. These points cannot be made because of the no standing situation and "zone of interest" required in citizen suits. H.R. 3862 will correct this injustice. It will restore due process considerations granted by the Constitution of the United States and will allow citizens the ability to place in evidence information that is critical in making informed decisions on an endangered species. Congressman Chenoweth, we applaud your effort and pledge our support of H.R. 3862 and would urge the Committee and House to quickly pass this much-needed amendment to the Endangered Species Act.

PREPARED STATEMENT OF JOHN D. LESHY

**Statement of John D. Lesly
Solicitor
U.S. Department of the Interior
Before the Committee on Resources
U.S. House of Representatives
on H.R. 3862**

September 17, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on H.R. 3862, a bill which seeks to ensure that persons affected economically by actions violating or taken under the Endangered Species Act may bring a so-called citizen's suit under the Act. The Department opposes H.R. 3862 because it is in all likelihood unnecessary and is certainly premature.

As the Committee is aware, the Supreme Court has agreed to review the Ninth Circuit Court of Appeals decision in the Bennett v. Spear (formerly Bennett v. Plenert) case. This case is referenced in section 2(2) of the bill and concerns the same issue the legislation addresses. The Supreme Court has already received written briefs from the parties, as well as many "friend of the court" briefs, and will hear oral argument in the case on November 13, 1996. We expect a decision in the next few months. Under these circumstances, there is no need to legislate concerning this issue. Should the Committee find the Court's decision unacceptable, the Committee can act to remedy the situation then. In short, this legislation is premature.

Moreover, as the brief for the United States in the Bennett case

makes clear, we believe that under current law plaintiffs with economic interests can obtain review of the Secretary's actions under the ESA equivalent to the review available to environmental plaintiffs. In our brief, copies of which were provided to the Committee shortly after it was filed in mid-July, we state that plaintiffs who allege injury to economic interests should be able to obtain judicial review of governmental action concerning protected species if they structure their lawsuits appropriately. Thus we have told the Supreme Court that while we think the result in Bennett was correct -- because the plaintiffs did not sue the federal agency actually taking the action which they claimed harmed them -- we do not believe it excludes plaintiffs with economic interests from the courtroom on ESA issues. This approach will be taken in all cases nationwide that involve this issue. Again, if the Court rejects our argument and decides that plaintiffs with economic interests cannot seek judicial review of ESA-related agency decisions, the Committee of course can address this matter legislatively, within constitutional limits.

In short, the pending Supreme Court case makes consideration of this proposal premature. Further, because our interpretation of the law permits all citizens who meet constitutional minimums to obtain judicial review of ESA-related decisions, the bill is also unnecessary. The Department therefore opposes this legislation. I would be pleased to answer any questions you may have.

PREPARED STATEMENT OF NANCIE G. MARZULLA

Testimony of
Nancie G. Marzulla
President and Chief Legal Counsel
DEFENDERS OF PROPERTY RIGHTS
Before United States House of Representatives
Committee on Resources

September 17, 1996

Mr. Chairman and Members of the Committee:

Thank you for the opportunity today to discuss the Citizen's Fair Hearing Act of 1996. Specifically, I will address the concerns this proposed legislation raises for private property owners.

I serve as President and Chief Legal Counsel of Defenders of Property Rights, the only national legal defense foundation dedicated exclusively to the protection of private property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Bill of Rights of the U.S. Constitution: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Defenders has a large national membership representative of the property owners, users and beneficiaries of the rights protected by the Constitution and traditional Anglo-American property law. Founded in 1991, Defenders has since participated in every landmark property rights case, including *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard, Oregon*, and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon.*, and more recently, *Bennett v. Plenert*, 63 F.3d 915 (1995), *cert. granted sub nom Bennett v. Spears*, No. 95-813 (U.S. 1996) which is scheduled for oral argument before the United States Supreme Court on November 13. Defenders has also devoted a significant amount of resources to analyzing legislative proposals concerning property rights at both the federal and state levels.

The United States Constitution contains no fewer than three provisions to protect private property rights. As already mentioned, the Fifth Amendment states that: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This last clause, the Just Compensation Clause, contains the only express provision for money damages in the entire Constitution. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." The Fourteenth Amendment states that "No State . . . shall deprive any person of life, liberty, or property, without due process of law." The language used in these Amendments is not vague or prefatory, nor does it admit of any exception. The language chosen is clearly designed to protect property rights.

Yet, despite these clear constitutional mandates to protect property rights and pay owners if their property is taken, citizens today are less secure in their ownership of property than at any time in United States history. The culprit is our very own government. Quite often, government avoids the duty to compensate property owners by simply regulating the uses of property rather than asserting a public necessity for the property and offering the owner compensation. When this happens, the government violates the principle contemplated by the Just Compensation Clause, which is to prevent government from "forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Since 1922, the government has known that if its regulations go "too far," then it must pay for the taking. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Nevertheless, government routinely overlooks how far its regulations go toward depriving citizens of Fifth Amendment guarantees to use and enjoy private property. Such regulation is unprecedented in its complexity, intrusiveness, and hardship inflicted on innocent citizens. The Endangered Species Act (ESA), as presently drafted, is an example.

Under the interpretation of the ESA by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in *Bennett v. Plenert*, 63 F.3d 915 (1995), the only way to protect endangered species is the way the court deems best -- not the way Congress deemed best by adopting a broad citizen' suit provision in the ESA. This interpretation by the Ninth Circuit denies the opportunity for individuals to seek redress who are directly affected by actions under the ESA.

I. CONGRESS SHOULD ADOPT LEGISLATION TO CLARIFY ITS INTENTION TO GIVE INDIVIDUALS WHO ARE INJURED BY VIOLATIONS OF THE ENDANGERED SPECIES ACT, STANDING TO COMMENCE A CIVIL SUIT, SO LONG AS SUCH INDIVIDUALS SATISFY CONSTITUTIONAL REQUIREMENTS.

The ESA has a provision allowing private citizens to sue other private parties or governments to enforce all of the sections of the Act:

Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf --
 (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g)(1).

The citizen suit provision of the ESA is very broad. Of course, an individual must first satisfy the standing requirements of the case or controversy clause of Article III of the United States Constitution in order to be entitled to sue under the ESA citizen suit provision.

Article III has been interpreted to mean that only parties with direct interests in a controversy or an "injury in fact" can sue in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In other words, parties cannot sue for the benefit of others, or for the benefit of the general public. Clearly Congress cannot by adopting a statute confer standing to sue beyond the constitutional requirements of "case or controversy."

Congress is free, however, to promulgate statutes with more restrictive standing requirements than those provided in Article III, or which confer standing co-terminus with Article III. In addition, when considering whether a plaintiff has standing to sue, courts apply a test to decide whether a plaintiff's interest was within the "zone of interest" that Congress intended to protect by passage of the statute at issue. Congress can identify which interests are within the "zone of interest," as the United States Supreme Court held in a case involving the right of plaintiffs to sue to enforce the Worker Adjustment and Retraining Notification Act: "As we noted in *Warth*, prudential limitations are rules of 'judicial self-governance' that Congress may remove . . . by statute.' . . . It has done so without doubt in this instance." *United Food and Commercial Workers Union, Inc. v. Brown Group, Inc.*, 116 S. Ct. 1529 (1996).

Similarly, Congress removed any doubt on an aggrieved individual's right to sue to enforce the terms of ESA. When drafting the ESA, Congress expressly chose to make standing *co-terminus* with Article III standing. As discussed below, an individual meeting Article III standing requirements would also have standing under the citizen suit provision of the ESA.

Nevertheless, some courts have disregarded the plain language of the ESA citizen suit provision. Most recently, the United States Court of Appeals for the Ninth Circuit held that "the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation." *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995). The Ninth Circuit erroneously concluded that Congress cannot confer standing co-terminus with Article III standing, as it seems to have done with the ESA citizen suit provision: "We note that, whether or not the zone of interests test applies, the class of plaintiffs that Congress had in mind was necessarily more limited than the literal language of the citizen suit provision suggests. As *Lujan* makes clear, Congress may not permit suits by those who fail to satisfy the constitutionally mandated standing requirements. For that reason, suits under the ESA, no less than suits

under any statute, are clearly not available to 'any person' in the broadest possible sense of that term." *Id.* at 918.

According to the Ninth Circuit, courts are free to ignore the plain language of a citizen suit provision if the court believes that the language chosen by Congress interferes with *the court's view* as to the "real" purpose of the statute in question:

In light of our consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff whose satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only 'marginally related' to, those of the Act.

Id.

Employing the "zone of interest" test, the Ninth Circuit ignored the text of the ESA and instead turned to court decisions, specifically *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) and *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995), for discerning the intent of Congress in passing the ESA. The United States Supreme Court, however, has held that the starting point for determining whether a plaintiff's claim is within a statute's zone of interest is to look at the statute itself. *United Food and Commercial Workers Union, Inc. v. Brown Group, Inc.*, 116 S. Ct. 1529 (1996).

By failing to follow the rules of statutory construction, the Ninth Circuit took the overall goal of the ESA -- which is obviously to protect endangered species -- and simply refused to enforce those provisions of the Act which the court believed were inconsistent with that purpose. Rather than focusing on the balancing-of-interests analysis chosen by Congress to protect endangered species, the Ninth Circuit explained away the plain language of the Act, to the point of absurdity: "Certainly, [Congress] did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Bennett v. Plenert*, 63 F.3d 915, 918.

It is now up to Congress to reiterate the plain meaning of the ESA citizen suit provision and clear up the erroneous interpretation of it by the Ninth Circuit.

II. A BROAD CITIZEN SUIT PROVISION IS CONSISTENT WITH THE ESA GOAL OF PROTECTING PRIVATE PROPERTY RIGHTS AND ECONOMIC INTERESTS TO INSURE PROTECTION OF ENDANGERED SPECIES.

The 1973 Endangered Species Act adopted by the 92nd Congress was this nation's first attempt to achieve by law protection of endangered and threatened species of flora and fauna. The Act made clear that success in their massive undertaking depended upon active pursuit of this goal by all sectors of our society -- public and private. Hence, various provisions in the Act address issues of private concern; notably, economic interests and private property rights. Decades of enforcement have underscored the Act's balanced approach to protecting endangered species.

A. THE PLAIN LANGUAGE OF THE ESA AND ITS LEGAL HISTORY DEMONSTRATE CONGRESS'S INTENTION TO RESPECT PRIVATE PROPERTY AND ECONOMIC INTERESTS THAT ARE PROTECTED BY THE CONSTITUTION.

The purpose of the ESA, as demonstrated through its text and its legislative history, is to set out a program to conserve endangered and threatened species. Congress adopted a system to accomplish this purpose through (1) federal land acquisition of private property; (2) outright avoidance of adverse impacts on endangered species by the federal government; and, (3) prohibitions on the "taking" of endangered species by any person or entity.

Through its land acquisition program, the ESA reflects Congress' intent to avoid foisting off on individuals the whole burden of species conservation, by requiring the federal government to condemn private property necessary to protect a species. Explaining the purposes of the land acquisition program, floor manager for the ESA, Senator Tunney,

stated: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." 119 Cong. Rec. 25,669 (1973). Representative Sullivan, the floor manager for H.R. 37 -- the House version of the bill -- confirmed this approach:

For the most part, the principal threat to animals stems from the destruction of their habitat. . . . Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

119 Cong. Rec. 31,062 (1973). *See also Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2415 (1995) (discussing the purposes of the Section 5 land acquisition procedure which is to allow the government to protect habitat before activity harms an endangered or threatened animal).

Other sections of the Act also reflect an attempt by Congress to protect private property rights. The consultation process under Section 7 can affect private landowners if a project or activity on private land requires some form of federal approval, such as a permit, or involves the expenditure of federal funds. Another example is the habitat conservation planning process under Section 10, which involves nonfederal projects or activities not requiring federal authorization or funding that may result in a prohibited taking of a listed animal or plant. Through this process, private landowners with activities or projects that may harm listed species can obtain a permit that allows the incidental taking of a listed species. *Id.*

To obtain an "incidental take" permit, the private landowner must develop a habitat conservation plan (HCP) -- a formal plan that specifies the effects that landowners' activities are likely to have on listed species, the measures that will be taken to minimize and mitigate these effects, the alternatives that the applicant considered and reasons why such alternatives were not implemented, and any other measures the Service may require.

(16 U.S.C. § 1539(a)(2)(A)(i-iv)). Successful development of a habitat conservation plan under the Act depends on balancing of interests.

With respect to the recently approved Balcones Habitat Conservation Plan, commentators have observed: "[T]he plan enjoys broad support among environmental and business groups and represents a surprising consensus on an important issue in a city that thrives on debate." Ralph K. M. Haurwitz, *Travis County's Balcones Conservation Plan Takes Off*, *Austin American-Statesman*, May 4, 1996, at 2. United States Department of Interior Secretary Bruce Babbitt, commenting on this plan, revealed his understanding of the importance of balancing of interests reflected in the ESA in achieving its goals:

The Balcones Canyonlands Conservation Plan is part of the Administration's focus on using the flexibility of the Endangered Species Act to find cooperative solutions that protect species. More than 140 habitat conservation plans that balance development with species protection under the Endangered Species Act are now in place.

1996 WL 222408 (D.O.I.)

B. PROTECTING PROPERTY RIGHTS AND ECONOMIC INTERESTS IS AN INTEGRAL ASPECT OF ACHIEVING PROTECTION OF ENDANGERED SPECIES.

The 1973 Endangered Species Act is today widely regarded as one of the most important and powerful environmental laws in the country. *See generally* M. Lynne Corn, Congressional Research Serv., *Endangered Species Act Issues 1* (1992). Although a major component of the ESA is achieved by prohibitions on federal government activity on public land under Section 7 of the Act, another large component prohibits certain actions by private individuals on privately owned land under Section 9 of the Act.

Moreover, fifty percent of the endangered species in this county live on privately owned land and the habitat of endangered species is almost exclusively on private land. Thus, the ESA necessarily contains specific provisions (discussed above) that balance those private land and economic interests with the need to protect endangered species. *See* Hank Fisher et al., "*Building Economic Incentives Into The Endangered Species Act*,"

Endangered Species Technical Bulletin Vol. 19, No. 2, p. 4 (U.S. Fish and Wildlife Service 1994)

As the Act itself reflects, Congress perceived protecting these private interests as directly and critically related to protecting endangered species. And the likelihood of protecting endangered species is significantly increased when property rights and economic interests are respected. Examples of successful public-private partnerships are well documented. See generally PERC, *The Endangered Species Act: Making Innocent Species The Enemy* 12 (Jane S. Shaw ed., 1995). Clearly, no conservation policy can succeed without the support of the regulated community.

Shortly after passage of the ESA, the Supreme Court held that Congress intended under the Act that endangered species were to be protected "whatever the cost" *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 (1978). Endangered species recovery has proven to be very costly -- in terms of both public and private resources. The cost of complying with the ESA is so costly in fact, that no definitive study on the total economic impact of the ESA has ever been conducted.

U.S. Fish and Wildlife Service (Service) data shows that the estimated¹ direct cost in 1994 of recovery plans for only 306 (of approximately 1200) species was over \$4 million. National Wilderness Institute, *Going Broke? Costs Of The Endangered Species Act As Revealed In Endangered Species Recovery Plans* (1994)(expressing the data in 1994 dollars). Other government estimates of the cost of recovery of *all* species are staggering. In 1990, the U.S. Department of Interior Inspector General estimated the potential future recovery costs for all endangered species to be over \$4.6 billion. This figure was based on a conservative estimate by the Service based on a ten-year recovery plan. U.S. Fish and Wildlife Service, *Federal and State Endangered Species Expenditures: Fiscal Year 1990* (1991).

These recovery cost estimates only scratch the surface of the true cost to implement the ESA. No estimate is accurate without assessing at least three other cost factors.

1. Cost of conservation activities other than recovery.

The Service makes clear that its estimates do not cover all the costs of enforcing the Act: "A significant portion of . . . conservation activities at all levels include law enforcement, consultation, recovery coordination, and other actions [] are not easily or reasonably funded by species. . . . Accounting procedures for staff salaries and operational, maintenance and other support services are not normally creditable towards individual species totals. Also, there exists significant variability among the various federal and state agency reports." "Federal and State Endangered Species Expenditures for Fiscal Years 1991, 1990 and 1989, U.S. Fish and Wildlife Service" (1992). In 1992, for every one dollar the Service spent on actual species recovery, it spent \$2.26 on related activities including permitting, consultation, enforcement and listing. U.S. Fish and Wildlife Service, *U.S. Department of the Interior Budget Justifications: Fiscal Year 1993* (1993).

2. Cost of compliance by state and other federal agencies.

Other federal agencies, too, must spend money to comply with the Act. For example, in 1992 the U.S. Army Corps of Engineers spent \$5.2 million to protect the California least tern. The Department of the Navy spent \$.5 million that year on that same species. Indeed, in 1992, other federal and state agencies spent 5.4 times more on ESA compliance than the Service and the National Marine Fisheries Service, the two agencies primarily charged with implementing the Act. In addition, the Service estimates "do[] not reflect the total governmental (federal and state) effort toward threatened and endangered species conservation and presents an incomplete funding picture . . ." *Id.*

3. Cost to the private sector.

The figures do not include indirect costs borne by private landowners of enforcement of the ESA, which is well known. Assistant Secretary of Interior, Fish, Wildlife, and Parks, George T. Frampton, Jr., has testified that future enforcement "must reduce administration, economic, and regulatory burden on small landowners while providing greater incentives to conserve species." House Task Force on Endangered Species (May 18, 1995). Regulators are also aware that these costs are so great that some private landowners, "motivated by a desire to avoid potentially significant economic constraints. . . are actively managing their land so as to avoid potential endangered species problems," -- a "predictable response to the familiar perverse incentives that sometimes accompany regulatory programs." Statement of Environmental Defense Fund attorney Michael Bean, to U.S. Fish and Wildlife officials, *quoted in PERC, The Endangered Species Act: Making Innocent Species The Enemy* 8-9 (Jane S. Shaw ed., 1995).

CONCLUSION

The cost to every American -- through public and private expenditures -- of protecting species under the current ESA program is tremendous, and as discussed above, practically inestimable. Given this investment, Congress should assure that every individual with a legitimate claim who meets constitutional standing requirements can seek redress under the Act. Congress should assure that through the ESA the nation 1) sets high goals for endangered species protection *and at the same time* 2) protects the economic and property interests that are negatively affected by achievement of these lofty goals.

The proposed bill, HR. 3862, would remove any doubt as to Congress's intent to give individual property owners who have met the constitutional Article III injury-in-fact requirements, standing to enforce judicially the ESA.

No. 95-813

In The
Supreme Court of the United States
October Term, 1995

—◆—
BRAD BENNETT, et al.,

Petitioners,

vs.

MARVIN PLENERT, et al.,

Respondents.

—◆—
On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit
—◆—

BRIEF OF
AMERICAN HOMEOWNERS FOUNDATION
AMERICAN LAND RIGHTS ALLIANCE
AS *AMICI CURIAE**
IN SUPPORT OF PETITIONERS
—◆—

NANCIE G. MARZULLA
LISA M. JAEGER
BARRY C. HODGE
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

May 24, 1996

**Amici* listing continued on next page



6235 33rd Street NW • Washington, DC 20015
phone (202) 686-4197 • fax (202) 686-0240

Defenders of Property Rights

bill summary

HR 2364 Endangered Species Recovery and Conservation Incentive Act of 1995

Introduced by Congressman John Shadegg (R-AZ) on September 19th with 9 co-sponsors

HR 2364 takes a nonregulatory approach to protection of endangered species. Conservation and recovery of species must be achieved through voluntary, incentive-based programs and the cooperation of private property owners, and must be based on valid facts and science as well as account for the rights of people.

DEFINITIONS

- "Injure" is an act directly resulting in physical harm that will significantly reduce the chance of survival, other than an unintended consequence of habitat modification.
- "Harm" means an intentional and direct action that injures or kills a species and that is not an unintended consequence of a lawful activity.

RECOVERY

- Within two years of listing a species, the Secretary of Interior must issue either a Plan, or where appropriate a more abbreviated Statement, of practical conservation or recovery endeavors. The Secretary must: include cost estimate, social benefits and a population goal in Plans and Statements; give priority to species of ecological, medicinal or economic value; and encourage participation by the public and owners of property where the species occurs.
- Goals must be achieved through nonregulatory means. Intentional killing of species remains prohibited.
- If emergency action is taken to prevent species or habitat destruction, the United States is liable for resulting damages to property.

DETERMINATION OF ENDANGERED ANIMALS AND PLANTS

- A review of the status of a species is conducted prior to its listing, and within two years the Secretary makes a determination that the species is: endangered, not endangered, endangered but will not be listed due to adequate protections under existing law or conservation efforts.
- Determinations must be based on independently verifiable data and take into account existing conservation programs.
- Emergency listings are possible for species in danger of imminent extinction. Within one year the Secretary must make a determination whether recovery is a feasible goal for the species.
- The Secretary must report to Congress on the success and cost to conserve species.

PROHIBITIONS

- Intentional and direct killing or injuring of species carries criminal and civil penalties.
- Greater penalties are imposed for poaching and malicious killing or injuring.
- Capture and attempted capture are illegal, with greater penalty for violations on national parks and wildlife refuges.

ENDANGERED SPECIES RECOVERY FUND AND CONSERVATION INCENTIVES

- A fund is established to carry out the Act. Revenue will derive in part from admission fees to national parks and other federal lands where a fee is already charged. A Lifetime User Pass is to be established at a maximum rate of \$500 to cover admission for life to any national park, refuge, recreation area, seashore, lakeshore or monument.
- A property tax credit is established for private property managed for species conservation.
- Estate tax deferral is established for property that directly contributes to conservation of species.
- A credit for expenses to further conservation or recovery may be established by the Secretary.

CONFORMING AMENDMENTS

- The Endangered Species Act of 1973 is amended to conform with this Act.
- The Secretary shall not issue jeopardy opinions, list species or designate critical habitat under the 1973 Act.
- The Secretary shall review all species presently listed and determine whether to retain the species on the list.
- Compensation shall be made for diminutions of at least 20% of the value of private property due to the operation of the 1973 Act. If property is diminished in value by 50% or more, compensation for the entire portion will be made upon request by the owner.

This document is informational, and is not meant to support or oppose any legislation before the House.



6235 33rd Street NW • Washington, DC 20015
phone (202) 686-4197 • fax (202) 686-0240

Defenders of Property Rights

bill summary

HR 2275 Endangered Species Conservation and Management Act of 1995

Introduced by Congressmen Don Young (R-AK) and Richard Pombo (R-CA) on September 7th with 93 co-sponsors

HR 2275 amends the Endangered Species Act of 1973 to provide property rights protections, to require the consideration of social and economic consequences of the Act and to encourage creative, voluntary means of protecting species. Companion bills HR 2284 and HR 2286 provide tax incentives to landowners and financial incentives to farmers for wildlife conservation.

PRIVATE PROPERTY RIGHTS AND VOLUNTARY INCENTIVES FOR PRIVATE PROPERTY OWNERS

- The federal government must compensate for 20% or more diminution in property value due to application of ESA to private property. If the diminution is 50% or more, the government may be obligated to purchase the property.
- Voluntary species protection is encouraged through Habitat Conservation Grants, a Technical Assistance Program, and Cooperative Management Agreements.
- "Take" and "harm" are defined to mean direct action against a species that actually injures or kills the species.

IMPROVING ABILITY TO COMPLY WITH THE ENDANGERED SPECIES ACT OF 1973

- Consultation procedures may be used by anyone who is concerned that future activity may endanger species, and the Secretary must issue a written opinion if a permit is not requested.
- General permits may be issued nationwide or to any defined region for actions that will have limited cumulative impact on the survival of a species.

IMPROVING SCIENTIFIC INTEGRITY OF LISTING DECISIONS AND PROCEDURES

- A determination that a species is endangered must be based on the best available scientific and commercial data and take into account existing conservation efforts.
- The Secretary may not adopt policies or regulations without providing an opportunity for public participation.
- Population counts must include captive-bred species and species on public conservation lands.

BETTER MANAGEMENT AND CONSERVATION OF LISTED SPECIES

- A conservation objective must be developed by a team that includes state government representatives and owners of property where the species is found.
- A conservation plan must define specific acts that would constitute an illegal "take" of a species; assess economic and social impacts of the plan; and suggest alternative strategies to achieve the conservation objective.
- Prior to implementing a Plan, the Secretary must consult with the Governor of any states where the species is found, publish a draft plan and hold at least one public hearing.
- Designation of critical habitat must take into account potential economic impact of the designation.

HABITAT PROTECTIONS

- The Secretary may protect species and habitat through land acquisition or exchanges.
- A Federal Biological Diversity Reserve is established to coordinate species and habitat protection on federal lands, and with the voluntary cooperation of state government and private landowners, state and private lands as well.

STATE AUTHORITY TO PROTECT ENDANGERED AND THREATENED SPECIES

- The Secretary must consult with appropriate states before a species is listed or a conservation plan is drawn up.
- States have enhanced opportunity to protect species on the state level.

FUNDING OF CONSERVATION MEASURES

- The federal government must share the cost of programs under this Act.
- A Species Conservation Trust Fund is established to be used to carry out this Act.

This document is informational, and is not meant to support or oppose any legislation before the House.



Notes From the President's Desk

ESA: The Government's "Land Lock Up Law"

On June 29th, the United States Supreme Court upheld a government regulation purporting to protect endangered species. In reality, it validated the government's continued taking of millions of acres of private land as "habitat." At issue in *Bruce Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* was whether the U.S. Fish and Wildlife Service could lawfully define "harm" in Section 9 of the Endangered Species Act (ESA) to include "habitat protection."

The Court's six-to-three decision in *Sweet Home* gives the government a "blank check" to destroy an individual's entire investment in land or private enterprise — not because an endangered species lives on the land, but simply because it is the kind of land on which an endangered species might one day *want* to live. For example, Margaret Rector bought fifteen acres in Texas as an investment for her retirement. Now seventy-three years old, her land sits idle — not because an endangered species lives there, but because it is *suitable habitat* for the golden-cheeked warbler. In Florida, a rancher was told he could not clear scrub off of his land to grow blueberries for his family because the bird *might* want to move there. Neither was paid for the taking of his land.

Moreover, there are no internal constraints requiring the government to respect private property rights. Indeed, the Clinton administration has been downright hostile to them. In *Dolan v. City of Tigard*, the government argued that Mrs. Dolan should not be paid for the taking of her land for a public bikepath. Associate Attorney General John Schmidt testified before the Senate Environment and Public Works Committee on June 27th, stating that if a community decides it wants private property, then the community's needs or desires should supersede any constitutional duty to pay for the taking of that property. In short, the Fifth Amendment has meaning only if the government does not want your land.

Sweet Home shows that courts are simply not curtailing the wholesale destruction of property rights in America. Given that neither the courts nor the executive branch is doing much to protect them, it is not surprising that the property rights community is looking to Congress for sensible solutions. While this may appear to be an oxymoron, there are some proposals under consideration. Congressmen Don Young (R-AK) and Richard Pombo (R-CA) have introduced ESA reform legislation (HR 2275). Congressman John Shadegg (R-AZ) has introduced more sweeping reform (HR 2364).

Only time will tell whether such proposals will become law. If not, private property appears to be the next "species" headed for extinction.

Endangered breed: those who own land

By NANCIE G. MARZULLA
Knight-Ridder Tribune News Service

If you think the Endangered Species Act is fine just as it is, you probably don't own any property — and don't hope to buy property sometime in the future. If you did, you would see things altogether differently.

Even Interior Secretary Bruce Babbitt and the National Wildlife Federation think the regulation needs to be changed. While it is anybody's guess

whether President Clinton would actually sign reform legislation, it looks like he will at least have the opportunity.

Congressmen Don Young, R-Alaska, chairman of the House Resources Committee, and Richard Pombo, R-Calif., chairman of the House Task Force on Endangered Species, have written the Endangered Species Conservation and Management Act, following a

year of public hearings across the country. The legislation now has 121 bipartisan cosponsors and was passed out of the Resources Committee in October. It could come up for a floor vote at any time.

The bill, among other things, would require the federal government to consider the social and economic consequences of enforcing the Endangered Species Act and encourage creative and voluntary means of protecting species at risk. Most importantly, if private land loses 20 percent or more of its value due to the Endangered Species Act, the bill would require that the owner be compensated.

Another bill under serious consideration is the Endangered Species Recovery and Conservation Incentive Act, sponsored by Rep. John Shadegg, R-Ariz. This bill takes a nonregulatory approach to endangered species protection, based exclusively on a voluntary, incentive-based program that fosters the cooperation of private property owners — avoiding the involuntary "taking" of private property in the first instance.

In the Senate, Slade Gorton, R-Wash., has introduced legislation addressing the problem property owners now face as a result of having their land designated as habitat for an endangered or threatened species. Sen. Dirk Kempthorne, R-Idaho, also has legislation requiring the compensation of owners if their property is devalued due to the Endangered Species Act.

In short, Congress appears ready to pass legislation that will provide greater protections for private property owners. The irony, of course, is that the push for this reform is a direct result of a defeat in the Supreme Court. At issue in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* was whether the U.S.

Fish and Wildlife Service could lawfully define "harm" in Section 9 of the Endangered Species Act to include "habitat protection."

The government has been barring the use of millions of acres of private land under this definition. The implications are staggering. In Texas, almost 800,000 acres were designated as habitat for just one "endangered" bird, the golden-cheeked warbler. There are currently 895 species listed as "endangered" and almost 3,500 waiting to be listed.

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The implications for private property owners are particularly severe because the government, under the Endangered Species Act, can take not only land on which an endangered species lives, but also land that some bureaucrat decides an endangered species might one day want to live. For example:

A landowner on South Padre Island planned to build a marina. Since the area is

considered prime habitat for the endangered piping plover, biologists spent nine days examining the land. Eighteen piping plovers were seen resting for a total of 11 minutes on adjacent property. The birds flew off in another direction, but the landowner was still told he could not build.

Needless to say, no compensation was paid to the property owner. That's why property owners hoped the court would rein in the government in the *Sweet Home* case. Much to their dismay, however, the court upheld the government's position.

The Clinton administration also has balked at facing up to the need for property rights protection. According to Associate Attorney General John Schmidt's testimony before the Senate Environment and Public Works Committee, if a community decides to take private property, then the community's desires supersede any constitutional duty to pay for the taking of that property. In short, according to Schmidt, the Fifth Amendment only has meaning if the government does not want your land.

Given that neither the judicial nor executive branch is doing an adequate job of protecting private property rights, it is not surprising that the property rights community is looking to Congress for sensible solutions — to amend laws so they will not result in the taking of private property and requiring compensation if a taking is inevitable.

Only time will tell whether such proposals will become law. If not, private property appears to be the next species headed for extinction.

Marzulla is president and chief legal counsel of the Defenders of Property Rights in Washington, D.C.; the nation's only legal defense foundation dedicated exclusively to the protection of private property rights.

PREPARED STATEMENT OF SAM KAZMAN



COMPETITIVE ENTERPRISE INSTITUTE

TESTIMONY OF SAM KAZMAN, COMPETITIVE ENTERPRISE INSTITUTE,
BEFORE THE HOUSE COMMITTEE ON RESOURCES
REGARDING PROPOSED AMENDMENTS TO
THE ENDANGERED SPECIES ACT UNDER H.R. 3862

On behalf of the Competitive Enterprise Institute, I wish to thank this Committee for the opportunity to testify today. CEI is a nonprofit organization dedicated to advancing private solutions to regulatory issues, especially in environmental areas. CEI also has a special interest in raising public awareness of the hidden costs, human as well as monetary, of overregulation. Finally, CEI has itself encountered, in its own litigation efforts, obstacles to judicial standing that are similar to those being explored in this hearing.

As explained below, the narrow zone of interests test applied to litigation under the Endangered Species Act (ESA) by the Ninth Circuit has a number of serious effects. It imposes a single domineering purpose on a complex statute whose provisions were intended to at least partially balance each other. It distorts the ESA's implementation. Most importantly, it prevents the accomplishment of simple justice with respect to aggrieved parties on the basis of unfair distinctions.

These problems would be alleviated by the proposed amendment to the ESA contained in H.R. 3862.

I. While The Effects Of The Endangered Species Act Encompass A Wide Range Of Harms And Benefits, The Ninth Circuit's Interpretation Allows Only One Portion Of These Effects To Be Litigated.

Environmental statutes and regulations have had dramatic impacts on the lives of millions of Americans. Some of those impacts have been beneficial, others have been detrimental. Yet while these environmental enactments can have drastically differing effects, their utilization in court is often skewed in one direction, and one direction only, and that is in the direction of "promoting" the statute's purposes.

This is precisely the approach taken by the Ninth Circuit in Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), cert. granted, 115 S.Ct. 2407 (1995). As the Ninth Circuit's decision makes clear, this approach is not unique to cases brought under the ESA (16 U.S.C. § 1531 et seq.); to the contrary, cases under NEPA and under the Clean Water Act are subject to similar requirements. 63 F.3d at 920.

The rationale of the Bennett case is cast in terms of supposedly advancing rather than frustrating the ESA's purposes. But in reality this approach amounts to a rather incredible form of favoritism. No matter how ironclad or wide-ranging a statute's procedural safeguards or requirements may be, they can be utilized only by one type of litigant. No matter how flagrant the statutory violation may be, judicial redress is available for only one type of complainant. If you stand to be helped by an action taken under the ESA in the name of conservation, then you are "for" the statute and you're in luck; if you stand to be harmed, then you are "against" it and you're left out in the cold.

The arguments offered to support this zone of interests approach are several. It supposedly prevents the ESA from being stretched beyond its intended limits. It reduces the likelihood of frivolous litigation. It facilitates the ESA's implementation.

But even if these objectives are accomplished, they carry an unacceptable cost. The fact is that this approach contravenes the constitutional guarantee of equal protection of the law. Consider two litigants with ESA complaints that, on their face, are procedurally identical. The first litigant argues that economic impact was illegally ignored in the preparation of a biological opinion or in the designation of critical habitat; the second argues that it was illegally overemphasized. Both claims may be perfectly valid, but under the Bennett approach only the latter will be heard in court. This is not a reasonable approach.

The situation of the first litigant described above is by no means hypothetical. The economic impacts of the ESA are widespread and can be devastating. Numerous individual property owners, businesses and local governments have suffered costly injuries as a direct result of the ESA's administration and implementation.¹ That such aggrieved parties should not have standing to sue under the ESA for violations of that statute is without justification and contravenes the Act itself.

¹ See, e.g., Mann, Charles, C. and Mark L. Plummer, "The Butterfly Problem," *Atlantic Monthly*, January, 1992; Mann and Plummer, *Noah's Choice: The Future of Endangered Species Conservation*, Alfred A. Knopf, 1995; Fitzgerald, Randy, "When a Law Goes Haywire," *Reader's Digest*, September, 1993; Gidari, Albert, "The Endangered Species Act: Impact of Section 9 on Private Landowners," *Environmental Law*, Vol. 24, No. 2, 1994; and Kazman, Sam, *Amicus Curiae* Brief of the Competitive Enterprise Institute in Support of Respondents, in *Babbitt v. Sweet Home*, March 24, 1995.

II. The Ninth Circuit's Use Of The Zone Of Interests Test For Endangered Species Litigation Results In A Form Of Political Favoritism That Cannot Be Justified.

In one sense the Ninth Circuit's approach is outcomes-based; the court refuses to hear a party's argument not because of its soundness, but because of where that argument might lead. Regardless of how valid the argument is, if its conclusion is "politically incorrect" with respect to the statute at issue (that is, if it doesn't promote the alleged purposes of the statute), then it is terminated at the outset; the party has no standing to raise it.

But in another sense this approach resembles a "loyalty oath" of sorts. First the ESA's sole purpose is construed to be that of preservation, and then loyalty to that purpose becomes a threshold criterion for a court hearing. In the words of the Bennett decision,

"Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort 'are more likely to frustrate than to further statutory objectives.'" 63 F.2d at 920 (citations omitted).²

In this manner the ESA's citizen suit provision is read to mean something quite different than what it says. It clearly provides for citizen suits, but it is construed to apply only to suits by "good" citizens; that is, by citizens loyal to its purposes.

This may be an exaggeration to some extent, but not to a very great extent. In Mountain States Legal Foundation v. Glickman, __ F.3d __, 1996 U.S. App. Lexis 21741

² More precisely, the ESA's stated purpose is to "conserve" listed species. Section 2 of the Act defines "conservation" in terms of "recovery". See Sugg, Ike C., "Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform," 23 *Cumberland L. Rev.* 1 (1993-1994). But "conservation" is expressly characterized as a federal duty, not that of private landowners or other non-federal entities. 16 U.S.C. §§ 1531(c)(1), 1536(a). Yet under Bennett, non-federal entities who judicially object to having this federal duty imposed on them are held to be beyond the ESA's zone of interests.

(D.C. Cir., Aug. 23, 1996), a very recent decision whose approach on ESA standing is directly contrary to that of Bennett, the court noted that "NEPA standing is not limited to the 'pure of heart'"; that is, to parties whose interests are solely environmental in nature. *Id.* at *19. While the court's choice of words may have been partly in jest, it does indicate that "purity of purpose", properly or improperly, can carry weight in certain tribunals.

III. The Zone Of Interests Test Distorts Statutory Construction.

The differing approaches taken in Bennett and in Mountain States point to a more subtle issue--that the zone of interests test may in some cases distort how a statute is actually construed by a court. Bennett sets forth a black-and-white, single-purpose reading of congressional intent in enacting the ESA--its "clear purpose ... is to ensure the protection of endangered species." 63 F.3d at 920. Mountain States, on the other hand, reads the ESA in a manner that is far more consistent with its actual statutory language:

"While Congress clearly did not adopt the ESA for the purpose of protecting economic interests, it equally clearly intended that such interests should come into play when critical habitats are designated." Lexis 21741 at *23.³

Both of these courts accepted the zone of interests test for standing, and so one cannot argue that this test automatically leads to strained statutory constructions. Nonetheless, a close reading of Bennett raises the suspicion that the court's emphasis on divining one overriding purpose for the ESA is responsible for its failure to give full weight to the statute's various provisions. In Bennett's words,

³ In the words of one environmental group, Defenders of Wildlife, "at nearly every stage of the ESA regulatory process save one, economic considerations are explicitly authorized." "Saving America's Wildlife: Renewing the Endangered Species Act," *Defenders of Wildlife*, July 1995, p. 61.

"To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal." 63 F.3d at 922.

The Mountain States decision, by comparison, rejects the notion of a single overriding intent for the far more reasonable position that

"no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice--and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." Lexis 21741 at *24.

The Bennett decision's view of the ESA is, in a way, similar to one of the administrative tendencies criticized by Justice Stephen Breyer in his study of overregulation, Breaking the Vicious Circle--Toward Effective Risk Regulation (1993):

"Tunnel vision, a classic administrative disease, arises when an agency ... carries single-minded pursuit of a single goal too far, to the point where it brings about more harm than good." Id. at 11.

In fact, every provision of the ESA manifests a congressional intent of one form or another. When, in the name of some allegedly overriding statutory purpose, a court downgrades the explicit statutory provisions that Congress enacted to prevent administrative tunnel vision, we have a classic case of statutory misconstruction.

The zone of interests standing test may well increase the likelihood of such misconstruction for two reasons: 1) it invites judicial attempts to divine overriding statutory purposes; and 2) it unnecessarily elevates the importance of such purposes, by enabling their use as threshold criteria that can cut off litigation at the outset. As a result, the purpose of statutory checks and balances tend to become downgraded or ignored altogether. In the name

of a statute's major purpose, its counterbalancing details lose their force. This is not a proper form of statutory construction.

In fact, for all of the emphasis in Bennett on "frustrat[ing] rather than further[ing] statutory objectives," it is ironic that the ESA's onerous land-use regulations have imposed such severe costs on private landowners that the net result is more harm than good for species conservation.⁴ Indeed, by penalizing landowners for having endangered species on their land, the ESA has created such perverse incentives that landowners have little reason to attract such species to their land and every reason to ensure their absence. Thus, by excluding economically aggrieved parties from the courts, Bennett may well "frustrate rather than further [the ESA's] statutory objectives," precisely the opposite of what that decision seeks to accomplish.

IV. CEI's Own Experience With The Zone Of Interests Test Illustrates Its Dangerous Potential For Restricting Judicial Consideration Of Important Regulatory Issues.

CEI has had its own litigating experience with environmental zones of interest. Several years ago, CEI brought a series of cases challenging actions taken by NHTSA, the National Highway Traffic Administration, in connection with its new car fuel economy program. This program is popularly known as CAFE, for Corporate Average Fuel Economy; it was enacted in 1975 as part of the Energy Policy and Conservation Act, codified at 15 U.S.C. § 2001 et seq.

⁴ See, e.g., Seasholes, Brian, "Species Protection and the Free Market: Mutually Compatible," *Endangered Species UPDATE*, Vol. 12, Nos. 4 & 5, 1995; "Reforming the Endangered Species Act: The Property Rights Perspective," written statement of Ike C. Sugg before the *Endangered Species Act Task Force of the House Committee on Resources*, May 18, 1995.

In particular, CEI challenged NHTSA's claim that the downsizing effect of CAFE on passenger cars has no effect on the safety of those cars. In our first case, CEI-I (CEI and Consumer Alert v. NHTSA, 901 F.2d 107 (D.C. Cir. 1990)), we succeeded in establishing standing under CAFE but we lost on the merits. In the second case, CEI-II (956 F.2d 321 (D.C. Cir. 1992)), the court overturned NHTSA's position, finding that it was based on a combination of "fudged analysis", "statistical sleight of hand", and "bureaucratic mumbo-jumbo". Id. at 324, 327. In the court's view, the evidence on record demonstrated that its "27.5 mpg standard kills people". Id. at 327. In CEI-III, 45 F.3d 481 (D.C. Cir. 1995) the agency's decision on remand (which took over a year to develop but which came to the same conclusion as before) was finally upheld, though the court noted that it still found NHTSA's treatment of the safety issue to be "troubling". Id. at 486.

What is relevant in these cases to this hearing is CEI's difficulty in obtaining standing. One of our original claims was that, in summarily claiming that CAFE had no safety impact, NHTSA had failed to comply with its own NEPA regulations. NHTSA's environmental assessment covered everything from CAFE's effect on wildlife to its effect on wetlands, but said not a word about its effect on people. In CEI-I, however, the court refused to hear this argument, ruling that neither CEI nor Consumer Alert fell within NEPA's zone of interests. Because our concern was with human safety, rather than environmental effects, we were unable to raise any NEPA challenge to NHTSA's handling of its CAFE program, regardless of the fact that NHTSA's own NEPA regulations encompassed social and safety impacts. See 901 F.2d at 122-24. Thus, the standing of CEI and Consumer Alert was based only on the CAFE statute itself.

Moreover, even though we succeeded in establishing standing under CAFE, even this would have been impossible had NHTSA construed that statute not to encompass safety concerns. Under such an alternative construction, complaints about the diminished safety of cars produced under CAFE may well have been regarded as lying beyond CAFE's zone of interests. As the CEI-II decision noted, such an interpretation "would have had a fair shot at being upheld." 956 F.2d at 323.

In the words of one commentator, this makes the CEI-II decision a "most remarkable example of a counterfactual imputation of reasonableness, as exemplified by a consideration of the relevant trade-offs, into a congressional statute." M.S. Greve, The Demise of Environmentalism In American Law 75 (1996). But unless Congress has made clear its intention to be unreasonable in drafting a statute, imputations of reasonableness are clearly desirable. If courts must err (and, like all human institutions, they occasionally will), then it is far better that they err on the side of reasonableness.

In short, the zone of interests test might well have prevented the critical issue of CAFE's impact on safety from ever being raised in court, even though we satisfied the constitutional requirements of standing.

Conclusion

Simple justice suggests that if a party can show injury due to actions taken under ESA, and if this injury meets the constitutional requirements of particularity, causation and redressability, then that should suffice for standing to litigate the validity of those actions. The elimination of the zone of interests test from the citizen suit provisions of the ESA, as

proposed in H.R. 3862, would be a major step toward increasing the likelihood of obtaining such justice.

Respectfully submitted,

Sam Kazman, General Counsel
Competitive Enterprise Institute
September 16, 1996

PREPARED STATEMENT OF JOHN CARR

**STATEMENT OF JOHN CARR, EXECUTIVE DIRECTOR,
DIRECT SERVICE INDUSTRIES, INC.
BEFORE THE COMMITTEE ON RESOURCES**
September 17, 1996

Direct Service Industries, Inc. ("DSIs") represents eight large industrial entities that purchase electric energy directly from the bulk power market, buying the majority of their power from the Bonneville Power Administration ("BPA"). For most of these companies, the price they pay for power is the single most important factor that determines their ability to compete successfully in the world-wide markets in which they operate. Traditionally, these companies have purchased between 25% and 30% of the power that Bonneville sells, and these purchases provide an equivalent share of Bonneville's total revenues.

Bonneville's power rates are designed to and do recover the costs which Bonneville incurs. Since 1991 and 1992, when three stocks of Columbia River salmon were first listed under the Endangered Species Act ("ESA"), BPA's costs incurred to protect these listed salmon have become a significant percentage of Bonneville's total costs. In the years since Columbia River salmon were first listed under the ESA, Bonneville (with money from Northwest ratepayers) has spent \$1.7 billion on fish mitigation costs, of which the DSIs paid a total of \$365 million. Presently, the average cost of fish mitigation included in Bonneville's rates is over \$400 million per year. Every time the Federal government alters hydro operations for fish it increases the cost of power and the DSIs bear a proportional amount of that increase. The DSIs have a large economic stake in how the ESA is implemented for the listed Columbia River salmon.

The DSIs are here today because of court decisions denying them standing to challenge many Federal actions taken under the ESA, which have had and will continue to have adverse economic consequences for the DSIs. Standing does not go to the issue of whether an agency decision was right or wrong or whether it was lawful or unlawful. When a party is denied standing, the court will not even hear whether the party has a valid complaint or whether the party was injured by a Federal agencies' violation of the law.

By creating a "zone of interest" test for standing to seek review of actions taken under the ESA, the Ninth Circuit has prevented parties that suffer huge economic injury, such as the DSIs, any ability to require Federal agencies to act in compliance with the law. Being denied standing in Court erodes our interests to affect agency decisions. When standing is denied to some but not other economic interests, government agencies will be biased toward the interests of those with standing, at the expense of the interests of parties who have been denied the ability to seek redress in the courts. Unfortunately, the agencies take you more seriously if you can sue them.

Purchasers of electric power are by no means the only economic interest significantly affected by government agency actions implementing salmon recovery efforts: the commercial harvest of listed and unlisted salmon within the Columbia River has been impacted; the release of hatchery juvenile salmon has been reduced because they compete for food and habitat with listed salmon; and stream and river side uses of property have been limited because of degradation of spawning and rearing habitat.

ESA implementation activities which impact these economic sectors are carried out by agencies of the Federal government. Whenever these agencies decide how to carry out their basic mandates while attempting to meet their obligations under the ESA, they effectively balance the relative economic harm or benefit one interest will suffer or gain versus another. The Federal agencies routinely make explicit judgments on these economic trade-offs when they implement the ESA.

Ironically, the parties whose economic interests are most directly affected by agency decisions are often, under the interpretation of the citizen suit provisions of the ESA adopted by the Ninth Circuit, denied judicial review. Economic interests are systematically denied any protection by the courts from government actions that may be arbitrary, capricious, erroneous or even illegal. The DSIs, whose economic health may hinge on how a Federal agency decides to implement the ESA, have been denied standing to seek judicial review of whether agency actions were carried out in compliance with the law, even though the courts acknowledged that the action in question had direct impact and adversely affected the DSIs' economic interests.

The DSIs were plaintiff-appellants in the lawsuit Pacific Northwest Generating Co-Op v. Brown, 38 F.3d 1058 (9th Cir. 1994) that established the guidelines for ESA standing regarding endangered salmon suits. We have been denied the ability to protect our economic interests based on the analysis

developed in PNGC v. Brown. In that case, the DSIs and two organizations representing public utilities filed citizen suits against several Federal agencies. In those suits, we alleged that:

1. Federal decisions on hatchery operations, habitat management and commercial harvest of mixed stocks of listed and unlisted salmon violated the ESA, adversely affected the listed salmon and resulted in drastic and expensive modification of hydroelectric operations; and
2. Federal agency decisions on hydro operations were based on a misinterpretation of the ESA, were inconsistent with available scientific evidence, and would increase Bonneville's customers' costs without any benefit to listed salmon.

The United States District Court for the District of Oregon ruled that the DSIs and the utility plaintiffs had no standing to bring their ESA claims because the economic interest of plaintiffs might be in conflict with the interests Congress intended to protect under the ESA -- the recovery of listed salmon stocks. On appeal, the Ninth Circuit ruled that, in addition to meeting the constitutional minimum requirements for standing, plaintiff must also be within the "zone of interest" protected by the ESA. Applying this test, the Court ruled that plaintiffs had made claims within the "zone of interest" of the ESA in arguing that there should be greater restrictions placed on hatchery production, fish harvest and habitat degradation. The Court reasoned that the DSIs could possibly benefit indirectly from protection of the salmon. If the DSIs could force greater protection of salmon from improper habitat, hatchery and harvest activities and thereby improve their recovery, it was possible that there would be less pressure to protect salmon through hydro operations.

The startling decision by the Court was that the DSIs had no standing to raise the claim that the government had taken steps under the ESA to dramatically alter hydropower operations *without* the requisite support in law or fact, despite the fact that such action economically harmed the DSIs. In effect, the Court concluded that as long as the government claimed to be protecting salmon, citizens harmed economically by that government action could not cause the government to justify or explain its actions to a reviewing court.

This decision has prevented the DSIs from challenging very expensive, and what we believe to be wholly insupportable, burdens placed year after year on the hydropower system. Based on our analysis, BPA is charging its

customers hundreds of millions of dollars annually for hydro operations compelled by the National Marine Fisheries Service based on an erroneous interpretation of the ESA and without adequate scientific information on the beneficial effect, if any, on salmon. Our inability to seek judicial review of agency actions biases the agencies to grant the requests of parties that have been found to have standing, even though, in some cases, these demands may be harmful to the salmon. After all, the Federal agencies can harm the DSIs with impunity, whereas they may be called upon to justify actions with which other parties do not agree.

The Court's "zone of interest" analysis, under which some economic interests are denied protection from potentially erroneous or arbitrary application of the ESA, is contrary to fundamental doctrines of due process upon which this country was founded and fails any test of fairness. The colonies declared their independence from Great Britain primarily because of unredressed economic injury. The Bill of Rights to the United States Constitution is designed to restrain abuse of government power; yet, the "zone of interest" test denies parties with economic interests protection from the abuse of government power if the government acts under color of the ESA.

Congress attempted to remove artificial barriers to a citizen's ability to hold government agents accountable for their actions when it adopted the judicial review provision of the Administrative Procedures Act. Under 5 U.S.C. § 706, the courts of the United States are directed to "compel agency action unlawfully withheld" and to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Under the expanding doctrine of "zone of interest," some courts have declined to carry out the APA statutory directive when, in the subjective judgment of the court, the interests of the injured citizen was not within the "zone" a particular statute was attempting to protect. It is undoubtedly true that Congress adopted the ESA to protect listed species. But, it was certainly not Congress' intent to allow Federal officials to act with complete impunity and beyond the reach of judicial review if they invoke the ESA to harm a citizen's economic or property interests.

In the PNGC v. Brown case, the United States District Court of Oregon implied that parties with purely economic interests at stake (and then only selected economic interests because commercial fish harvesters have been found to have broad standing under the ESA) might somehow subvert the ESA by seeking to protect their interests. This line of reasoning totally misses the point. Allowing a day in court to a party that has had its interests damaged, when

those interests did not happen to be the primary focus of the law invoked to cause that damage, will not prevent enforcement of the law. A court can determine whether the law has been applied properly no matter what interests the citizen invoking the law is attempting to protect.

The "zone of interest" test simply denies certain citizens any remedy for damage to their interests from misapplication of the law. In the cases relevant to the DSIs, this doctrine has precluded us from requiring Federal agencies to establish that their determinations to require multimillion dollar changes to hydro operations are based on a viable interpretation of the ESA, or that these requirements have sufficient scientific support to meet the arbitrary and capricious standard in 5 U.S.C. § 706. The "zone of interest" test simply excuses Federal agencies from providing any rational explanation for actions under the ESA that cause enormous economic harm to some citizens, and removes from some citizens' protection from governmental abuse. When a party is denied standing under the "zone of interest" test, the Court has not concluded that the party was not injured, or that the injury was inflicted in compliance with the law; the Court has simply found that the party cannot seek redress no-matter how unjustified the government act that harmed the party may be.

No citizen should be subjected to damage from misapplication of any law, and no citizen should be denied the right to obtain judicial review of the lawfulness of an agency action that subjects that citizen to harm. Arbitrary or unlawful action should not be insulated from review based solely on the particular law invoked when that action was taken.

H.R. 3862 is a positive step toward ensuring the right of full and fair judicial participation and review for all interests -- including economic interests -- under the ESA. It can be improved, however. Rather than declaring economic interests to be within the "zone of protected interests" of the ESA, it would be preferable to prohibit a Court from using the "zone of interest" test to impose barriers greater than the minimal showings required by the Constitution.¹

We are also concerned that the remedy proposed in this bill may not be adequate to allow citizens to protect their economic interests from potentially

¹ Courts have held that the "case or controversy" language in the Constitution requires that a plaintiff establish that: (1) it has or will suffer a concrete injury in fact; (2) that the injury was or will be caused by the action at issue; and (3) that the relief sought in court will redress the injury.

arbitrary agency action. Judicial review of agency action is based on the administrative record submitted by the agency to the court. If a citizen has been denied any opportunity to raise its interests before the agency, review based on the record compiled by the agency may be meaningless. Citizens should be notified and provided an opportunity to participate in any ESA consultation that is likely to affect that citizen's economic or other interest.

In one ESA case in which we were involved, the Federal agencies conducted their consultations on Columbia River hydroelectric operations in closed door meetings with some, but not all, of the economic interests. The DSIs and other parties with economic interests in electric power were excluded. Not surprisingly, the hydro operation plans that were developed, and which guide operations today, were extremely expensive for the disenfranchised electric power interests.

Similarly, a citizen's interest may not have been harmed by an agency's initial action, but that interest may be threatened by actions some other citizen is seeking to compel through judicial action. Therefore, it is important that citizens have standing to intervene in lawsuits initiated by others under the ESA whenever the suit threatens their economic or other interests.

Finally, since we believe standing should be more accessible under all parts of the ESA, we would recommend the deletion of any limitation of this provision to harm caused via designation of critical habitat. Economic interests should have standing under all sections of the ESA, provided they meet the minimum constitutional requirements.

On behalf of the members of Direct Service Industries, Inc., I appreciate the opportunity to address this Committee regarding an issue that has and does effect our very significant economic interests.



PREPARED STATEMENT OF AMERICAN FARM BUREAU FEDERATION

AMERICAN FARM BUREAU FEDERATION®

225 TOUHY AVENUE • PARK RIDGE • ILLINOIS • 60068 • (312) 399-5700 • FAX (312) 399-5896
600 MARYLAND AVENUE S.W. • SUITE 800 • WASHINGTON, D.C. • 20024 • (202) 484-3600 • FAX (202) 484-3604

**STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
ON H.R. 3862
THE CITIZEN'S FAIR HEARING ACT OF 1996
THE HOUSE RESOURCES COMMITTEE**

September 17, 1996

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The American Farm Bureau Federation (AFBF), the nation's largest general farm organization, represents the interests of farmers and ranchers nationwide. AFBF has affiliate state Farm Bureaus in all 50 states and Puerto Rico, representing the interests of more than 4.5 million member families. We offer this statement for the hearing record in support of H. R. 3862.

AFBF has testified before this committee many times over the course of the last few years describing the adverse impacts that the Endangered Species Act (ESA) has had on our members and detailing the need for reform of the Act. Farmers, ranchers and small landowners across the country are restricted from using their private property in traditional ways because of the presence or alleged presence of a listed species, or because their property might someday be habitat for such species. The ESA was enacted on the basis that preservation of species is in the "public interest," yet small farmers and ranchers on whose property these species live are being forced to bear the entire cost for preserving these species.

Recent federal court decisions have even deprived farmers, ranchers and small landowners of the ability to protect themselves and their interests from governmental excesses under the Endangered Species Act. Cases such as *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995) and currently on appeal to the U.S. Supreme Court, have shut the courthouse door to farmers, ranchers and small landowners who feel they have been wronged under the Endangered Species Act. The Ninth Circuit denied standing to farmer-plaintiffs to bring any claims for relief under the ESA, claiming that farmers and ranchers seeking to protect their economic interests are outside the "zone of interests" sought to be protected under the ESA. This holding creates the fundamentally unfair situation where one entire class of plaintiffs is denied access to the courts.

H.R. 3862 would correct this gross inequity by ensuring that people on both sides of the Endangered Species Act --those who claim that government action under the ESA goes too far, as well as those who claim that such ESA actions do not go far enough --have access to the courts. It appropriately clarifies the intent of Congress that people who lose the use of their property or are prevented from earning a living, or suffer some other economic injury, as a result of the application of the ESA can seek judicial redress when the actions of the government causing the economic injury are illegal. The bill is necessary, timely, and resolves a significant problem under the ESA.

While the ESA imposes certain responsibilities on the federal government to protect listed species, it also contains certain safeguards and places certain duties on the federal government to make sure that the ESA is administered within scientific and procedural parameters. For example, section 4 of the ESA requires that any listing of a species must be made on the basis of "the best scientific and commercial data available." In addition, section 4 requires that if a species proposed for listing is not listed within one year, the proposal must be withdrawn. (The ESA allows for a six month extension in certain circumstances, but if the proposal is not finalized within that period, it must also be withdrawn.)

The ESA also contains a number of procedural safeguards to protect the rights of people who might be affected by an ESA action. For example, section 4 requires 60 days notice of proposed listings, together with a requirement that such proposal be published in a local newspaper. In addition, if anyone requests a hearing on the proposal, one must be held.

Such provisions at least try to ensure that the ESA is administered fairly, that ESA actions are taken only on the basis that they are scientifically justified, and that affected people have ample opportunity to present new evidence or make their views known before action is taken. Thus, Congress has sought to see that rights of affected individuals are protected at the same time that species are protected from becoming extinct. The obligations placed on the federal government by these substantive and procedural provisions are no less than any other obligations on the government to protect species. The government should be held accountable to the people regulated under the ESA to the same extent that species are protected.

The federal courts have changed all of that. After *Bennett*, affected people within the Ninth Circuit have no way to hold the federal government accountable for regulatory excesses under the ESA. The federal government is free to act in any manner it wants in the name of the ESA, including the ability to flaunt the provisions of the ESA and trample the rights of farmers and ranchers with unfettered impunity. Since the area encompassed within the jurisdiction of the Ninth Circuit contains a significant number of the listed species and related conflicts, the problem caused by the courts is quite significant.

AFBF has experienced the problems caused by application of the *Bennett* decision firsthand. Our experience may serve to illustrate the problems faced by affected parties and the need for legislation like H.R. 3862 to correct them.

Our situation involves the proposed listing of five species of mollusks found in the middle reaches of the Snake River in Idaho. The stated impacts to our members were that the extensive farm and ranch interests in this area would be restricted in both the amount of water they could take from the River and also in the amount of crop protection materials they could use that might run off into the River.

The scientific data supporting listing was, in our view, quite weak. There was as much scientific information either opposing listing or creating uncertainty about the species as was

advanced to support the listing. The evidence clearly and incontrovertibly indicated that less than one percent of the potential habitat for these species had ever been surveyed for the species. Moreover, the expert hired by the Idaho Farm Bureau Federation twice conducted his own surveys for these species, and twice found them in areas where the government said they did not exist.

The ESA requires that listings be made on the basis of “the scientific and commercial data available.” AFBF and the Idaho Farm Bureau Federation filed suit challenging the listings on the basis that there was no science to support the listings, and the listings were therefore in violation of the ESA.

We were not even able to get our case to the judge. Citing the *Bennett* decision, he dismissed our case for lack of standing, based solely on the fact that we were challenging ESA actions as going too far, rather than trying to extend the ESA by claiming that actions did not go far enough. Thus farmers and ranchers who had legitimate and basic questions with the manner in which these mollusks were listed, and whose livelihoods may be significantly impacted by their listing, were denied the right to protect their interests in court.

That is the problem that the courts have caused. People who have legitimate claims that government action is adversely impacting traditional personal interests of property and livelihood are foreclosed from the courts simply because they are on the wrong side of an issue.

But while people are foreclosed from challenging the ESA as going too far, those who challenge agency action as not going far enough to protect species are still filing lawsuits. Thus courts are only allowing one side of the issue to be heard, a situation even worse than not allowing a hearing on either side at all. Only allowing one side of an issue creates an inherent imbalance in the administration of the law whereby the government is only accountable to one side and not to the other. The inevitable result is that the government leans toward the side to which it is accountable to and ignores the side over which it has free rein.

Thus, the issue addressed by H. R. 3862 is one of fundamental fairness. It makes sure that all sides of an issue are heard, that the government is accountable for its actions to all affected parties, and that all parties have the right to have injuries redressed within the limits set by Article III of the Constitution.

The bill does not change the Constitutional rules of standing, nor can it. Article III of the Constitution, as articulated by the U.S. Supreme Court, contains certain basic requirements that all litigants must meet in order to be allowed to proceed in court. Such requirements include the existence of an actual or imminent injury that is caused by the activity at issue which can be redressed by the court. The bill does not seek to change these well-established rules of standing.

Rather, the bill seeks to clarify some of the elements of prudential or discretionary grounds upon which standing can be denied under the ESA. Courts like the Ninth Circuit have

misconstrued these elements to produce an inherently unfair result. Other courts may, and have, construed the ESA citizen suit standing provision differently, producing the anomalous result that people adversely impacted by the ESA can seek legal redress in some parts of the country but not in other parts. Legislative clarification is necessary and appropriate both to correct current problems and to provide the "legislative intent" that courts often seek in making similar types of decisions.

The fact that the *Bennett* case has been accepted for oral argument before the U.S. Supreme Court does not obviate the need for this legislation. In the first place, oral argument is not scheduled in this matter until November 13, and a decision is not likely for several months after that. Secondly, the federal respondents have argued in their brief before the Court that a decision can and should be made without consideration of the "zone of interest" issue that prompted the Court to take the case in the first place. If the Court accepts this reasoning, the problems that farmer and rancher ESA plaintiffs have in the area within the Ninth Circuit jurisdiction will remain, without having been addressed by the Supreme Court.

AFBF fully supports H.R. 3862. It provides a reasonable, uniform and timely solution to a problem that prevents an entire class of plaintiffs from protecting their interests against overzealous and overreaching government. It does so in a manner that does not seek to expand or change the Constitutional definition of standing. More importantly, it restores fundamental fairness to the judicial system, by providing equal judicial footing to people on both sides of the ESA. It restores balance in the judicial administration of the ESA. And finally, it provides legislative clarification to an issue that has been subject to various conflicting interpretations by the courts, thereby bringing needed uniformity to the question of who may sue under the ESA.

We thank the committee for holding a hearing on this important issue, and look forward to working with the committee to pass H.R. 3862.

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PREPARED STATEMENT OF NATIONAL ASSOCIATION OF HOME BUILDERS

The National Association of Home Builders (NAHB) represents more than 185,000 builders and associate member firms organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. More than half of NAHB's builder members build less than 10 homes per year, and three-quarters of our builder members build less than 25 homes per year. NAHB is truly an association that represents small business.

As small business owners, home builders are often dramatically impacted by government regulations. There are perhaps no regulations, however, that have more profound implications for home builders than those which govern the use of private property. Similarly, there is perhaps no other small businessperson that is affected more keenly and more immediately by the regulation of private property. It follows, then, that there is no small businessperson on whom the Endangered Species Act (ESA) places a greater potential burden.

It is for this reason that NAHB feels compelled to provide comments on the issue of judicial standing for individuals affected by critical habitat designations under the ESA, an issue that H.R. 3862, introduced by Rep. Helen Chenoweth (R-ID), attempts to address.

It is clear that a primary intent of H.R. 3862 is to effectively overturn a misguided decision made by the U.S. Court of Appeals for the Ninth Circuit, a decision which has dramatic and profound implications for landowners throughout the nation. Essentially, the Ninth Circuit ruled that only environmental groups, and other organizations and individuals who want to expand the reach of the ESA, have standing to file citizen suits under the Act. This means that regulated parties, such as home builders, who bear the burden of the ESA, would not have the opportunity to challenge in a court of law the U.S. Government's listing of species and designation of critical habitat, and the subsequent prohibitions on land use that accompany such determinations. Landowners would also be precluded from challenging the results of agency

consultations under Section 7, which can have dramatic impacts on property owners. Indeed, the Ninth Circuit has effectively closed the courthouse doors to regulated parties. In arriving at its decision, the court found that:

Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives."

With its decision, the Ninth Circuit has for practical purposes nullified the ability of property owners to protect themselves from unlawful ESA regulation. This is a sweeping decision, with the potential of having severe consequences for property owners across the country. To provide some perspective on this decision's potential ramifications, a 1994 General Accounting Office report showed that 90% of the 781 species listed at that time as endangered or threatened under the ESA inhabit non-federal lands. Furthermore, of those species listed, 517 have over 60% of their total habitat on non-federal lands, covering tens of millions of acres of private property. Obviously, there are a lot of landowners who could see their investments get swallowed up as a result of a decision made by a Fish and Wildlife Service (the Service) bureaucrat -- landowners who would have no legal recourse to challenge that decision.

The burdens that the ESA places on owners of private land are by no means hypothetical. There are numerous examples that can be cited, sometimes tragic, of substantial losses of private property brought on by overzealous enforcement of the ESA. Perhaps the most well-known of these unfortunate occurrences is that of the 28 families in Riverside County who lost their homes to a wildfire. These families had the misfortune of residing in the same general area as the endangered Stephens Kangaroo Rat. In their efforts to protect the "K-rat," the Service prohibited the clearing of fire breaks around their property, as it would ostensibly have disturbed the K-rat's habitat, using threats of civil, and even criminal, penalties. Those homeowners who defied the Service saved their property. Those who did not lost virtually everything they owned. These homeowners deserve their day in court. The Ninth Circuit's decision would deny them that.

In another instance, in August 1993, the Service listed two cave bugs as endangered in the Austin, Texas area. The listing of one of these bugs, the Bone Cave Harvestman, forced home builder Ed Wendler, Jr. to set aside 90 acres of real property for its protection -- at a cost of \$1,170,000. The Service listed both of these bugs without proceeding through any of the required notice and comment procedures -- a blatant violation of the ESA. Under the Ninth Circuit's decision, Mr. Wendler would not have the opportunity to file suit against the federal government.

It is situations such as these that H.R. 3862 attempts to resolve. Without at least the potential for its actions to be challenged by those it regulates, the Fish and Wildlife Service will be under virtually no constraints not to overregulate as it makes unilateral decisions that can have profound impacts on the lives of citizens. Fortunately, the Supreme Court has agreed to hear an appeal of the Ninth Circuit's decision during its fall calendar, and NAHB, together with several other interests, has submitted an Amicus Curiae brief in support of overturning this decision, which we have attached for inclusion in the record. Of course, this is by no means a guarantee that the decision will be overturned, making passage of H.R. 3862 that much more important. NAHB has submitted this brief for the record.

To be sure, an equally important goal of H.R. 3862 is to reaffirm the will of the Congress, as it can certainly be argued that the Ninth Circuit decision ignores Congressional intent. Indeed, in enacting the ESA, Congress clearly extended standing under the Act to the limits of Article III of the Constitution. 16 U.S.C. Sec. 1540 (g)(1) states that:

The term "person" is liberally defined in the ESA to mean:

an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department or instrumentality of the Federal government, of any state or political subdivision thereof, or any foreign government.

There is nothing within this definition that attempts to qualify it in such a way as to

exclude a “person” with a “competing interest,” or to restrict standing to a person who *only* seeks to further the ESA’s statutory objectives, both standards referred to in the Ninth Circuit decision. On the contrary, the definition of standing under the ESA is quite broad and inclusive. It seems clear that it was Congress’ intent to provide some legal recourse to those who believe they have been the victim of an incorrect decision on the part of the federal government. Unfortunately, the Ninth Circuit’s extremely narrow decision eliminates that course of action.

It is for this reason that NAHB applauds Rep. Chenoweth’s efforts. This legislation, if enacted, will do nothing to broaden the scope or the protections under the Endangered Species Act. It will not lead to a flood of challenges aimed at “frustrating statutory objectives.” What it will do is reaffirm that which Congress intended 23 years ago, and in doing so reaffirm the right of all citizens to have their day in court.



NATIONAL ASSOCIATION OF REALTORS®
700 Eleventh Street, N.W.
Washington, D.C. 20001-4507

Arthur L. Godi, President
Dr. Almon R. Smith, CAE, Executive Vice President
Stephen D. Driesler, Vice President & Chief Lobbyist
Government and Political Relations

Jerry Giovaniello, Vice President
Government Relations
Telephone 202-383-1115
Fax 202-383-7580

September 24, 1996

The Honorable Don Young
Chair
House Resources Committee
1328 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Young:

On behalf of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I request that this letter be placed in the hearing record, for the hearing, held on September 17, on H.R. 3862, the "Citizens Fair Hearing Act of 1996."

NAR opposes those aspects of environmental and natural resource legislation that amount to uncompensated condemnation of private property through government actions. It is essential that the rights of private property owners be fully recognized in local, state and federal programs and laws.

NAR supports a multiple use approach to the management of our nation's public lands and we oppose wide scale withdrawals of public lands for wilderness designation. We are particularly sensitive to those withdrawals and policies that reduce supplies for housing and increase costs of resources utilized in building construction. In addition, we oppose legislation or regulation which decreases access to timber resources or prohibits the export of timber from private lands.

NAR also, believes that the way in which the Endangered Species Act (ESA) is implemented is of major importance. We support amendments to the Threatened and Endangered Species Act that recognize socioeconomic considerations and urge that compensation be required in cases where the value of private property has been unduly diminished or jeopardized by government action under the Act.

Sincerely,

Arthur L. Godi
President

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