Sierra Club v. Glickman

Elizabeth Kristen

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z382N87

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
Section 7(a)(1) of the Endangered Species Act (ESA), the duty to conserve provision, has been underutilized as a tool for species protection. In Sierra Club v. Glickman, the Fifth Circuit found that the USDA did not meet its 7(a)(1) obligations regarding its subsidies to irrigated agriculture in central Texas. The court found that federal agencies have an "affirmative duty" to "conserve each species listed pursuant to [the ESA]." This Note argues that the court correctly extended the scope of the duty to conserve and properly found that the Club had standing with regard to 7(a)(1).
III. Legal Analysis .............................................................. 721
   A. Standing ........................................................................ 721
   B. ESA Consultation Provisions ...................................... 723
Conclusion .............................................................................. 726

INTRODUCTION

In 1998, the Fifth Circuit ruled that the U.S. Department of Agriculture (USDA) violated the Endangered Species Act (ESA) by failing to implement its Section 7(a)(1) "duty to conserve" when regulating the impacts of irrigated agriculture on endangered species in central Texas. In *Sierra Club v. Glickman*, the court held that the duty to conserve provision of Section 7(a)(1) of the ESA should be interpreted broadly and that the USDA had failed to conserve five endangered species dependent on the Edwards Aquifer. This interpretation may breathe life into Section 7(a)(1), providing another tool for environmental plaintiffs to utilize when challenging agency inaction regarding endangered and threatened species. In finding that the Sierra Club had standing to bring this action, the court also navigated recent standing jurisprudence to reach a mostly favorable result for environmental plaintiffs.

This Note focuses on *Glickman's* contribution to both the interpretation of the ESA and the application of the law of standing. Part I reviews standing doctrine, discusses ESA

---

1. 156 F.3d 606 (5th Cir. 1998).
2. The decision also has regional implications. Texas is the only western state still following a rule of capture for groundwater. See Robert A. McCleskey, *Maybe Oil and Water Should Mix – At Least in Texas Law: An Analysis of Current Problems with Texas Ground Water Law and How Established Oil and Gas Law Could Provide Appropriate Solutions*, 1 TEX. WESLEYAN L. REV. 207, 212 (1994). This rule of capture, developed from English common law, allows landowners (or their lessees or assignees) to pump as much groundwater as they want. The only limitations on this right are that the owners must not waste it willfully, pump it negligently, or use it to maliciously injure a third party. See Todd H. Votteler, *The Little Fish That Roared: The Endangered Species Act, State Groundwater Law, and Private Property Rights Collide Over the Texas Edwards Aquifer*, 28 ENVTL. L. 845, 854-55 (1998); see also Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21, 29-30 (Tex. 1978). Courts rarely find that a party has engaged in waste and have never found malicious conduct. See Matthew Carson Cottingham Miles, *Water Wars: A Discussion of the Edwards Aquifer Water Crisis*, 6 S.C. ENVTL. L.J. 213, 222 (1997). This "rule of the biggest pump" creates a strong incentive to pump as much water as possible to prevent others from taking the water first, causing disastrous environmental consequences. Votteler, supra, at 854. A series of Sierra Club lawsuits have brought the federal courts' influence to bear on the state's legal regime for regulating groundwater. See, e.g., Sierra Club v. City of San Antonio, 115 F.3d 311 (5th Cir. 1997); Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997); Sierra Club v. Babbitt, 995 F.2d 571 (5th Cir. 1993); Sierra Club v. Lujan, No. MO-91-CA-069, 1993 U.S. Dist. LEXIS 3361, at *1 (W.D. Tex. Feb. 1, 1993). A number of
Section 7, and provides background about the aquifer and species at issue in Glickman. Part II summarizes the Glickman opinion. Finally, Part III discusses the court's application of standing doctrine and argues that the Fifth Circuit correctly extended the scope of federal agencies' duty to conserve under the ESA.

I

BACKGROUND

A. Standing

A comprehensive discussion of standing is outside the scope of this Note. This section therefore provides only a brief overview of this important constitutional doctrine.

1. Article III Standing

The United States Constitution limits the power of the judiciary to "cases" and "controversies," and the Supreme Court has outlined the criteria plaintiffs must meet to establish this "Article III standing." To have standing, a plaintiff must demonstrate "some actual or threatened injury" that "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." The standing requirements are designed to ensure that parties have "a personal stake in the outcome" of a controversy amenable to judicial resolution.

Plaintiffs asserting procedural injuries have more difficulty establishing Article III standing because their injuries usually result from "complex regulatory processes in which numerous commentators have deemed Sierra Club v. Lujan "a collateral attack" on Texas groundwater law. McCleskey, supra, at 218; accord Miles, supra, at 225. As one author has noted, the ESA "became the instrument that eventually brought state regulation to the [Edwards] Aquifer and the end to unrestricted withdrawals of groundwater." Votteler, supra, at 846. Glickman could be viewed as another case chipping away at the rule of capture for groundwater. A detailed discussion of these regional implications, however, is outside the scope of this Note.


factors, judgments, and politics often play significant roles." In
_Lujan v. Defenders of Wildlife_, the Court stated that plaintiffs
raising "generalized" grievances about the operation of
government, when those operations do not affect a concrete
interest providing the ultimate basis for their standing, do not
have standing under Article III. Nevertheless, the Court found
that when plaintiffs with concrete interests assert that an agency
did not follow proper procedures, they need not meet all the
usual standards for immediacy and redressability.

The Court's decision in _Bennett v. Spear_ sheds some light
on how loose these standards can be for procedural injury
plaintiffs. In _Bennett_, plaintiffs with economic interests in the
Klamath Irrigation Project, operated by the Bureau of
Reclamation (Bureau), sued the Fish and Wildlife Service (FWS)
over the biological opinion the FWS issued pursuant to the
ESA. The biological opinion stated that operation of the project
would likely jeopardize two listed species, and offered several
"reasonable and prudent alternatives," including maintaining
minimum water levels. Although minimum water levels would
have adversely affected the plaintiffs' economic interests, the
FWS argued that the plaintiffs did not have standing to challenge
the opinion because the document was strictly advisory, and the
Bureau—not the FWS—had to make the ultimate decision to
increase water levels. Although the Court reaffirmed that
standing cannot be found where injury is due to the "independent action" of a third party not before the Court, it held
that the FWS biological opinion had a "coercive" effect and
therefore satisfied Article III's redressability and traceability
requirements. The Court explained that "fairly traceable" does
not mean that the action complained of has to be the "last step
in the chain of causation." Thus, the _Bennett_ decision provided
guidance to lower courts considering the traceability and
redressability components of standing for plaintiffs asserting

9. _id_. at 573-74 & n.7.
10. _See id_. at 573 n.7.
12. _See Schultz, supra_ note 7, at 702.
14. _See id_. at 159.
15. _See id_. at 159-60.
16. _See id_. at 168.
17. _Id_. at 168-71.
18. _Id_. at 169.
procedural rights.\textsuperscript{19} The Glickman court's approach emphasizes how loose the connection can sometimes be between the injury and the government agency's action.

2. \textit{Prudential Standing}

Plaintiffs seeking to enforce statutory rights must also establish prudential standing. Statutes such as the Administrative Procedure Act (APA),\textsuperscript{20} and various environmental laws, often provide a basis for standing. For example, the APA provides a right to sue for plaintiffs who are "adversely affected or aggrieved by [federal] agency action within the meaning of a relevant statute."\textsuperscript{21} In addition, the ESA states that "any person" can sue to enforce the provisions of the Act.\textsuperscript{22} When a statute contains such a "citizen suit" provision, courts assess whether the plaintiff's injury is the type of harm Congress intended to redress under the statute.\textsuperscript{23} This inquiry into "prudential standing" requires the court to determine whether the plaintiff was "injured in fact" and whether she was "arguably within the zone of interests" protected by the statute.\textsuperscript{24}

\textit{Bennett} also addressed prudential standing requirements.\textsuperscript{25} Prior to Bennett, lower courts split over whether the zone of interests test (originally developed in relation to the APA)\textsuperscript{26} should be applied when plaintiffs sued under environmental citizen suit provisions.\textsuperscript{27} With regard to the ESA, the Bennett Court held that the Act's broad language negated the "zone of interests" inquiry.\textsuperscript{28} The Court also found that the plaintiffs had standing to bring suit under the APA despite the fact that they asserted an economic interest.\textsuperscript{29}

\begin{itemize}
  \item \textsuperscript{19} But cf. Schultz, supra note 7, at 704 (stating that the decision's effect is unclear because the Supreme Court failed to address different approaches being taken in the lower courts regarding redressability and traceability).
  \item \textsuperscript{20} 5 U.S.C. §§ 551-559, 701-706 (1994).
  \item \textsuperscript{21} Id. § 702 (1994).
  \item \textsuperscript{22} See 16 U.S.C. § 1540(g) (1994). The Supreme Court has interpreted "any person" in a broad way. See Bennett, 520 U.S. at 166 (1997).
  \item \textsuperscript{24} Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).
  \item \textsuperscript{25} Bennett, 520 U.S. at 162-66; see also Schultz, supra note 7, at 693-702.
  \item \textsuperscript{26} See Barney, supra note 23, at 1922-23.
  \item \textsuperscript{27} See id. at 1924-25.
  \item \textsuperscript{28} See Bennett, 520 U.S. at 164.
  \item \textsuperscript{29} See id. at 167.
\end{itemize}
B. Endangered Species Act

The ESA, passed in 1973, provides a strong legal framework for species protection. In fact, the Supreme Court has called the ESA "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." The ESA contains a number of provisions designed to aid the conservation of endangered and threatened species by regulating government agencies and private actors. First, the Act authorizes the listing of threatened and endangered species. In the listing process, the National Marine Fisheries Service (NMFS) or the FWS—depending on the species involved—must consider a number of factors discussed in Section 4 of the ESA and make a determination about whether a species should be designated as threatened or endangered. Once a species has been listed, the NMFS or FWS must designate critical habitat and develop and implement recovery plans for the species.

Once a species has been protected by the ESA, the Act prevents private individuals from "taking" that listed species. The ESA's restraints on federal agencies are even more comprehensive. Section 7 of the ESA restricts federal projects that jeopardize listed species. Two provisions of ESA Section 7

32. Id.
33. An "endangered" species is one that is "in danger of extinction throughout all or a significant portion of its range..." with the exception of certain insects which are considered "pest[s]." 16 U.S.C. § 1532(6) (1994). Threatened species are those "likely to become... endangered... within the foreseeable future throughout all or a significant portion of [their] range." Id. § 1532(20).
34. The listing process is described in Section 4 of the ESA. See id. § 1533.
35. See id.
36. The ESA defines critical habitat as areas occupied by the species that are both "essential to the conservation of the species and... may require special management considerations or protection." Id. § 1532(5)(A)(i) - (ii).
37. Section 4 of the ESA requires the Secretary to "develop and implement [recovery] plans... for the conservation and survival of endangered [and threatened] species." Id. § 1533(f)(1).
38. To "take" within the meaning of the ESA is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Id. § 1532(19). The ESA also allows the federal government to permit certain "takes." See id. § 1539(a)(1); see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 687-709 (1995) (discussing the definition of "take").
at issue in Glickman, 7(a)(1) and 7(a)(2), respectively mandate that federal agencies undertake actions to conserve listed species and limit agency actions that might jeopardize endangered species. These two sections are discussed below.

1. Section 7(a)(1)

Section 7(a)(1) sets forth an agency's duty to conserve listed species, mandating that federal agencies "shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species . . . ." The Act defines "conserve" as the use of all procedures and methods necessary to "bring any endangered . . . or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." Thus, agencies have an affirmative duty to conserve listed species that is triggered as soon as the federal government lists a species.

Unlike Section 7(a)(2), which applies only to specific projects, Section 7(a)(1) requires that agencies work with the FWS and NMFS on a continuous basis to develop species conservation programs. Although federal agencies have an affirmative duty to conserve, they also have some discretion in how they choose to meet that obligation.

Prior to Glickman, courts established that, under 7(a)(1): (1) all federal agencies have a duty to conserve listed species; (2) all federal agencies have some discretion to determine how to implement their conservation duties; (3) the Secretaries of Interior and Commerce may have a greater duty to conserve than


42. See Kilbourne, supra note 40, at 525.

43. 16 U.S.C. § 1536(a)(1) (1994). Section 7(a)(1) outlines two sets of obligations, one for the Secretaries of Interior and Commerce and a second set for all other federal agencies. See Kilbourne, supra note 40, at 564. Although some commentators initially believed that the distinction between these two sets of obligations meant that federal agencies, other than Interior and Commerce, did not have enforceable duties under 7(a)(1), this interpretation has been rejected by the courts. See id. at 565; see also Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy, 898 F.2d 1410, 1417 n.15 (9th Cir. 1990) (rejecting the idea that the Navy should be held to a "lesser duty to conserve" than Interior department agencies).


45. See Ruhl, supra note 40, at 1123.

46. See id.

47. See Kilbourne, supra note 40, at 565.
secretaries of other agencies; and (4) to establish that they have met their 7(a)(1) obligations, agencies must show that they have not jeopardized listed species, have taken measures that aid conservation to some degree, and have reasonable grounds for rejecting other conservation alternatives. 48

2. Section 7(a)(2)

Section 7(a)(2) mandates that federal agencies consult with the FWS or NMFS to ensure their actions do not jeopardize listed species or their critical habitat. 49 It provides that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available. 50

Thus, every time a federal agency approves a project, for example, it must consult with the FWS (or NMFS) to ensure that listed species suffer no adverse impacts. The ESA thereby provides the FWS (or NMFS) with a "strong presence" both in federal agency actions and in projects that non-federal entities carry out with federal approval. 51

48. See id. at 571-72; see also Conner v. Andrus, 453 F. Supp. 1037, 1041 (W.D. Tex. 1978) (finding that the conservation obligation did not support a set of hunting restrictions because the restrictions did not prevent a threat to the species); Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 261-62 n.5 (9th Cir. 1984) (declining to decide whether Section 7(a)(1) duties should come before other conflicting statutory program directives, and declining to outline the parameters of the Secretary's ESA obligations); Pyramid Lake Paiute Tribe of Indians v. United States Dept' of Navy, 898 F.2d 1410, 1417-18 (9th Cir. 1990) (recognizing that federal agencies have "affirmative obligations to conserve" threatened and endangered species but deferring to the agency's discretion); National Wildlife Fed'n v. National Park Serv., 669 F. Supp. 384, 387-88 (D. Wyo. 1987) (concluding that the Park Service's failure to close a campground that impacted the grizzly bear was part of a management plan for the bear, and the Service therefore had not violated 7(a)(1)); Enos v. Marsh, 616 F. Supp. 32, 61-62 (D. Haw. 1984), aff'd, 769 F.2d 1263 (9th Cir. 1985) (holding that the duty to conserve did not require the Secretary of Interior to designate critical habitat for a species when the Secretary lacked adequate data to do so).

49. See Ruhl, supra note 40, at 1119.


51. See Ruhl, supra note 40, at 1120. The sheer number of consultations
Section 7(a)(1) has been implemented quite differently than 7(a)(2). The FWS and NMFS have not adopted regulations to guide other agencies in meeting their Section 7(a)(1) obligations. Furthermore, although the two agencies may make conservation recommendations in the course of the 7(a)(2) consultation process, these recommendations are only advisory and do not carry "binding legal force." 52

Legal challenges have not been brought under Section 7(a)(1) as often as under Section 7(a)(2). In fact, "only a handful of cases have interpreted [Section 7(a)(1)]," 53 and the parameters of the duty to conserve have not been clear. 54 Although environmental plaintiffs have not often used this section to advance species protection, it has the potential to be a powerful tool and has been called "the sleeping giant of the ESA programs." 55 Glickman may have awakened the giant.

C. The Edwards Aquifer and The Endangered Species

The Edwards Aquifer plays a unique role in the Texas landscape and provides crucial habitat for several endangered and threatened species populations. Because many species rely on the aquifer for sustenance, it has understandably become a flash point for conflict. There has been tremendous controversy over the management and use of the aquifer—Glickman was only the most recent development in a long-running story.

1. The Aquifer

An aquifer is a layer of rock or soil that holds and transports water. 56 The Edwards Aquifer, located in central Texas, is 175 miles long and covers about 3,600 square miles. 57 The aquifer

conducted pursuant to its mandate illustrates the breadth of Section 7(a)(2). From 1988 to 1993, over 70,000 Section 7(a)(2) consultations took place. See id. at 1119 n.57.

52. 50 C.F.R. § 402.14(j) (2000); see Kilbourne, supra note 40, at 565.
53. Kilbourne, supra note 40, at 564.
54. See id. at 525.
55. Ruhl, supra note 40, at 1109.
56. See Miles, supra note 2, at 213.
depends on rainfall for recharge of its water supply.\textsuperscript{58} The amount of such precipitation is highly variable in the arid Texas climate, and recharge of the aquifer varies from 46,000 to two million acre feet per year.\textsuperscript{59}

Known human reliance on the aquifer began in the 1500s.\textsuperscript{60} People started regularly digging wells to access the water in the 1880s and began pumping more extensively in the 1950s.\textsuperscript{61} Today, humans in the aquifer region use the water for a variety of activities. People in the western part of the region use the aquifer primarily for irrigation.\textsuperscript{62} On the eastern edge of the aquifer, people count on the aquifer’s water for tourism and recreation.\textsuperscript{63} The City of San Antonio, the largest U.S. city to depend solely on groundwater,\textsuperscript{64} relies completely on the aquifer for its water supply.\textsuperscript{65} Thousands of farmers use the aquifer’s water to “irrigate millions of dollars worth of crops . . . .”\textsuperscript{66} Ultimately, two million people and thousands of businesses use the water.\textsuperscript{67} Because this regional conflict pits agriculture against urban development, it has been especially contentious and has resulted in a long series of cases discussed further in Part I.C.3 of this Note.

2. The Endangered and Threatened Species

Numerous animal and plant species are found only at springs fed by the aquifer. Two of these springs, the Comal Springs and the San Marcos Springs (on the eastern edge of the deposits which eventually became “the porous, honeycombed, karstic limestone rock of the Edwards Aquifer.” Id. The combination of the faulting and the disintegration of the rock allows water to flow through the formation. See Sierra Club v. Lujan, 1993 U.S. Dist. LEXIS 3361, at *8.

\textsuperscript{58} See Miles, supra note 2, at 214.


\textsuperscript{60} See Votteler, supra note 2, at 849.

\textsuperscript{61} See id. at 850.

\textsuperscript{62} See Miles, supra note 2, at 216.

\textsuperscript{63} See id.

\textsuperscript{64} See McCleskey, supra note 2, at 216. In San Antonio, a number of political factions hold contrary opinions about whether the city needs to find an additional water source. These conflicts have prevented the Applewhite Reservoir from being completed. See Miles, supra note 2, at 220.

\textsuperscript{65} See McCleskey, supra note 2, at 216.

\textsuperscript{66} Sierra Club v. Glickman, 156 F.3d 606, 610 (5th Cir.1998).

\textsuperscript{67} See id.
aquifer about fifteen miles apart) are the largest in the Southwest. Habitat at these springs supports some of the greatest biodiversity in the region, and they are the sole habitat for a number of listed species. The five species at issue in Glickman are the fountain darter (Etheostoma fonticola), the San Marcos gambusia (Gambusia georgei), the San Marcos salamander (Eurycea nana), the Texas blind salamander (Typhlomolge rathbuni), and Texas wild rice (Zizania texana). These five species (the Edwards-species) are only found at the San Marcos and Comal Springs. When the water level in the aquifer declines, it reduces the water supply to the springs, adversely impacting the species that live there.

68. See Sierra Club v. Babbitt, 995 F.2d 571, 573 (5th Cir. 1993).
70. See Votteler, supra note 2, at 851. One author has stated that the aquifer region was as "ecologically rich" as the Galapagos Islands. See Hay, supra note 57, at 1462 n.29 (citation omitted).
71. The San Marcos gambusia may be extinct. See Glickman, 156 F.3d at 610; see also Votteler, supra note 2, at 851 n.36.


Finally, Texas wild rice, listed as endangered in 1982, see 50 C.F.R. § 17.12, is an aquatic perennial grass related to the type of wild rice humans eat. The plant is found only in the upper part of the San Marcos River. See Texas Parks and Wildlife, Endangered and Threatened Species, (visited Oct. 9, 1999) <http://www.tpwd.state.tx.us/nature/endang/plants/twildric.htm>. Other Edwards-species on the endangered or threatened list include the Comal Springs dryopid beetle (Stygoparnus comalensis), Comal Springs riffle beetle (Heterelmis comalensis) and Peck's cave amphipod (Stygobromus pecki). See Votteler, supra note 2, at 851.

73. See Glickman, 156 F.3d at 610.
74. See Votteler, supra note 2, at 851-n.52. Water quality also impacts the species and the "bad water" line—where the aquifer's water becomes so mineralized as to be unpotable. See Miles, supra note 9, at 215; Sierra Club v. Lujan, 1993 U.S. Dist. LEXIS 336, at *20. Excessive water withdrawals may lead to further bad water encroachment into the aquifer. See id.
3. Previous Cases

Glickman was not the first lawsuit to challenge excessive water withdrawals from the aquifer. In fact, some commentators consider the Edwards Aquifer area the "epicenter of Texas water litigation."\(^75\) In *Sierra Club v. Lujan*, decided in 1991, the Sierra Club\(^76\) sued the Secretary of the Interior and the FWS, alleging that by failing to establish minimum spring-flow levels for the San Marcos and Comal springs, the defendants had allowed unauthorized "takes" in violation of the ESA.\(^77\) The district court ordered defendants to establish minimum springflow levels to prevent taking endangered species.\(^78\) Furthermore, Judge Bunton's district court opinion essentially informed the Texas legislature that if it did not change the system by which aquifer withdrawals were regulated, the court would intervene.\(^79\)

In 1993, the legislature attempted to comply with the court's directive. One day prior to the deadline set by *Lujan*, the legislature adopted Senate Bill 1477\(^80\) that called for creation of an Edwards Aquifer Authority (EAA) having expansive aquifer management powers.\(^81\) Because the bill provided that EAA members be appointed rather than elected, the bill was challenged under the Voting Rights Act of 1965, and the Department of Justice refused to "preclear" the bill.\(^82\) Since the

---

75. Miles, *supra* note 2, at 213.
76. The other plaintiff in this case was Clark Hubbs, an emeritus zoology professor from the University of Texas at Austin. See Votteler, *supra* note 2, at 856.
77. See id.
79. See id. at *92. Defendant-intervenors other than the FWS appealed to the Fifth Circuit, which dismissed the appeal for want of jurisdiction. See *Sierra Club v. Babbitt*, 995 F.2d 571, 573 (5th Cir. 1993). In 1996, the Fifth Circuit dismissed the action as moot after the FWS published a revised recovery plan. See *Sierra Club v. City of San Antonio*, 112 F.3d 780, 792 (5th Cir. 1997).
80. See Votteler, *supra* note 2, at 860 (citing S. 1477, 73d Leg., Reg. Sess. (Tex. 1993)).
81. See Hay, *supra* note 57, at 1454. These powers included the authority to: limit pumpage amounts, levy penalties, issue well permits, transfer water rights, require installation of well-measuring devices, institute demand-management mechanisms, conduct research on springflows, provide financial assistance for water conservation, assess user fees, issue revenue bonds, institute water quality programs, and make other rules necessary for the implementation of Authority programs.
82. See Hay, *supra* note 57, at 1455. The EAA was to replace the Edwards Underground Water District (EUWD). See Miles, *supra* note 2, at 227. Senate Bill 1477 limits the amount that can be taken from the aquifer to 450,000 acre feet per year, with reductions over the next fifteen years to 400,000. See Hay, *supra* note 57, at 1454.
Texas legislature meets only every two years, it was unable to change the EAA appointment provisions until 1995. With the EAA's implementation halted, the Sierra Club went back to Judge Bunton's court for relief. Although the court was prepared to take action in both 1994 and 1995, rains averted the crisis.

In 1995, the legislature corrected the voting rights defects in Senate Bill 1477 and EAA members were to be sworn in on August 28, 1995. Two water conservation districts and two cattle companies promptly brought a facial challenge to the EAA, however, and the state court found the bill to effect an unconstitutional taking. The Texas Supreme Court reversed, finding the Act constitutional on its face but leaving open the issue of whether compensation would be required for the reduced water allocations.

In 1996, the EAA finally met and voted against emergency measures because, at the time, the aquifer had a reasonably high water level. Dissatisfied with the EAA's progress, the Sierra Club again filed suit in Judge Bunton's court, alleging that excessive aquifer use was resulting in takes of endangered species. The Sierra Club sought an injunction allowing pumping only for mandatory human needs. In a preliminary injunction, the judge ordered a reduction in pumping until the EAA could demonstrate that a plan to conserve the endangered species was in place.


83. See Miles, supra note 2, at 228. The EUWD continued to exist during this period but did not collect taxes. See id.
84. See Votteler, supra note 2, at 861.
85. See id. at 861-63. In 1994, a court-appointed monitor prepared an emergency plan to reduce pumping from the aquifer. The plan was not implemented because fall rains and seasonally decreased pumping eliminated the immediate need to conserve water. See id. at 861. In 1995, a revised plan was prepared and approved by the court, but again rain and reduced pumping meant that the court did not implement the plan. See id. at 863.
86. With House Bill 3189, the legislature changed the composition of the EAA from a nine member appointed board to a seventeen member board which was partly elected and partly appointed. See Miles, supra note 2, at 228.
87. See Votteler, supra note 2, at 866.
89. See id. at 631.
90. See Sierra Club v. City of San Antonio, 112 F.3d 789, 796 (5th Cir. 1997).
91. See Miles, supra note 2, at 233-34.
92. See id. at 234.
species was operative.\textsuperscript{93} The Fifth Circuit stayed the order pending an appeal and vacated the injunction in 1997.\textsuperscript{94} Although the EAA has attempted to implement various water use reduction programs, it has been thwarted by legal challenges in state court.\textsuperscript{95} Therefore, the EAA's effectiveness is doubtful.

\section*{II DESCRIPTION OF THE CASE}

A. Facts and Procedural History

In \textit{Sierra Club v. Glickman},\textsuperscript{96} environmentalists attempted to reduce groundwater pumping by utilizing a new approach; they attacked USDA farm subsidies that encouraged irrigated agriculture in the Edwards Aquifer region. In particular, the Sierra Club\textsuperscript{97} challenged the USDA's irrigation subsidies for Texas farmers. The Club alleged that the USDA failed to protect the aquifer from contamination and that the agency violated the ESA by not consulting with the FWS and by neglecting to carry out conservation programs for the five listed species that depend on the Edwards Aquifer.\textsuperscript{98} The Sierra Club filed its action in the U.S. District Court for the Western District of Texas on April 28, 1995.\textsuperscript{99} The three-count complaint\textsuperscript{100} alleged that the USDA had violated provisions of the Agriculture and Water Policy Coordination Act,\textsuperscript{101} the Bankhead-Jones Farm Tenant Act,\textsuperscript{102} and the Endangered Species Act.\textsuperscript{103}

\textsuperscript{93} \textit{See id.; see also Sierra Club v. City of San Antonio, 112 F.3d at 793.}

\textsuperscript{94} \textit{See Sierra Club v. City of San Antonio, 112 F.3d at 793-94 (vacating the preliminary injunction based on the Burford abstention doctrine, since the EAA was a comprehensive state regulatory scheme implicating issues of concern to the whole state).}

\textsuperscript{95} \textit{See generally Votteler, supra note 2, at 869-73; Jerry Needham. \textit{Judge Strikes Down Drought Rules Court Tosses Limits on Pumping}, SAN ANTONIO EXPRESS-NEWS, Jan. 5, 1999, at A8.}

\textsuperscript{96} 156 F.3d 606 (5th Cir. 1998).

\textsuperscript{97} Clark Hubbs again served as co-plaintiff. \textit{See Glickman, 156 F.3d at 606.}

\textsuperscript{98} See Votteler, supra note 2, at 856.

\textsuperscript{99} 156 F.3d at 610-11.

\textsuperscript{100} \textit{See id. at 610.}

\textsuperscript{101} 7 U.S.C. §§ 5401-5405 (1994) (establishing various environmental duties for the USDA).

\textsuperscript{102} 7 U.S.C. § 1010 (1994). This act authorizes and directs the Secretary of Agriculture to " develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in [various..."
Count I of the complaint invoked the Agriculture and Water Policy Coordination Act and the Bankhead-Jones Farm Tenant Act. The Club argued that these statutes required the USDA to implement programs to prevent environmental degradation resulting from agricultural production and to protect waters from pollution. It further contended that the USDA was not in compliance with these statutes with regard to irrigation and pumping from the Edwards Aquifer. The complaint sought injunctive relief requiring the USDA to create programs to aid in conservation of the Edwards-species. The district court granted the Club's motion for summary judgment with respect to Count I of the complaint and required the USDA to develop a number of programs.

Counts II and III alleged that USDA had violated Sections 7(a)(1) and 7(a)(2) of the ESA. The Club first argued that the USDA violated Section 7(a)(1) by failing to consult with the FWS and by not carrying out programs to aid in the conservation of the Edwards-species. The Club sought an injunction requiring the USDA to consult with the FWS in developing programs to encourage farmers to use less water for irrigation. With respect to Count II, the district court ordered the USDA to develop a program for conservation in consultation with the FWS.

In Count III, the Club charged the USDA with failure to comply with Section 7(a)(2) for encouraging irrigation-dependent environmental activities."

104. See Glickman, 156 F.3d at 610.
105. See id.
106. See id.
107. See id. at 611.
108. See id. The first required program, pursuant to the Bankhead-Jones Farm Tenant Act, was to "assist in preserving natural resources and protecting fish and wildlife through land conservation and utilization . . . ." Id. at 611. The second called for an inter-agency program under the Agriculture and Water Policy Coordination Act to "protect waters from contamination from . . . agricultural production practices . . . ." Id. The third, also pursuant to the Agriculture and Water Policy Coordination Act, called for the creation of a plan to "evaluate, prevent, and mitigate environmental problems that may result from agricultural production . . . ." Id.
110. Id. § 1536(a)(2) (1994).
111. See Glickman, 156 F.3d at 610-11.
112. See id. at 610.
113. See id. at 611.
114. See id. at 612.
agriculture without consulting with the FWS.\textsuperscript{115} Again, the Club sought an injunction requiring that the USDA consult with the FWS to consider withholding or conditioning farm payments to encourage water conservation.\textsuperscript{116} The district court held a bench trial to rule on Count III.\textsuperscript{117}

During the district court litigation, Congress passed the 1996 farm bill, the Federal Agriculture Improvement and Reform Act (FAIR).\textsuperscript{118} FAIR provided for a new "production flexibility contract" payment program whereby the USDA would pay decreasing amounts to eligible farmers for seven years.\textsuperscript{119} FAIR required the USDA to make these payments once certain criteria, outlined in the statute, were met.\textsuperscript{120} Therefore, the USDA could not withhold these payments as a means to influence the irrigation practices of farmers.\textsuperscript{121} Nevertheless, the Sierra Club moved for a preliminary injunction to prevent the USDA from disbursing FAIR payments to farmers until the agency engaged in ESA-required consultation with the FWS.\textsuperscript{122}

After the bench trial on Count III, the court found that the USDA could target money for designated "conservation priority areas" even if it could not withhold farm payments.\textsuperscript{123} Furthermore, since the USDA had "unreasonably delayed" consultation with the FWS concerning these payments, the court ordered the USDA to complete that process.\textsuperscript{124} The court, however, did not enjoin the payments or order formal consultation; it simply ordered informal consultation to take place.\textsuperscript{125} The USDA appealed and the Fifth Circuit granted a stay of the district court's order pending appeal.\textsuperscript{126}

\textsuperscript{115} See id. at 611.
\textsuperscript{116} See id.
\textsuperscript{117} See id. at 612.
\textsuperscript{119} See Jason Waanders, Growing a Greener Future? USDA and Natural Resource Conservation, 29 ENVTL. L. 235, 268 (1999). To be eligible, farmers must comply with conservation programs and have croplands which were "previously planted with or enrolled in an acreage reduction program for a commodity, [or came] out of an expiring conservation reserve contract." Id. The payments are tied to past receipts. See id.
\textsuperscript{120} See Glickman, 156 F.3d at 611.
\textsuperscript{121} See id.
\textsuperscript{122} See id.
\textsuperscript{123} Id. at 612.
\textsuperscript{124} See id.
\textsuperscript{125} See id.
\textsuperscript{126} See id. The intervenors also were parties to the appeal. See id.
B. Fifth Circuit Decision

1. Count I and Standing Doctrine

The court of appeals relied on standing doctrine to reverse the district court's ruling on Count I.\(^{127}\) The Fifth Circuit held that the Sierra Club did not have standing to bring its Count I claims (that the USDA failed to comply with various non-ESA statutes) since it had only stated a "generalized grievance."\(^{128}\) Furthermore, the court found that the injury could not be fairly traced to the USDA's failure to implement programs under the Count I statutes.\(^{129}\) Finally, since the Sierra Club did not demonstrate that requiring the USDA to comply with these statutes would correct its injury, it failed to establish redressability.\(^{130}\)

2. Count III and Mootness

The court turned to the related constitutional doctrine of mootness to dispose of Count III, the USDA's alleged violation of ESA Section 7(a)(2).\(^{131}\) The USDA had argued that the Sierra Club lacked standing with regard to 7(a)(2).\(^{132}\) The agency also claimed that 7(a)(2) did not apply to the farm payments because they were "nondiscretionary federal actions," and because the farmers' actions were not "authorized, funded, or carried out" by a federal agency.\(^{133}\) The court, by its own admission, did not reach these issues.\(^{134}\) Rather, since the USDA had completed its Biological Evaluation on the impact of subsidies for irrigated agriculture on the Edwards-species, and did consult with FWS about the evaluation, the court found Count III moot.\(^{135}\)

---

\(^{127}\) Although the USDA raised a question of Sierra Club's standing to bring the suit at the district court level, the court simply ruled "without elaboration" that the Club and Hubbs had standing. Id. at 611.

\(^{128}\) Id. at 620-21. The court said relatively little about standing with regard to Count I. It simply stated that the Sierra Club (the court did not mention Hubbs) failed to show its injury was fairly traceable or redressible. See id. at 620.

\(^{129}\) See id.

\(^{130}\) See id.

\(^{131}\) The Sierra Club filed a motion to dismiss the appeal as moot with regard to Section 7(a)(2) because the USDA had completed, and submitted to the FWS, its biological evaluation concerning the impact of FAIR payments on the Edwards-species. See id. at 619.

\(^{132}\) See id.

\(^{133}\) Id.

\(^{134}\) See id.

\(^{135}\) See id.
Although the court found Count III to be moot, it nevertheless addressed the USDA’s arguments that the Club lacked standing.\(^{136}\) The agency wanted the Fifth Circuit to evaluate the Club’s standing under Section 7(a)(2) rather than leave intact the lower court’s favorable standing analysis. The agency argued that, because the farmers’ pumping decisions rather than the USDA’s actions caused the species harm, the Club’s 7(a)(2) complaint failed the traceability and redressability prongs of standing analysis.\(^{137}\) The Fifth Circuit was not convinced that standing was a live controversy but stated no opinion about the district court’s standing conclusion.\(^{138}\) However, the court refused the USDA’s request to remand to the district court with instructions to vacate the part of the order addressing the Section 7(a)(2) issue.\(^{139}\)

The USDA also alleged that a second “live controversy” remained, arguing that the matter was “capable of repetition but evading review.”\(^{140}\) Essentially, the USDA maintained that if the court found Count III moot, in the future, the USDA would have to defend against a similar Section 7(a)(2) challenge to FAIR payments.\(^{141}\) The court found that the USDA was attempting to “turn this exception on its head.”\(^{142}\) The court found “evading review” to be a plaintiff-centered exception, not a device to protect defendants against possible future lawsuits “when the sole reason that the case is moot is a direct result of the defendant’s voluntary compliance with the district court’s order.”\(^{143}\)

Finally, since the USDA voluntarily complied with the district court’s consultation order, the Fifth Circuit refused to vacate the judgment with regard to Section 7(a)(2).\(^{144}\) Nevertheless, the court stated that, should the Sierra Club apply for an attorneys’ fee award for its 7(a)(2) claim, the district court should “reexamine” its analysis of whether the Club had standing.\(^{145}\) Thus, while the USDA raised some interesting issues in its attempt to attack the district court’s 7(a)(2) holding, the Fifth Circuit essentially left the district court’s ruling intact by

\(^{136}\) See id.
\(^{137}\) See id.
\(^{138}\) See id. at 619-20 & n.8.
\(^{139}\) See id. at 620.
\(^{140}\) Id.
\(^{141}\) See id.
\(^{142}\) Id.
\(^{143}\) Id.
\(^{144}\) See id.
\(^{145}\) Id. at 620 n.8.
finding that the claim was moot. Therefore, the bulk of the Glickman opinion focused on Count II, the proper interpretation of the conservation provision and whether the Sierra Club had standing to bring its Section 7(a)(1) claim.

3. Count II – Standing and Interpretation of ESA Section 7(a)(1)

Although the district court seemed to ignore this threshold issue, the Fifth Circuit carefully considered whether the plaintiffs had standing to bring this claim. After reviewing the requirements to establish Article III standing (injury in fact, causation and redressability), the court discussed the special problems of asserting a procedural injury. The court characterized the Club's complaint, “at its core,” as an effort to force the USDA to comply with Section 7(a)(1) procedural requirements. While stating that a procedural rights claim needs to meet all the requirements for Article III standing, the court cited Lujan v. Defenders of Wildlife for the proposition that procedural rights claims are “not held to the normal standards for redressability and immediacy.”

It then outlined the necessary elements of standing for such a procedural claim. The Club had to demonstrate that: (1) it suffered a concrete and particular injury (not just an “undifferentiated interest in the proper application of the law”); (2) the injury was fairly traceable to the action or inaction; and (3) there was a possibility that the procedural remedy would be capable of redressing the injury. The redressability component is related to the concrete injury requirement—the remedy must redress the injury that forms the basis for standing. A plaintiff asserting a procedural rights claim need not show as close a fit between the injury and remedy as other plaintiffs, however.

The court held that the imminent and substantial risk to the Edwards-species (the Club's injury) was sufficiently concrete and particular to be judicially cognizable because the water withdrawal posed a particular risk to the listed species. The

146. Before addressing standing, the court concluded that the Section 7(a)(1) issues were not moot since the parties provided no information that the USDA complied with its obligations under that section. See id. at 613.
147. See id.
148. Id.
149. Id. at 613 (citing Sierra Club v. Lujan, 504 U.S. at 573 n.7).
150. Id. at 613.
151. See id.
152. See id. at 613-14. The USDA itself conceded that the Club had suffered an injury sufficient for standing under the ESA. See id. at 614.
court issued two caveats in finding a sufficient injury. First, it warned that it made no ruling as to whether a plaintiff whose injury was simply that a species remains on the endangered or threatened species list would have standing. The court implied that such a plaintiff would have to show that she suffered some "further identifiable and particularized harm" in addition to the species remaining listed. It also noted that a plaintiff whose only claim was that an agency had not taken action to benefit a species not in jeopardy or suffering takings might not have standing. Second, it considered a hypothetical claim against an agency for adopting a less environmentally friendly alternative. After raising the issue, the court stated "no opinion" as to whether such a plaintiff would have standing.

Although the USDA contested causation, arguing that the farmers' independent pumping decisions were the true cause of the Club's injury, the court found that the USDA could affect those pumping decisions through various programs. The court relied on a study showing that if the USDA provided farmers with financial assistance to install water conservation measures, an average of 38,000 acre-feet of Edwards-aquifer water could be saved each year. In dry years, that amount of water would represent twenty percent of the total amount pumped from the aquifer. The FWS found that a twenty percent reduction would have a significant effect on the Edwards-species. The court therefore concluded that since the USDA had the authority to implement such a water conservation program, its failure to do so was traceable to the Club's injury.

The court turned to the language of the ESA to determine whether Section 7(a)(1) was designed to protect against the type of injury alleged by the Sierra Club. The court noted that if Section 7(a)(1) created only a generalized duty to develop conservation programs to benefit listed species rather than a more particular and specific duty to each species, proving

153. See id. at 614.
154. Id.
155. See id.
156. See id.
157. Id.
158. See id. at 614-15.
159. See id. at 614 (citing "cooperative solutions," a study updated in 1996 by the DOT, Texas A&M University, and the Texas State Soil & Water Conservation Board).
160. See id. at 615.
161. See id.
162. See id.
redressability would be difficult.\textsuperscript{163} After examining the history and purpose of the ESA as a whole, however, the court found that Section 7(a)(1) imposed "an affirmative duty on each federal agency to conserve each of the species listed pursuant to § 1533 [Section 4 of the ESA]."\textsuperscript{164} Furthermore, to meet this duty, the agencies "must consult with [the] FWS as to each of the listed species, not just undertake a generalized consultation."\textsuperscript{165} Therefore, since the agency could take action to redress the Sierra Club's injury, the Club had standing to bring the action.\textsuperscript{166}

Once the court had established Article III standing, it considered the USDA's challenges to statutory standing. The USDA argued that neither the ESA nor the APA supported Sierra Club's citizen suit.\textsuperscript{167}

Section A of the ESA's citizen suit provision states that, "any person may commence a civil suit . . . to enjoin any person, including the United States . . . who is alleged to be in violation of [the Act] . . ."\textsuperscript{168} In Bennett v. Spear,\textsuperscript{169} the Supreme Court concluded that the Bennett plaintiffs' ESA Section 7 claims against the Secretary of the Interior were not reviewable under Section A of ESA's citizen suit provision since Section A's reference to "in violation" did not include "maladministration of the Act."\textsuperscript{170} Although the USDA attempted to use this part of the Bennett holding to argue that the Sierra Club could not use Section A to challenge the USDA's failure to follow Section 7 procedure, the Fifth Circuit rejected this approach as a "misreading" of Bennett.\textsuperscript{171} Instead, the Fifth Circuit found that Section A of the ESA citizen suit provision allows private parties to enforce the ESA against regulated parties whether they are governmental or private entities.\textsuperscript{172} Although the court decided that the Club had standing under the ESA, it went on to consider whether it could maintain an action under the APA.\textsuperscript{173}

APA section 702 allows "any person" who is "adversely affected or aggrieved by agency action" to bring suit to have

\textsuperscript{163} See id.
\textsuperscript{164} Id. at 616.
\textsuperscript{165} Id.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{169} 520 U.S. 154 (1997).
\textsuperscript{170} Id. at 174.
\textsuperscript{171} Glickman, 163 F.3d at 616.
\textsuperscript{172} See id. at 617 (citing Bennett, 520 U.S. at 173).
\textsuperscript{173} The APA provides the standard of review for challenges to administrative decisions under the ESA. See Pyramid Lake Paiute Tribe, 898 F.2d at 1414.
agency “action, findings, and conclusions” set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . ”\textsuperscript{174} The USDA argued that the APA did not apply for two reasons. First, the agency claimed that the Section 7(a)(1) duties were drawn too broadly to be judicially reviewable.\textsuperscript{175} In other words, the “duty to conserve” supplied no standard against which the court could measure compliance.\textsuperscript{176} In response, the court found that this argument relied heavily on the USDA’s other claim, that 7(a)(1) did not impose a duty to consult with the FWS and develop conservation programs for each listed species.\textsuperscript{177} Since the court had previously rejected that construction, it found that Section 7(a)(1) imposed a duty to consult and develop conservation programs that was not so broad as to be unreviewable.\textsuperscript{178}

Second, the USDA argued that because Section 7(a)(1) gives agencies a great deal of discretion in developing conservation programs, the USDA had nonreviewable discretion to develop no programs at all.\textsuperscript{179} The court also rejected this argument, finding that agency final decisions are reviewable, and stating that reviewing courts should examine whether the agency considered relevant issues and followed the prescribed procedures.\textsuperscript{180}

The court also elaborated on its interpretation of 7(a)(1) in response to the USDA’s contention that it had complied through incidental benefits to the Edwards-species from other agency programs. The court rejected this tactic, holding instead that the plain language of 7(a)(1) required specific conservation programs.\textsuperscript{181}

The court noted that the USDA had not challenged the scope of the district court’s injunction to consult with the FWS in developing an organized program for the conservation of the

\textsuperscript{174} 5 U.S.C. § 702 (1994). The APA also provides for challenges to “compel agency action unlawfully withheld.” \textit{Id.}

\textsuperscript{175} \textit{See Glickman}, 156 F.3d at 617.

\textsuperscript{176} \textit{See id.}

\textsuperscript{177} \textit{See id.}

\textsuperscript{178} \textit{See id.}

\textsuperscript{179} \textit{See id.}

\textsuperscript{180} \textit{See id.} In a footnote, the court also rejected the USDA’s argument that the APA did not apply because there was “no final agency action” to review. \textit{See id.} at 618 n.7. Although the USDA’s “action” was technically inaction, the court found that since the USDA had never consulted with the FWS and had no plans to do so, its failure to consult qualified as agency action. \textit{See id.}

\textsuperscript{181} \textit{See id.} at 618.
Edwards-species. The court therefore affirmed the district court's order as to Count II.

III
LEGAL ANALYSIS

A. Standing

Glickman’s standing analysis provided some good news for environmental plaintiffs. For example, the USDA failed to counter the Sierra Club’s assertion of injury in fact, thus conceding that the damage to the Edward-species and their habitat from agricultural pumping was sufficiently concrete for standing. This concession, accepted by the court, was certainly helpful for the plaintiffs.

Nevertheless, the injury in fact portion of the Glickman decision may be very limited. The court left open a number of questions regarding injury in fact by raising hypothetical situations and then stating “no opinion” as to whether such an injury would suffice for standing. For example, if the USDA had taken some action to conserve the listed Edward-species but the Sierra Club deemed that action insufficient, the Club might not have had standing to bring an action challenging the measures. Furthermore, if the Edward-species had not been in jeopardy or suffering an “identifiable and particularized harm,” the Club might not have been able to state a cognizable injury by claiming that the USDA had not taken action to aid the species. Thus, while the injury in fact component of the decision is useful for environmentalists, it may have limited applicability because of the extreme facts of this case.

The Glickman court made two interesting contributions to causation analysis under the ESA. First, the bad news: the court’s rejection of the Sierra Club’s standing argument under the Count I statutes may undermine the usefulness of these statutes for environmental litigators. The court’s holding rested on the argument that the Club’s injury was not traceable to the USDA’s lack of action under these statutes. Here, the fact that the third-party farmers were causing the injury proved dispositive to the court. The good news lies in the court’s

182. See id.
183. See id. at 621.
184. See id. at 614.
185. See id.
186. Id.
analysis of Section 7(a)(1) and the USDA's ability to affect farmers' pumping decisions. The court, relying heavily on three reports, found that the USDA had influenced the farmers' decisions despite the agency's argument that such decisions were independent of the agency's actions. This interpretation of causation could be significant for future challenges to USDA subsidies for irrigated agriculture. Furthermore, it could be used to show standing to challenge similar programs in other agencies. That is, when government programs influence third parties to take actions adverse to the environment, the resulting injuries may suffice for standing against the agency. In the future, environmental plaintiffs may be able to submit reports demonstrating an agency's capacity to affect a third party, thus establishing causation. The ease with which the court found causation may be a function of the unique circumstances of Glickman, however, because the USDA had taken no action to protect the Edward-species and the species had no alternative habitat.

The court next found that the USDA could redress the injury caused by third-party farmers through its "specific and particular" Section 7(a)(1) duties. This redressability analysis contrasts sharply with the court's conclusions regarding the Count I statutes. There, the court held that the Club did not demonstrate that requiring the USDA to implement its duties with regard to the Count I statutes would suffice to redress the Club's injury.

In applying the lower threshold for redressability for the procedural injuries alleged under Count II, the court relied in part on its causation holding to find that the Sierra Club's injuries were redressable by the USDA. The court also looked extensively to the purpose of the ESA, as articulated in its legislative history and case law interpretations. Thus, while redressability could have been a barrier to the Club's suit against the USDA (since the farmers actually doing the pumping were not parties to the suit), the Fifth Circuit found that plaintiffs' procedural injury suit easily met the standing requirements. The decision indicates that even a rather indirect relationship between an agency's action and the harm caused to

187. See id. at 615.
188. Id.
189. See id. at 620.
190. See id. at 615-16.
the plaintiff may satisfy the causation and redressability requirements for standing under Section 7(a)(1). If plaintiffs can show that an agency has a strong ability to affect third-party decisions, this showing may suffice for traceability and redressability. The result is similar to that reached by the *Bennett* Court, when it found that the FWS’s report had a coercive effect on the Bureau.  

Here, the USDA subsidies had a similarly coercive effect on the farmers. Thus, despite *Bennett*’s negative implications, its analysis on this point might be useful to environmental plaintiffs.  

However, the court’s finding that the Sierra Club did not have standing to raise its Count I claims is troubling. The court indicated that the relationship between the USDA’s actions and the harm suffered by the Club was too tenuous to support standing. The seeming inconsistency between the court’s analysis of Counts I and II may hinge on the court’s broad interpretation of Section 7(a)(1) and the purpose of the ESA, though the opinion justified its conclusion by stating that the Club raised only a “generalized grievance” under Count I. 

Although the Fifth Circuit upheld the lower court’s analysis of the Club’s standing to bring the 7(a)(2) claim (Count III), the holding may not be useful to future environmental plaintiffs since the court mandated that the analysis be re-evaluated if the Club sought attorneys’ fees. Therefore, while it was good that the Club was able to establish standing in the lower court, the Fifth Circuit’s treatment of the issue undermines the future value of the lower court’s analysis. 

Ultimately, *Glickman* indicates that while citizen plaintiffs suing under the ESA for an agency’s failure to conserve do not have to show a tight fit between harm and redressability, the same is not true for causes of action under the statutes at issue in Count I. 

B. ESA Consultation Provisions

*Glickman*’s most important contribution is its development of Section 7(a)(1)’s duty to conserve provision. The Fifth Circuit

---

192. See *Bennett*, 520 U.S. at 168-71.  
193. See *Glickman*, 156 F.3d at 620-21.  
194. *Id.*  
195. See *id.* at 620 n.8.  
196. While the Section 7(a)(2) appeal was found to be moot, the court let the district court’s order with regard to that provision remain in effect. See *id.* at 620. Thus, the lower court’s decision regarding 7(a)(2) might be of use to future environmental plaintiffs.
held that federal agencies have a particularized duty to consult with the FWS or NMFS regarding their duty to conserve each listed species. Thus, the incidental benefits from an agency's existing projects will not be enough, at least in the Fifth Circuit. Furthermore, although agencies have a great deal of discretion in implementing their 7(a)(1) duties, their decisions are reviewable.

Glickman ultimately suggests that Section 7(a)(1) may be a useful tool for species protection. As one author has argued, the full potential of Section 7(a)(1) has not yet been realized; this section can be used as "a shield, a sword, or a prod" for increased conservation of listed species. As a shield, Section 7(a)(1) provides cover for federal agencies who take discretionary actions to protect listed species. In *Carson-Truckee Water Conservation District v. Clark*, the Ninth Circuit considered a challenge by two Nevada cities to the Secretary of Interior's decision not to sell them water from the Stampede Dam. The Interior Department's operation conserved two species of endangered fish and therefore had no water to spare for the two cities. Although the plaintiffs argued that the ESA only obligated the Secretary to avoid jeopardizing the fish and therefore should sell them water, the court recognized that the Secretary also had to "actively pursue a species conservation policy." Applying Section 7(a)(1), the court found that the Secretary's decision not to sell the water was "well-justified."

After Glickman, federal agencies can interpret their duty to conserve more broadly because Section 7(a)(1) should shield them from legal and political challenges. Thus, an agency might be more willing to try innovative approaches to conservation because Section 7(a)(1) could protect those conservation programs from attack.

Section 7(a)(1) might also serve as a sword to attack agency decisions that do not fully implement the duty to conserve. An example of an unsuccessful use of 7(a)(1) as a sword is *Pyramid Lake Paiute Tribe of Indians v. United States Department of the Interior*.198

---

197. See Glickman, 156 F.3d at 616.
198. Ruhl, supra note 40, at 1129.
199. See id.
200. 741 F.2d 257 (9th Cir. 1984).
201. Id. at 259.
202. Id. at 261-62.
203. Id. at 261-62.
204. Id. at 262.
205. See Ruhl, supra note 40, at 1131.
Navy. The Tribe challenged the Navy's cropland lease program that was designed to reduce dust storms by creating buffer zones of irrigated vegetation around a naval air station. The Tribe argued that the Navy's program excessively diverted the waters of the Truckee River, negatively impacting the endangered cui-ui.

The district court found that Section 7(a)(1) imposed a lesser duty to conserve on non-Interior federal agencies than on the Interior Department. The Ninth Circuit disagreed, holding that although non-Interior agencies must consult with the Secretary of the Interior in carrying out their duty to conserve, they do not have a lesser duty.

Pyramid Lake also suggests the limitations of Section 7(a)(1); despite the court's finding on the scope of the duty to conserve, the Ninth Circuit held that the Navy met its obligations. The Tribe had argued that the Navy was obligated to adopt a more conservation-oriented alternative that would be equally effective at serving the Navy's interest. The court found that the Tribe's alternative would only have a slight conservation effect, and the Navy therefore need not adopt it. Furthermore, the Navy met its duty under Section 7(a)(1). Thus, the court acknowledged the power of 7(a)(1) to influence agency decisions but nevertheless affirmed the Navy's choice because the alternatives would have an "insignificant" effect. The court was also reluctant to divest the Navy of its discretion in fulfilling its duty to conserve.

While Pyramid Lake illustrates the use of Section 7(a)(1) to challenge agency action, the result indicates that if an agency is taking at least some action, the court may not disturb agency discretion. Glickman confirms this analysis by suggesting that only an agency that takes no action with regard to its Section 7(a)(1) duties will be forced to comply. In fact, when agencies take some action, the results may be harder to challenge than
Section 7(a)(2) actions because less specific findings will be required of the agency.

Finally, Section 7(a)(1) could be used to prod agencies to take direct action to conserve listed species rather than simply making conservation part of their primary mission. The Glickman decision certainly ought to push agencies into examining whether they have fully complied with the broad duty to conserve, as outlined by the Fifth Circuit. In fact, Glickman might best be seen as contributing toward the use of ESA Section 7(a)(1) and as a catalyst for conservation measures. After the Fifth Circuit's decision, agencies arguably will have to take action to conserve all listed species rather than rely on more general conservation measures or complete inaction with regard to conservation.

CONCLUSION

Sierra Club v. Glickman has potentially enhanced available remedies for environmental plaintiffs. With regard to standing, the decision may indicate a very loose causation and redressability component for certain procedural injuries. In fact, if plaintiffs can submit documentation showing that an agency could affect a third party decision, such information might be enough to obtain standing against the agency under the ESA.

The Fifth Circuit's holding that federal agencies have a broad duty to conserve each listed species may have expanded the reach of the ESA. Although the Glickman court provided little guidance to the agencies about how to comply with their duty to conserve, the decision made it clear that courts should not allow agencies to do nothing. The Pyramid Lake decision and some of the hypotheticals discussed in Glickman may indicate, however, that courts will defer to agency discretion about how to implement conservation programs. Although courts will defer to agency discretion—meaning that environmentalists may not be able to use Section 7(a)(1), except in a narrow range of cases—the Glickman decision was important for what it added to the interpretation of the conservation duty. If plaintiffs are able to use the decision to attack agency inaction with regard to listed species, the Fifth Circuit's decision could make an important contribution to species protection.

217. See Ruhl, supra note 40, at 1135.