

CUTTING THROUGH THE FOREST OF THE STANDING DOCTRINE: CHALLENGING  
RESOURCE MANAGEMENT PLANS IN THE EIGHTH AND NINTH CIRCUITS

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I. INTRODUCTION

What are forest plans? Congress, through the National Forest Management Act, requires them, citizens rely upon them, the Sierra Club challenges them, and the Forest Service defends and implements them. But no one agrees on the the true essence of forest plans. Are they strategic planning devices to implement the management objectives of Congress? Are they programmatic tools undertaken simply to give vague direction and guidance for forest projects? Or, are they blueprints that directly affect on-the-ground decisions of forest management? Although the confines of the plans are controlled by legislation, the degree of impact on ground level activities of the Forest Service is hotly debated.

The Forest Service, [FN1] an agency within the Department of Agriculture, prepares forest plans as part of its management of the National Forest System. [FN2] This management of the National Forest System is not a simple or isolated agency action. With 191 million acres involved, the administration of this system impacts national, regional, and local levels. For example, the federal timber harvest amount, an integral aspect of forest planning, is the gauge from which private harvesting is measured. Reductions or increases in the federal harvest amount can dictate the level of private production. Nationally, reductions in the federal harvest in the Pacific Northwest, due in part to the spotted owl controversy, have led to a heightened demand for southern timber. As a result, production in and profits from southern forests, particularly private holdings, have increased. [FN3] The relationship between National Forest System supervision and its local impact is acutely felt in areas with large amounts of federal forestland and in states dependent on the forest industry. Arkansas generally falls within both categories. [FN4] Unlike the majority of eastern states (states east of the hundredth meridian), a significant portion of Arkansas is federally owned, [FN5] due largely to the amount of National Forest and National Park land within the state. [FN6]

With forestland covering over one-half of Arkansas, the forest and the timber industries are vital parts of the economy and way of life. [FN7] Forests in Arkansas directly employ some 40,000 persons while the forest products industry provides one out of every five manufacturing jobs in the state. [FN8] However, the forests represent more than just economic benefits to the state. They also provide recreational opportunities, aesthetic and environmental beauty, and wildlife habitat. Forest management has many effects ranging from economic to recreational to environmental to aesthetic. Forest management affects fish and wildlife habitats for hunting and fishing, hiking trail availability, and river management. Other effects of management can be felt by adjoining landowners who may object to clearcuts within the view of their property and the resulting erosion. Also, property values can rise or fall according to nearby forest

opportunities. [\[FN9\]](#)

Congress enacted the Forest and Rangeland Renewable Resources Planning Act of 1974 [\[FN10\]](#) (Resources Planning Act) to guarantee the sustainable development and management of our National Forests. A few years later, in response to litigation, Congress passed the National Forest Management Act of 1976, [\[FN11\]](#) amending the Resources Planning Act and requiring the Forest Service to conduct strategic planning for the management of the forests. The National Forest Management Act directs the Forest Service to develop land and resource management plans for each forest unit in the National Forest System. [\[FN12\]](#) At the local level, these so-called "forest plans" establish standards and guidelines for each forest's management. The plans must be prepared in accordance with the National Environmental Policy Act, which requires each federal agency to consider the environmental impacts of agency actions. [\[FN13\]](#) It has taken several years for each forest plan to be developed, but today most of these plans are complete [\[FN14\]](#) and they will guide the forest activities for the next ten to fifteen years. [\[FN15\]](#)

Citizens groups, environmental groups, and industry alike have attempted to initiate judicial review of National Forest Management Act plans. [\[FN16\]](#) The lawsuits involve issues ranging from the substantive and procedural mandates of the National Management Forest Act, the environmental impact statement requirements of the National Environmental Policy Act, and the regulations of the Endangered Species Act. [\[FN17\]](#) The causes of action frequently raise issues in all three areas, but most cases focus on the first two acts. Plaintiffs' claims under the National Forest Management Act usually fall within two groups: those disputing the plan as a whole and those concerned with the specific activities of the Forest Service, such as land and resource allocations or individual timber sales. The National Environmental Policy Act claims challenge the adequacy of the environmental impact statements prepared in conjunction with forest plans and activities. A challenge under the National Environmental Policy Act may also be made against an individual activity on the basis that the agency did not prepare an environmental impact statement when one may have been required. Would-be challengers to forest plans must first overcome the jurisprudential obstacles of standing and the related doctrine of ripeness before courts will hear the merits of their grievances. As in any case, a plaintiff must show that he or she has a legally recognized interest in the outcome of the action. This burden, standing to sue, is a concept originating from Article III of the United States Constitution, the "cases and controversies" clause, that has been further developed by the United States Supreme Court. Plaintiffs in cases questioning specific Forest Service management activities have had a much easier task in establishing standing than plaintiffs in cases attempting to challenge a forest plan. [\[FN18\]](#)

As to this standing hurdle, two recent United States Supreme Court cases have tightened the requirements of environmental standing. [\[FN19\]](#) The circuit courts have not agreed on what these cases mean for plaintiffs disputing a forest plan. The United States Court of Appeals for the Eighth Circuit recently held that forest plans are not challengeable because, as mere programmatic tools, they cannot inflict injury sufficient to sustain a standing inquiry. [\[FN20\]](#) The United States Court of Appeals for the Ninth Circuit, a frequent forum for environmental litigation, has allowed plaintiffs to bring actions contesting the validity of forest plans. [\[FN21\]](#) The Ninth Circuit's holdings are based on the determination that adoption of a forest plan and the resulting management under the plan can result in an actionable injury. [\[FN22\]](#)

This article is intended to explore this split in the Eighth and Ninth Circuits and the resulting impact it may have on future litigation of forest plans and, by extension, other land and resource management plans such as those prepared by the Fish and Wildlife Service and the National Park Service. [FN23] Part II attempts to determine the nature of forest plans by reviewing the history and implementation of forest planning. This analysis will demonstrate Congress's intention for management plans to occupy a vital role in the disposition of the nation's natural resources. Part III explains the constitutional and prudential requirements of standing and the related doctrine of ripeness. Part IV examines the rationale behind each circuit's position by reviewing *Sierra Club v. Robertson*, a recently decided Eighth Circuit case, and *Resources Ltd. v. Robertson*, a representative case from the Ninth Circuit. Part V discusses the arguments for and against allowing forest plans to form the basis of standing. Finally, Part VI concludes with a brief review of the consequences of each circuit's position if either is adopted by the Supreme Court as the proverbial "law of the land."

## II. FOREST PLANNING

Managing some 191 million acres of land in forty-three states, [FN24] the Department of Agriculture, Forest Service, is one of the major federal land management agencies. [FN25] Guided by several statutes including the Multiple-Use Sustained-Yield Act of 1960, the Resources Planning Act, and the National Forest Management Act, the Forest Service is responsible for providing a wide range of products and managing many different uses of the land in the National Forests. Management must provide for such diverse considerations as timber, grazing forage, minerals, fuels, wildlife habitat, watershed, and recreational use. [FN26]

Although there was no official Forest Service until 1905, Congress authorized general management of the forests reserved under the 1891 Forest Reserve Amendment in the Organic Act of 1897. [FN27] This Act provided for management of the reserves to ensure favorable water flow and timber supplies. [FN28] After its official creation in 1905, the Forest Service was unique among federal bureaus because it was decentralized and efficient, yet exuded an air of professionalism. [FN29] The agency also enjoyed wide discretion within the parameters of its management of the resources under its care. [FN30]

Forest planning first began at the Forest Service under the leadership of Gifford Pinchot. [FN31] Pinchot is frequently cited today as the father of modern forestry, and his "brand of conservation and silviculture effectively became official policy" when he gained control of the Forest Service in 1905. [FN32] After the Transfer Act of 1907, he required "working plans" for all proposed timber sales to ensure a sustainable annual timber yield. [FN33] Other types of plans, such as for range, conservation, recreation, and wilderness uses, became a central activity at the Forest Service, although timber supply remained the primary planning objective until Congress involved itself in forest planning in the 1960s and 1970s. [FN34]

Congress first announced its intentions toward the Forest Service's control over the forests in 1960 with the passage of the Multiple-Use Sustained-Yield Act. [FN35] Although it had been the practice at the Forest Service since the outset, the Multiple-Use Sustained-Yield Act required the Service to manage its lands from a multiple-use

perspective. [FN36] The Act declared that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." [FN37] The Act further stated that this mandate is supplemental to the purposes set forth in the 1897 Act (water flow and timber supply). [FN38] Courts have held that the Multiple-Use Sustained-Yield Act provides no judicially enforceable standards as it is phrased in sweeping and expansive language [FN39] that gives the Forest Service broad discretion in the specific use of a given area. [FN40]

The current system of forest planning was imposed upon the Forest Service by the Resources Planning Act, which had the principal purpose of requiring nationwide strategic forest planning to assure the continued productivity and sustainability of our natural resources. [FN41] According to the Resources Planning Act, the Forest Service is required to prepare integrated management plans for units of the National Forest System that conform to the mandates of the National Environmental Policy Act and the Multiple-Use Sustained-Yield Act. [FN42] In 1976 several lawsuits challenging Forest Service activities under the 1897 Organic Act threatened to curtail the nation's supply of timber. [FN43] Congress responded by enacting the National Forest Management Act as an amendment to the Resources Planning Act.

Relying on the Resources Planning Act's strategic planning system as the foundation, the National Forest Management Act focuses on providing guidance for all forest management activities. [FN44] As described in the National Forest Management Act, planning is "an open process to set goals for the conditions of and outputs from the national forests, to identify standards and guidelines for activities, and to describe the actions and funding needed to achieve the goals." [FN45]

Within Forest Service operations, the Organic Act [FN46] and the Multiple-Use Sustained-Yield Act provide the broad management framework while the National Forest Management Act and the National Environmental Policy Act guide local resource management and public participation. Congress intended activities under the National Forest Management Act to be compatible with the Resources Planning Act, the National Environmental Policy Act, and the Multiple-Use Sustained-Yield Act. [FN47] Congress also intended for the National Forest Management Act to balance use and conservation of forest resources. [FN48] The Senate Committee Report to the National Forest Management Act states that other forest resources, besides timber, such as "wildlife and fish habitats, water, air, aesthetics, and wilderness ... must be protected and improved. Consideration of these resources is an integral part of the planning process." [FN49] The National Forest Management Act authorizes standards, considerations, and guidelines in planning for the balanced management of the National Forests. [FN50]

Management planning under the National Forest Management Act is a three step process. Planning regulations are first promulgated, [FN51] local draft plans are prepared in accordance with the regulations, [FN52] and the draft plans are then revised at minimum intervals. [FN53] The Forest Service is to utilize an integrated approach in developing and maintaining the management plans. [FN54] Although substantial discretion is left to the Forest Service, the National Forest Management Act prescribes specifics for such priorities as providing for a diversity of plant life, [FN55] prohibiting irreversible soil and watershed damage, [FN56] protecting water resources, [FN57] limiting the size of clearcuts, [FN58] and mandating a sustainable annual timber yield. [FN59] Also, the plan must reflect possible and proposed future activities. [FN60] Due to comprehensive planning requirements of the National Forest Management Act, some

have called it the "new Organic Act" of the Forest Service. [FN61] Essentially, the National Forest Management Act mandates a planning process establishing procedural, as well substantive, standards and guidelines. It directs the Forest Service in three primary ways. First, it requires development of long-term integrated plans for each forest unit that will be amended at least every fifteen years, or more often if needed. Second, it directs the promulgation of regulations detailing the substantive directives for forest management. Third, it provides for public involvement in the planning process. [FN62]

Perhaps the most undeveloped of these functions from the point of view of standing is that of public involvement. Section 6 of the National Forest Management Act commands the Secretary to provide for public participation at all levels of forest planning: development, review, and revision. [FN63] The regulations encourage public involvement generally [FN64] and provide for public input in determining the purpose and needs of the local forest unit. [FN65] Outlined by the regulations, the objectives of public participation are to broaden the information base upon which land and resource management planning decisions are made; ensure that the Forest Service understands the needs, concerns, and values of the public; inform the public of Forest Service activities; and provide the public with an understanding of Forest Service programs and proposed activities. [FN66]

Participation of interested parties is a vital element of the intended planning process. Nothing in the National Forest Management Act implies that Congress expected this participation to end with the adoption of the plan. However, by failing to supply a citizen's cause of action (or citizen suit) provision, the National Forest Management Act does not explicitly give the public the right to participate in the judicial review of forest plans. Whether the detailed public involvement provisions in the statute and regulations extend the public's opportunity to influence forest plans to the judicial review stage is a question that, by default, has been left up to the courts.

### III. STANDING TO SUE

The doctrine of standing to sue requires a party to have a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." [FN67] The United States Constitution limits federal courts to adjudication of "cases" and "controversies." [FN68] The Constitution, however, does not delineate the extent of the "cases and controversies" language. The Supreme Court has developed a body of case law that defines standing as required by the Constitution. Although not constitutionally required, courts have created a second phase of policy-based standing that plaintiffs must also satisfy, which is known as prudential standing. [FN69] Prudential standing is utilized to limit court dockets, reduce the scope of judicial review, and give deference to agency actions. Plaintiffs, then, must overcome three hurdles: standing as required by the Constitution, standing as required by prudential concerns, and the issue of ripeness.

#### A. Constitutional Standing

Constitutional standing has a minimum of three elements.

First, the plaintiff must have suffered an "injury in fact" ....  
Second, there must be a [causal] connection between the injury and the conduct complained of--the injury must be "fairly ... trace[able] to the challenged action of the defendant" .... Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. [\[FN70\]](#)

## 1. Injury in Fact

The centerpiece of constitutional standing is the injury in fact component. [\[FN71\]](#) Environmental and aesthetic injuries are sufficient to satisfy this requirement. [\[FN72\]](#) Historically, plaintiffs had to plead economic or property injury, but in 1970 the Supreme Court held that noneconomic injury could form the basis for standing. [\[FN73\]](#) The concept of "environmental standing" [\[FN74\]](#) originated in *Sierra Club v. Morton*, [\[FN75\]](#) when the Court acknowledged that environmental values could form the background for standing by recognizing that environmental well-being is an "important ingredient in the quality of life" and the fact that environmental interests are shared by a large number of people does not make "them less deserving of legal protection through the judicial process." [\[FN76\]](#)

The Court's interpretation of the injury in fact requirement has ebbed and flowed from a high point in 1973 [\[FN77\]](#) to what appears to be a low point in the 1990s. [\[FN78\]](#) In 1990 the Supreme Court further restricted the limits of standing and tightened the mandates of the injury in fact requirement. [\[FN79\]](#) In *National Wildlife Federation v. Lujan (Lujan I)*, [\[FN80\]](#) the plaintiffs challenged a Bureau of Land Management ad hoc program that reviewed land withdrawal decisions. The plaintiffs claimed that the "program" violated the Federal Land Policy and Management Act and the National Environmental Policy Act. [\[FN81\]](#) The National Wildlife Federation submitted an affidavit stating that one of its members visited some areas affected by the Bureau of Land Management's program. The Court rejected the plaintiffs' claims for lack of standing. The Court's decision emphasized the need to show how particular individuals are affected by the contested agency action. The National Wildlife Federation's affidavit lacked sufficient specificity to establish the injury in fact component. [\[FN82\]](#) This holding requires plaintiffs to plead, with heightened detail, a concrete injury from agency action in the contested area that is frequented by the members of the representative organization. [\[FN83\]](#)

The Supreme Court's trend toward increasing the plaintiff's standing burden continued in 1992 with the Court's decision in *Lujan v. Defenders of Wildlife (Lujan II)*. [\[FN84\]](#) This case increased the fact-pleading responsibilities of the plaintiff and further curtailed the interpretation of injury in fact. The majority held that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." [\[FN85\]](#) Imminence of harm must be specifically established by the submitted affidavits of the party. [\[FN86\]](#) This appears to mean that plaintiffs must state the exact times when they or their members use or expect to use the specific areas in question. The Court also stated that procedural injury alone would not support a finding of standing. [\[FN87\]](#) Instead, a procedural interest equates to standing only when agency disregard of the procedure at issue would result in a separate substantive injury. [\[FN88\]](#)

## 2. Causation/Traceability and Redressability

Causation addresses the question of whether the injury a plaintiff complains of has been caused by or can be fairly traced to the conduct of the defendant. In other words, this component asks whether the "line of causation between the ... conduct and [the] injury [is] too attenuated." [FN89] Redressability is the third element, and it is closely related to causation. [FN90]

Redressability inquires into whether the "prospect of obtaining relief from the jury as a result of a favorable decision is too speculative." [FN91] Essentially, the court must be able to offer the plaintiffs a satisfactory resolution to the injury suffered. [FN92] Redressability is interrelated with the first two requirements. Unless the plaintiffs suffer actual injury that is caused by the defendant, the court's remedy would not redress the plaintiffs' harm. [FN93]

### B. Prudential Standing

Once a court finds that a party has satisfied the threshold tests of constitutional standing, the court must then determine if the prudential standing elements are present. [FN94] Prudential restrictions require that the plaintiff's injury fall within the "zone of interests" protected by the statute under which the plaintiff's claim arises, [FN95] involve the party personally, [FN96] and does not amount to a "generalized grievance." [FN97] Obviously, these components are very similar to the constitutional requirements, and courts have often confused the limit and application of each. Courts frequently combine constitutional analysis with prudential analysis or call their inquiry into statutory requirements "prudential standing." For the sake of simplicity, only the zone of interest element will be discussed, as the remaining two requirements are fairly self-explanatory. [FN98]

In a world where the courts do not confuse the principles of constitutional and prudential standing, three broad contexts for standing exist. First, in cases where no citizen suit provision applies, constitutional and prudential standing requirements are examined. Second, cases can be brought under the Administrative Procedure Act to address agency action under a statute that does not otherwise provide for citizen initiated judicial review. Finally, where a statutory citizen suit provision is available, both constitutional and statutory requirements must be met. When determining standing under a statute with a citizen suit clause, the court should look for satisfaction of the elements Congress defined as that statute's standard of review. If, however, the suit is brought under a statute without such a provision, the analysis should fall back on prudential requirements.

This dichotomy is complicated in situations where the plaintiff alleges procedural injury from an agency action under the Administrative Procedure Act. For example, in forest plan litigation, plaintiffs frequently allege injury under the National Environmental Policy Act and the National Forest Management Act. Neither statute provides a private right of action for violation of its provisions. Challengers must therefore bring suit pursuant to section 10(a) of the Administrative Procedure Act. This section states that "a

person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." [\[FN99\]](#) Thus, prudential standing is converted back to statutory standing because the underlying statutory provisions form the basis for standing. For all meaningful purposes in resource plan litigation, satisfaction of the Administrative Procedure Act standard substitutes for the prudential standing examination. [\[FN100\]](#)

The two essential elements of the Administrative Procedure Act's standing provision are agency action and zone of interest. The plaintiff must first establish that he or she has been harmed by an agency action. Agency action is defined as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." [\[FN101\]](#) If the plaintiff is seeking judicial review pursuant to the general review provision of Administrative Procedure Act section 10(a), as opposed to the specific provisions of the underlying statute, the alleged agency action must be "final." [\[FN102\]](#) This requirement comes from the language of Administrative Procedure Act section 704: "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." [\[FN103\]](#)

Under the second prong, zone of interests, a plaintiff must show that his or her injury was either a legal wrong or an aggrievement caused by the final action. [\[FN104\]](#) Whether a plaintiff has suffered a legal wrong or an aggrievement is determined within the meaning of the underlying statute that forms the basis for the plaintiff's complaint. In other words, the injury must fall within the zone of interests sought to be protected by the statutory provision at issue. [\[FN105\]](#) This test is intended to distinguish between cases that are "more likely to frustrate than further statutory objectives." [\[FN106\]](#) The zone of interests protected under the National Environmental Policy Act include recreational, environmental, and aesthetic concerns. [\[FN107\]](#) Economic concerns have been found to fall outside the scope of the National Environmental Policy Act. [\[FN108\]](#) The National Forest Management Act provides for several interests including timber, recreation, watershed, and wilderness usage. [\[FN109\]](#)

### C. Ripeness

Ripeness is simply another justiciability concept that has an intertwined role in resource plan litigation. To gain judicial review, a claim must be sufficiently mature so that it is considered a "controversy" as required by Article III of the Constitution. This requirement prevents the courts from reviewing hypothetical issues that have not ripened into actual, present controversies. In summary:

[the] basic rationale of "ripeness doctrine" arising out of [a] court's reluctance to apply declaratory judgment and injunctive remedies unless administrative determinations arise in context of a controversy ripe for judicial resolution, is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, and [a] court is required to evaluate both fitness of issues for judicial decision and

hardship to parties of withholding court consideration. [FN110]

Ripeness is a timing principle that is closely related to the "final agency action" requirement in the Administrative Procedure Act standing test. [FN111] In the context of agency action, the ripeness doctrine requires that the claim come only after a "final" agency action. Thus, for forest plans, the issue is at what point the Forest Service's action is considered "final," the management plan stage or the project/on-the-ground activity stage. Courts, specifically the Eighth and Ninth Circuits, have answered this question differently.

#### IV. THE SPLIT BETWEEN THE CIRCUITS

As noted throughout the above discussion, the courts have not been consistent in their application of the standing and ripeness doctrines. The divergent opinions of the Eighth and Ninth Circuits regarding the ability of plaintiffs to challenge national forest management plans are characteristic of this inconsistency. These circuits answer two crucial questions differently.

The first issue is determining what *Lujan I (National Wildlife)* and *Lujan II (Defenders)* require for plaintiffs to establish standing. The second issue concerns the nature and actionability of a forest plan. These two issues are interrelated. The Eighth Circuit held that because forest plans are only a management tool, plaintiffs can suffer no injury in fact under the requirements of the Supreme Court cases. [FN112] The Ninth Circuit, on the other hand, has held that the plans play an important if not critical role in forest management and, to the extent that they "predetermine the future, they represent a concrete injury that plaintiffs must ... have standing to challenge." [FN113] The Ninth Circuit affirms this holding to be valid in light of the *Lujan* Supreme Court cases. [FN114] The consequences of this split affect at least three aspects of a plaintiff's case: the specificity of facts pled, the timing of the challenge, and the basis of the challenge. Other courts have taken up these issues, but this article will only discuss the holdings of the Eighth and Ninth Circuits, as these are representative of the two positions the federal courts have adopted regarding standing. [FN115]

##### A. The Eighth Circuit: *Sierra Club v. Robertson*

Recently the Eighth Circuit decided *Sierra Club v. Robertson*, [FN116] apparently the first case to be brought before that circuit challenging a forest plan as a whole. In addition to the Sierra Club, other plaintiffs were the defenders of the Ouachita Forest, several individuals, and the State of Arkansas as an intervenor. These parties brought suit against the Forest Service and timber industry intervenors for the management and planning of the Ouachita National Forest. The plaintiffs sought judicial review at two levels of planning for the forest, the forest plan level and the site-specific timber sale level. The plaintiffs alleged that the amended management plan violated the requirements of the National Environmental Policy Act, the National Forest Management Act, and the Administrative Procedure Act. They also alleged that the final environmental impact statement that was prepared in conjunction with the management plan and record of decision was inadequate. The plaintiffs further alleged that two specific timber sale

decisions violated both the National Environmental Policy Act and the National Forest Management Act. [\[FN117\]](#)

The district court denied a preliminary injunction barring the two sales. [\[FN118\]](#) The district court had previously held that the environmental groups had standing to challenge the Forest Service's decisions regarding timber sales and adoption of the plan and that the decisions were final agency actions overcoming the ripeness barrier. [\[FN119\]](#) Eventually, the district court granted summary judgment in favor of the defendants, finding that the plan satisfied both the National Forest Management Act and the National Environmental Policy Act. [\[FN120\]](#) The Sierra Club then appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the grant of summary judgment but reversed the district court's finding of standing. [\[FN121\]](#)

The district court's well-reasoned opinion is in stark contrast to the Eighth Circuit's brief and conclusory decision. The district court opinion began its standing analysis by reviewing the constitutional requirements. [\[FN122\]](#) At the time of the opinion, the Supreme Court had not decided *Lujan II*. As to injury in fact, the district court refused to accept the defendants' view that the management plan was only a "programmatic statement of intent." The district court stated that the standing inquiry directly connects to the determination of whether the plan is a "final agency action" for purposes of the Administrative Procedure Act. [\[FN123\]](#) The district court confused the injury in fact, prudential, and ripeness requirements.

Continuing with the constitutional components, the district court found both causation, because the management plan designated specific areas suitable for timber as well as methods of production, and redressability. [\[FN124\]](#) Next the district court reviewed statutory standing under the Administrative Procedure Act. The court defined and explained the two part test of final agency action and zone of interests. [\[FN125\]](#) Finding that the plaintiffs' interests are definitely protected by the National Environmental Policy Act and the National Forest Management Act, the zone of interest test was satisfied. [\[FN126\]](#)

The court addressed the "final agency action" element in its discussion of ripeness. Paraphrasing the defendants' arguments that the adoption of the land resource management plan is not a final agency action, the court stated: "Rhetoric aside, the defendants essentially base ... their [argument] on the assertion that the [management plan] and [environmental impact statement] are of so little import that their approval can neither injure the plaintiffs nor be described as any sort of action." [\[FN127\]](#) The court rejected this argument, distinguishing *Lujan I* on the basis that the Supreme Court in that case was not reviewing an actual and integrated program mandated by a statute. [\[FN128\]](#) The court further determined that the management plan had specific directions as to how management decisions are to be made including, in the context of the vegetation management plan, what tools and methods are allowed, the frequency of treatment, and mitigation methods that may be used in future site-specific decisions. [\[FN129\]](#) The court noted that the management plan is a "final plan, and no other management guidelines for the forest as a whole need come now." [\[FN130\]](#) In summary, the district court concluded that "the Supreme Court in *Lujan I* clearly did not intend to preclude review of a plan simply because a project level decision ... had not been made." [\[FN131\]](#)

On appeal, the Eighth Circuit also started its analysis with a discussion of constitutional standing, quoting from the then recently decided *Lujan II (Defenders of Wildlife)* case. [FN132] Although the court acknowledged that environmental harms could be sufficient to confer standing, [FN133] it emphasized that the plaintiffs had not asserted an injury that was "certainly impending," thereby failing to meet the Article III injury in fact test. [FN134] The court made several broad statements concerning the nature of a forest plan, assuming the plan's adoption could not inflict injury because it "does not effectuate any on-the-ground environmental changes." [FN135] Calling the management plan a "general planning tool," [FN136] the court first required a site-specific action to be proposed and found consistent with the plan before review could be made, lest the court move into an area of "speculation and conjecture." [FN137]

The court flatly refused to accept the series of Ninth Circuit cases that entertained challenges to similar forest plans. Specifically, the court found it hard to determine the "concrete" and "particularized" injury upon which the holdings must have been based, assuming the Ninth Circuit decisions were intended to be in conformity with the *Lujan* cases. The Ninth Circuit, however, in *Resources Ltd. v. Robertson*, [FN138] made the grant of standing in light of the two *Lujan* cases, determining that its decision was both consistent and appropriate given the facts of the *Resources* case.

#### B. The Ninth Circuit: *Resources Ltd. v. Robertson*

Continuing a line of cases that grant standing to forest plan challenges, the United States Court of Appeals for the Ninth Circuit in *Resources* reflected upon its recent decisions and their relation to the *Lujan* cases. For this reason, *Resources* was chosen as the representative case of Ninth Circuit reasoning concerning standing. In that case the plaintiffs, several environmental groups, asserted that the defendant Forest Service violated the National Environmental Policy Act, the National Forest Management Act, and the Endangered Species Act. The plaintiffs also challenged the Flathead National Forest management plan and its related forest-wide environmental impact statement. [FN139] The plaintiffs claimed that the Forest Service's decision that the management plan's adoption would not harm endangered and threatened species was arbitrary and capricious and that the related environmental impact statement was inadequate. [FN140] The district court held that the plaintiffs lacked standing and the issue was not ripe for review, following similar arguments as the Eighth Circuit and relying upon an earlier case from the same district court that was eventually reversed by the Ninth Circuit. [FN141] The court, therefore, granted summary judgment for the defendants on all counts. [FN142]

The plaintiffs appealed the district court's decision. The Ninth Circuit issued a threefold decision, reversing the district court's findings as to standing and ripeness, affirming that the environmental impact statement was adequate, and finding that the Forest Service acted arbitrarily and capriciously when the agency concluded the plan to allow logging in the forest would not harm endangered and threatened species, thereby reversing the district court's grant of summary judgment on that issue. [FN143] The holding of the district court as compared to the appellate court in *Resources* is nearly the exact reverse of *Sierra Club v. Robertson*. Interestingly, so are the reasonings of the appellate courts.

As is customary in standing analyses, the *Resources* court started with the issue of constitutional standing, quoting *Lujan II*'s three-part test. [FN144] It then directed its attention to the district court's finding that the plaintiffs failed to satisfy the injury in fact requirement. Because the district court relied upon its previous decision in *Idaho Conservation League v. Mumma* [FN145] that was reversed upon appeal, the Ninth Circuit court reiterated its rationale behind that reversal. [FN146] In the *Mumma* appeal, [FN147] the court had recognized the importance of the plan decision. Basing its determination on the perceived intention of Congress, the *Resources* court found constitutional standing had been fulfilled and repeated several observations made in *Mumma*. [FN148] The court reiterated that unless it is assumed that Congress intended to create useless procedural safeguards in the National Forest Management Act, the plan plays "some, if not a critical, part in subsequent decisions." [FN149] The court also repeated that unless plaintiffs may challenge the forest-wide environmental impact statement, the plan itself may forever escape review, [FN150] and "to the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge." [FN151] The district court in *Sierra Club v. Robertson* expressed a concern similar to the Ninth Circuit that some maneuvering on the part of the Forest Service, namely the sporadic withdrawal of challenged timber sales, could insulate the agency's activities from review. [FN152]

The court rejected the Forest Service's argument that the *Mumma* decision was invalid after the *Lujan* decisions. [FN153] In fact, the Ninth Circuit had just decided two more cases, in light of *Lujan I* and *Lujan II*, that reaffirmed *Mumma*'s continuing validity. Those cases were *Seattle Audubon Society v. Espy* [FN154] and *Portland Audubon Society v. Babbitt*. [FN155] The court cited these cases and their rationale as evidence that their reasoning was not in conflict with *Lujan I* and *Lujan II*. [FN156] In a footnote, the court reiterated that a person can enforce his or her procedural rights. [FN157] This rule was not altered by *Lujan II* as long as the procedural rights were intended by Congress to protect against some threatened concrete injury, for instance, that the person is harmed by the underlying government action and not merely by a procedural violation. [FN158] The Ninth Circuit further recognized that Congress has acknowledged the procedural harm alleged by the plaintiffs, by imposing the National Environmental Policy Act requirements on planning activities. [FN159] In *Resources* and other similarly decided Ninth Circuit cases, the affidavits satisfied the heightened fact pleading requirements of *Lujan I* and *Lujan II*, thus reinforcing the Ninth Circuit's analysis of the *Lujan* cases. [FN160]

Expressly rejecting the argument that the plaintiffs must wait for a specific timber sale to be proposed, the court held that the plaintiffs' claim was ripe for review. [FN161] Citing *Espy*, the court affirmatively acknowledged that certain timber sales are "driven" by the underlying management plans. [FN162] Therefore, there was no need to wait for specific project proposals to invoke judicial review because in some measure the plans "pre-determine" the future [FN163] and represent final agency action.

Likewise in *Salmon River Concerned Citizens v. Robertson*, [FN164] the Ninth Circuit granted standing and ripeness based instead upon the Administrative Procedure Act test. The court found that the minimum Article III requirements had been met. [FN165] In addition, the court held that the statutory elements, "final agency action" and "zone of interest," (though different from constitutional standing, but related to ripeness), were also satisfied by the plaintiffs' claimed injury of an inadequate environmental impact statement prepared for a forest herbicide program. [FN166] The court stated that it had previously held that when a party's complaint is with an overall

forest plan or program, the party does not have to wait to challenge a specific project. [\[FN167\]](#)

## V. SHOULD THERE BE FOREST PLAN STANDING?

Opponents of allowing parties to challenge forest plans, namely the Forest Service and other land management agencies, insist that the plans are nothing more than broad statements of intent and outlines of principles that the forest managers may consider when making on-the-ground decisions. Their arguments can be grouped into three categories: those based on the perceived nature of forest plans, those citing the recent Supreme Court decisions and the traditional standing doctrine, and those founded on policy considerations.

In the first category, it is argued that plans only suggest standards and guidelines for management. The forest supervisors are not bound by the plan and may change and amend it if the need arises. [\[FN168\]](#) In other words, the plan does not dictate ground level activities and decisions with absolute certainty. Due to intervening circumstances, the standards of the plan can be altered. These circumstances may include budget cuts, plan amendments, litigation, and adoption of regional Resources Planning Act timber harvest targets. Because the forest plan standards are frequently changed, the challenging party's injury is rendered conjectural and hypothetical. Supporting this argument is the fact that each site-specific project requires its own environmental assessment, potentially an environmental impact statement, and a record of decision. [\[FN169\]](#)

In response to these arguments, it should be pointed out that it is the intent of Congress and the agency for the plans to determine how the federal lands are to be managed. [\[FN170\]](#) First, consistency of on-the-ground projects with the relevant forest plan is required by the National Forest Management Act, the Forest Service regulations, and by the agency's administrative rules. The National Forest Management Act requires "resource plans and permits, contracts, and other instruments for the use and occupancy of the National Forest System to be consistent with the land management plans." [\[FN171\]](#) Forest Service regulations reiterate this intent by requiring all administrative activities affecting the unit, such as budget proposals, to be based upon the plan. [\[FN172\]](#) Further, the Forest Service Land and Resource Management Planning Handbook directs the agency to "make site specific decisions based on the Forest Plan direction." [\[FN173\]](#)

Second, several statutory obligations are triggered if an agency determines that its action will have an on-the-ground impact. For example, the Endangered Species Act demands consultation with the Fish and Wildlife Service if an agency decides its action "may affect" a listed species. [\[FN174\]](#) If the Forest Service has abided by these obligations and found impact from its plan adoption or implementation, then the agency itself is acknowledging that the plan "affects" the forest environment and its site-level management.

The third and potentially most important counter-argument focuses on the intent of Congress. The Arkansas district court and the Ninth Circuit both implicitly accepted this

argument by finding forest plans to be more than useless procedural safeguards. Asserting that forest plans mean nothing to specific activities ignores the intent of Congress and assumes Congress meant to create an exercise in futility by establishing the huge, time-consuming, and expensive forest planning process. Congress intended to influence local forest management activities and chose the planning process as the means to effectuate its objectives expressed in the National Forest Management Act. This intent is especially apparent given the circumstances in which the Act was enacted. [\[FN175\]](#)

A second category of arguments advocating denial of standing concentrates on the demands of the *Lujan* cases and traditional standing analysis. In addition to the injury in fact arguments already discussed in Part III, the injury of forest plan plaintiffs may be too remote and attenuated to be fairly traceable to the act of adoption of the forest plan in question. This line of argument is fact dependent and varies in success depending upon the statutory violation that is alleged. In *Sierra Club v. Robertson*, the plaintiffs claimed that the plan was arbitrary and capricious, thus violating certain provisions of the National Forest Management Act, including the requirement of an integrated plan. [\[FN176\]](#) These allegations do not lend themselves readily to a finding of causation. Connection of the indirect effects of large scale actions, such as a forest plan to the injuries of particular persons, is tenuous at best. [\[FN177\]](#) Whether the lack of an integrated plan could be directly linked to any harm claimed by the plaintiffs is speculative.

For example, in *Resources* the alleged violations of the Endangered Species Act could be traced more readily to the adoption decision of the Forest Service, according to the Ninth Circuit. [\[FN178\]](#) In *Resources*, the plan designated specific management areas with each emphasizing a certain resource, such as timber harvest or grizzly bear habitat, and limited the types of management activities within its boundaries. The plaintiffs alleged that because grizzly bears do not recognize discrete management areas as the limits of their habitat, the bears, as a listed species, could be harmed by the management area designation and resulting management activities prescribed by the plan. Therefore, the plaintiffs would be injured as well. Impacting a listed species is a violation of the Endangered Species Act. Although the Ninth Circuit found this to be sufficient injury for standing purposes, it is unclear whether such a reading is consistent with *Lujan II*. [\[FN179\]](#)

Another fact-related argument is that the *Lujan* cases place on plaintiffs stricter pleading requirements to establish with heightened specificity their alleged injury. This hurdle may be hard, if not impossible, to overcome in a plan challenge. The plaintiffs may be expected to show the precise location and dates that they used the forest. The response of standing proponents should be that with the right facts, this would not be an extra burden. It is merely an issue of sufficiency of the facts pled. [\[FN180\]](#)

Numerous policy-laden arguments, the third class of arguments against standing, can be made by proponents of standing as well as opponents. The Eighth Circuit held that the plaintiffs had to delay their challenge until a site-specific decision, such as timber sales or vegetation treatment, was made. [\[FN181\]](#) This deferral would not only avoid presenting abstract questions to the court, but would also allow judicial review to occur on a more controllable level. The facts of the decision would be more detailed and less open to dispute. Delay in review would also eliminate the chance that courts would be required to issue advisory opinions on provisions of the plan which are not yet

implemented.

In response, the plaintiffs, the Arkansas district court, and the Ninth Circuit argue for a form of judicial efficiency. If several actions threaten harm, it is much less costly and more efficient simply to challenge the plan as a whole rather than repeatedly sue over each activity. Similarly, if the court requires a deferral, the plaintiff would be denied the review of the management plan's validity and would be put in the "unhappy, not to mention costly, position of being required to file numerous complaints before getting to the stage where judicial review could be granted." [\[FN182\]](#)

Furthermore, the planning process envisioned by Congress encouraged public involvement and was not intended to be insulated from review. [\[FN183\]](#) If a court insists upon delay in challenging a plan until implementation, broad mandates and standards in the plan could forever escape review. Likewise, under a deferral policy, the Forest Service may evade review of some of its activities by issuing a decision, upholding it on administrative appeal, then withdrawing it when a plaintiff files a lawsuit. [\[FN184\]](#)

Perhaps the most persuasive justification for review is the resource efficiency argument. A plan challenger put it best:

the agency has ... spent hundreds of millions of dollars and countless employee hours on this planning effort. Planning participants, Forest Service employees, and taxpayers alike must be quite chagrined to learn that, after huge expenditures of time, money, and effort, the Forest Service views forest plans as having merely an "extremely conjectural" influence over subsequent forest management activities. [\[FN185\]](#)

One commentator estimated that over \$1 billion has been spent in a process which took over ten years to complete. [\[FN186\]](#) This rationale is strengthened by the related arguments of congressional intent and judicial efficiency. As noted earlier, if Congress created the planning process with no expectation of impacting on-the-ground activities, then it created nothing more than a huge waste of taxpayers' money. Also, if the plan and its authorizing mandates are incapable of review, more waste of public and judicial resources will result by requiring plaintiffs to bring piecemeal litigation challenging site-specific activities.

## VI. CONSEQUENCES AND OBSERVATIONS

### A. Getting to Trial

In light of the above observations, attorneys might question how they should go about getting their forest or resource management plan case to trial. It is important to note that the pleadings should incorporate two distinct concepts. First, the plaintiff's connection to the area that is the subject of the agency action must be described. Second, the plaintiff's statutorily protected interest that may be impaired by agency action must be characterized, along with the possible injury that would result.

First, given the *Lujan* cases, it should be emphasized that facts must be established with excruciating detail and methodology. It is not enough to have visited the area at issue a few times or to have limited the use to a small area. Therefore, choosing a plaintiff who has the requisite connection to the managed area is of foremost importance. The challenger should be someone who has used and enjoyed a wide portion of the area on a regular and repeated basis. Second, the description of the injury is the key to establishing standing. The court, in determining standing, should be looking at the injury in terms of the applicable law to determine what injustice that law was created to prevent. [FN187] Therefore, the injury should not be expressed as the lack of government action, such as an enforcement action, but as government intrusion on a personal and concrete interest that is protected by the underlying law. In resource plan litigation, this can translate into describing the interest as an opportunity that is protected by the agency's governing statute. For example, the plaintiff's injury should be characterized not as the lost ability to see a certain forest at a certain time, but as impairment of the opportunity to experience a national forest, an interest acknowledged by the Multiple-Use Sustained-Yield Act and the National Forest Management Act. [FN188] To describe the harm in terms of the legal remedy available from the statute (i.e., from a favorable decision on the merits) is to characterize the injury so that it satisfies both the injury in fact and redressability requirements for standing. [FN189]

Linking the injury with the remedy is also applicable in procedural injury cases arising under the National Environmental Policy Act and the Administrative Procedure Act. In such cases, it is frequently argued that even if the agency had complied with the procedural regulations, its decision would not have changed. Thus, the attorney should explain the injury as the enhanced possibility of harm from the agency's failure to comply with procedure. [FN190] To be absolutely sure that the procedural injury would suffice for standing, it should be based upon a procedural interest protected by statute, result in an infringement of a recognized substantive interest, and be particularized as to the plaintiffs. [FN191]

It is notable that the facts and submitted affidavits of the environmental plaintiffs in both *Lujan* cases were noticeably deficient. The Supreme Court has not yet addressed a case where the plaintiffs pled with detail their continued use and enjoyment of the area to be impacted by a challenged resource plan. [FN192] This leaves open the possibility of distinguishing *Lujan I* and *Lujan II* on their facts. For example, it is arguable that a forest plan is intrinsically different from an ad hoc program as in *Lujan I*. In addition, it is arguable that adequate facts of the plaintiff's actual use of the environmentally impacted area is all that is required under *Sierra Club v. Morton*, regardless of what *Lujan II* seems to require. [FN193]

## B. Consequences of the Circuit Holdings

If the Supreme Court approves the Eighth Circuit's rationale, the legal analysis would have to arise from the assumption that the forest plans are only innocuous blueprints of prescriptions that are essentially nonbinding. This approach draws criticism in two main areas. First, there are many instances where the plaintiffs' objection is with the plan itself, not with immediate activities of the Forest Service. Each plan assumes a number of things including overall strategy and primary emphasis. If a party is concerned that, for example, ecosystem management is not being incorporated into forest management, how and when does he or she bring his or her complaint? For this example it is absurd to expect a party to challenge only on-the-ground activities, for that is not where the plaintiff's dissatisfaction resides. The lack of review to challenge entire plans impairs the interests of environmentalists and industry alike. Industry is just as likely to oppose a broad new formula of resource management as environmentalists are likely to complain that present strategies are outdated and harmful to the environment. As the

forest plans begin the stage of revision and amendment, public participation should be enhanced in accord with congressional intent, not limited.

Another major criticism of the Eighth Circuit's rationale and holding is that agency actions, including broad planning initiatives, should not escape review. As discussed in Part V, avoidance of review can occur if plaintiffs are required to delay challenge. Not only is it possible that the plans are never reviewed, but on-the-ground activities may also evade consideration through an administrative game of hide-the-ball and strategic withdrawal. If the Supreme Court adopts the Eighth Circuit's assumptions and reasoning, the Court would be validating this denial of public participation. It is not the role of the Supreme Court to reduce the public's ability to challenge government action when this right has been conveyed by Congress through substantive statutes and the Administrative Procedure Act. [FN194] It is further questionable whether prudential standing requirements are supported by the simple constitutional mandate of "cases" and "controversies." [FN195]

Alternatively, if the Supreme Court follows the Ninth Circuit's approach and decides that forest plans can directly impact site-specific projects, the Court would be acknowledging the management framework that Congress intended to control in the National Forest Management Act. The Court would not be opening the floodgates of litigation, but would be judicially recognizing the vital role public participation was meant to play in the disposition of our nation's public resources. Proper management of our natural resources is in the public interest, as well as a source of particular and individual importance, especially for those who are economically dependent on the resources and for those who gain environmental benefit from their existence. If the Ninth Circuit's formulation were adopted, the majority of the burden from successful challenges would fall on the Forest Service. The question, then, is who best should bear this burden--the people and the courts, or the agency which is already required to include public involvement and opinion in the planning process?

### C. Conclusion

A challenger's ability to contest agency action that impacts resource management is at stake in this controversy over forest plans. Extension of the eventual rule could influence litigation concerning mineral leasing, oil and gas exploration, rangeland disposition, and water allocations, to name a few. As forest plans are developed, modified, and implemented, and the courts are thus asked more frequently to intervene in the planning process, the opportunity for a definitive Supreme Court ruling increases. Even though proponents on both sides of the issue can justify their position, this important issue cannot be resolved by simply relying on old notions of standing and the assumed nature of the plans. The Court must instead review its assumptions about agency process and statutory mandate. Ultimately, this will require weighing arguments and observations that combine numerous public policy concerns including the extent of public participation in agency action, the role of the courts in effectuating this participation, judicial and public efficiency, and the intentions of Congress.

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[FN1]. The Forest Service, which follows a decentralized style of management, is divided into four management levels: Chief of the Forest Service, regional foresters, forest supervisors, and district rangers. The regional foresters administer the nine regional offices while the forest supervisors manage the 155 national forest units, such as the Ozark and Ouachita National Forests. Each forest unit's day-to-day management decisions are made at the forest supervisor level. DONALD C. BAUR ET AL., U.S. DEP'T OF AGRIC., NATURAL RESOURCES LAW HANDBOOK 178 (1991). Several sources provide guidance in the complex task of managing the nation's forests. The agency's primary statutes are found in Title 16 of the United States Code and the implementing regulations are at 36 C.F.R. Group 200. The Forest Service produces a forest service manual along with a line of handbooks for more comprehensive direction.

[FN2]. The National Forest System contains 155 national forests, 20 national grasslands, and many areas of valuable mineral and range resources. DONALD C. BAUR ET AL., U.S. DEP'T OF AGRIC., NATURAL RESOURCES LAW HANDBOOK 177 (1977). See *infra* part II, including note 25 and accompanying text for a more complete history.

[FN3]. Telephone interview with Roy L. Murphy, Chief Executive Officer, Mid-South Engineering Co. (an engineering firm that specializes in the design of forest products facilities) (Mar. 8, 1995).

[FN4]. *Id.* In Arkansas, as may be the case for other states with high federal forest ownership, the federal harvest level of the local forest units acts as a stabilizing mechanism for the local forest industry as a whole. *Id.*

[FN5]. The total land area of Arkansas, excluding inland waters, is approximately 33.6 million acres. The total acreage owned by the federal government is around 3.4 million acres. This represents 10.2% federal ownership as compared with other regional states such as 1.7% in Alabama and Texas, 2.2% in South Carolina, 3.6% in North Carolina, 4.6% in Missouri, 5.5% in Mississippi, and 6.1% in Georgia. Eastern seaboard states have much less; for example, 0.7% in New York, 1.6% in Massachusetts, and 2.8% in New Jersey. U.S. DEP'T OF AGRIC., PUBLIC LAND STATISTICS 1990 5, tbl. 4 (1989).

[FN6]. The National Forest System consists of 2.5 million acres of land in Arkansas. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. (114th ed. 1994). The gross area within the National Forest System boundary in Arkansas is 3.49 million acres. This total includes private and public lands within the unit boundary. *Id.*

[FN7]. Approximately 51% of Arkansas is forestland of which 15.9% is federally owned. FOREST SERVICE, U.S. DEP'T AGRIC., RESOURCE BULL. NO. SO-141, FOREST STATISTICS OF ARKANSAS COUNTIES (1988). Of the 16,673,000 acres of forestland in Arkansas, 15.9% is owned by the federal government, 2.1% is state-owned, and 81.9% is privately held. This percentage of federally managed timber is the highest for the southern area states of Oklahoma, Arkansas, Texas, Louisiana, Mississippi, Alabama, Tennessee, and Kentucky. U.S. DEP'T OF COMMERCE, STATE & METROPOLITAN AREA DATA BOOK 177 (4th ed. 1991). Another source cites the total forestland acreage of the state at 17.24 million acres not including non-commercial timberland. The breakdown by ownership is 18% government (federal, state, county, and city), 25% private forest industry, and 57% private non-industrial landowners. FOREST SERVICE, U.S. DEP'T AGRIC., RESOURCE BULL. NO. SO-141, FOREST STATISTICS OF ARKANSAS COUNTIES (1988); UNIV. OF ARK. BULL. NO. 908, THE ARKANSAS FOREST PRODUCTS INDUSTRY (1988).

[FN8]. Each forest products manufacturing job equates to at least three additional jobs in the forest industry. The value added by the forest products industry leads the manufacturing sectors of the state. The annual stumpage value of the state's timber

resource is estimated at \$237 million. FOREST SERVICE, U.S. DEP'T AGRIC., RESOURCE BULL. NO. SO-141, FOREST STATISTICS OF ARKANSAS COUNTIES (1988); UNIV. OF ARK. BULL. NO. 908, THE ARKANSAS FOREST PRODUCTS INDUSTRY (1988).

[FN9]. The Ozark and Ouachita Forests plans influence each of these concerns.

[FN10]. 16 U.S.C. §§ 1600-1614 (1994).

[FN11]. National Forest Management Act of 1976, Pub. L. No. 94-588, 83 Stat. 852 (codified as amended in scattered sections of 16 U.S.C.). See also *supra* note 10.

[FN12]. 16 U.S.C. § 1604 (1994). National and regional plans are also prepared. See 36 C.F.R. § 219.4 (1994). The Planning Act Assessment and Program is the mechanism for national planning. The assessment, prepared every 10 years, provides an inventory of forest resources and current and proposed Forest Service programs, as well as an analysis of the supply and demand for timber and other renewable resources. 16 U.S.C. § 1601 (1994). The Planning Act Program, submitted to Congress on five year intervals, reports the agency's forest management recommendations, budgetary needs, and expected production of national forests. *Id.* § 1602. An annual report must also be prepared which evaluates the achievement of the program objectives. *Id.* § 1606(c). Regionally, a plan is developed to guide region-wide administration and policy. It is subject to the National Environmental Policy Act. See 36 C.F.R. § 219.8-.9 (1994).

[FN13]. See 16 U.S.C. § 1604 note 1 (1994). The National Environmental Policy Act is codified at 42 U.S.C. §§ 4321-4347 (1994). The National Environmental Policy Act requires all federal agencies to consider the likely environmental effects of their activities. Section 101 establishes as the ongoing "policy of Federal Government to use all practicable means ... to create and maintain conditions under which man and nature can exist in productive harmony." National Environmental Policy Act § 101(a), 42 U.S.C. § 4331(a) (1994). To implement this broad directive, § 102 requires that all federal agencies prepare an environmental impact statement for each proposal for legislation and other "major federal action significantly affecting the quality of the human environment." National Environmental Policy Act § 102, 42 U.S.C. § 4332(2)(c) (1994). The environmental impact statement must include a detailed statement of environmental impacts, alternatives to the proposed action, and any irretrievable commitments of resources.

The procedure for determining whether an agency should prepare an environmental impact statement has three stages. Initially, the agency must determine if the action is one in which an environmental impact statement is normally required or if the action is one in which an environmental impact statement is normally not required. *Id.* If the action falls outside of these two categories (in other words, into the "gray area" in between), the agency must prepare an environmental assessment. *Id.* If, on the basis of the environmental assessment the agency determines not to prepare an environmental impact statement, it must make a finding of no significant impact. *Id.* If, however, the activity will result in significant impact then an environmental impact statement must be prepared. *Id.* A forest plan falls within the first category of always requiring an environmental impact statement.

[FN14]. The National Forest Management Act requires that the Forest Service "attempt to complete" the plans by September 30, 1985. 16 U.S.C. § 1604(c) (1994). By 1987 only a few plans had been completed and released for public review.

[FN15]. See *infra* notes 53 and 168.

[FN16]. For circuit court opinions, see Sierra Club v. Marita, 46 F.3d 606 (7th Cir.1995); Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994); Resources Ltd. v. Robertson, 35

F.3d 1300 (9th Cir.1994); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir.1993); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir.1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir.1992). For recent district court opinions see Wind River Multiple-Use Advocates v. Espy, 835 F.Supp. 1362 (D. Wyo. 1993); Southern Utah Wilderness Alliance v. Thompson, 811 F.Supp. 635 (D. Utah 1993); Sierra Club v. Cargill, 732 F.Supp. 1095 (D. Colo. 1990), rev'd, 11 F.3d 1545 (10th Cir.1993); Citizens for Env'tl. Quality v. United States, 731 F.Supp. 970 (D. Colo. 1989); Intermountain Forest Indus. Ass'n v. Lyng, 683 F.Supp. 1330 (D. Wyo. 1988).

[FN17]. 16 U.S.C. §§ 1531-1542 (1994).

[FN18]. The reason for this, as will be discussed infra in parts III and IV, is the distinction drawn between specific forest activities, such as timber sales, clearcuts, and pesticide applications, and the plan that authorizes these activities as "agency action." The question lies in whether the adoption of a plan results in an injury that is direct enough to establish standing.

[FN19]. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Lujan II); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (Lujan I).

[FN20]. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994).

[FN21]. The Ninth Circuit has found that grievances based on forest planning can result in an injury in fact. Ninth Circuit cases which have denied standing in this context have generally done so because the plaintiff did not plead sufficient facts to establish injury in fact or did not satisfy another element of standing such as the zone of interests or final agency action under the Administrative Procedure Act.

[FN22]. See Resources Ltd. v. Robertson, 35 F.3d 1300 (9th Cir.1994); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir.1993); Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir.1993); Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir.1992).

[FN23]. All major public land management agencies, such as the National Park Service, the Bureau of Land Management, the Forest Service, and the Fish and Wildlife Service, must engage in land and resource planning. The Forest Service and the Bureau of Land Management both must manage according to multiple-use criteria. The Forest Service's planning activities are controlled explicitly in the Planning Act, the National Forest Management Act, and the Multiple-Use and Sustained-Yield Act. See infra notes 31-40 and accompanying text. The Bureau of Land Management's specific congressional mandates for planning are contained in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1988), which was signed into law by President Gerald Ford on the same day as the National Forest Management Act. Although the planning guidelines for the National Park Service and the Fish and Wildlife Service are highly detailed, these agencies do not have to take into account the entire extent of commercial development. See 16 U.S.C. § 1 (1994) (National Parks) and 16 U.S.C. § 668(dd) (1994) (National Wildlife Refugees). CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 11 (1987).

[FN24]. OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, PUB. NO. OTA-505, FOREST SERVICE PLANNING: ACCOMMODATING USES, PRODUCING OUTPUTS, AND SUSTAINING ECOSYSTEMS 3 (1992).

[FN25]. The creation of the National Forest System began in 1876 when Congress took initial steps to protect and manage the nation's forest lands by appropriating money for the preparation of a report on forestry issues. After several decades of homesteading the

public lands to settlers and prospectors, the government had, in the late 19th century, begun to withdraw lands from disposition. In 1891 the first forest withdrawals or reserves were made pursuant to the Forest Reserve Amendment, 16 U.S.C. § 471 (repealed 1976). Initially within a division of the Department of Interior, the administration of the forest reserves was transferred to the Department of Agriculture in 1905. Transfer Act of Feb. 1, 1905, ch. 228, § 1, 33 Stat. 628 (codified at 16 U.S.C. § 472 (1994)). In 1907 the reserves were officially designated the National Forest System. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269. For a comprehensive history of the Forest Service and the National Forest System, see CHARLES F. WILKINSON & H. MICHAEL ANDERSON, *LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS* (1987); H. STEEN, *THE UNITED STATES FOREST SERVICE: A HISTORY* (1976); Charles F. Wilkinson, *The Forest Service: A Call for the Return to First Principles*, 5 PUB. LAND L. REV. 1 (1984); James L. Huffman, *A History of the Forest Policy in the United States*, 8 ENVTL. L. 239 (1978).

[FN26]. See *infra* notes 36 and 37 and accompanying text.

[FN27]. The Forest Reserve Amendment, or the "Creative Act," gave the President the authority to "set apart and reserve [land], in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations." 16 U.S.C. § 471 (repealed by Pub. L. No. 94-579, 90 Stat. 2792 (1976)). On March 30, 1891, less than one month after the passage of the Forest Reserve Amendment, President Hardin exercised his new discretion and reserved and established the Yellowstone Park Forest Reserve. By the mid-1890s, Hardin had reserved a total of 13 million acres in 14 new reserves. WILKINSON & ANDERSON, *supra* note 23, at 18, n.57.

[FN28]. 16 U.S.C. §§ 472-482 (1994) (§ 476 repealed in 1976). Section 475 states that the forests may only be established "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475 (1994).

By 1911 the majority of forest lands reserved from disposition of the public domain were located in the western United States. Congress provided for federal acquisition of valuable timber production land by purchase or land exchange in the Weeks Law (codified at 16 U.S.C. §§ 515-520 (1994)). This Law was enacted to create national forests in the eastern United States, where there was a lack of public domain.

[FN29]. This reputation was partially the result of the leadership of Gifford Pinchot, the chief forester of the Department of Agriculture's Division of Forestry from 1898 until the forest reserves were transferred from the Department of the Interior to the Department of Agriculture in 1905. At that time Pinchot became the first Chief of Forestry over the newly created Forest Service. Pinchot's influence over his close friend Theodore Roosevelt is thought to be the reason behind not only the massive presidential forest land withdrawals of the late 18th and early 19th centuries, but also the fairly unusual switch from the Interior to the Agriculture Department. His theories and techniques of forestry led to the decentralized style of management in the Service and its unique independence as a federal agency. See GIFFORD PINCHOT, *BREAKING NEW GROUND* (1947) (Pinchot's autobiography) and HAROLD W. WOOD JR., *PINCHOT AND MATHER: HOW THE FOREST SERVICE AND PARK SERVICE GOT THAT WAY* (1976).

[FN30]. Until recently, the congressional mandates were generally thought simply to mean that the Forest Service was "to harvest timber on the national forests in the manner it thought best." See COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCE LAW* (3d ed. 1991).

[FN31]. See *supra* note 29.

[FN32]. COGGINS ET AL., supra note 30, at 606.

[FN33]. WILKINSON & ANDERSON, supra note 23, at 20-21. Pinchot advocated the conservation tradition of planning as opposed to the utilitarian theory. He expected each planner to develop a comprehensive inventory of forest resources, to exclude sensitive areas or areas in need of protection from use, to monitor the conditions of the forest, and to ascertain the sustainable levels of use. WILKINSON & ANDERSON, supra note 23, at 23. These four characteristics are incorporated into the modern version of planning under the National Forest Management Act.

[FN34]. Planning followed in a path from timber and range plans during the Pinchot era, to recreation and wilderness planning in the 1920s and 1930s, to land use plans under the mandate of Congress in the 1960s and 1970s. WILKINSON & ANDERSON, supra note 23, at 15-45.

[FN35]. 16 U.S.C. §§ 528-531 (1994).

[FN36]. The Multiple-Use Sustained-Yield Act was congressional ratification of reality. Attempting to address the demands of all the users of the forest (the recreational segment, ranchers, timber operators, and reclamation interests), the Forest Service needed further guidance as to its mission. It seems the Forest Service walked a narrow line and requested clarification of purpose legislation while simultaneously arguing it had whatever authority it needed already. See COGGINS ET AL., supra note 30, at 622.

[FN37]. 16 U.S.C. § 528 (1994). The order of this list of uses was of particular importance. Although it was in alphabetical order, in an attempt to pacify the growing recreationist movement, the term "outdoor recreation" was put at the head of the list by adding "outdoor" to "recreation" and rearranging the common phrase "fish and wildlife."

[FN38]. Id.

[FN39]. "Multiple use" is defined in the act as "the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people." 16 U.S.C. § 531 (1994). "Sustained yield" means "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." Id.

[FN40]. The Multiple-Use Sustained-Yield Act has been a frequent target for criticism from commentators and courts alike. Its directives are stated in broad and imprecise language, which has led to the argument that it does not offer any true guidance for forest administration, nor does it contain any judicially reviewable standards. See Perkins v. Bergland, 608 F.2d 803 (9th Cir.1979); C. REICH, BUREAUCRACY AND THE FORESTS (1962) (considering the breadth of the Act's mandates); Comment, Managing the Federal Lands: Replacing the Multiple Use System, 82 YALE L.J. 787 (1973) (suggesting abolition); Steven E. Daniels, Rethinking Dominant Use Management in the Forest-Planning Era, 17 ENVTL. L. 983 (1987) (arguing for a dominant and multiple use combination approach). It is arguable that, because it gives so much discretion, the Multiple-Use Sustained-Yield Act is an impermissible grant of legislative authority.

[FN41]. Passage of the Resources Planning Act was basically an attempt to provide the Forest Service with higher appropriations so it could better achieve its objectives. The Forest Service is not self-sufficient, but must rely on annual appropriations from Congress for its operating funds. The Resources Planning Act requires the periodic submission from the Forest Service of an assessment of the forest renewable resources, a program of

proposed goals, and an annual report detailing the achievement of program objectives. 16 U.S.C. §§ 1601(a), 1602, and 1606(c) (1994), respectively. See also supra note 12. Two documents are required to be submitted by the President: a statement of policy at five year intervals that frames budget requests for forest activities and a yearly budget explanation requesting necessary funds to meet the goals contained in the statement of policy. 16 U.S.C. § 1606(a), (b) (1994).

[FN42]. See 16 U.S.C. §§ 1602, 1604(e), 1604(g) (1994).

[FN43]. The primary case held that clearcutting in the Monongahela National Forest in West Virginia violated provisions of the 1897 Organic Act. The United States Court of Appeals for the Fourth Circuit upheld the district court's decision and held that § 551 of the Organic Act allowing the Forest Service to sell "dead, matured, or large growth of trees" that had been "marked and designated" for sale did not authorize clearcutting of young (not fully mature) trees. By affirming the injunction against clearcutting in the Monongahela Forest, the court diminished the Forest Service's ability to use its preferred form of harvest. West Virginia Div. of the Izaak Walton League, Inc. v. Butz, 367 F.Supp. 422, aff'd, 522 F.2d 945 (4th Cir.1975).

[FN44]. See infra notes 55-60 and accompanying text.

[FN45]. OTA REPORT, supra note 24, at 49.

[FN46]. Although the Organic Act was repealed in 1976 by the National Forest Management Act, it still plays a part in the posture and direction of the Forest Service operations.

[FN47]. 16 U.S.C. §§ 1602, 1604(e), 1604(g) (1994).

[FN48]. U.S. SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, S. REP. NO. 893, 96th Cong., 2d Sess. 278-362 (1976).

[FN49]. Id.

[FN50]. 16 U.S.C. § 1604 (1994).

[FN51]. 16 U.S.C. § 1604(g) (1994).

[FN52]. Resource plan development is itself a three-stage process. Pertinent information, such as resource inventories, is gathered; an integrated plan is created according to the congressional mandates of public participation, multiple or dominant use, and the National Environmental Policy Act; and finally the plan is implemented. WILKINSON & ANDERSON, supra note 23, at 10.

[FN53]. 16 U.S.C. § 1604(f)(5) (1994). Revision is to be made: (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section [which explain the requirements of each plan including compliance with the Multiple-Use Sustained-Yield Act] and public involvement comparable to that required by subsection (d) of this section [providing for public participation in the development, review, and revision of management plans].  
Id.

The regulations also require revision if policies, goals, or objectives would have a significant impact on forest projects. 36 C.F.R. § 219.10(g) (1994).

[FN54]. Section 1604(b) requires that "the Secretary shall use a systematic

interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b) (1994). See also 36 C.F.R. § 219.5 (1994).

[FN55]. National Forest Management Act § 6(g)(3)(B), 16 U.S.C. § 1604(g)(3)(B) (1994).

[FN56]. 16 U.S.C. § 1604(g)(3)(E) (1994).

[FN57]. Id. § 1604(g)(3)(E)(iii).

[FN58]. Id. § 1604(g)(3)(F)(iv).

[FN59]. Id. § 1611(a).

[FN60]. Id. § 1604(f)(2).

[FN61]. WILKINSON & ANDERSON, *supra* note 23, at 46-51.

[FN62]. The issue of standing to challenge the plans to date has centered on the second function. Most court challenges question the extent of these substantive guidelines.

[FN63]. 16 U.S.C. § 1604(d) (1994). This section requires the Secretary to provide for public participation in the development, review, and revision of land management plans including but not limited to making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions. Id.

[FN64]. 36 C.F.R. § 219.6 (1994).

[FN65]. Id. § 219.12(b). This provision states that "the interdisciplinary team shall identify and evaluate public issues ... including those identified throughout the planning process during public participation." Id.

[FN66]. 36 C.F.R. § 219.6(a)(1)-(4) (1994).

[FN67]. BLACK'S LAW DICTIONARY 978 (6th ed. 1990). See also Sierra Club v. Morton, 405 U.S. 727 (1972).

[FN68]. U.S. CONST. art. III, § 2, cl. 1. This provision states:  
The judicial power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public ministers and Consuls; -to all Cases of Admiralty and maritime Jurisdiction; -to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.  
Id. (emphasis added).

[FN69]. One formula for standing which combines constitutional and prudential requirements is as follows. There are four main features of standing which the plaintiff must allege: (1) that the challenged injury will cause the plaintiff some actual or threatened injury in fact; (2) that the injury is fairly traceable to the challenged action;

(3) that the injury is redressable by judicial action; and (4) that the injury is to an interest arguably within the zone of interests to be protected by the statute alleged to have been violated. ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 727 (1992). The first three requirements are constitutional while the fourth is the primary prudential element. See *infra* note 94 and accompanying text.

[FN70]. Lujan II, 504 U.S. at 560-61 (citations omitted).

[FN71]. The courts have accepted three types of injury in fact: substantive, procedural (see *infra* note 87), and informational (see *infra* note 88).

[FN72]. Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

[FN73]. Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 152 (1970).

[FN74]. About the same time as judicial recognition of environmental interests evolved, the legislature was incorporating citizen suits into new environmental statutes such as the Clean Water Act and the Clean Air Act.

[FN75]. 405 U.S. 727 (1972). Although it recognized environmental interests as valid for review purposes, it required the plaintiffs to have actually used the area in question. *Sierra Club v. Morton* was a case where the plaintiffs intended to test the limits of the Court's recent switch from the "legal interest" test, to the two part test of injury in fact plus consideration of whether the interest is within the zone of interests designed to be protected by the underlying statute. See Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1970). In an attempt to clarify the extent of standing for environmental organizations, the *Sierra Club* simply pled that a large number of its members resided in the San Francisco Bay area near a proposed ski resort in the Sierra Nevada Mountains of California and that the *Sierra Club* had a "special interest" in conservation of national parks, forests, etc. Sierra Club v. Morton, 405 U.S. at 734. The Court stated that a "special interest" in a problem or the way in which that problem is resolved was insufficient to support standing. Id. at 739. The Court required that there be "actual use" which was adversely affected. *Id.*

[FN76]. Morton, 405 U.S. at 734.

[FN77]. Perhaps the most relaxed view of the injury in fact requirement came in 1973 with United States v. SCRAP, 412 U.S. 669 (1973). Though the plaintiffs were merely representative of nationwide injury, the Court allowed standing when the plaintiffs alleged that they would be harmed by the Interstate Commerce Commission's order approving a 2.5% surcharge on freight charges, on the ground that the surcharge discriminated against recycled materials, encouraged consumption of natural resources, and therefore increased the likelihood of litter. *Id.* The plaintiffs contended that this would cause adverse environmental effects to the plaintiffs' recreational use of forests, streams, etc., surrounding the Washington metropolitan area.

[FN78]. Subsequent decisions after *SCRAP* have indicated that the Court is retreating from that expansive and attenuated view of standing. See Allen v. Wright, 468 U.S. 737 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982); Simon v. EKWRO, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

[FN79]. Lujan I, 497 U.S. at 871. Despite a fairly liberal use of standing by the lower courts, the Supreme Court began a restrictive mode of interpretation for challengers under the federal environmental statutes. Randall Abate & Michael Meyers, Broadening the Scope of Environmental Standing: Procedural and Informational Injury in Fact After

Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345, 346 (1994).

[FN80]. 497 U.S. 871 (1990).

[FN81]. This action was brought under the Administrative Procedure Act because neither the Federal Land Policy and Management Act nor the National Environmental Policy Act create private causes of action through citizen suit provisions.

[FN82]. The Bureau program and the two actions under attack that allegedly caused the plaintiffs' "injury" revoked withdrawals on two tracts of land: 4500 acres within a 2 million acre area and approximately 1.8 million acres of a 5.5 million acre parcel were left open to mining, and therefore were no longer withdrawn from development. The affidavits did not establish that these revocations of withdrawals would harm the plaintiffs, who alleged that two of their members used the lands in the "vicinity" of the revocations.

[FN83]. Lujan I, 497 U.S. at 888. This decision also rested on other standing issues arising under the Administrative Procedure Act that will be discussed below in the context of the prudential standing requirement of zone of interest. This case is important because it clarified *Sierra Club v. Morton's* scope of environmental standing to ensure that the plaintiffs themselves suffer the recreational or aesthetic injury, and to require a much more specific fact allegation by the injured party. As one commentator put it, the holding made sure the plaintiffs were not just "officious intermeddlers." William Funk, *Standing Issues in Environmental Cases, Address Before the Environmental and Natural Resources Law Seminar (1993) in Federal Judicial Center and Northwestern School of Law Manual, 1993, at 3.*

Another form of standing that frequently arises in environmental cases is organizational standing. When an organization brings suit as a representative of its members, it must show that the organization's members would themselves have standing to sue by meeting the constitutional and prudential requirements, and that the interests the organization seeks to protect are "germane to the organization's purposes." See *Automobile Workers v. Brock, 477 U.S. 274 (1986).*

[FN84]. Lujan II, 504 U.S. at 555. In this case, the plaintiffs challenged a Department of Interior regulation requiring Endangered Species Act consultation by agencies only if the action occurred in the United States or on the high seas. Id. at 558. The plaintiffs' affidavits described how two of its members had traveled to foreign countries (Sri Lanka and Egypt) to see endangered species in their native habitat. Id. at 563. The plaintiffs alleged that these species would be harmed by U.S. Agency for International Development projects unless consultation between the agencies was required. Id. at 566. The plaintiffs' affidavits indicated that they may visit those areas again "sometime in the future." Id. at 564. This possibility of future harm was not concrete enough to establish injury in fact. Id. at 578.

[FN85]. *Id.*

[FN86]. *Id.*

[FN87]. Procedural rights arise when the public is granted the opportunity to participate in an agency action or process by receiving notice and having an opportunity to comment. Therefore, a procedural injury occurs through the interference with this right. However, in *Lujan II* the plaintiff's procedural injury was one suffered by the public as a whole. Even though the Endangered Species Act allows "any person" to sue to enforce its mandates, the consultation requirement's process does not involve the public directly--although it certainly was intended to benefit the public indirectly. The *Lujan II* court required that the procedural interest be supported by an underlying substantive right that

would be impaired by the agency's failure to comply with procedure. This rule was not satisfied by the broad "whole world" procedural violation alleged by the plaintiffs.

[FN88]. Lujan II, 504 U.S. at 576. For the view that procedural injury offers a promising mechanism for redressing environmental harms, see Abate & Meyers, *supra* note 79 and Teresa B. Salamone, *How Footnote 7 in Lujan II May Expand Standing for Procedural Injuries*, 9 NAT. RES. J. 75 (Winter 1995).

This holding in Lujan II also seems to eliminate "informational standing" as a viable form of procedural injury. Informational injury is alleged by organizations who base part of their mission on the ability to disseminate information to their members. This interest in obtaining and providing information is claimed to be impaired when an agency does not follow informational procedures such as preparation of an environmental impact statement.

[FN89]. Allen v. Wright, 466 U.S. 737, 752 (1984).

[FN90]. *Id.* Distinguishing between traceability and redressability, the Court in *Alen* recognized that "there is a difference, that the former examines the causal connection between the asserted unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Id.* at 753 n.19.

[FN91]. *Id.*

[FN92]. The statements made by the Court in Lujan II concerning redressability of generalized government action is of particular importance to resource planning litigation. In holding that the plaintiffs did not meet the redressability component, the Court stated, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication." Lujan II, 504 U.S. at 568 (citing Alen, 468 U.S. at 759-60). Note, however, that forest plans are required by the National Forest Management Act to be prepared and do not necessarily fall within the Court's characterization of "programs ... establish[ed] to carry out their legal obligations," which seems to refer to agency programs and systems created to fulfill their statutory duties.

[FN93]. Colhoun and Hamill explain this way: "Redressability relies on both injury in fact and causal connection: If an actual injury does not exist, it would not be redressable. Similarly, if the causal connection does not exist, the requested relief would not redress the conduct complained of." Martha Colhoun and Timothy S. Hamill, Environmental Standing in the Ninth Circuit: Wading Through the Quagmire, 15 PUB. LAND L. REV. 249, 262 (1994).

[FN94]. Prudential requirements are based in policy rather than in "purely constitutional considerations." Flast v. Cohen, 392 U.S. 83, 97 (1968).

Generally, although courts have not strictly followed this rule, prudential requirements are not applicable if Congress has expressed an intent to eliminate the restrictions by creating citizen suit provisions in the statute. See Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 156-57 (1970). Theoretically, the plaintiffs would have to show only satisfaction of the constitutional elements, and that their interests fall within those intended to be protected by the statute under which the plaintiffs bring the claim.

[FN95]. See Lujan I, 497 U.S. at 882-83.

[FN96]. See Warth v. Seldin, 422 U.S. 490, 499 (1975).

[FN97]. Lujan II, 504 U.S. at 573-78.

[FN98]. The zone of interest concept, as will be discussed, is one part of the Administrative Procedure Act's statutory standing requirements. It was first intended only in that context, not as a prudential component, but courts began to apply the zone of interest review in both Administrative Procedure Act and non-Administrative Procedure Act cases, as a prudential restriction. See Colhoun & Hamill, *supra* note 93, at 264.

[FN99]. 5 U.S.C. § 702 (1994).

[FN100]. The zone of interest test is a component of the Administrative Procedure Act standard. Therefore, that element of prudential standing will be evaluated in the context of the Administrative Procedure Act.

[FN101]. 5 U.S.C. § 551(13) (1994). Several creative arguments against standing have been made in forest plan cases. In one case, the Forest Service argued that the forest plans, throughout their duration, were not an ongoing agency action but were so only at the time of adoption or upon revision or amendment. Calling this argument incorrect, the Ninth Circuit rejected it by determining that "the [management plans] have an ongoing and longlasting effect even after adoption, [thus] we hold that the [management plans] represent ongoing agency action." Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053 (9th Cir.1994).

[FN102]. Sierra Club v. Robertson, 764 F.Supp. 546, 552 (W.D. Ark. 1994), (citing Lujan I, 497 U.S. 871 (1990)) rev'd in part, 28 F.3d 753 (8th Cir.1994), cert. denied, 115 S.Ct. 1793 (1995). Final agency action is closely related to the ripeness inquiry because the agency action will not be "ripe" for review under the Administrative Procedure Act until it is "final." A court may decide the final agency action and zone of interest elements in its discussion of ripeness. *Id.*

[FN103]. 5 U.S.C. § 704 (1994) (emphasis added). The Administrative Procedure Act does not define "final agency action" and courts have been challenged to define it.

[FN104]. Sierra Club v. Robertson, 764 F.Supp. at 552.

[FN105]. There has been some confusion in the application of the zone of interest test. This test was originally intended to grant review in Administrative Procedure Act cases only. Courts, however, began to apply it as a general prudential requirement. See Colhoun & Hamill, *supra* note 93, at 265. By evaluating and adjusting its future application, the Supreme Court, in Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 394-403 (1987), refined the zone of interest test by expressing that the plaintiff's claim should be denied only if his or her "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Colhoun & Hamill, *supra* note 93, at 399.

[FN106]. Nevada Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 715 (1987) (citing Clarke, 479 U.S. at 394-403).

[FN107]. See Lujan I, 479 U.S. at 885-86.

[FN108]. Several courts have held that plaintiffs who assert purely economic injury do not have standing to challenge agency action under the National Environmental Policy Act. See Churchill Truck Lines, Inc. v. United States, 533 F.2d 411, 416 (8th Cir.1976); Clinton Community Hosp. Corp. v. Southern Md. Medical Ctr., 510 F.2d 1037, 1038 (4th Cir.1976), cert. denied, 422 U.S. 1048 (1975); Nevada Land Action Ass'n, 8 F.3d at 713. Finding that the National Environmental Policy Act was "not designed to prevent loss of

profits but was intended to promote general awareness of and action concerning environmental problems," the Eighth Circuit rejected a plaintiff's alleged economic injury by determining that "petitioners whose sole motivation in this case was their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest in [these] proceedings." Churchill Truck Lines, 533 F.2d at 416.

[FN109]. 16 U.S.C. § 1604(e) (1994).

[FN110]. BLACK'S LAW DICTIONARY 1891 (6th ed. 1990) (citing Abbott Labs. v. Gardner, 387 U.S. 136 (1967)).

[FN111]. Ripeness occasionally centers around the "label" the court or agency puts on the challenged activity. If an agency calls its activity something other than what is required to trigger judicial review, such as "program" or "recommendation" or "report" as opposed to "actions" or "proposals" in the National Environmental Policy Act context, those activities may escape review because the court does not find them "final" and therefore ripe. See Bridget A. Hust, Ripeness Doctrine in NEPA Cases: A Rotten Jurisdictional Barrier, 11 LAW & INEQ. J. 505 (1993).

[FN112]. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994).

[FN113]. Resources Ltd. v. Robertson, 8 F.3d 1394, 1397 (9th Cir.1992) (citing Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir.1992)).

[FN114]. Id.

[FN115]. The United States Court of Appeals for the Seventh Circuit, in Sierra Club v. Marita, 46 F.3d 606 (7th Cir.1995), affirmed a district court opinion granting standing to users of the National Forest in a challenge to a management plan's adequacy as to incorporation of conservation biology, providing recreational opportunities, and to the environmental impact statement's range of alternatives. The district court rejected the Forest Service's argument that the plaintiffs' anticipated injury was with the implementation of the plan, not the plan itself because under that reasoning the plaintiffs would have to wait until specific activities were proposed. The district court stated that, although the plan sets guidelines and parameters, it also establishes detailed "prescriptions that are in no sense conditional or optional." Sierra Club v. Marita, 843 F.Supp. 1526, 1530 (E.D. Wis. 1994), aff'd, 46 F.3d 606 (7th Cir.1995). Further, the district court noted that "because the current plan mandates, in quite specific terms, the very management activity that will ultimately cause plaintiffs' injury, the fact that the [Forest] Service has yet actually to inflict the injury through development of site-specific projects, does not render the injury 'conjectural' or 'speculative' and therefore does not deprive plaintiffs of standing to challenge the plan." Id. at 1531. The Seventh Circuit reiterated the point by quoting the district court's above statement. Marita, 46 F.3d at 611-12. See also Southern Utah Wilderness Alliance v. Thompson, 811 F.Supp. 635 (D. Utah 1993); Wind River Multiple-Use Advocates v. Espy, 835 F.Supp. 1362 (D.Wyo. 1993); Sierra Club v. Cargill, 732 F.Supp. 1095 (D.Colo. 1990); Citizens for Env'tl. Quality v. United States, 731 F.Supp. 970 (D.Colo. 1989); Intermountain Forest Indus. Ass'n v. Lyng, 683 F.Supp. 1330 (D.Wyo. 1988).

[FN116]. 28 F.3d 753 (8th Cir.1994).

[FN117]. Sierra Club v. Robertson, 764 F.Supp. 546, 547 (W.D. Ark. 1991) (granting motion to dismiss, in part, and denying, in part, finding plaintiffs to have standing).

[FN118]. Id. at 593 (denying motion for preliminary injunction).

[FN119]. Id. at 555.

[FN120]. Sierra Club v. Robertson, 810 F.Supp. at 1021 (granting defendant's motion for summary judgment).

[FN121]. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994).

[FN122]. Sierra Club v. Robertson, 764 F.Supp. 546, 550 (W.D. Ark. 1991).

[FN123]. Id. at 550.

[FN124]. Id. The court stated that a favorable decision would satisfy plaintiffs' request for review because the Forest Service would be forced to establish reasonable methods of accounting for diversity (a requirement of the National Forest Management Act that the plaintiffs alleged the defendant agency violated). Id.

[FN125]. Id. at 552.

[FN126]. Id.

[FN127]. Sierra Club v. Robertson, 764 F.Supp at 553.

[FN128]. Id. at 553-54.

[FN129]. Id. at 554.

[FN130]. Id.

[FN131]. Id.

[FN132]. Sierra Club v. Robertson, 28 F.3d 753, 757-58 (8th Cir.1994) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

[FN133]. Id. at 758 (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

[FN134]. Id. at 758 (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

[FN135]. Id.

[FN136]. Id.

[FN137]. Sierra Club v. Robertson 28 F.3d at 758 (citing O'Shea v. Littleton, 414 U.S. 488, 497 (1974)).

[FN138]. 8 F.3d 1394 (9th Cir.1994).

[FN139]. Id.

[FN140]. An environmental impact statement should not be set aside absent a showing of arbitrary and capricious agency action. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). The Ninth Circuit reviews agency decisions not to prepare such a statement under the arbitrary and capricious standard. Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989 (9th Cir.1993).

[FN141]. Idaho Conservation League v. Mumma, 21 Env'tl. L. Rep. 20,666 (D. Mont.

1990), rev'd, 956 F.2d 1508 (9th Cir.1992).

[FN142]. Resources Ltd. v. Robertson, 8 F.3d at 1397.

[FN143]. Id. at 1402.

[FN144]. Id. at 1397.

[FN145]. 21 Env'tl. L. Rep. 20,666 (D. Mont. 1990), rev'd, 956 F.2d 1508 (9th Cir.1992).

[FN146]. Resources Ltd. v. Robertson, 8 F.3d at 1397.

[FN147]. 956 F.2d 1508 (9th Cir.1992).

[FN148]. Resources Ltd. v. Robertson, 8 F.3d at 1397.

[FN149]. Id. (citing Mumma, 956 F.2d at 1516).

[FN150]. Id.

[FN151]. Id.

[FN152]. Sierra Club v. Robertson, 764 F.Supp. at 554.

[FN153]. Resources Ltd. v. Robertson, 8 F.3d at 1397.

[FN154]. 998 F.2d 699 (9th Cir.1993).

[FN155]. 998 F.2d 705 (9th Cir.1993).

[FN156]. Resources Ltd. v. Robertson, 8 F.3d at 1398.

[FN157]. Id. at 1397-98 n.2.

[FN158]. See Espy, 998 F.2d at 703.

[FN159]. Resources Ltd. v. Robertson, 8 F.3d at 1397-98 n.2.

[FN160]. In Resources Ltd. v. Robertson, the plaintiffs filed affidavits detailing their members' regular and recreational uses in a large area of the Flathead Forest. Id. at 1398.

[FN161]. Id.

[FN162]. Id.

[FN163]. Id.

[FN164]. 32 F.3d 1346 (9th Cir.1994).

[FN165]. Id. at 1353 (quoting Lujan II, 504 U.S. 555 (1992)).

[FN166]. Id. at 1354.

[FN167]. Id.

[FN168]. Section 1604 of the National Forest Management Act states that plans are to be revised occasionally if the Secretary determines that significant changes in the conditions of the forest so warrant. The regulations echo this requirement but add that plans may also be revised when "changes in [Planning Act] policies, goals, or objectives would have a significant effect on forest level programs." 36 C.F.R. § 219.10(g) (1994). See supra note 53.

[FN169]. See supra note 13.

[FN170]. The regulations implementing the National Forest Management Act state that: "Plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. They determine resource management practices, levels of resource production and management, and the availability of lands for resource management." 36 C.F.R. § 219.1(b) (1994).

[FN171]. 16 U.S.C. § 1604(i) (1994).

[FN172]. 36 C.F.R. § 219.10(e) (1994).

[FN173]. FOREST SERVICE, DEP'T OF AGRIC., LAND AND RESOURCE MANAGEMENT PLANNING HANDBOOK, ch. 53.

[FN174]. See 50 C.F.R. § 402.14 (1994).

[FN175]. See supra notes 43-45 and accompanying text.

[FN176]. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994).

[FN177]. Professor William Funk of Northwestern School of Law at Lewis & Clark College explains that:  
Large scale actions may "harm" the species or ecosystem, but will it in fact result in reduced ability to enjoy the species or ecosystem[?] If there are still thousands of spotted owls to be seen in the area frequented by the plaintiffs, does the fact that the species has been further "threatened" actually injure [the] plaintiffs[?]  
William Funk, Standing Issues in Environmental Cases, Address Before the Environmental and Natural Resources Law Seminar (1993), in Federal Judicial Center and Northwestern School of Law Manual, 1993, at 10-11. Professor Funk believes there is abundant language in Lujan II to suggest that this type of effect does not "injure" the plaintiffs. Id.

[FN178]. Resources Ltd. v. Robertson, 8 F.3d 1394 (9th Cir.1994).

[FN179]. See supra note 177.

[FN180]. See infra part VI.A.

[FN181]. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir.1994).

[FN182]. Sierra Club v. Robertson, 764 F.Supp. 546, 554-55 (W.D. Ark. 1991).

[FN183]. See 16 U.S.C. § 1604(d) (1994). See also supra note 63 and accompanying text.

[FN184]. See Sierra Club v. Robertson, 764 F.Supp. at 554.

[FN185]. Reply Brief of Appellant Reply at n.2, Resources Ltd. v. Robertson, 8 F.3d 1394 (9th Cir.1994) (No. 92-35047).

[FN186]. Stark Ackerman, Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on the U.S. Forest Service Decision Making, 20 ENVTL. L. 703, 732 (1990).

[FN187]. See Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150 (1950). This case was the first to reject the previous standing formulation of "legal interest" where the plaintiff's standing was determined by reference to the statutory or constitutional provision at issue. The case instead required the showing of "injury in fact," an investigation into the harm of the plaintiff without reference to the merits of the case. This new requirement does not have a foundation in the history or text of the Constitution. See also Cass R. Sunstein, Standing Injuries, 1993 SUP.CT.REV. 37; Cass R. Sunstein, What's Standing After Lujan?, 91 MICH.L.REV. 163 (1992).

[FN188]. Both of these Acts contemplate the continued use of the forest in a diverse way. Not only are timber and resource interests recognized, but recreational, wildlife, and wilderness concerns are also. See Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 (1994); National Forest Management Act, 16 U.S.C. §§ 1600, 1604(e), 1604(g) (1994). See generally, Cass R. Sunstein, Standing Injuries, 1993 SUP.CT.REV. 37, 50.

[FN189]. Cass R. Sunstein, Standing Injuries, 1993 SUP.CT.REV. 37. This commentator points out that the issue of standing is essentially the same question as whether the plaintiff has a cause of action. Although this is conceptually similar to the zone of interest inquiry, courts have split the injury (i.e., interest in the outcome of the case) and the cause of action or remedy (i.e., the merits of the case) questions for the purpose of determining constitutional standing. See supra note 187 and accompanying text.

[FN190]. See supra notes 87-88 and accompanying text.

[FN191]. Where a procedural injury affects the whole world as opposed to specifically harming the plaintiff, the injury may not suffice for actual injury. See supra note 87.

[FN192]. This should not be too hard if the plaintiffs are actual users of a forest or recreational area on a regular basis. In Resources Ltd. v. Robertson, for example, the plaintiffs, who lived near the Flathead National Forest, frequently hiked, camped, and generally enjoyed the entire forest area. Resources Ltd. v. Robertson, 8 F.3d at 1394.

[FN193]. Remember that Lujan II involved projects in foreign lands to which plaintiffs may "sometime" return. Although that was not adequate, it is unclear what level of use the Court would have accepted as sufficient. See Lujan II, 504 U.S. at 555.

[FN194]. Counter to this argument is the judicial construction that the statutory grant of review to "any person" does mean application to any person. This is the so-called "separation of powers" approach to standing. In Lujan II Justice Scalia explains that vindication of the public interest is the job of the legislature while the role of the courts is to vindicate the rights of individuals. Scalia wrote that "to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to take care that the laws be faithfully executed." Lujan II, 504 U.S. at 555.

[FN195]. That discussion, though interesting and relevant, is beyond the scope of this article.