

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: MANUEL LUJAN, JR., SECRETARY OF THE  
INTERIOR, Petitioner V. DEFENDERS OF  
WILDLIFE, ET AL.

CASE NO: 90-1424

PLACE: Washington, D.C.

DATE: December 3, 1991

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WASHINGTON, D.C. 20543

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MANUEL LUJAN, JR., SECRETARY :

4 OF THE INTERIOR, :

5 Petitioner : No. 90-1424

6 v. :

7 DEFENDERS OF WILDLIFE, :

8 ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Tuesday, December 3, 1991

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:05 a.m.

15 APPEARANCES:

16 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the Petitioner.

19 BRIAN B. O'NEILL, ESQ., Minneapolis, Minnesota; on behalf  
20 of the Respondents.

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1 PROCEEDINGS

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 90-1424, Manuel Lujan v. The  
5 Defenders of Wildlife.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONER

9 MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The Eighth Circuit, in this case, invalidated a  
12 regulation issued by the Secretary of the Interior in 1986  
13 to interpret the geographic reach of the first sentence of  
14 section 7(a)(2) of the Endangered Species Act of 1973.

15 That sentence provides that each Federal agency,  
16 in consultation with the Secretary, shall ensure that any  
17 action it authorizes, funds, or carries out, is not likely  
18 to have either one of two consequences: first, jeopardize  
19 an endangered or threatened species or, second, adversely  
20 modify habitat that is determined by the Secretary, after  
21 consultation with affected States, to be critical for the  
22 species.

23 The Secretary, from the outset, has construed  
24 the portion of section 7(a)(2) that concerns critical  
25 habitat of a species not to apply in foreign countries,

1 because the reference to affected States gives it a  
2 domestic focus, and because application in foreign  
3 countries would present practical difficulties and impose  
4 this Nation's environmental laws and land use planning on  
5 foreign countries. Neither respondents nor the courts  
6 below have challenged that construction.

7 In the 1986 interpretive regulation at issue  
8 here, the Secretary concluded, for similar reasons, that  
9 the portion of the same sentence that concerns actions  
10 that affect the species themselves likewise does not apply  
11 in foreign countries.

12 The court of appeals invalidated that  
13 interpretation, thereby setting aside the uniform  
14 interpretation of not only the agencies charged with  
15 administering the act, but also the agencies engaged in  
16 furnishing assistance to foreign governments for projects  
17 in their countries.

18 The court of appeals erred in two fundamental  
19 respects. First, the court should not have even reached  
20 the merits of the validity of the regulation, because the  
21 respondent organizations do not have standing to challenge  
22 it. The respondent organizations wholly failed to carry  
23 their burden of showing that any of their members suffered  
24 actual or threatened injury as the result of U.S.  
25 assistance to a project in a foreign country affecting

1 their ability to view wildlife.

2 QUESTION: Mr. Kneedler, how does the citizens'  
3 suit provisions affect the standing inquiry?

4 MR. KNEEDLER: In the first place, we think the  
5 citizen suit provision is inapplicable in this case  
6 because that refers to situations generally where persons  
7 alleged to be in violation of the act. The Secretary's  
8 interpretive regulation, which he wasn't even required to  
9 issue in the first place, in our view, does not fall  
10 within the citizens' suit provision.

11 The provision that addresses the Secretary's  
12 enforcement responsibilities, which is what respondents  
13 seem to be directing their suit to, does not govern this  
14 sort of regulation. It governs a specific category of  
15 regulations under section 4 of the act. So in the first  
16 place, we think the citizens' suit provision is  
17 inapplicable here.

18 But moreover, the citizens' suit provision, as  
19 this Court has made clear in Sea Clammers and other cases,  
20 cannot extend the standing -- the jurisdiction, case or  
21 controversy requirement -- jurisdiction under the case or  
22 controversy requirement beyond that specified in this  
23 Court's cases.

24 So the --

25 QUESTION: Well, I guess it could, though,

1 provide that abridgement of the right that Congress has  
2 given would constitute injury.

3 MR. KNEEDLER: Well, what would be -- to be  
4 sure, if the statute defines a statutory right and then  
5 says that a person may sue for a violation --

6 QUESTION: Yes.

7 MR. KNEEDLER: -- of that right, then standing  
8 would result because Congress has defined the right.

9 But this -- the citizens' suit provision does  
10 not define any substantive rights. Just as this Court  
11 said in Valley Forge, the APA provision, giving any person  
12 aggrieved a right to sue, does not define substantive  
13 rights, it simply creates a cause of action.

14 So respondents would be required to look  
15 elsewhere in the Endangered Species Act for any  
16 substantive rights that they would seek to invoke in this  
17 case.

18 At one point, respondents were arguing that they  
19 had certain procedural rights to have one agency consult  
20 with another regarding projects in foreign countries. As  
21 we pointed out in our petition and brief, that holding by  
22 the Eighth Circuit to that effect was inconsistent with  
23 every other court of appeals that has considered it. And  
24 respondents do not, as we understand it, defend it here,  
25 because procedural rights can only be invoked by persons

1 who have a substantive stake in the agency's decision.

2 So unless respondents can show that some of  
3 their members had an actual stake in a foreign project and  
4 were injured there, the fact that there might be  
5 procedural provisions under the act would not be  
6 sufficient to give them standing.

7 So to come back to your question, and argue this  
8 case does not arise under the citizens' suit provision.  
9 It's essentially an APA challenge to a regulation. And as  
10 such, as a -- if the A -- regulation is the agency action,  
11 this Court has made clear, just two terms ago in the  
12 National Wildlife Federation case, that unless a statute  
13 specifically provides for a -- challenge to a regulation  
14 as soon as it's issued, ordinarily a person has to wait  
15 until the regulation has been applied to his particular  
16 case.

17 QUESTION: Well, I understood the respondents to  
18 argue that section 7(a)(2) provides that each Federal  
19 agency shall consult with the Secretary when action or  
20 funding is likely to jeopardize the continuation of an  
21 endangered species.

22 MR. KNEEDLER: That's correct.

23 QUESTION: And they think that is the  
24 substantive right that they're seeking to enforce under  
25 the citizens' suit provision.



1 MR. KNEEDLER: Well, if an agency that was  
2 otherwise required to do so did not consult or took action  
3 that would jeopardize a species, that would be a violation  
4 of the act.

5 But again, respondents have not sued an action  
6 agency, seeking prevent what they claim would be a  
7 violation of the act by that agency -- the engaging in a  
8 project in a foreign country without the necessary  
9 consultation.

10 They've sued the Secretary of the Interior, who  
11 has simply issued an interpretive regulation stating what  
12 he believes to be the content of the section 7(a)(2)  
13 requirement. But the -- but the Secretary of the Interior  
14 cannot require another agency to consult with the  
15 Secretary about a project.

16 So whatever may be the case in a dispute about a  
17 particular project, which, again, we don't have here --

18 QUESTION: We did. Do you think that the  
19 citizens' suit provision would enable a citizen to sue  
20 because the -- a Federal agency had failed to consult?

21 MR. KNEEDLER: It would confer a right of  
22 action. But again, the article III standing requirements  
23 would have to be met. And as this Court has made clear,  
24 there are three essential standing requirements that, even  
25 under a citizens' suit, a plaintiff has to meet.

1 First, the plaintiff must show that he has  
2 suffered some actual or threatened injury; second, he must  
3 show that that injury is fairly traceable to the  
4 challenged action; and third, he must show that that  
5 injury -- there's a likelihood that that injury will be  
6 redressed by a decision in his favor.

7 And we've shown in our brief that respondents  
8 here satisfy none of those requirements with respect to  
9 any of their members in foreign countries.

10 Respondents, in their brief, focus on two of  
11 Defenders' members in an effort to establish  
12 standing -- excuse me, focus on five. The court of  
13 appeals found standing only on the basis of two. It  
14 rejected the third, Mr. Plowden, on the ground that he  
15 hadn't even gotten within 200 miles of the project in  
16 question. And any nexus that the remaining two might have  
17 had to a project was so insubstantial that the court of  
18 appeals didn't even address it.

19 So this case -- respondent's standing would  
20 depend entirely on the ability to establish that two  
21 members that the court of appeals focused on had standing  
22 in their own right. And those two members fail each step.  
23 These two are Joyce Kelly and Amy Skilbred.

24 Joyce Kelly's entire basis for standing is one  
25 paragraph in an affidavit that appears at one -- page 101

1 of the joint appendix. In that -- in her affidavit, Joyce  
2 Kelly makes no allegation that on her visit to the Nile  
3 River in 1986 she was harmed at all in her viewing of any  
4 endangered species. All she says was that I will suffer  
5 harm.

6 And with respect to future injuries, she says I  
7 will suffer harm as a result of U.S. Bureau of Reclamation  
8 assistance in rehabilitating the Aswan Dam Hydroelectric  
9 Power -- Power Plant. There's no indication in her  
10 affidavit, or in the Bureau of Reclamation report which  
11 she references, that that rehabilitation would have any  
12 effect, whatever, on an endangered species, and  
13 specifically, the Nile crocodile.

14 Moreover, Joyce Kelly has not shown that she  
15 actually has firm plans to return to Egypt. All she says  
16 is that I have observed the traditional habitat of the  
17 Nile crocodile, and I intend to do so again. I plan to  
18 return to Egypt.

19 QUESTION: Does she say when she observed --

20 MR. KNEEDLER: She did not say when she intended  
21 to return to Egypt. It's --

22 QUESTION: Did she say when in the past she had  
23 observed it?

24 MR. KNEEDLER: She said that she had travelled  
25 to Egypt in 1986.

1           Now -- so she hasn't shown either actual injury  
2           in the past -- she didn't claim it -- or future injury.  
3           Because, as this Court has said, with respect to  
4           threatened injury, the threat has to be real and  
5           immediate. The injury has to be certainly  
6           impending -- which suggests that any injury has to be  
7           immediately forthcoming. The sort of vague, unspecific  
8           allegation or assertion that Joyce Kelly makes here, that  
9           she intends to return sometime in the future, falls far  
10          short of that necessary to establish a concrete threat of  
11          future injury.

12                 QUESTION: What would -- could she possibly  
13           satisfy? What if she'd actually seen some crocodiles, and  
14           she said they're going to be building the dam until 1991  
15           and she plans to go back in 1990, or something. Would  
16           that have been enough?

17                 MR. KNEEDLER: Well, first of all, the mere fact  
18           that she visited in the past is not, alone, enough, as  
19           this court said in Lyons. If this was a damage action, a  
20           past -- past injury may be relevant. But for future  
21           injunctive relief, the past injury is not sufficient.

22                 But with respect to future injury, we think at a  
23           minimum there has to be a definitive and concrete plan.  
24           And picking up on this Court's language that the  
25           threatened injury has to be real and immediate, we think

1 that the -- that the injury -- that the threatened  
2 injury --

3 QUESTION: Well, how could the injury -- I mean,  
4 the project is going to take several years to complete.  
5 And she couldn't be injured -- her theory is that she's  
6 injured by the completion of the project, as I understand.  
7 It may kill off the crocodiles.

8 And if she's seen crocodiles the last time, she  
9 says sometime a couple of years from now, she wants to go  
10 back and take pictures of them and make studies, that  
11 wouldn't be enough?

12 MR. KNEEDLER: Well, there are two aspects of  
13 the injury problem. One is the threat that the agency's  
14 project might have an effect on species. But there's the  
15 further requirement that she, personally, suffer injury.  
16 And if she doesn't plan to visit the project for 5  
17 years --

18 QUESTION: Well, let's get one thing I'm  
19 troubled by. Supposing the injury is she won't be able to  
20 see any more crocodiles. She likes to look at crocodiles  
21 or make studies of them. Is that an injury that's  
22 cognizable?

23 MR. KNEEDLER: It is the sort of injury, yes,  
24 that would be cognizable under the act.

25 QUESTION: Well, then why does she have to say

1 any more than she thinks there's a danger that if you  
2 don't consult and you don't avoid the environmental hazard  
3 and so on and so forth, the crocodiles may become extinct,  
4 and I can't see any more crocodiles?

5 MR. KNEEDLER: She would have to show both that  
6 and the --

7 QUESTION: She'd have to prove that there would  
8 be the adverse consequence. I thought the statute was  
9 designed to avoid -- you know, minimize the danger that  
10 that would happen.

11 MR. KNEEDLER: Well, she would have to show, at  
12 least, that there was a likelihood of some -- of some  
13 adverse impact. That's the standard that triggers the  
14 consultation requirement in the first place.

15 So if she's relying just on injury to the  
16 species, rather than her use of the land, which she's not  
17 alleging here -- just injury to the species, she would  
18 have to show some injury to the species.

19 But beyond that, she would also have to show --

20 QUESTION: She's kind of asked to do her own  
21 environmental impact study.

22 MR. KNEEDLER: Well, but she is the one who's  
23 claiming the injury. The burden is on her.

24 QUESTION: Well, I think she -- relying on risk  
25 of injury unless adequate is made first to determine

1 whether or not those injuries would occur. That's not  
2 enough, in your view. She has to -- she has the  
3 affirmative burden of establishing injury as a result of  
4 the project.

5 MR. KNEEDLER: At least a likelihood of injury,  
6 we submit. And again, the -- under this Court's standing  
7 doctrine, the Court has reiterated just last term, the  
8 Court presumes it doesn't have jurisdiction unless it  
9 affirmatively appears in the record, and it's up to the  
10 person invoking the jurisdiction of the Court to show the  
11 injury.

12 So in this case, she has to show some injury.  
13 And a risk to animals does not translate into injury to a  
14 human being.

15 QUESTION: Wouldn't she also have to at least  
16 suggest how the Bureau's -- Bureau of Reclamation's  
17 involvement in this dam might hurt the crocodile?

18 MR. KNEEDLER: Yes, she would. She would have  
19 to show that if she was challenging the project itself --  
20 again, she's challenging a regulation, which is even one  
21 more step removed. But assuming she was challenging the  
22 regulation -- I mean the project -- she would have to show  
23 that the injury is fairly traceable to the Bureau of  
24 Reclamation's assistance, and would be likely to be cured  
25 by either a withdrawal of the assistance or consultation,

1 or at least by the withdrawal of the assistance.

2 And that she can't show, both because the Bureau  
3 of Reclamation is an independent actor. But beyond that,  
4 we have here foreign sovereigns who have it within their  
5 own power, as respondents concede, to go forward or not to  
6 go forward, to seek funding from other sources.

7 So -- but going back to the --

8 QUESTION: She is not challenging the repair of  
9 the Aswan -- the specific project. She is just  
10 challenging a regular -- an interpretive regulation issued  
11 by the Secretary of the Interior.

12 MR. KNEEDLER: That -- that's correct. And the  
13 same thing is true with Amy Skilbred, with respect to the  
14 Mahaweli project. She hasn't brought this suit to try to  
15 enjoin the -- U.S. AID from furnishing assistance to the  
16 Mahaweli project. She's brought this suit to challenge an  
17 interpretive regulation -- or the respondent organizations  
18 have. And they have used these two projects as being  
19 illustrative of the sort of projects that the U.S. may  
20 engage in overseas.

21 But the fact that the respondents have  
22 challenged the Secretary's regulation, and the court  
23 entertained the suit in that context, really converts the  
24 court of appeals' disagreement with the Secretary's  
25 interpretation into nothing more than an advisory opinion.



1 Because these respondents do not --

2 QUESTION: Would it be part of -- would it be  
3 part of her burden to also prove that the foreign  
4 government could not get financing elsewhere? Because I  
5 guess it's always -- there's always a possibility that the  
6 government could build its own dams and all the rest of it  
7 without American money.

8 MR. KNEEDLER: Well, the --

9 QUESTION: Would that be part of her burden?

10 MR. KNEEDLER: Yes, it would. And in fact, when  
11 it comes to the actions of a foreign country, we think  
12 that as a matter of law, she could not show that, for  
13 reasons derived from this Court's act of state and  
14 political question doctrines. A U.S. court should not  
15 presume to decide and receive evidence on the question of  
16 whether a foreign sovereign is likely or not likely to  
17 undertake a project on its own soil with -- seeking other  
18 foreign assistance.

19 But beyond that, under this -- under this  
20 Court's decisions in *Allen v. Wright* and *Simon v. Eastern*  
21 *Kentucky Welfare*, even in a wholly domestic context, the  
22 Court has made clear that, at the very least, the  
23 plaintiff bears the burden of showing that the actions of  
24 a third party are so likely to happen that the injury will  
25 be redressed by the relief. And respondents have fallen

1 wholly short in this case of showing that.

2 In fact, this is a particularly improbable case  
3 for making such a showing. The Mahaweli project -- the  
4 U.S. Government has furnished less than 10 percent of the  
5 overall assistance to that project.

6 QUESTION: Where is the Mahaweli project?

7 MR. KNEEDLER: I'm sorry. It's in Sri Lanka on  
8 the Mahaweli River in Sri Lanka.

9 So -- and again, Amy Skilbred did not allege  
10 that she suffered any injury with -- on her visit to Sri  
11 Lanka and her ability to view wildlife back in 1981. And  
12 she also said in her deposition, at pages 65 to 67, that  
13 she had no concrete plans to return.

14 She said she hoped to return some day, but she  
15 had no concrete plans. Again, the requirement of a  
16 threatened injury -- going back to Justice Stevens'  
17 question -- is not just the threat that the agency's  
18 action will have some impact on species, but also that  
19 she, personally, will suffer the injury which, at the very  
20 least, requires a showing that the visit to the foreign  
21 project is imminent, and therefore that the injury is  
22 imminent.

23 Should the Court disagree with our position that  
24 the respondent organizations do not have standing in this  
25 case, it would then be necessary to reach the merits of

1 the scope, geographic scope, of section 7(a)(2). In our  
2 -- in our view, the court of appeals seriously erred in  
3 its resolution of the merits, as well.

4 This Court reiterated --

5 QUESTION: Mr. Kneedler, is there any other way  
6 we might, one day, reach that question?

7 MR. KNEEDLER: It's possible that that could  
8 arise, if -- for example, if there was a project  
9 undertaken directly by the foreign government -- I mean,  
10 excuse me -- by the U.S. agency, not a foreign government,  
11 which is not the case here. For example, a U.S.-  
12 constructed project in a foreign country, and a plaintiff  
13 showed the requisite personal injury, actual injury.  
14 Then, just as in the Teleco Dam case in a domestic  
15 project, we think it's possible that a plaintiff would  
16 have standing. So this -- our position here does not rule  
17 out that possibility.

18 But in a situation such as this, where the  
19 project is undertaken by the foreign government, only with  
20 the financial assistance of the U.S. Government, we think  
21 that the elements of causation and redressability are far  
22 too attenuated.

23 But on the merits, the Court reiterated just  
24 last term in the ARAMCO case, that it's an established  
25 principle of American law that acts of Congress are

1 presumed not to apply in foreign countries, absent an  
2 affirmative intention of Congress to the contrary that has  
3 been clearly expressed.

4 QUESTION: Mr. Kneedler, if in place of Sri  
5 Lanka and Egypt this were Antarctica, what would be your  
6 position?

7 MR. KNEEDLER: The same position. It's outside  
8 -- it's outside the territorial jurisdiction of the United  
9 States.

10 QUESTION: But no foreign country?

11 MR. KNEEDLER: But no foreign country.

12 Now, we had taken the position that the  
13 consultation requirement applies on the high seas. I --  
14 let me correct that. I'm not sure that we've taken a  
15 position on whether it would apply in Antarctica. I know  
16 I've taken the position that NEPA does not apply there, so  
17 I would assume that we would take the same position here.  
18 But I'm not certain.

19 QUESTION: Well, you have taken the position it  
20 applies on the high seas?

21 MR. KNEEDLER: Yes, we have.

22 QUESTION: And yet there's no clear statement to  
23 that effect in the statute --

24 MR. KNEEDLER: There's not -- and of course,  
25 that's not in issue here. But we think that some support

1 for that can be obtained from what is the closely parallel  
2 provision of the act that governs the taking of endangered  
3 species.

4 The section 9(a)(1) of the act prohibits the  
5 taking of protected species by a person subject to the  
6 jurisdiction of the United States, either when it's in the  
7 territory of the United States, or on the high seas. But  
8 conspicuously absent, missing from the statute, is any  
9 prohibition against the taking of a species in a foreign  
10 country, presumably because the regulation of the taking  
11 of species in a foreign country would be something that  
12 would be subject to the laws of that country, which was  
13 something that the CITES, the Convention on International  
14 Trade in Endangered Species, makes clear, that the  
15 trade --

16 QUESTION: But presumably, there's no law in  
17 Antarctica, anyway.

18 MR. KNEEDLER: Well, in Antarctica, but in terms  
19 of the general proposition, in foreign countries there  
20 would be such law. And on the high seas, there's no  
21 governing law, and therefore no direct conflict with the  
22 controlling law of another sovereign.

23 QUESTION: Well, Mr. Kneedler, the 1978  
24 amendments presume that some agency action will be  
25 taken -- will take place outside of any State, and outside

1 of any circuit.

2 MR. KNEEDLER: That's correct, in the judicial  
3 review provisions --

4 QUESTION: Yes.

5 MR. KNEEDLER: -- and the consultation  
6 provisions. But that falls far short of suggesting that  
7 it covers actions in foreign countries. Again, this ties  
8 into the position that it could apply in territories --

9 QUESTION: Well, it certainly isn't clear that  
10 it's limited to the Outer Continental Shelf. I think  
11 that's kind of an odd interpretation. It must mean  
12 something.

13 MR. KNEEDLER: Well --

14 QUESTION: Didn't the Secretary take the  
15 position for some years that it did apply overseas?

16 MR. KNEEDLER: The Secretary -- the Secretary  
17 initially took the position in 1978 regulations that it  
18 did. But that position was greatly objected to by the  
19 State Department, Defense Department, and others.

20 The Solicitor of the Interior promptly ordered a  
21 reconsideration of that in 1979. And that official  
22 position of the Interior Department was reversed in 1981.  
23 And then in nine -- in these 1986 regulations, that new  
24 position was stated.

25 Now, under Chevron, that agency position is

1 entitled to considerable deference. And it is not -- it  
2 does not fatally undermine that position that the  
3 Secretary changed positions. He had good reasons for  
4 doing so. One thing --

5 QUESTION: Weren't they due to a change in the  
6 administration, in your view?

7 MR. KNEEDLER: No, what -- the opinion itself  
8 states that the precipitating factor or the basis in the  
9 statutory text was the 1978 amendments to the Endangered  
10 Species Act, which simply reconfirmed the domestic focus  
11 of section 7. Section 7 as originally passed referred  
12 only to affected States.

13 In 1978, Congress adopted an elaborate exemption  
14 provision to allow for projects to go forward,  
15 notwithstanding the strict, substantive standard in  
16 section 7. And those elaborate exemption provisions,  
17 themselves, have a domestic focus, by providing for a  
18 representative of an affected State on the Endangered  
19 Species Committee, by providing for notification to the  
20 Governor of the affected State, but not the foreign  
21 countries.

22 But again, going back to Justice O'Connor's  
23 question, the reference to the State, if any, in which the  
24 action occurs, is certainly far less compelling, frankly,  
25 than the alien exemption under title VII in last term's

1 ARAMCO case. And yet the Court found that to be -- to be  
2 insufficient to overcome the presumption that the act does  
3 not apply.

4 Again, the burden is on the respondents in this  
5 case to show that Congress affirmatively intended the act  
6 to apply overseas. They've pointed to nothing in the text  
7 of section 7 or 7(a)(2), nothing in the legislative  
8 history of section 7(a)(2), and nothing in the background  
9 of the conventions that the Endangered Act was designed to  
10 implement, to support the contention that Congress  
11 specifically intended section 7(a)(2) to apply overseas.

12 That, in our view, is the end of the matter, as  
13 it was in ARAMCO because an affirmative indication is  
14 required. But even --

15 QUESTION: They do have the argument, don't  
16 they, that the interpretation that it applied abroad had  
17 issued before the -- statute was amended and was amended  
18 without -- without comment on that? So it's an argument  
19 that they assumed that it applied overseas.

20 MR. KNEEDLER: But there's no indication that  
21 Congress was aware of that interpretation. And again,  
22 given the presumption, it has to be Congress, itself, that  
23 affirmatively chooses to extend --

24 QUESTION: Is there a presumption that Congress  
25 would be aware of regulations implementing an earlier



1 statute?

2 MR. KNEEDLER: Well, this Court has, on  
3 occasion, looked to that fact. But particularly in this  
4 context, where there's no affirmative indication, at all,  
5 that Congress was aware of it, much less that it wanted  
6 to --

7 QUESTION: No, I know there's no affirm -- I'm  
8 just asking if there's a presumption that Congress knows  
9 what the law is.

10 MR. KNEEDLER: I don't know that it's a  
11 presumption in the sense that it's a legal presumption  
12 that operates here. There is an assumption, I guess, in  
13 certain situations. But I think that that -- that that  
14 background is simply not involved here. The respondents  
15 rely on a passage in the conference report on the 1978  
16 amendments, for example, that refer to the conferees'  
17 decision to retain language in the Senate bill.

18 Well, what the Senate bill was proposing to  
19 delete, that the conference report language refers to, was  
20 the whole reference to consultation between agencies and  
21 the Secretaries.

22 Well, that's -- that -- that perhaps inadvertent  
23 deletion of the whole consultation process is something  
24 quite different from suggesting that Congress intended to  
25 apply this specific provision of the act overseas.

1           Again, the reference in section 7(a)(2) of the  
2 act, itself, to affected States, gives that section --  
3 gives that sentence a domestic focus. And respondents  
4 here, are trying to make the improbably argument that  
5 Congress, in another portion of the very same sentence  
6 intended the agency's obligations to have a vastly  
7 different geographic reach, since the critical habitat  
8 portion of that sentence concededly does not apply in  
9 foreign countries. Yet, they're arguing that the  
10 protection for the species, themselves, the species that  
11 would use that habitat, does apply in foreign countries.

12           It's also important to point out the practical  
13 difficulties and serious interference with foreign  
14 relations that would result from applying section 7(a)(2)  
15 in this setting. And those are concerns that were  
16 discussed recently in the dissenting opinion in ARAMCO  
17 last term -- which even though disagreed with a particular  
18 presumption in that case, acknowledged that where an act  
19 would interfere with the conduct of the Nation's foreign  
20 relations and diplomacy, the act should not be presumed to  
21 apply.

22           And that is directly true here. Because a  
23 rigid -- an application of section 7's rigid, substantive  
24 standard, and elaborate domestically focused procedural  
25 provisions to projects in foreign countries, would

1 interfere with the flexibility and responsiveness of  
2 American foreign policy.

3 After all, foreign aid is -- does not stand in  
4 isolation. It's part of a broader diplomatic initiative.  
5 And the application of 7(a)(2) would interfere with those  
6 initiatives.

7 I'd like to reserve the balance of my time.

8 QUESTION: Very well, Mr. Kneedler.

9 Mr. O'Neill, we'll hear from you now.

10 ORAL ARGUMENT OF BRIAN B. O'NEILL

11 ON BEHALF OF THE RESPONDENTS

12 MR. O'NEILL: Mr. Chief Justice, and may it  
13 please the Court:

14 I'd like to start with Amy Skilbred and the  
15 Mahaweli project. Ms. Skilbred is a Defenders' member,  
16 and a professional wildlife biologist who visited Sri  
17 Lanka in 1981 and 1982, and visited the Mahaweli project  
18 site.

19 She was deposed, and at her deposition she  
20 testified that she confirmed her visit to the project site  
21 by looking at the AID project documents. So Ms. Skilbred  
22 went to the site, and she went to the site for the purpose  
23 of studying endangered species and their habitat.  
24 Concededly, she didn't see any endangered species at the  
25 site, but that's why she was there. To require her to

1 actually find the endangered species is sort of a catch-  
2 22 because if they were easy to find, they wouldn't be  
3 endangered.

4 Ms. Skilbred wants to return. And in her  
5 deposition she stated that the reason that she could not  
6 return, or could not have present plans to return to the  
7 Mahaweli project was because there was an ongoing civil  
8 war. So to say that she doesn't have an intent to return  
9 is to misstate the record. She does intend to return.  
10 She couldn't return at the time of her deposition because  
11 of the civil war.

12 QUESTION: Did she say anything more specific  
13 about her plan to return than that, other than that she  
14 planned to -- as I understand it from the Solicitor  
15 General, she said she did not have any definite plan to  
16 return. Did she say anything more?

17 MR. O'NEILL: She said, specifically, I can't  
18 return now because of the civil war. And in answer to the  
19 question, and for what purpose would you like to go back  
20 to Sri Lanka to visit the Mahaweli project, she answered,  
21 I'd rather go back to visit the wildlife that live in the  
22 area of the Mahaweli project. She did not have a plane  
23 ticket.

24 QUESTION: Well, she not only didn't have a plan  
25 ticket, she didn't have any plan, it sounds from that.

1 MR. O'NEILL: One of the deponents, Steven  
2 Schroer had a plane ticket, and had a passport.

3 QUESTION: Well, did the Eighth Circuit grant  
4 him -- grant your organization standing on his behalf?

5 MR. O'NEILL: No, sir, they did not.

6 QUESTION: Did you cross-appeal?

7 MR. O'NEILL: No, we did not.

8 QUESTION: Then I don't think he can be involved  
9 in this case.

10 MR. O'NEILL: I'd respectfully offer the  
11 following proposition: the Eighth Circuit sustained the  
12 organization's standing. We won below, and any grounds  
13 that can be used to sustain the verdict below, ought to be  
14 used by this Court.

15 QUESTION: So you say that you can invoke  
16 different persons who may have been deposed, since what  
17 we're talking about is organizational standing. And the  
18 Eighth Circuit sustained your organization's standing?

19 MR. O'NEILL: That's our position, Your Honor.  
20 We can invoke any individual, so long as there was an  
21 adequate record before the district court. And Mr.  
22 Schroer's deposition, like Ms. Skilbred's deposition, was  
23 lodged with the district court.

24 With regard to the Mahaweli project --

25 QUESTION: If you want to speak about Mr. -- the

1 gentleman you just spoke --

2 MR. O'NEILL: Schroer was to visit a World Bank  
3 project, I believe in Thailand, and had a ticket to  
4 Thailand, and had a passport at the time of his  
5 deposition.

6 QUESTION: Well, but the World Bank isn't a  
7 United States agency.

8 MR. O'NEILL: No, but the Treasury Department  
9 funds the World Bank. The Treasury -- and the statute,  
10 section 7, deals with any agency action that authorized  
11 funds or carries out a project.

12 QUESTION: Well, this sounds very much like the  
13 house that Jack built.

14 (Laughter.)

15 QUESTION: We're talking about an Interior  
16 Department, Interior -- interpretive regulation. And  
17 you're telling us that the World Bank was going to fund a  
18 project in Thailand. I mean, there just seems to be a  
19 great deal of distance between the two.

20 MR. O'NEILL: We disagree that it is an  
21 interpretive regulation. And, indeed, when the Interior  
22 Department published the regulation, in the preamble to  
23 the regulation in the Federal Register, the Interior  
24 Department took the position that the regulation was  
25 binding on other Federal agencies.

1 QUESTION: Does it still take that position?

2 MR. O'NEILL: It doesn't before this Court. But  
3 there's nothing published in any new preamble, or in any  
4 new regulations. But the position that they took in the  
5 preamble to the '86 regulation, and it's -- and the  
6 proposed rule, was that it was a regulation that was  
7 binding on all of the Federal agencies, in response to the  
8 specific suggestion by other agencies that the Interior  
9 Department ought to make these nonbinding guidelines.

10 QUESTION: How could the Interior Department  
11 bind other agencies in this regard? I mean, I think the  
12 Interior Department can say, you know, whether it will  
13 consult or not. But I don't see how the Interior  
14 Department can bind them not to do the funding.

15 MR. O'NEILL: The Interior Department is given  
16 authority in both sections 4 and 7 of the regulations to  
17 publish rules implementing the statute. And the position  
18 that the Interior Department took in the preamble to its  
19 1986 regulations and the proposed regulations, was that  
20 that's specifically what it was doing. It was  
21 implementing the statute, and it was given that authority  
22 by the Congress. That's the Department's position.

23 QUESTION: If the Interior Department had not  
24 issued these regulations, one of the points made by the  
25 Government is there's -- there's nothing to show that the

1 agencies, themselves, would not have adopted the position  
2 taken in the regulation.

3 MR. O'NEILL: That's --

4 QUESTION: In which case they would not  
5 consult, in which case you'd have the same result you have  
6 here.

7 MR. O'NEILL: That's a correct statement.

8 QUESTION: Well, if that's a correct statement,  
9 then you haven't met one of the conditions for standing,  
10 is -- which is that the injury you complain about would  
11 not occur if the relief you were given is accorded.

12 MR. O'NEILL: What --

13 QUESTION: What you've just said is that whether  
14 the -- whether the Secretary has this regulation out or  
15 not, it may well be that these agencies won't consult.

16 MR. O'NEILL: Well, let me address that.

17 The first answer to that is that the Secretary's  
18 position is that the rules are legally binding. The  
19 second answer to that is right now, the Secretary refuses  
20 to consult --

21 QUESTION: Excuse me. It doesn't matter what  
22 the Secretary's position is. The point is, if the  
23 agencies -- have that same position, they are not going to  
24 consult. And therefore, just getting the Secretary to  
25 change his mind is not going to give you the relief you



1 want. The agencies may still not consult.

2 MR. O'NEILL: It gives -- we are not required to  
3 address every aspect of our injury. By getting the  
4 Secretary to change the regulation, we, for the first time  
5 in a number of years, make consultation available to the  
6 agencies. Right now, the Secretary has published a  
7 refusal to consult. The Secretary is, in essence, a  
8 scofflaw, and says I'm not going to result -- I'm not  
9 going to consult, and has done so formally.

10 So the regulation is a harm, because the  
11 consultation service is not available to the other Federal  
12 agencies. That's a harm.

13 The second harm is that so long as the  
14 consultation service is not available to the other  
15 agencies, nobody's going to consult. And nobody now does  
16 consult. And species are at risk because the one --

17 QUESTION: But you can attack that when somebody  
18 doesn't consult, goes ahead and funds a project. And then  
19 you can attack that agency that funds the project.

20 But trying to do that indirectly by attacking  
21 the Secretary, when you don't know -- the agency might go  
22 ahead and adopt the same interpretation of the law that  
23 the Secretary has adopted. It's very likely that the  
24 agency would. Even if the -- even if the Secretary  
25 withdrew this, it seems to me very likely that the other

1 agencies of Government -- regardless of his regulation --  
2 would continue to adopt the same position. So this Court  
3 would have issued an opinion, spun its wheels, for no  
4 benefit whatever.

5 MR. O'NEILL: The initial reason that nobody  
6 consults today is that the service is not available,  
7 because the Secretary, by regulation, refuses to make it  
8 available.

9 QUESTION: Well, we don't know that. They may  
10 not be consulting simply because they agree with the  
11 Secretary -- since they're in the same Government as the  
12 Secretary, I bet you they do.

13 So even if he -- even if he withdrew this  
14 regulation, you're going to have the same result.

15 MR. O'NEILL: Well, then you have a situation  
16 where you have the whole Government refusing to comply  
17 with the statute --

18 QUESTION: And you have a means of challenging  
19 that. If and when an agency goes ahead and funds a  
20 project without consulting, go get them.

21 MR. O'NEILL: I agree that we have that means of  
22 challenging the project. In addition, we are challenging  
23 the Secretary's position in a way that such agency  
24 decisions has been challenged since Abbott Laboratories.  
25 And we had the same kind of a situation here that the

1 Court had in Abbott Laboratories.

2 We have a legal construction of a statute. We  
3 have a final regulation, which you didn't have in Lujan v.  
4 National Wildlife Federation. There's nothing else that  
5 can be brought to the party to help with regard to the  
6 interpretation of the statute. And there is ongoing  
7 harm -- that is, the consultation process, which is the  
8 remedy that the Congress enacted to solve the problem of  
9 extinction, is not in place.

10 So while we can sue, with regard to a specific  
11 project, we've chosen this route. And this route has been  
12 sanctioned in Abbott Laboratores; this route was  
13 sanctioned months before we filed this civil action in the  
14 Japanese Whaling v. American Cetacean case, which  
15 Defenders and HSUS were plaintiffs in.

16 QUESTION: But Lab says you can challenge a  
17 rule, but -- in Abbott Labs, by striking down the rule, we  
18 would -- we eliminated the obstacle that the plaintiffs  
19 were complaining about -- namely, they thought that they  
20 could not issue these pharmaceuticals with these labels,  
21 because the Secretary had said if you do, you'll be  
22 prosecuted.

23 Once we struck that down, that obstacle was  
24 eliminated. What I'm suggesting to you is that we can  
25 strike down this regulation and we don't know that the

1 obstacle will be eliminated.

2 The other -- crucial to the relief you want is  
3 that the agency consult. And if the agencies have the  
4 same view of the law that the Secretary does -- and it  
5 seems to me quite likely that they do -- you're wasting  
6 our time. We can give you everything you ask, and nothing  
7 will change.

8 MR. O'NEILL: I hope I'm not wasting your time.

9 There is a chance that the agencies will not  
10 consult if this Court affirms the Eighth Circuit. That's  
11 a fact.

12 QUESTION: You're presuming that those agencies  
13 would disregard a decision of this Court interpreting that  
14 statute?

15 MR. O'NEILL: I said there was a chance. I  
16 think it's extremely unlikely.

17 QUESTION: I don't think that's a reasonable  
18 presumption, is it, that the agencies would refuse to  
19 follow our interpretation of the law?

20 MR. O'NEILL: The Justice -- I would assume  
21 that, if this Court rules, that's the end of the subject.  
22 The Secretary will issue a regulation, the agencies will  
23 comply with the regulation, the Secretary will begin to  
24 consult, and endangered species will begin to be protected  
25 worldwide like the statute requires.

1           As to whether there is a possibility on the  
2 outskirts of reality that the agencies won't comply, the  
3 answer to that is there is a possibility. But it is  
4 extremely unlikely.

5           I'd like to talk for a minute about the statute.  
6 The statute that's at issue is essentially the fourth  
7 iteration of the Endangered Species Act. There was an  
8 iteration issued in '66, an iteration issued in '69. The  
9 iteration in '69 created a listing process. And under the  
10 '69 statutes, species throughout the world were listed.

11           So that in 1973, Congress was writing against an  
12 Endangered Species Act that listed species throughout the  
13 world. The 1973 act, in section 2, the Congress  
14 recognizes that the U.S. has pledged itself as a sovereign  
15 state in the international community, to conserve various  
16 species of wildlife.

17           Section 4, which deals with the listing of the  
18 species, requires that both foreign and domestic species  
19 are listed. And there's no question about that. And the  
20 Secretary lists foreign species.

21           Section 7(a)(2), which is at issue, and which  
22 was written against the backdrop of the 1969 Endangered  
23 Species Act which listed species worldwide, says each  
24 Federal agency -- it doesn't say each Federal agency  
25 except the State Department -- shall consult with the

1 Secretary to ensure that any agency action -- and it  
2 doesn't say any agency action in the United States --  
3 funded or carried out as not likely to jeopardize the  
4 continued existence of any endangered or threatened  
5 species. It doesn't say any endangered or threatened  
6 species in the United States.

7 But again, that section, in '73 when it was  
8 passed, was passed against a backdrop of listing of all  
9 species, both here and abroad. When the act was amended  
10 in 1978, and that's why I said that there were essentially  
11 four versions of the act that we're talking about, the  
12 Secretary's position was that section 7 applied worldwide.

13 QUESTION: May I stop you there, for just a  
14 moment?

15 MR. O'NEILL: Yes, sir.

16 QUESTION: Is the authority for that the  
17 guideline that's in pages 28 to 30 of the joint appendix,  
18 where they talked about the general parameters, that  
19 section 7 applies to activities and programs by Federal  
20 agencies affecting listed species in foreign countries and  
21 high seas?

22 MR. O'NEILL: The guidelines were published  
23 before the 1977 and '78 regulations.

24 QUESTION: But is that the language, basically,  
25 you're talking about?

1 MR. O'NEILL: Yes, sir.

2 QUESTION: Because -- I have this question in  
3 reading it. It's clear that it applies to endangered  
4 species in foreign countries and on the high seas, but it  
5 isn't clear to me that that applies to projects located  
6 out of the United States. Because you could have projects  
7 in the southern part of the State -- of the United States  
8 that affect species in Mexico or Canada or something like  
9 that. But I'm not -- it isn't clear to me that the  
10 project had to be located out of the States.

11 MR. O'NEILL: The '70 -- the regulations that  
12 went into effect in January of 1978 made clear that the  
13 protection of the act applied to species outside the  
14 United States.

15 QUESTION: Right, I can see that. And do they  
16 disagree with that? If there were a project on the  
17 Canadian border that would cause acid rain or something  
18 like that and affect species across the border, wouldn't  
19 they agree there would be consultation there?

20 MR. O'NEILL: I believe they would.

21 QUESTION: And why do you -- what is it that you  
22 say, in the prior guidelines, made it clear that the --  
23 that the project outside the United States was governed?

24 MR. O'NEILL: The regs -- the 1978 regulations  
25 did make it clear that they were addressing projects

1 outside the United States.

2 QUESTION: It did.

3 MR. O'NEILL: And then the conference report,  
4 when it changes section 7 in 1978, the conference  
5 committee says the conferees felt that the Senate  
6 provision, by retaining existing law, was preferable,  
7 since regulations governing section 7 are now familiar to  
8 most Federal agencies. So the conferees were aware  
9 specifically of the section 7 regulations. And the  
10 section 7 regulations had been published in January of  
11 1978 and had talked about this debate, and said we're  
12 going to apply the regulations worldwide.

13 So one can presume that the conferees knew of  
14 the debate when they restructured section 7, and said  
15 we're not changing the section 7 law. And when they  
16 changed section 7, and they provided for judicial review,  
17 from the consultation process -- as Justice O'Connor  
18 mentioned, they provided for suit in the District of  
19 Columbia when you can't sue in any other circuit.

20 And section 7 provides for review by the  
21 Secretary of State. It provides for national security  
22 review. The Secretary's reading reads out half of the  
23 endangered species that are listed.

24 So the Secretary, in making this so-called  
25 interpretive regulation, isn't tinkering with the edges of



1 the statute. He isn't interstitially filling in gaps  
2 within the statute. He's taking the language in section  
3 7, which is broadly based -- any and all -- and he's  
4 cutting out half of the endangered species.

5 With regard to the contention that the citizens'  
6 suit provision does not apply, section A of the citizens'  
7 suit provision says any person may commence a civil action  
8 on his own behalf to enjoin any person, including the U.S.  
9 and agencies alleged to be in violation of any provision  
10 of this chapter. The Secretary is in violation of the  
11 duty to consult because he has publicly affirmed the fact  
12 that he refuses to consult.

13 The Secretary is in violation of the duty to  
14 publish legal regulations. And in the court below, we  
15 alleged that the Secretary had an affirmative duty to  
16 ensure that programs can serve endangered species. His  
17 regulation does not meet the obligations of that  
18 affirmative duty.

19 QUESTION: (Inaudible) do you think just any  
20 person in the -- any citizen in the country could bring  
21 this suit?

22 MR. O'NEILL: Yes.

23 QUESTION: Everyone's got standing?

24 MR. O'NEILL: Well, that is not our case. But  
25 the statute creates a heritage --

1 QUESTION: Well, I don't know why. If it was so  
2 clear, I suppose it would be your case. You wouldn't have  
3 to be talking around about going to India or someplace.

4 MR. O'NEILL: Well, we had a member who went to  
5 Mahaweli at Sri Lanka, and it was -- why push the edges of  
6 the standing envelope?

7 QUESTION: Well, you're now doing it.

8 MR. O'NEILL: I'll move on.

9 (Laughter.)

10 MR. O'NEILL: Moving right along --

11 QUESTION: Mr. O'Neill, instead of moving on,  
12 could you move back just for a second --

13 MR. O'NEILL: Yes, sir.

14 QUESTION: -- to your point about the fact that  
15 the Secretary's reading of 7 renders irrelevant the  
16 listing of foreign species? Isn't an answer to that that  
17 although the Secretary's reading would, of course,  
18 not -- of section 7 would, of course, render the listing  
19 of foreign species irrelevant to 7, the listing would  
20 still be relevant under section 8, with the -- which  
21 provides the obligation of foreign consultation? Isn't  
22 that a way of reconciling the listing of foreign species  
23 with the Secretary's reading of 7?

24 MR. O'NEILL: Section 8 provides for assistance  
25 programs to foreign nations. So the listing doesn't come

1 into play with regard to section 8.

2 QUESTION: Oh, the listing has no reference to  
3 8?

4 MR. O'NEILL: No, but it does to 9. So your  
5 argument works with regard to section 9.

6 QUESTION: I see.

7 MR. O'NEILL: Section 9 provides a series of  
8 prohibitions about taking species outside the U.S., about  
9 engaging in international trade outside the U.S.

10 My answer to the argument, though, is section 9  
11 shows you that when Congress wanted to limit the scope of  
12 the statute to the United States or to the high seas, or  
13 to the United States, the high seas, and a foreign  
14 country, it did so in the structure of section 9.

15 In section 7, they use all-encompassing  
16 language -- any agency action, any endangered species. So  
17 the lesson that I draw from section 9 is different than  
18 the one that you proposed.

19 With regard to the Foley, ARAMCO line of cases,  
20 it's our position that they don't apply. We're dealing  
21 with our money, in Washington, D.C., right down the  
22 street, and our agencies. And the agencies are born of  
23 Congress. So it really isn't a question of an extra-  
24 territorial application of the statute.

25 QUESTION: But isn't that -- overlook the

1 language "ensure that any action authorized is not likely  
2 to," doesn't that impose an obligation on -- of some kind  
3 of best efforts, at least, to be sure what happens in the  
4 foreign country?

5 MR. O'NEILL: If we're going to spend our money,  
6 it does.

7 QUESTION: Yeah. So then doesn't that -- isn't  
8 that a response to your most recent argument?

9 MR. O'NEILL: It is a response, but if you look  
10 at the totality of the action decision being made, it is  
11 more of a United States action decision than it is a Sri  
12 Lankan action decision.

13 QUESTION: What if we're only putting up 10  
14 percent of the money?

15 MR. O'NEILL: The consultation process -- and  
16 the Congress has found that the interaction that results  
17 in the consultation process saves species. If we're  
18 putting up 10 percent of the money, our interaction with  
19 the Sri Lankan Government may very well affect those  
20 species. And there is support in the record for that  
21 contention, in a couple of places.

22 A couple of the deponents, including Dr. Elliott  
23 McClure, who was an expert in the area, testified that he  
24 had seen the consultation process work.

25 The AID documents, below in the record, indicate

1 the Mahaweli project could harm endangered species, and  
2 that the Sri Lankan Government wants our input to avoid  
3 that harm. So the consultation process, at least with  
4 regard to the Mahaweli project, is made for the situation.

5 The other differences between this case and the  
6 Foley, ARAMCO line of cases are that this act explicitly  
7 was intended to implement treaties.

8 If you assume that the Foley, ARAMCO line of  
9 cases did come into play to begin with, those cases deal  
10 with labor and employment. And you can say, well, those  
11 are labor and employment cases, but labor and employment  
12 is historically a local concern. The environment is not a  
13 local concern. And the Congress recognizes it both in the  
14 preamble to this statute, and the preamble to numerous  
15 other environmental statutes.

16 And in this case, unlike the Foley, ARAMCO line  
17 of cases, we believe the statute is clear on its face.  
18 The mere fact that the Government makes the argument that  
19 it isn't, doesn't change the clarity of the statute.

20 With regard to the general issue of standing, we  
21 have a citizens' suit provision. So this case is  
22 different than the Federation v. Lujan case. We have a  
23 final agency action, which everybody admits that is a  
24 final agency action. So this case, unlike the Federation-  
25 Lujan case, is -- presents the issue clearly and squarely.

1 Yes, sir.

2 QUESTION: Come back to what I was asking you,  
3 your response to the fact that the Secretary's decision  
4 won't make any difference is, well, of course, once we  
5 decide that it's unlawful, the other agencies will fall in  
6 line.

7 How is that any different from a case in which I  
8 try to challenge a law of Indiana as being  
9 unconstitutional? And, in fact, I don't live in Indiana;  
10 I'm not a citizen of Indiana. This law doesn't apply to  
11 me.

12 But there is a similar law in New York that is  
13 applying to me. Now, would I have standing to challenge  
14 the Indiana law because once the Court says that that law  
15 is unconstitutional, of course New York will comply with  
16 the Court's decree.

17 Would I really have standing in Indiana --

18 MR. O'NEILL: The answer to your question is --

19 QUESTION: -- simply because the judgment will  
20 pronounce a determination of law that will be obeyed by  
21 somebody else?

22 MR. O'NEILL: The answer to your question is no,  
23 you would not have standing.

24 QUESTION: Well, why is this any different?

25 MR. O'NEILL: Thank you. For a couple of

1 reasons. The first is, the Secretary takes the position  
2 that the regulation is legally binding, and the Secretary  
3 has the support for that position in the statute. The  
4 statute delegates to the Secretary a rule-making authority  
5 with regard to the Endangered Species Act both in sections  
6 4 and 7 of the Endangered Species Act. That's the first  
7 reason.

8 The second reason is --

9 QUESTION: So you'd say that the other agencies  
10 are bound to follow the Secretary's determination?

11 MR. O'NEILL: That's correct. And that's the  
12 Secretary's position, at least in the preamble to the  
13 regulations. It isn't today, because it isn't convenient  
14 today.

15 QUESTION: Of course, the Secretary could  
16 comply, I suppose, by simply withdrawing the regulation  
17 and not saying anything.

18 MR. O'NEILL: That is correct. But the form of  
19 the -- because the Secretary has abdicated his  
20 responsibility for a number of years and has told the  
21 world don't consult, and the consultation process has  
22 essentially laid waste for a number of years, it is within  
23 the sound discretion of the district court judge to tailor  
24 a remedy for that wrong. And he has done that.

25 And the nature of the remedy, the district court

1 remedy, which is publish new rules, is not before this  
2 Court. Nobody has argued about it.

3 In addition, what is -- right now, what is the  
4 impediment to there being any consultation? The first  
5 roadblock that needs to be removed is the Secretary's  
6 refusal to consult. If we were to go to an action agency  
7 and sue them and say you didn't consult with regard to the  
8 Mahaweli project in Sri Lanka, they would say we can't  
9 consult because the Secretary refuses to consult.

10 So this is roadblock number one. And roadblock  
11 number one is a final, agency action. The Secretary has  
12 taken the position that it's a mandatory regulation. And  
13 the Secretary has created an additional harm by going out  
14 and distributing the line to the other Federal agencies  
15 that consultation isn't required. The consultation  
16 process has lied fallow. And species continue to be  
17 extinguished, as the result of the U.S. projects overseas.  
18 That's why I think it's different than New York and -- was  
19 it Indiana or Illinois?

20 QUESTION: I think you're right, that those are  
21 substantial differences.

22 MR. O'NEILL: I'm going to see if there are any  
23 more in my outline.

24 (Laughter.)

25 MR. O'NEILL: If those are the ones I remember,



1 they've got to be the best ones.

2 And Larson v. Valente says we don't need to cure  
3 every single injury.

4 With regard to the standing fight, in addition  
5 to the fact that there's a citizens' suit, if you look at  
6 it from a common sense perspective, what else would  
7 another procedural posture bring to this case and the  
8 resolution of this issue? Nothing. There's the  
9 regulation and the statute. And in this case, the  
10 regulation is either in violation of the statute, or it  
11 isn't in violation of the statute.

12 QUESTION: Well, you can say that about a lot of  
13 cases, Mr. O'Neill, in which we've said there was no  
14 standing. It's a perfectly good record. A plaintiff with  
15 standing might not bring much more to the case, and  
16 nonetheless, we've fairly rigorously enforced our standing  
17 requirement.

18 MR. O'NEILL: And in this case, I believe we  
19 meet them, because Ms. Skilbred who went to the site, who  
20 intends to go back to the site.

21 The argument -- and I say this facetiously --  
22 but the argument that the Government makes about what kind  
23 of intention you need to go back to the site, in essence  
24 requires us to camp out at the site, in order to have  
25 standing.

1           QUESTION: Whereas you say a visit 10 years ago  
2 suffices.

3           MR. O'NEILL: Well, it wasn't a visit 10 years  
4 ago when we started the civil action. The civil action is  
5 5 years old -- 5 years. She uses the resource,  
6 professionally, and she intended to go back.

7           But we have different kinds of use. Dr. Elliott  
8 McClure, for example, studied Asian elephants. Now, he's  
9 never been to the Mahaweli project, but the Mahaweli  
10 project is extinguishing Asian elephants from the face of  
11 the earth. There's an animal nexus between Dr. McClure  
12 and the elephant.

13           QUESTION: You mean the Asian elephants might  
14 come over here so he could study them here?

15           MR. O'NEILL: He's studied them in places other  
16 than the Mahaweli area of Sri Lanka.

17           QUESTION: You are pressing the outer envelope  
18 of standing.

19           (Laughter.)

20           MR. O'NEILL: Then I'll go back to Ms. Skilbred,  
21 who, by the way is here, and who, in the last 2 days  
22 getting ready for this, I've deeply fallen in love with  
23 because she went to the Mahaweli project.

24           But they would require us to camp out at the  
25 site. And in all honesty, we don't believe this Court's

1 decision require us to camp out at the site.

2 If anybody has any further questions I'd be  
3 happy to answer them. Otherwise, I'll sit down early.

4 QUESTION: Thank you, Mr. O'Neill.

5 MR. O'NEILL: Thank you, Judge.

6 QUESTION: Mr. Kneedler, you have 3 minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

9 ON BEHALF OF THE PETITIONER

10 MR. KNEEDLER: Thank you, Mr. Chief Justice.

11 I have several points. First on the question of  
12 standing, the Secretary of the Interior did not take the  
13 position in 1986, just as we do not take the position  
14 today, that the interpretive regulation is binding on  
15 other agencies. I refer the Court to page 6 of our brief,  
16 in which we say that the preamble to the 1986 regulation  
17 stated that the Fish and Wildlife Service performs only,  
18 quote, "an advisory function under section 7," close  
19 quote, and that the action agency makes the ultimate  
20 decision as to whether its proposed actions will comply  
21 with the act.

22 QUESTION: Yeah, but that doesn't -- it doesn't  
23 reach the question of whether there's -- they're bound to  
24 consult.

25 MR. KNEEDLER: Well, but the -- this is an

1 interpretive regulation. The Secretary of the Interior,  
2 and respondents' own witnesses in this case, as we showed  
3 in our brief, agreed with us. The Secretary cannot make  
4 another agency consult.

5 QUESTION: Your colleague on the other side said  
6 that at one time, the Secretary took the position that the  
7 agency is bound to consult, if he has a regulation that  
8 they have to consult.

9 You haven't answered that yet.

10 MR. KNEEDLER: No, the best evidence that they  
11 did not is the fact that respondents have not pointed to,  
12 and we are not aware of a single instance in which  
13 an -- in which an agency --

14 QUESTION: So you did say that -- you did say  
15 the Secretary has never taken that position.

16 MR. KNEEDLER: Has never taken the position --

17 QUESTION: Well, that's with respect to foreign  
18 projects. But there is an obligation to consult with  
19 regard to --

20 MR. KNEEDLER: There's an obligation to consult.  
21 And again, what --

22 QUESTION: But isn't that equal -- I mean, it  
23 just depends on the scope of the obligation. Why is one  
24 any more mandatory than the other? It's a question of  
25 whether --

1 MR. KNEEDLER: The statutory duty is mandatory.  
2 The question is whether the Secretary's interpretation of  
3 what the statute means --

4 QUESTION: But if the statute clearly applied to  
5 foreign projects, then there would be a mandatory duty to  
6 consult.

7 MR. KNEEDLER: Right, but that's not -- that's  
8 different from saying the Secretary's interpretive  
9 regulation is binding on the agency. Whatever binds the  
10 agency is the statute, itself, not what the Secretary says  
11 about it.

12 QUESTION: But would the -- would this  
13 Secretary's interpretation of the statute be entitled to  
14 deference from other agencies?

15 MR. KNEEDLER: Yes, it would be entitled to  
16 deference the same way as any others. But from 1978 to  
17 1986, while the prior regulation was in effect, agencies  
18 did not consult with the Fish and Wildlife Service.

19 QUESTION: Do you agree with his reading that  
20 that regulation clearly applied to foreign projects, as  
21 well as species in foreign countries?

22 MR. KNEEDLER: Yes.

23 QUESTION: You do.

24 MR. KNEEDLER: 1978.

25 With respect to the fact that this Court might

1 affirm the judgment, the standing question, with all  
2 respect, has to be looked at at the time the plaintiffs  
3 filed the action in district court. The question is  
4 whether a single, district court decision construing the  
5 act would be followed by other agencies. And there's no  
6 indication -- no reason to believe that it would be.

7 On the merits, with respect to the listing  
8 requirement, Justice Souter, section 8 does specifically  
9 refer to endangered or threatened species with respect to  
10 the President's furnishing of foreign assistance. So the  
11 listing of foreign species is tied in both with respect to  
12 section 8 and section 9.

13 Finally, with respect to the presumption,  
14 respondents say it only applies for local activities such  
15 as employment. But we say that there is -- in our view,  
16 nothing could be more local than the construction of a  
17 project on foreign soil by a foreign government in matters  
18 that affect that foreign country's own resources. There's  
19 no reason to believe that section 7 applies there.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
21 Kneedler.

22 The case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the  
24 above-entitled matter was submitted.)

25

*CERTIFICATION*

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NO. 90-1424 - MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,  
Petitioner V. DEFENDERS OF WILDLIFE, ET AL.

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