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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BRAD BENNETT, ET AL., Petitioners :

v. MICHAEL SPEAR, ET AL.

CASE NO: 95-813

PLACE: Washington, D.C.

DATE: Wednesday, November 13, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRAD BENNETT, ET AL., :

4 Petitioners :

5 v. : No. 95-813

6 MICHAEL SPEAR, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, November 13, 1996

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:06 a.m.

13 APPEARANCES:

14 GREGORY K. WILKINSON, ESQ., Riverside, California; on
15 behalf of the Petitioners.

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

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1 PROCEEDINGS

2 (10:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 95-813, Brad Bennett v. Michael
5 Spear.

6 Mr. Wilkinson.

7 ORAL ARGUMENT OF GREGORY K. WILKINSON

8 ON BEHALF OF THE PETITIONERS

9 MR. WILKINSON: Mr. Chief Justice, and may it
10 please the Court:

11 This case arises from the Ninth Circuit and
12 raises the question whether farmers and irrigation
13 districts that receive water pursuant to Federal contracts
14 have standing to complain when their water supplies are
15 cut, their crops threatened, and their land devalued as a
16 consequence of Government conduct alleged to violate the
17 provisions of the Endangered Species Act.

18 QUESTION: We're talking about the granting of a
19 motion to dismiss here, aren't we?

20 MR. WILKINSON: That's correct.

21 QUESTION: So, we're talking about the -- how
22 you construe allegations in a complaint basically.

23 MR. WILKINSON: In part, that's -- yes,
24 absolutely correct.

25 According to the Ninth Circuit, the answer to

1 the question I posed is no because petitioners'
2 competitive, economic-based interest in the water places
3 them outside a zone of interest protected by the ESA.

4 We believe this ruling goes well beyond the
5 bounds of any standing decision of this Court, and
6 notably, neither the Government nor any amicus attempts to
7 defend it. If prudential considerations apply at all to
8 actions commenced under the citizen suit provision of the
9 ESA, they are more than satisfied by the petitioners in
10 this case. Their water supply contracts and the claims
11 they alleged in their complaint place them well within any
12 zone of interest either protected or regulated by the ESA

13 And for the same reason, petitioners also have a
14 right to review under the Administrative Procedure Act
15 since they are persons adversely affected or aggrieved
16 within the meaning of the relevant statute, namely, the
17 ESA.

18 Finally, unless the ruling of the Ninth circuit
19 is reversed, we believe there will be at least three far-
20 reaching and negative effects from it.

21 First, there will exist a prudential standing
22 scheme under the ESA that overtly discriminates against
23 economically based plaintiffs.

24 Second, because the courthouse doors will be
25 closed to everyone except environmental plaintiffs, there

1 will be one-sided enforcement of the ESA.

2 Finally, the result of that one-sided
3 enforcement we believe will be skewed implementation of
4 the act that continually presses the Government forward to
5 a position of over-regulation instead of the balance
6 sought by Congress when it has committed the act.

7 QUESTION: Mr. Wilkinson --

8 MR. WILKINSON: Yes, Your Honor.

9 QUESTION: -- the Solicitor General in response
10 apparently chooses not to address the merits, but does
11 raise an issue about whether the petitioners have Article
12 III standing and an issue about whether the claims are
13 cognizable under the statutory scheme.

14 Were those arguments raised below in response to
15 the motion to dismiss?

16 MR. WILKINSON: Justice O'Connor, the Article
17 III arguments were raised below. However, they were not
18 decided by either of the courts below.

19 The cognizability claims in our view were never
20 raised below, nor were they raised in the cert op. And
21 accordingly, in our view rule --

22 QUESTION: You mean in response to the petition
23 on certiorari?

24 MR. WILKINSON: That's correct, yes. And
25 consequently, it would be our view that those

1 cognizability issues are not properly before you.

2 QUESTION: And do we have before us today any
3 issue on the APA claim?

4 MR. WILKINSON: The APA arguments as well were
5 not raised below in our view by the Government, and
6 consequently also are not properly before you today.

7 QUESTION: Mr. Wilkinson, jurisdictional issues
8 are always properly before us. I mean, if there is no
9 standing, we have no jurisdiction over the case. We can
10 surely reach the Article III issue if we want to.

11 MR. WILKINSON: Oh, Justice Scalia, yes, I
12 believe you can. I'm not intending to say that the
13 Article III issues were not properly raised. I believe
14 they were and I believe the Government preserved those
15 issues.

16 There's a question, however, that may arise as
17 to which do you get to first: the prudential issues or
18 the Article III issues. Our reading of the decisions of
19 this Court indicate that while preliminary jurisdictional
20 questions may be approached first, certainly before merits
21 issues are to be decided, that there's no decision of this
22 Court which indicates which comes first.

23 We think there are good reasons here for dealing
24 with the prudential questions before you reach the Article
25 III questions. Those were the issues resolved by the

1 courts below. Those were the issues that were the subject
2 for the -- of the petition of writ of certiorari and those
3 were the issues on which certiorari was granted.

4 In addition, those are the issues, the
5 prudential issues, that have split the courts of appeal,
6 and as I think we've indicated in a letter to the Court,
7 that split has only grown since cert was granted.

8 QUESTION: Assuming we agree with you on the
9 prudential issues, would you want us to resolve the
10 Article III issue or remand to have --

11 MR. WILKINSON: We would prefer, if you are with
12 us on the prudential issues, that we are still in this
13 case, that you go forward and try and resolve the Article
14 III issues. I think that's particularly appropriate, in
15 fact, in the circumstances in this case because it does
16 arise on motions to dismiss. And according to Lujan v.
17 Defenders of Wildlife, at that stage of the case, the
18 burden for a petitioner attempting to deal with Article
19 III is a more modest one --

20 QUESTION: Well, now, is the Article III
21 standing issue -- does the resolution of that depend at
22 all on who it is the petitioners sued, what agency?

23 MR. WILKINSON: We don't believe that --

24 QUESTION: Does that enter into the calculus of
25 the Article III standing question?

1 MR. WILKINSON: No, Your Honor, it doesn't as
2 far as I'm concerned. I'm not sure that I fully
3 understand the --

4 QUESTION: Well, apparently the suit below was
5 not brought against the Secretary who has the final
6 determination.

7 MR. WILKINSON: Actually the suit below was
8 brought against the Secretary. It was named -- Bruce
9 Babbitt was named as a defendant. Bruce Babbitt is also,
10 apart from being the Secretary of the Interior, the
11 cabinet official responsible for both the Fish and
12 Wildlife Service and the Bureau of Reclamation. It has
13 struck us as somewhat curious, indeed, that the United
14 States would challenge Article III standing on the basis
15 that we had not properly joined the Bureau. We had sued
16 the cabinet official responsible for the Bureau.

17 QUESTION: The problem that's bothering me --
18 maybe I'll set it all out -- is that suppose I think this
19 isn't ripe, this case. That's the problem. It isn't
20 ripe. There was a report that you say was not properly
21 prepared. The report was to go to the Secretary. When
22 the Secretary gets it, he might act, he might not act. If
23 the Secretary in fact says the levels of the lake should
24 be higher, your clients are hurt. If the Secretary says
25 they shouldn't be higher and ignores the report or

1 whatever, your clients suffered no harm.

2 So, it sounds to me as if this isn't final
3 agency action. Well, when it is final and your client is
4 hurt, you have a case and you bring it.

5 How can I decide in the abstract whether you
6 have standing or not have standing without knowing what
7 the Secretary is going to do --

8 MR. WILKINSON: Your Honor --

9 QUESTION: -- and without knowing what your
10 basis for attacking the Secretary's action is?

11 I assume it would be the Secretary said the
12 level of the lake should be higher. That hurts our
13 client. He based that on a decision of the Wildlife
14 Service or whatever and that decision is no good for the
15 very reasons you're saying now.

16 But how can I decide the standing question
17 abstractly without knowing what your final claim would be
18 when your clients are really about to be hurt because the
19 Secretary says the lake level has to stay up?

20 MR. WILKINSON: Let me deal first with the
21 situation that exists in this case, and then I'll deal
22 with your hypothetical.

23 Your hypothetical is not this case, Your Honor,
24 because in this case it was alleged that the Bureau would
25 comply, that the Secretary would authorize the Bureau to

1 comply with the biological opinion. And in its merits
2 brief, the United States admits that the Bureau indicated
3 that it would comply. In fact, it has complied. So, your
4 hypothetical differs from this case in the sense that it
5 assumes non-compliance when in fact there is compliance.

6 But let me deal with the hypothetical straight
7 up.

8 QUESTION: Mr. Wilkinson, could you just clarify
9 what you mean by comply? You said the Secretary has
10 complied. Has he made an adjustment in the water level?

11 MR. WILKINSON: Yes, he has, Justice Ginsburg.
12 He has, and as a consequence of that adjustment, we lost
13 80 percent of our water supply. Lands were fallowed.
14 People lost their jobs. The value of property fell from
15 hundreds of dollars per acre to \$20 per acre.

16 Now, we didn't have an opportunity. This case
17 didn't get far enough for us to raise those issues either
18 on a motion for summary judgment or a trial, but we are
19 prepared to prove every one of those allegations.

20 QUESTION: So, you say the ripeness question is
21 something that needs to be aired in a court of first
22 instance, but that you have --

23 MR. WILKINSON: We believe that we have
24 satisfied in this case already, on the basis of the
25 pleadings before you, the issue of ripeness.

1 QUESTION: It can be contested later in more
2 detail I assume.

3 MR. WILKINSON: Certainly, and --

4 QUESTION: At the summary judgment stage and at
5 the merits stage, even more evidence can be brought in on
6 that.

7 MR. WILKINSON: That's correct.

8 QUESTION: But you're saying that at the
9 pleading level, you've done all that's needed at that
10 point.

11 MR. WILKINSON: That's correct.

12 QUESTION: Yes, but you just recited some facts
13 that are not included in your pleading.

14 MR. WILKINSON: We never had the opportunity to
15 raise those issues.

16 QUESTION: Well, but if you want -- it just
17 seems to me if you want the issue decided on the complaint
18 as it now stands, I don't see how you can tell us facts
19 that are not in those things you say should be
20 dispositive.

21 MR. WILKINSON: In our complaint -- it's page 40
22 of the petition appendix -- we alleged that the
23 restrictions on lake levels imposed in the biological
24 opinion adversely affect plaintiffs by substantially
25 reducing the quantity of available irrigation water.

1 That's the generalized allegation of injury.

2 QUESTION: Yes, but the Government points out
3 there's no allegation that you're going to even lose a
4 gallon of water.

5 MR. WILKINSON: Well --

6 QUESTION: And theoretically under your
7 pleading, all the harm could be suffered by other water
8 users.

9 MR. WILKINSON: Well, the Government is not, I'm
10 afraid, being straight with you in terms of how this
11 project operates. We don't know because we haven't gotten
12 the case this far, but the fact is the project operates on
13 a pro rata distribution basis. The project is in fact
14 administered by the petitioner, the irrigation districts.

15 And what we've got is a situation where it
16 really doesn't matter in effect how the harm or the loss
17 of water is distributed. What we have is a situation as a
18 result of the biological opinion that whatever amount of
19 water is bestowed by nature, whatever amount of water is
20 left in carryover storage and so forth, whatever amount is
21 there, the biological opinion takes a certain amount of
22 that from all of us and we are left to divide up what
23 remains.

24 QUESTION: Did you allege that the Secretary
25 accepted the opinion and was proceeding in accordance with

1 the opinion.

2 MR. WILKINSON: We did.

3 QUESTION: Is that in your complaint?

4 MR. WILKINSON: We alleged on -- this is at

5 petition appendix --

6 QUESTION: Where and what?

7 MR. WILKINSON: -- page 32.

8 QUESTION: Appendix?

9 MR. WILKINSON: Petition appendix, page 32.

10 QUESTION: In the blue brief you mean?

11 MR. WILKINSON: No, the white one, Your Honor.

12 QUESTION: No, the white.

13 MR. WILKINSON: Right here.

14 QUESTION: Okay. At page what?

15 QUESTION: 32 --

16 MR. WILKINSON: 32 of the appendix to that, the

17 very bottom of the appendix page. We alleged on

18 information and belief, that the Bureau of Reclamation

19 will abide by the restrictions imposed by the biological

20 opinion. And in their merits brief, United States admits

21 that in fact the Bureau of Reclamation made the decision

22 to comply.

23 QUESTION: Well, isn't it a general rule too

24 that in -- at the motion to dismiss stage, you interpret

25 the allegations of a complaint to support a cause of

1 action, if there's any ambiguity about it?

2 MR. WILKINSON: In fact, you assume that they
3 are true I believe at the motion to dismiss.

4 QUESTION: Well, yes, for purposes of deciding
5 any legal question raised by the motion to dismiss.

6 MR. WILKINSON: Right.

7 QUESTION: I was wondering if you could get back
8 to the hypothetical Justice Breyer posed.

9 MR. WILKINSON: I wanted to do that, Justice
10 Kennedy.

11 QUESTION: You were interrupted.

12 MR. WILKINSON: Let me see if I can recall the
13 hypothetical.

14 QUESTION: The basic thing would be that, look,
15 the APA -- and I say the statute is similar -- says that
16 you can sue to complain about final agency action, and the
17 final agency action in this instance, arguably, is not the
18 action of the Fish and Wildlife Service, but rather the
19 action, let's say, of the Bureau of Reclamation.

20 And whether you put this sentence in the
21 complaint or didn't put it in the complaint, you are not
22 suing to claim that the action of the Bureau of
23 Reclamation is unlawful. What you are suing to complain
24 about is that the action of the report sending is
25 unlawful.

1 And therefore, I wondered if it is ripe in the
2 sense that your complaint does not attack the final agency
3 action, namely, the action of the Bureau of Reclamation
4 which would lower or raise or do something with the water.
5 That was -- and I wondered how I could go at the standing
6 question if I believed the hypothetical because standing
7 would depend on what your argument is in respect to the
8 final agency action which you would attack which this
9 complaint seems not to attack. That was --

10 QUESTION: Before you answer that, would you
11 incorporate please --

12 MR. WILKINSON: Yes.

13 QUESTION: -- whether in fact you're relying on
14 the APA as the source of the action or whether you can sue
15 separately under the Endangered Species Act without
16 reference to the final agency action requirement of APA.

17 MR. WILKINSON: Let me answer your question
18 first, Justice O'Connor.

19 We believe we do have independent causes of
20 action under both the Administrative Procedure Act and the
21 citizen suit provision of the Endangered Species Act. In
22 fact, 1540(g)(5) of the Endangered Species Act provides
23 for redundancy of remedy and provides that nothing in the
24 citizen suit provision will preclude a petitioner from
25 using other remedies as well. And so, the Congress

1 intended there to be a redundancy of remedy.

2 Justice Breyer, in response to your question, I
3 believe I've answered it on the facts of this case which
4 are that the Bureau has already agreed to comply, but let
5 me --

6 QUESTION: My question, remember --

7 MR. WILKINSON: -- deal with the hypothetical as
8 you posed it.

9 QUESTION: But you haven't sued the Bureau.

10 MR. WILKINSON: We sued --

11 QUESTION: I mean, in his question is the fact
12 that you have sued the wrong party. The party you have
13 sued has not taken final agency -- the final agency action
14 which would affect you.

15 MR. WILKINSON: Justice Scalia, we sued Bruce
16 Babbitt, Secretary of Interior. If we get a decision
17 against Bruce Babbitt, who is the cabinet Secretary
18 responsible for the Bureau of Reclamation, we think as a
19 practical matter, the Bureau will not differ from a
20 decision which binds the Secretary. And your decisions do
21 indicate that in resolving issues of finality, you use a
22 doctrine of practicality.

23 QUESTION: What is the remedy you seek? Do you
24 seek to get more water which would be the remedy that
25 pertains to the final action in question, or do you seek

1 to get a revised report?

2 MR. WILKINSON: We seek to get the existing
3 report vacated and then revised in accordance with science
4 because --

5 QUESTION: But that is not a remedy that will do
6 you any good because the Secretary can look at the revised
7 report and say, I like the other one better. Throw away
8 the revised report and come out with the same decision
9 that you're complaining about here.

10 MR. WILKINSON: Well, if the Secretary is bound
11 by this decision, I'm not sure that that would be the
12 case. The Secretary would presumably have to comply with
13 the decision of the Court.

14 QUESTION: Which is what? Which is simply that
15 he consider the report, but -- that he consider the new
16 report. But he's fully -- he's free to reject it, isn't
17 he?

18 MR. WILKINSON: No, I don't believe he is in
19 fact, because he can't operate this project without the
20 incidental take statement that was found in the biological
21 opinion.

22 The United States raised the identical argument
23 that they are raising here in a case called Ramsey v.
24 Kantor. It's not cited in any of the briefs because it
25 came down from the Ninth Circuit about 6 weeks ago.

1 Clearly the Ninth Circuit does not bind you, but we
2 believe their reasoning is persuasive here.

3 What they said was that when a biological
4 opinion is issued and the biological opinion finds there
5 to be jeopardy, that a reasonable and prudent alternative
6 is developed. The opinion also then includes an
7 incidental take statement.

8 They said the incidental take statement -- that
9 part of the biological opinion is the functional
10 equivalent of a permit to operate the project. Without
11 it, you can't operate the project.

12 The Secretary, the Bureau in this case, had no
13 possibility of doing anything other than complying with
14 the biological opinion if it expected to receive immunity
15 from civil, or potentially criminal, prosecution.

16 So, in answer to your hypothetical, Justice
17 Breyer, yes, we believe that the biological opinion was
18 final as of the time that it was issued and that the
19 Bureau in fact did not really have any opportunity as a
20 practical matter -- the test you use in determining
21 finality -- to do anything other than comply.

22 And the United States admits in its reply brief
23 that it's very rare that these agencies ever deviate. In
24 fact, they never cite a single example of deviation.

25 QUESTION: That's a very interesting answer, and

1 really you're saying that these reports are like
2 environmental impact statements because environmental
3 impact statements are preliminary to final agency action,
4 but they are final because of the intent of an
5 environmental impact statement which is to stop the
6 machinery.

7 The problem with that answer is that all this
8 hasn't been argued at all because at first blush it
9 doesn't appear that they're the same as environmental
10 impact statements since they aren't designed to stop the
11 machinery of the bureaucracy from gearing up.

12 So, I find that an interesting and important
13 response, but I just haven't seen it fully argued.

14 MR. WILKINSON: Well, we would, I guess,
15 disagree that it's tantamount to environmental impact
16 statement which is essentially --

17 QUESTION: I mean in the sense that it's final
18 by itself.

19 MR. WILKINSON: This is much more of an
20 operative document in the sense that as a practical
21 matter, the test again that you use, you cannot operate
22 this project without the incidental take statement in the
23 biological opinion.

24 QUESTION: Mr. Wilkinson, may I --

25 QUESTION: Suppose that the Bureau of

1 Reclamation said we have had a 3-year drought in the
2 Pacific Northwest and we're not going to be making any
3 releases from the Clear Lake Gerber reservoir even if we
4 have abundant rainfall for 2 more years. Would you then
5 have standing? And your injury is for the next 2 years
6 let's say.

7 MR. WILKINSON: We hold contracts with the
8 United States for water from this project. If the
9 Bureau's determination or the Secretary's determination in
10 that circumstance was believed to be arbitrary and
11 capricious and we would then bring a lawsuit --

12 QUESTION: No, no. I'm assuming that he has
13 good grounds not to release the water. He doesn't have
14 much water.

15 MR. WILKINSON: I believe that in that instance
16 we are certainly within the zone of interest regulated by
17 the Bureau. We are injured by the action. It's traceable
18 to the Secretary, the Bureau's decision.

19 QUESTION: No, no. I -- maybe my hypothetical
20 is inept. I'm assuming that the Secretary is acting
21 within his proper discretion based on the drought
22 conditions.

23 MR. WILKINSON: Oh, all right.

24 QUESTION: Do you still have a cause of action
25 against the Secretary and the Fish and Wildlife Service

1 for the improper preparation of this report?

2 The Secretary in my hypothetical also has this
3 report. He has two reasons for not giving the water. One
4 is what the Fish and Wildlife Service says. The other is
5 he doesn't have any water anyway.

6 MR. WILKINSON: I guess there's a question that
7 arises whether the plaintiff is injured by the action of
8 the Fish and Wildlife Service or the action of the
9 Secretary in that circumstance.

10 QUESTION: There has to be -- in other words,
11 there has to be some redressability. Footnote 7 of Lujan
12 I think doesn't completely say that redressability is
13 irrelevant, does it?

14 MR. WILKINSON: It doesn't say it's irrelevant.
15 It does say that procedural rights are special and that
16 normal standards for redressability and immediacy do not
17 apply.

18 Now, if we look at footnote 7, the example used
19 in footnote 7 of the Defenders decision involved the
20 construction of a dam next to a property owner's land, and
21 the issue was whether the property owner could, in that
22 circumstance, compel production of an environmental impact
23 statement.

24 We think the circumstances here are very similar
25 in the sense that we are also raising procedural

1 violations. This project is in our back yard. It is
2 critical to the operation of our farms and our businesses,
3 and we have we believe a right to go forward on procedural
4 arguments and --

5 QUESTION: Well, counsel --

6 QUESTION: And I take it you're saying that
7 there's a likelihood, a reasonable possibility, that the
8 Fish and Wildlife report will be dispositive.

9 MR. WILKINSON: In the hypothetical that you
10 have posed, it may or may not be. In our situation it
11 absolutely is dispositive.

12 QUESTION: Well, counsel --

13 QUESTION: Well, why is it dispositive? Why --
14

15 QUESTION: Yes. I'm concerned about your suit
16 is brought under the Endangered Species Act.

17 MR. WILKINSON: And the APA as well.

18 QUESTION: As an alternative you said.

19 MR. WILKINSON: Correct.

20 QUESTION: But under the Endangered Species Act,
21 would that have anything at all to do with a reduction of
22 water based on drought conditions? It wouldn't. That
23 isn't an action under the ESA. It's an action to save
24 endangered species, and that's what you're complaining
25 about. How does a drought and a reduction in water by the

1 Secretary or the Government have anything to do with that?

2 MR. WILKINSON: Well, it doesn't have anything
3 to do with our case. That's I suppose the problem with
4 the hypothetical. Our case --

5 QUESTION: Does it have anything to do at all
6 with the Endangered Species Act if you're complaining
7 about a change in water level because of absence of water
8 due to no rain?

9 MR. WILKINSON: That's not what we are
10 complaining about, Justice O'Connor, is not an absence or
11 a minimum lake level established to protect against
12 drought. What we're dealing with in this situation was a
13 determination by the Fish and Wildlife Service that these
14 fish required certain minimum lake levels in order to
15 continue to exist. We don't believe there's any science
16 behind that decision.

17 The drought had very little to do, in fact, with
18 this opinion. This is not a situation where if these
19 irrigation releases had continued, the reservoirs would
20 simply run out of water. That wasn't the situation at
21 all.

22 QUESTION: But you think there has to be some
23 proximity, some redressability, some causation between the
24 injury you allege, i.e., lack of receipt of the water, and
25 the procedural default that you're alleging under the

1 Endangered Species Act.

2 MR. WILKINSON: Justice Kennedy, we believe
3 there is that connection in this case. The biological
4 opinion is the thing which becomes the operating scheme,
5 if you will, for the project. The biological opinion is
6 not based on the existence of a drought. It's based upon
7 a determination by the Fish and Wildlife Service that
8 certain amounts of water are necessary for the well-being
9 of these fish. The problem --

10 QUESTION: Mr. Wilkinson.

11 MR. WILKINSON: -- we have with that is there's
12 no science behind that determination.

13 QUESTION: How wedded are you to attacking the
14 Fish and Wildlife report per se? In other words, you were
15 cut off at the pass essentially, and when I heard the
16 question about why didn't you sue the Bureau of
17 Reclamation, well, that's an eminently fixable lack, if it
18 is a lack at all. And similarly, you could amend your
19 complaint to say, yes, we're getting at the report through
20 the acceptance of it by the Bureau of Reclamation.

21 So, I'm trying to determine whether we're just
22 dealing with a pleading that may not be appropriate and
23 could be amended or whether there's some reason why you
24 must zero in directly on the Fish and Wildlife Service
25 report rather than reach it through the Bureau of

1 Reclamation acceptance of it.

2 MR. WILKINSON: If the decision of the Ninth
3 Circuit were to be reversed and this case remanded to the
4 district court for further proceedings, it would be our
5 intention, Justice Ginsburg, to amend the complaint to
6 name the Bureau. There's no reason not to I suppose in
7 these circumstances. We don't believe it's necessary, but
8 if this Court concludes to the contrary that Article III
9 or finality or ripeness considerations require that the
10 Bureau be named, I can assure you the Bureau would be
11 named. There is not any kind of policy reason I suppose
12 for not naming the Bureau here.

13 We felt we had named the people that had
14 violated the act, the people who had determined that these
15 minimum reservoir levels were necessary for the fish, and
16 that was enough.

17 If -- and I believe you're absolutely correct
18 that this is an eminently fixable problem, if indeed it's
19 a problem at all.

20 QUESTION: Mr. Wilkinson, I think I understand
21 your probability argument. Let me just carry the
22 redressability point one step further.

23 Assume that in fact there were a determination
24 that the report was as defective as you say and therefore
25 would not be a proper basis for the Secretary's action as

1 the ultimate official responsible for BOR. Is there any
2 reason in law why the Secretary could not at that point
3 say simply, not that I'm worried about unusual drought
4 conditions? I'm simply worried about the fish, and common
5 sense tells me that having more water in the reservoirs is
6 going to be better for the fish and be far less likely to
7 lead to their extinction than less water in the
8 reservoirs. So, report or no report, for purposes of
9 protecting the fish, I'm simply going to keep the water
10 level up and do exactly what I've done before. Is there
11 any legal reason -- or exactly what the BOR has done
12 before. Is there any legal reason that the Secretary
13 could not do that?

14 MR. WILKINSON: Yes, Your Honor, there is, and
15 the legal reason is that the Endangered Species Act
16 requires that these determinations, including the one
17 you've described, be based on science, not speculation,
18 not conjecture.

19 QUESTION: Well, but you would have a separate
20 action in that case I understand against the Secretary,
21 but the -- would the Secretary be violating -- perhaps I
22 should have -- should rephrase my question. Would the
23 Secretary be violating any procedural norm other than
24 needing a scientific basis?

25 MR. WILKINSON: Well, he'd be violating section

1 7 of the act because that act requires that biological
2 opinions be based on science.

3 QUESTION: But does he have to have a biological
4 opinion? In other words, does he have to make this
5 reference to the Fish and Wildlife Service?

6 MR. WILKINSON: The biological opinion is the
7 result of the consultation and that is the document that
8 concludes --

9 QUESTION: But is the consultation required?

10 MR. WILKINSON: Yes.

11 QUESTION: Does he have an option not to consult
12 in these circumstances?

13 MR. WILKINSON: If consultation is -- well, what
14 happens is that a biological assessment is developed. A
15 consultation is sought by the action agency, if you will.

16 QUESTION: Okay, but let's assume he doesn't
17 seek it and he simply says, I don't need the Fish and
18 Wildlife Service to tell me that more water is better for
19 the fish. Would he be violating any procedural norm of
20 the act except, as you say, for failing to have a more
21 systematically justified basis for his action?

22 MR. WILKINSON: Well, Justice Souter, that of
23 course is not this case, but I presume if there were no
24 consultation --

25 QUESTION: No, but it goes to redressability.

1 MR. WILKINSON: But it does only in the sense
2 that we're talking about actions under the Endangered
3 Species Act. The Secretary might have the option to
4 develop recommended conservation measures. Those
5 measures, however, are not binding on agencies such as the
6 Bureau of Reclamation. And since they're not binding, the
7 Bureau has already told us what they would be willing to
8 do and it didn't involve minimum reservoir levels.

9 So, I think that if we vacate the biological
10 opinion here, there would be no basis for the Bureau,
11 given what it has already said, to impose a minimum
12 reservoir level.

13 QUESTION: So, you're saying that this is an
14 Endangered Species Act suit and the fact that there has
15 been a reference in effect sets the stage for what
16 redressability means in this circumstance. And given the
17 fact that there has been a reference, there has been a
18 report, necessarily if the report, in effect, is required
19 to be withdrawn, you will get relief. The Secretary may
20 turn around tomorrow morning and do something else that
21 you don't like --

22 MR. WILKINSON: Correct.

23 QUESTION: -- but you'll get relief.

24 MR. WILKINSON: We will be restored to the
25 priority that we had initially.

1 I think I would like to reserve whatever time I
2 have remaining.

3 QUESTION: Very well, Mr. Wilkinson.

4 Mr. Kneedler, we'll hear from you.

5 Mr. Kneedler, there are two questions presented
6 in the petition for certiorari. One is whether the
7 standing under the citizen suit provision of the ESA has a
8 zone of interest test, and if it does, is it a one-sided
9 test. I wasn't able to tell from the Government's brief
10 what the Government's response was to either of those
11 questions. I hope you'll tell us during your argument.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER

13 ON BEHALF OF THE RESPONDENTS

14 MR. KNEEDLER: Yes. Let me answer that from the
15 outset.

16 The zone of interest test or formulation, as
17 this Court said in the Clarke decision, is ultimately
18 traceable as a gloss on the Administrative Procedure Act
19 when there -- for determining when there's a cause of
20 action under the Administrative Procedure Act. At least
21 that's where it originated. So, it's ultimately a
22 question of statutory interpretation.

23 In our view the proper approach to whether there
24 is a cause of action under the Endangered Species Act
25 citizen suit provision in this case is also a question of

1 statutory interpretation, not by reference to unanchored
2 questions of zone of interest, but by reference to the
3 specific text of the citizen suit provision that we have
4 at issue here.

5 And as to that, we say that there is -- the only
6 cognizable claims under the citizen suit provisions are
7 things for violations of the act, and as we explain in our
8 brief, violations of the act refer to on-the-ground
9 activities that could be engaged in by a private person or
10 by a Federal agency with on-the-ground responsibilities
11 equally. In other words, the citizen suit provision for
12 actions against any person, including the United States,
13 includes situations in which the United States, like any
14 person, might be taking on-the-ground activities that
15 would adversely affect a species.

16 In our view it does not provide an avenue for
17 judicial review of ordinary administrative action of a
18 regulatory nature. It provides for a citizen suit against
19 those who are regulated, not the agency that is
20 regulating. The APA --

21 QUESTION: But even if that were true, the
22 Administrative Procedure Act would provide for a suit
23 against Government action, action that couldn't be taken
24 by private individuals --

25 MR. KNEEDLER: That -- that's --

1 QUESTION: -- but can be taken by Government so
2 long as the individual is within the zone of interest.

3 MR. KNEEDLER: That's correct.

4 QUESTION: And if the statute requires economic
5 considerations to be taken into account, a person who
6 would be favored by taking them into account is certainly
7 within the zone of interests.

8 MR. KNEEDLER: Yes, but that would be a suit
9 under the APA. So --

10 QUESTION: Which is not eliminated by the --

11 MR. KNEEDLER: Right. No. In fact, the final
12 subsection of the Endangered Species citizen suit
13 provision here preserves other causes of action.

14 So, let me be clear.

15 QUESTION: But in short, you under the
16 Endangered Species Act, although without talking about
17 zone of interest, reach really the same conclusion as the
18 Ninth Circuit, namely, that this is an act that works only
19 one way for those who are protecting the endangered
20 species and not for economic interests that are injured.

21 MR. KNEEDLER: That's -- violations are
22 categorized as things that harm the species. That's
23 consistent with citizen suit provisions generally.

24 QUESTION: Excuse me. You're saying the
25 substantive provisions of the act only operate one way,

1 but the procedural provisions of the act, those that limit
2 the types of action that the Government can take, those
3 provisions are subject to the APA.

4 MR. KNEEDLER: Well, yes. I mean, there are two
5 -- the Government when it is -- if the Government is
6 operating a reclamation project or building a dam that may
7 harm a species, in that situation it is analogous to a
8 private party who may also be engaged in on-the-ground
9 activities. If it -- when the Government is operating as
10 regulator, then we think the APA is the normal cause of -

11 -
12 QUESTION: Well, I don't understand. Suppose
13 that they brought the suit the way I was suggesting it
14 would be brought. There is an action taken by the Bureau
15 of Reclamation to keep the lake level up. That deprives
16 my clients of X million square feet of water which they
17 have a contract for and would otherwise get. All right?

18 MR. KNEEDLER: Right.

19 QUESTION: The reason that it is illegal, says
20 the plaintiff, is because they received a report that was
21 not prepared as the statute requires; i.e., it did not use
22 the best scientific commercial and -- scientific and
23 commercial data available. Therefore, it violated section
24 706 of the ESA. Are you saying that they would not be
25 able to pursue such a suit?

1 MR. KNEEDLER: They would bring a suit against
2 the action agency, not against the Fish and Wildlife
3 Service, and they would have that --

4 QUESTION: No. That's right. They would bring
5 it against the Secretary, this time saying that the
6 Secretary's action in keeping up the lake level is
7 unlawful for the reason that the report did not correspond
8 with what the statute requires.

9 Now, are you saying that that suit could not be
10 brought for some reason of standing?

11 MR. KNEEDLER: No. No. In that situation the
12 suit could be brought against the Bureau of Reclamation.

13 But let me just clarify --

14 QUESTION: They would name the Secretary. Is
15 that right?

16 MR. KNEEDLER: They would name who was ever
17 responsible for operating the project on the ground, not
18 whoever gave the advice.

19 QUESTION: Could the suit be brought under the
20 citizen suit provision of the Endangered Species Act?

21 MR. KNEEDLER: No. In our view in this
22 situation it would be brought under the APA.

23 QUESTION: What is it in the Endangered Species
24 Act that limits the ability to bring the suit that we're
25 hypothesizing?

1 MR. KNEEDLER: Because again in our view the
2 citizen suit provision of the Endangered Species Act like
3 citizen suit -- other citizen suit provisions are designed
4 to allow private persons or the Government as the
5 plaintiff to sue whoever might be causing pollution or
6 harming a species. That is the origin of the citizen suit
7 provision.

8 QUESTION: But it doesn't say that.

9 QUESTION: What is in the statute that leads you
10 to --

11 MR. KNEEDLER: It's the word violation because
12 the word violation in our view and enforcing the act,
13 which is another word that the citizen suit provision
14 uses, suggests law enforcement against people who are
15 taking actions --

16 QUESTION: Could we consider the language of the
17 statute? 1540(g)(1) says, any person may commence a civil
18 suit on his own behalf to enjoin any person, including the
19 United States and any other Government agency, who is
20 alleged to be in violation of any provision of this
21 chapter.

22 And section 1533(b)(2) says, the Secretary shall
23 designate critical habitat on the basis of the best
24 scientific data available and after taking into
25 consideration the economic impact and so on.

1 And here they've sued the Secretary, and that's
2 precisely what they say wasn't done. And that section
3 appears to be alleged to have been violated. Why doesn't
4 it fall under that citizen suit provision?

5 MR. KNEEDLER: Justice O'Connor, there are a
6 number of provisions -- a number of aspects of the citizen
7 suit provision which we think cut strongly the other way.
8 If I may.

9 Subparagraphs (b) and (c) specifically -- on
10 page 2a --

11 QUESTION: Where are you reading?

12 MR. KNEEDLER: Beginning on page 2a of the
13 appendix to our brief, we have the entire citizen suit
14 provision set out.

15 Section 7(a)(2) which imposes duties on action
16 agencies is on the preceding page.

17 Seven -- the citizen suit provision on page 2a
18 in paragraph (a) says, provides for a suit to enjoin any
19 person, including the United States or a governmental
20 agency. Paragraphs (b) and (c) talk about suits against
21 the Secretary. (b) and (c) are both for actions against
22 the Secretary in his administrative responsibilities under
23 the act. The first one were some interim provisions in
24 paragraph (b), and in paragraph (c) the only provision of
25 the citizen suit provision that refers to section 4 of the

1 act does it in a very precise way against the Secretary
2 where there's alleged failure to perform a mandatory duty
3 under the act.

4 QUESTION: (c) was added 8 years later?

5 MR. KNEEDLER: It was.

6 QUESTION: Where are you reading?

7 MR. KNEEDLER: But (b) was in the original act
8 and referred to the --

9 QUESTION: We have an act in which redundancy
10 clearly is not a sin, and your argument basically is a
11 redundancy kind of argument. And I'm not sure that we
12 should accept the redundancy premise as appropriate.

13 MR. KNEEDLER: Well, it's not just a question of
14 redundancy. It's a question that Congress used different
15 --

16 QUESTION: Well, redundancy plus violation, but
17 I mean, your -- one of your arguments is that on Justice
18 O'Connor's suggested reading, you wouldn't need (c) there.
19 And it seems to me that this is an act in which redundancy
20 doesn't cut much.

21 MR. KNEEDLER: Well, it's not just the
22 redundancy that -- let me make several other points, if I
23 may. It's the fact that Congress used different
24 terminology. When it was referring to the person who
25 might be committing on-the-ground violations just like the

1 private person, it used the word agency or United States.
2 When it was referring to the Secretary acting in his
3 regulatory capacity, it used the word Secretary.

4 And back on page 1a where -- which is the
5 operative provision that the petitioners say was violated
6 here, it says that each Federal agency shall in
7 consultation and with the assistance of the Secretary make
8 sure that its actions don't cause jeopardy.

9 So, even in that section as well, the Congress
10 distinguished between agencies that take on-the-ground
11 activities and their duty to avoid jeopardy. And this
12 duty is imposed on the action agency, the Bureau of
13 Reclamation.

14 QUESTION: Suppose that the Bureau of
15 Reclamation said, we're not going to be releasing any
16 water for a couple years, and the Fish and Wildlife
17 Service said, in reliance on that, we're not going prepare
18 a biological report. Would that be a violation of the
19 act? And an endangered species has been identified, et
20 cetera.

21 MR. KNEEDLER: Not in itself. I mean, what
22 would -- if the operating agency, even in that situation,
23 thought that some aspect of its operation might affect the
24 species, it is supposed to trigger -- it is supposed to
25 request consultation.

1 QUESTION: But you don't think there would be
2 standing for someone to at least test the Fish and
3 Wildlife Service's refusal to prepare a biological report?

4 MR. KNEEDLER: Well, in that situation there
5 might well be an action under the APA, 706, paragraph 1.

6 QUESTION: No. Let's talk about the Endangered
7 Species Act.

8 MR. KNEEDLER: I think there would not be, no,
9 again for the reason that that -- first of all, that's not
10 final agency action, and it's part of the --

11 QUESTION: No.

12 MR. KNEEDLER: -- and the Secretary's
13 administration of --

14 QUESTION: No, I'm not talking about final
15 agency. I'm talking about whether or not there's a suit
16 under the Endangered Species Act citizen suit provision -

17 -

18 MR. KNEEDLER: Right.

19 QUESTION: -- when the Fish and Wildlife Service
20 says, despite the fact we've identified an endangered
21 species, we're not going to file a biological report.

22 MR. KNEEDLER: I believe there would not be a
23 cause of action under the citizen suit provision for that
24 because, again, that goes to the administration of the
25 act.

1 QUESTION: There's no violation of the act?

2 MR. KNEEDLER: There's not a violation that's
3 enforceable under the citizen suit provision. I mean,
4 there may be a failure to perform a -- an obligation that
5 the Secretary has, but again paragraph (c) of the citizen
6 suit provision provides for suits against the Secretary to
7 compel him to perform mandatory duties only in specific
8 circumstances under section 4 of the act where there are
9 certain time limitations and listing determinations, but
10 the sort of -- we think the clear implication of that --

11 QUESTION: I'm quite amazed that the Fish and
12 Wildlife Service could refuse to perform its duties under
13 the act and not have a suit. And, of course, the reason
14 you don't want to admit that it does is because then you
15 can't distinguish that between a suit brought by the
16 plaintiffs who are positioned as the plaintiffs here are.

17 MR. KNEEDLER: No, well, we're not saying
18 there's no suit. Again, the APA would provide -- where
19 it's a question of administering the act, the APA is the
20 usual way in which a plaintiff challenges a regulatory
21 agency's administration of the act --

22 QUESTION: That's right, but it's not exclusive.

23 MR. KNEEDLER: No, no.

24 QUESTION: There may be a right of action under
25 the ESA --

1 MR. KNEEDLER: Right. No.

2 QUESTION: -- apart from APA.

3 MR. KNEEDLER: My only point goes to the
4 question of whether the plaintiffs would be left remedy-
5 less.

6 And our entire submission in this case is not to
7 try to keep resource users out of court. We think -- we
8 do, however, think it's important to have an orderly
9 process about how such suits are brought.

10 QUESTION: Mr. Kneedler, may I interrupt?
11 Because I'm still interested in the answer to the question
12 the Chief Justice asked at the very beginning about the
13 questions presented in the -- in this case.

14 And as I understand your argument -- I may be
15 wrong -- you would answer both of the questions presented
16 by the petition differently than the Ninth Circuit did.
17 Is that correct?

18 MR. KNEEDLER: On the zone of interest, we would
19 answer it differently in the sense that we would not use
20 the phrase, zone of interest. We agree with its
21 conclusion on the ground that the citizen suit provision
22 itself is narrowed to -- is confined to situations where
23 there -- where what the defendant is doing would be
24 harming the species. It doesn't answer the question by
25 reference to generalized zone of interest. It answers the

1 question in terms of what's a violation that is cognizable
2 under the act. And, I mean, that is our central
3 submission in this case.

4 And it -- one related point --

5 QUESTION: Do you endorse the reasoning of the
6 Ninth Circuit then?

7 MR. KNEEDLER: Not -- we --

8 QUESTION: They have a one-way -- it's slightly
9 differently articulated, but it's also a one-way
10 construction of the statute.

11 MR. KNEEDLER: Well, with all respect, I think
12 one-way is an unfair characterization.

13 QUESTION: Well, if we can characterize it, the
14 Ninth Circuit says one-way, then yours is also one-way, is
15 not?

16 MR. KNEEDLER: It's one-way in the sense that,
17 yes, the citizen suit is designed to advance the purposes
18 of species protection just like this Court in Gwaltney
19 says --

20 QUESTION: But it also, Mr. Kneedler, has very
21 specific protections for the resource user.

22 MR. KNEEDLER: Yes.

23 QUESTION: And you just read that out of the act
24 and remit them to their remedies under the APA where, I
25 tend to agree with you, there may not be final action

1 under the APA.

2 MR. KNEEDLER: Yes, but let me also say if --
3 even if the citizen suit provision were applicable to
4 administration of the act rather than on-the-ground
5 activities, we think it would be extraordinary for
6 Congress in that situation to have departed from the
7 normal rules for judicial review of agency action and
8 specifically the final agency action point. And this ties
9 --

10 QUESTION: But citizen suits generally depart
11 from the traditional rules, don't they?

12 MR. KNEEDLER: Well, they do in a sense, but
13 that can be overstated. For example, the petitioners in
14 this case specifically endorse the proposition that this
15 Court stated in the Seaclammers case, that the citizen
16 suit provision of the Clean Water Act, which is the
17 foundation for this citizen suit provision, was designed
18 to allow a right of action where that would be true under
19 Sierra Club v. Morton.

20 Well, in fact, the Sierra Club v. Morton was a
21 suit under section 10 of the APA. It specifically
22 discussed the zone of interest test and said that the
23 plaintiffs there, even though they're environmental --
24 even though they were environmental interests being
25 advanced, were within that zone of interest. It was not a

1 repudiation of the zone of interest test but an
2 application of it.

3 So, when you have this citizen suit provision
4 building on Sierra Club v. Morton, its principal thrust
5 was that environmental interests are a sufficient basis
6 for bringing a suit. But there's no -- particularly
7 against that background, there's no suggestion that the
8 citizen suit provision, even if it were applicable to
9 suits against agencies and their administration of the
10 act, was intended to depart from --

11 QUESTION: But you're saying the citizen suit -
12 - just to oversimplify a little bit, you're saying the
13 citizen suit provision is a narrower remedy than the
14 remedy under the APA.

15 MR. KNEEDLER: Yes. It addresses -- and again,
16 it's not designed for -- it's not -- it may allow broader
17 standing where it applies, but it has a narrow application
18 and the application is very much consistent with --

19 QUESTION: Is one-way. And Congress can write a
20 one-way statute --

21 MR. KNEEDLER: Yes.

22 QUESTION: -- if it wants, I presume.

23 MR. KNEEDLER: It can. And it was addressing a
24 harm that any person, including the United States, might
25 engage in not the special expertise --

1 QUESTION: But your position is that the citizen
2 suit provision just changes that one aspect of the APA
3 which deals with zone of interests and only as to certain
4 people, namely, those who are complaining about
5 environmental harm.

6 MR. KNEEDLER: That's correct.

7 QUESTION: And the APA contains a provision,
8 doesn't it, although I think it's rarely cited, that it
9 shall not be superseded except -- unless explicitly.

10 MR. KNEEDLER: That's correct.

11 QUESTION: So, all of the other provisions would
12 certainly continue to apply, at least where there's no
13 direct conflict.

14 MR. KNEEDLER: That's right.

15 I'd like to make one other point that ties in
16 here. The petitioners in their reply brief had suggested
17 that this Court resolve the Article III standing question,
18 and we argued in our brief that there is no causation and
19 redressability for much the same reason we've talked
20 about, that they sued the wrong agency, sued the Fish and
21 Wildlife Service for its advice rather than the Bureau of
22 Reclamation for what it actually did. That ties directly
23 into our final agency action point.

24 QUESTION: They claimed in their complaint that
25 there was causality, and this was dismissed without any

1 further investigation. They said that there was.

2 MR. KNEEDLER: Right.

3 QUESTION: Upon information and belief, they
4 said that he would follow it.

5 MR. KNEEDLER: Our point is not one of fact.
6 It's one of law, and it ties directly into our final
7 agency action point.

8 QUESTION: Well, excuse me. I don't understand
9 that. Causality is a question of fact, not of law.

10 MR. KNEEDLER: Well, I think it's a mixed
11 question. In the opinion for the plurality in Lujan v.
12 Defenders of Wildlife where redressability was discussed,
13 the four-Justice plurality in that part of the opinion
14 focused on the fact that the action taken by the Fish and
15 Wildlife Service in interpreting the regulation or stating
16 when consultation was necessary was not binding on the
17 other agency, the action agency. And for that reason,
18 there was an absence of redressability. And that was not
19 a factual question in our view.

20 QUESTION: But there was no allegation in that
21 complaint. I don't even remember whether Lujan came up at
22 the pleading stage. It was at the summary judgment stage
23 rather than pleading?

24 QUESTION: Which is quite different.

25 QUESTION: Which is quite different. And there

1 was no allegation in Lujan that there was this causality,
2 that the agency had determined to follow this report.
3 That would have made it a totally different ball game.

4 MR. KNEEDLER: But let -- if I may make the
5 other half of the argument I'm making is the problems with
6 that, exactly how close a connection there has to be, are
7 completely taken care of if the Court simply adheres to
8 the normal final agency action rule.

9 QUESTION: Well, but if -- let's assume we
10 disagree with you with reference to your one-way
11 interpretation of the Endangered Species Act. And
12 incidentally, I think we should be very cautious about
13 receiving an argument that destroys the usual neutrality
14 that we think underlies the rule of law in this country.
15 But you're arguing for this one-way provision.

16 Now, let's assume that we disagree with you upon
17 that. Isn't there a likelihood -- a likelihood, a very
18 real likelihood -- there of economic injury based on the
19 Fish and Wildlife Service report?

20 MR. KNEEDLER: As a practical matter, there may
21 well be. That's not our --

22 QUESTION: But isn't that really the core of the
23 inquiry we make under redressability when we're
24 determining Article III standing?

25 MR. KNEEDLER: Well, I think not. I think where

1 there is an intervening action by a third party, as there
2 was in Simon v. Eastern Kentucky Welfare or in this
3 Court's decision in Franklin where there's intervening
4 action by the President, it's not sufficient. In fact, in
5 Franklin there had never been an instance in which the
6 President had failed to follow the recommendation --

7 QUESTION: No, but we said there was Article III
8 standing in Franklin. We found there was no final agency
9 action, but we said there was Article III standing.

10 MR. KNEEDLER: On the -- only on the
11 constitutional question, but --

12 QUESTION: But that's what we're talking about.
13 You keep wanting to talk about the APA. I'm talking about
14 the Endangered Species Act.

15 QUESTION: As I take it, your point is that a
16 FTC staff recommendation does not become final agency
17 action simply because the commission itself always follows
18 it.

19 MR. KNEEDLER: That's exactly correct. For --
20 to use another example in the internal operations of the
21 Government, if the Secretary of another Department asks
22 the Attorney General for a legal opinion and the Attorney
23 General writes a legal opinion, I think it's safe to say
24 that almost invariably, if not invariably, the other
25 agency would follow it. But that doesn't mean that the

1 suit would lie against the Attorney General.

2 QUESTION: But I'm still not certain --

3 QUESTION: Suppose the agency has taken the
4 action, as is alleged here. It is alleged that the agency
5 is proceeding according to this report. Once it has, is
6 it not proper to question under the APA the adequacy of
7 the factual bases on which the agency took that action,
8 including in this case the report?

9 MR. KNEEDLER: Absolutely, in the suit against
10 the action agency. The advice -- the recommendation
11 becomes part of the record that the Bureau of Reclamation
12 acts upon, but at that point it doesn't make the
13 recommendation final agency action. The recommendation
14 remains a recommendation and gets acted upon, along with
15 whatever else the Bureau of Reclamation may have in its
16 files that would influence the way in which --

17 QUESTION: I see that part. The part that I'm
18 finding difficult to follow is let's imagine my suit. I
19 sue the Bureau of Reclamation. That's the ground agency.
20 Right?

21 MR. KNEEDLER: yes.

22 QUESTION: And the reason I sue them is because
23 they issued an order to keep the water up. That's a final
24 action. Right?

25 MR. KNEEDLER: Yes.

1 QUESTION: And I allege in my Endangered Species
2 Act complaint as a person who is asking for an injunction
3 or the setting aside of this final agency order by another
4 Government person. The judge says, why is it illegal?
5 And I say, the reason that it's illegal is because it
6 didn't comply with section 7(a)(2) of the ESA because it
7 did not rest upon the, quote, best scientific and
8 commercial data available.

9 Now, there. I have standing. I'm hurt. I'm
10 complaining about a final action, and I have a reason that
11 under the law was not complied with. Now, are you saying
12 I cannot bring that action, and if not, why not?

13 MR. KNEEDLER: Okay. There are two situations
14 in which you might sue the action agency. If the action
15 agency is -- if the Bureau of Reclamation reduced the
16 water and it might have harmed the species, there's
17 unquestionably a cause of action under the citizen suit
18 provision.

19 QUESTION: Raised the water.

20 MR. KNEEDLER: If the water is raised, there's
21 no general proposition in the Endangered Species Act that
22 requires the action agency to take only the minimum amount
23 of action necessary in order to protect the endangered
24 species. It could, not just for endangered species
25 concerns or because it wanted to add -- have an extra

1 layer of caution --

2 QUESTION: Why did they put in those words, best
3 scientific and commercial data? Because they could have
4 said raise the water for any reason you want.

5 MR. KNEEDLER: The background of that provision
6 when it was enacted in '79 indicates that that was put in
7 there so that the agency would not feel it had to hold up
8 doing anything at all until it had perfect information.

9 QUESTION: Just like the EPA. Even though you
10 get a wonderful environmental report, the agency isn't
11 bound by the conclusion of that report so long as it has
12 been done properly. It's free to proceed on its best
13 judgment.

14 MR. KNEEDLER: That's --

15 QUESTION: And you're saying that's the same
16 with this biological report here.

17 MR. KNEEDLER: That's exactly right. The Bureau
18 of Reclamation may have other evidence --

19 QUESTION: So, you are saying it's just like an
20 environmental impact statement.

21 MR. KNEEDLER: Yes.

22 QUESTION: In other words, the agency must get
23 it before it acts, but it may totally ignore it.

24 MR. KNEEDLER: Well --

25 QUESTION: Does that make any sense?

1 (Laughter.)

2 MR. KNEEDLER: The sense of the act is that the
3 -- and experience shows that the action agency relies upon
4 the biological opinion. Most action --

5 QUESTION: But they don't have to.

6 MR. KNEEDLER: They don't, and that's our point.
7 They don't legally have to. And in fact, they may --

8 QUESTION: But they have to get one.

9 MR. KNEEDLER: They have to get one.

10 QUESTION: They have to get a good one just as
11 an agency has to get an environmental impact statement,
12 and if it hasn't gotten a good one, if it has gotten one
13 that's been done on the cheap or one that's a sham,
14 they're in violation of the act. Isn't that right?

15 MR. KNEEDLER: No. The action agency simply has
16 to consult. The duty to prepare a comprehensive
17 biological opinion is a duty owed by the consulting agency
18 to the action agency.

19 QUESTION: Yes. That's the Fish and Wildlife
20 Service, and that's the one agency you say that can't be
21 sued.

22 MR. KNEEDLER: Well, but that's -- when you have
23 a question of internal deliberations between two
24 Government agencies and a statute that tells an agency,
25 before you take certain action, talk to the Attorney

1 General, it would be odd to say you can sue the Attorney
2 General because of the advice that he gave to the action
3 agency.

4 QUESTION: Let me ask you this just as a
5 proposition of administrative law, and I guess it would be
6 under either the APA or the Endangered Species Act.

7 Suppose that the Bureau of Reclamation gets the
8 biological report from the Fish and Wildlife Service.
9 Could it not say that we're not sure that it took into
10 account the best scientific evidence, but we think it's
11 reasonably close, and in our best judgment it's an
12 adequate report? Can it say that?

13 MR. KNEEDLER: Yes.

14 QUESTION: If it says that, then if an aggrieved
15 person under the APA feels that the act -- feels that the
16 report is inadequate, does he sue the Bureau of
17 Reclamation?

18 MR. KNEEDLER: Yes, and the --

19 QUESTION: And what does he allege?

20 MR. KNEEDLER: He alleges that the decision was
21 arbitrary and capricious, and that's the standard under
22 the APA or the ESA. The same substantive standard of
23 review applies. He would say that the decision of the
24 Bureau of Reclamation was arbitrary and capricious because
25 it was not adequately supported by the administrative

1 record.

2 QUESTION: And there's no way anybody can get an
3 accurate biological report. Nobody can compel this agency
4 to give an adequate biological report is what you're
5 saying. Nobody.

6 MR. KNEEDLER: I think no private person.

7 QUESTION: No private person.

8 MR. KNEEDLER: I believe that's --

9 QUESTION: Just the Secretary.

10 MR. KNEEDLER: I believe that's correct, but
11 what -- the way -- let me retreat from that just to this
12 extent.

13 QUESTION: I hope you will.

14 (Laughter.)

15 MR. KNEEDLER: What would be done is that the
16 plaintiff would sue the Bureau of Reclamation and said --
17 and say, you proceeded without an adequate basis. And if
18 the allegation was you proceeded with a report that was -
19 - that didn't rise to the minimum necessary to be a
20 biological opinion under section 7, you have to set aside
21 your agency action and you, Bureau of Reclamation, can't
22 proceed unless you get a more complete biological opinion.

23 QUESTION: It's just the way it works with an
24 environmental impact statement.

25 MR. KNEEDLER: That's exactly right, but the

1 suit is not directly against the Fish and Wildlife
2 Service. It's still always a suit set aside --

3 QUESTION: Well, this one isn't either. This
4 one isn't either. I mean, this one is against the
5 Secretary, which includes everybody.

6 MR. KNEEDLER: Yes, but the Secretary was only
7 sued in his capacity to -- as the person making jeopardy
8 determinations. He was not sued in his capacity in
9 running the Bureau of Reclamation. And the relief sought
10 was to withdraw the biological opinion, not to have the
11 Secretary take other action with respect to the raising or
12 lowering of water.

13 QUESTION: But you're saying withdrawing the
14 biological opinion is indeed relief that can be sought.
15 If you say you proceeded without an adequate biological
16 opinion, you say you can get a judgment requiring the
17 Secretary to get a proper biological opinion.

18 MR. KNEEDLER: No. Technically what you would
19 get is a judgment saying you can't go forward with the
20 action unless you get an adequate biological opinion. It
21 would be full and complete relief because the Secretary
22 would have to proceed on the basis of something else.

23 But I'd like to tie our position too into
24 something Justice Kennedy was asking about, the
25 interrelationship of the water situation in the area to

1 the Endangered Species Act concerns. There can also be
2 questions of the contract rights that these plaintiffs
3 have. All of that ties into the standing question. All
4 of that ties into the substantive right of what contract
5 rights they have, what Bureau of Reclamation statutes --

6 QUESTION: What about footnote 7 in Lujan which
7 seems to indicate that standing requirements are somewhat
8 relaxed when it's a procedural attack?

9 MR. KNEEDLER: Well, in that situation we think
10 you still have to be alleging a concrete injury to
11 yourself and you have to be alleging that the -- it at
12 least has to be true that if you -- in the sort of suit I
13 was describing to Justice Scalia, if you set aside the
14 agency action, to have the procedural measure taken. That
15 would be adequate Article III standing. We're not
16 suggesting to the contrary. Our point here has been on
17 causation and redressability.

18 QUESTION: What about the word arguably? Do you
19 remember the word arguably?

20 MR. KNEEDLER: In the zone of interest?

21 QUESTION: In data processing. Right. When we
22 go through all this, isn't it at least arguable that that
23 scientific data provision and so forth covers -- isn't
24 their claim at least arguable in that respect?

25 MR. KNEEDLER: It may be, but again we think in

1 this situation if they're claiming that the Bureau of
2 Reclamation is not giving them enough water, that arises
3 directly under the reclamation laws and their contracts.
4 And they can say that -- when the Bureau says our defense
5 is the biological opinion and other information we have,
6 then they could say, well, that's not an adequate
7 biological report because it doesn't have the best
8 scientific evidence in it. So, we're not saying that they
9 can't make arguments about scientific adequacy.

10 QUESTION: But footnote 7 of Lujan talks about
11 redressability. You answered my question and said, oh,
12 well, we're talking about redressability. Footnote 7 says
13 the standards are relaxed even with reference to
14 redressability.

15 MR. KNEEDLER: But it is always I think
16 necessary --

17 QUESTION: So, it seems to me not a proper
18 argument to say, well, I'm talking about redressability.
19 That's what it --

20 MR. KNEEDLER: Well, in the EIS situation, for
21 example, the harm is redressed if the dam is going forward
22 and your claim is there's an inadequate --

23 QUESTION: I think you've answered the question,
24 Mr. Kneedler.

25 Mr. Wilkinson, you have 1 minute remaining.

1 REBUTTAL ARGUMENT OF GREGORY K. WILKINSON

2 ON BEHALF OF THE PETITIONERS

3 MR. WILKINSON: Thank you, Your Honor.

4 Simply put, Congress made no distinction between
5 environmental plaintiffs and resource user plaintiffs when
6 it provided for citizen suit review and APA review. It
7 simply used the term, any person. All we are asking this
8 Court to do is follow the plain language of the statute.

9 If you do that, it renders completely
10 unnecessary this arcane, artificial review process that
11 the Government is proposing where you have to sue an
12 agency that didn't propose the opinion, didn't have the
13 expertise, and may in fact disagree with it internally.

14 QUESTION: You mean the archaic procedure that's
15 used everywhere else in the Government. Right?

16 (Laughter.)

17 QUESTION: Except in this one statute.

18 MR. WILKINSON: Not in this statute, Your Honor,
19 it isn't used. The opinion that was issued in this case
20 was more than just a legal opinion. It was in fact an
21 operating plan for the project. The Bureau --

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Wilkinson.

24 The case is submitted.

25 (Whereupon, at 11:07 a.m., the case in the

1 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

BRAD BENNETT, ET AL., Petitioners
v. MICHAEL SPEAR, ET AL.

Case No. 95-813

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedrico

(REPORTER)