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# Failing to See the Forest for the Trees: Standing to Challenge the National Forest Management Plans

## Part 2

by

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lative branch.[165] As Justice Scalia has written, it is the job of the executive branch to see that "the Laws be faithfully executed,"[166] and it is that branch's prerogative to "lose" or "misdirect" — that is, not enforce — certain laws in the course of that duty.[167] Congress, therefore, may not grant general standing to vindicate "the undifferentiated public interest in executive officers' compliance with the law," because that would take power from the executive.[168] And even if Congress defines a specific injury by statute, courts may review the implementation of the statute only insofar as it protects "individual rights against administrative action fairly beyond the granted powers" authorized by Congress.[169]

In summary, a plaintiff satisfies the concrete injury requirement, and avoids running afoul of the separation of powers principle, if she shows that she has been harmed more than the general public has been harmed,[170] and so long as the harm is a "present or immediately threatened injury resulting from unlawful governmental action."[171]

Although the Supreme Court has firmly established this separation of powers approach to the standing and ripeness inquiries, it has done so amid internal and external criticism. Of the internal criticisms, the most significant came from Justice Blackmun in *Lujan v. Defenders of Wildlife.* The dissent criticized the majority's separation of powers argument in the context of the "procedural injury" claim,[172] and is especially significant because it was joined by Justice O'Connor,[173] who, as the author of the Court's opinion in *Allen v. Wright*, expressly relied on the separation of powers justification for the standing and ripeness doctrines.[174] Arguing that the majority opinion could be read to mean that breaches of some procedural duties would satisfy the injury in fact requirement,[175] Justice Blackmun made the point that:

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165 *See Defenders*, 504 U.S. at 577; Allen v. Wright, 468 U.S. 737, 760-61 (1984).

166 U.S. CONST. art. II, § 3.

167 Scalia, *supra* note 162, at 897; *see Defenders*, 504 U.S. at 577; *Wright*, 468 U.S. at 761.

168 *Defenders*, 504 U.S. at 577.

169 *Defenders*, 504 U.S. at 577 (quoting Stark v. Wickard, 321 U.S. 288, 309-10 (1944)).

170 *See* Scalia, *supra* note 162, at 894-95.

171 *Wright*, 468 U.S. at 760 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)); *see* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 894 (1990).

172 *See Defenders*, 504 U.S. at 602.

173 *See id.* at 589, 602.

174 *See Wright*, 468 U.S. at 739, 750-51.

175 The majority itself explicitly acknowledged this point. *See Defenders*, 504 U.S. at 573 n.8.

> [T]he principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense — not of the courts — but of Congress, from which that power originates and emanates. . . . Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.[176]

A second important internal criticism of the Court's separation of powers jurisprudence recently came from Justice Stevens in his dissent in *Plaut v. Spendthrift Farm, Inc.*[177] Justice Stevens' criticism, however, was much more fundamental than Justice Blackmun's in *Defenders*. Justice Stevens did not attack a particular application of the separation of powers principle, but rather attacked the notion that the Court's view of the separation of powers is the correct fundamental understanding of our system of constitutional government.[178] The correct understanding, he asserted, is not that the three branches "operate with absolute independence,"[179] but rather that our system operates under a notion of shared and commingled powers.

Each of these internal criticisms has been analyzed, elaborated, and expanded by critics outside the Court.[180] For example, several commentators have pointed out that the Court plays a critical role in protecting Congress' power to make the laws that the administrative agencies must implement.[181] Moreover, there is a salient argument that less judicial review of agency actions can result in decreased control of the bureaucracy, leading not to the implemen-

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176 *Id.* at 602, 604 (Blackmun, J., dissenting).

177 115 S. Ct. 1447, 1466 (1995) (Stevens, J., dissenting).

178 *See id.* at 1473.

179 *Id.* (quoting Morrison v. Olson, 487 U.S. 654, 693-94 (1988) (quoting United States v. Nixon, 418 U.S. 683, 707 (1974))).

180 Two excellent criticisms are Cass R. Sunstein, *What's Standing after* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992), and Jonathan Poisner, *Environmental Values and Judicial Review after* Lujan: *Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991). *See also* Stanley E. Rice, Note, *Standing on Shaky Ground: The Supreme Court Curbs Standing for Environmental Plaintiffs in* Lujan v. Defenders of Wildlife, 38 ST. LOUIS U. L.J. 199 (1993). For a more fundamental and universal attack on the Court's standing jurisprudence, see William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

181 *See* Poisner, *supra* note 180, at 377-78; Sunstein, *supra* note 180, at 217-18; Stanley E. Rice, *supra* note 180, at 229; *see also* Fletcher, *The Structure of Standing*, *supra* note 180, at 233 (arguing that the Court's standing decisions have actually resulted in the Court expanding its own powers at the expense of Congress).

tation of majoritarian desires, but rather to the benefit of a minority (i.e. agency capture) at the expense of the majoritarian goals as enacted by Congress.[182]

However valid these criticisms may be, the fact remains that a majority of the Court believes strongly in the recently espoused separation of powers justification for the standing and ripeness doctrines. Accordingly, no court should find that plan challenges are justiciable unless such a finding is consistent with the separation of powers.

## IV. The Circuits Are Split

Four Circuit Courts of Appeals have ruled on whether environmental plaintiffs have standing to challenge national forest management plans and on whether those claims were ripe. In chronological order, the Ninth, Eighth, Seventh, and Eleventh Circuits have decided this issue, and their answers have resulted in an even circuit split. The Ninth and Seventh Circuits have held that environmental plaintiffs do have standing to challenge forest plans and that their claims are ripe for review.[183] The Eighth and Eleventh Circuits have decided against would-be plan challengers, with the former basing its decision on a lack of standing and addressing the ripeness question not at all,[184] and the latter doing the inverse, deciding the issue as a ripeness question and not one of standing.[185]

In *Idaho Conservation League v. Mumma* (9th Circuit), the plaintiff contested a Forest Service decision to recommend against wilderness designation for forty-three of the forty-seven roadless areas within the Idaho Panhandle National Forest.[186] The Conser-

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[182] *See* Poisner, *supra* note 180, at 373-77.

[183] *See* Sierra Club v. Marita, 46 F.3d 606, 613-14 (7th Cir. 1995); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518-19 (9th Cir. 1992). The Ninth Circuit has affirmed its holding in *Mumma* in three subsequent decisions. *See* Resources Ltd. v. Robertson, 35 F.3d 1300, 1303 (9th Cir. 1993) [hereinafter *Resources Ltd.*]; Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) [hereinafter *Seattle Audubon*]; Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993) [hereinafter *Portland Audubon*].

[184] *See* Sierra Club v. Robertson, 28 F.3d 753, 757, 760 (8th Cir. 1994). *But see* Friends of the Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 886-87 (8th Cir. 1995) (holding that environmental plaintiffs did have standing to challenge a forest plan). The *Thomas* court distinguished its decision from *Robertson* on the grounds that the plan in question "explicitly provided for an expansion of timber sales . . . and specifically identified the location where the timber would be harvested." *Id.* at 887. Despite repeated attempts, I was unable to obtain a copy of the plan involved in that case. Thus, it is unclear whether that plan's designation of timber sale locations was any different from the Management Area prescriptions described in more than a dozen other forest plans the author reviewed.

[185] *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390-91 (11th Cir. 1996).

[186] *See Mumma*, 956 F.2d at 1510.

vation League claimed that the agency had violated the NFMA and the NEPA by failing to comply with the NEPA's requirements regarding the consideration of alternatives and assessment of the value of the timber in the roadless areas.[187] Thus, the claims were procedural not substantive.[188]

In *Sierra Club v. Robertson* (8th Circuit), the Sierra Club challenged the adoption of the Ouachita (Arkansas) National Forest LRMP.[189] The Sierra Club's claims included allegations of substantive violations under the NFMA and procedural violations under both the NFMA and the NEPA.[190] For example, the plaintiffs brought substantive NFMA claims regarding the plan's suitability and diversity provisions, procedural NFMA claims regarding the sufficiency of the resource inventory and the failure to "integrate" the plan with other agency planning documents, and procedural NEPA claims regarding the adequate consideration of alternatives.[191]

In *Sierra Club v. Marita* (7th Circuit), the Sierra Club challenged the forest plans for both the Nicolet and Chequamegon National Forests in Wisconsin, asserting that those plans had failed to protect biological diversity in the forests because they had not considered and applied principles of conservation biology.[192] While the emphasis of these claims was substantive, the plaintiffs also asserted NEPA violations regarding the development of alternatives and the adequate consideration of the ecological effects of the plans.[193] Thus, both the NFMA and the NEPA were implicated.

Finally, in *Wilderness Society v. Alcock* (11th Circuit), the Wilderness Society contested the forest plan for the Cherokee National Forest in Tennessee.[194] The plaintiffs asserted several NFMA claims, arguing that they were both substantive and procedural, but, uncharacteristically, made no NEPA claims.[195] For example, they made substantive claims regarding the plan's

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187 *See id.* at 1512.

188 The Ninth Circuit's other decisions in this area have also involved procedural claims. Two of them, like *Mumma*, involved only procedural injuries, *see Portland Audubon*, 998 F.2d at 707-08; *Seattle Audubon*, 998 F.2d at 703, while the third also involved substantive claims. *See Resources Ltd.*, 35 F.3d at 1302.

189 *See Robertson*, 28 F.3d at 754.

190 *See id.* at 760. For an in-depth discussion of the Sierra Club's claims see the district court's decision in *Robertson*, 810 F. Supp. 1021, 1025-30 (W.D. Ark. 1992).

191 *See Robertson*, 28 F.3d at 760.

192 *See Marita*, 46 F.3d at 608, 610.

193 *See id.* at 616.

194 *See Alcock*, 83 F.3d at 387.

195 *See id.* at 388-89.

resource development suitability decisions and its protection of biological diversity and the visual quality resource.[196] In addition, the Wilderness Society argued that the Forest Service had failed to conduct adequate species inventories and provide for biological diversity before developing the plan, a procedural NFMA violation.[197]

In summary, all of these cases involved procedural claims under the NFMA, and some also involved NEPA claims. Moreover, all but *Mumma* also involved substantive claims under the NFMA. In dispositional terms, however, the decisions diverge on three basic questions: First, is "procedural injury"[198] alone sufficient to establish standing and to make a plaintiff's case ripe? Second, do forest management plans result in "certainly impending" substantive injury? Third, if the plan cannot be challenged at the time the Forest Service adopts it, can it be challenged at the time site-specific actions are proposed to implement it, or is it forever beyond review?

How each of the four courts answered these questions with respect to both standing and ripeness will now be discussed in turn. As was discussed in Part III, above, the lower courts have generally analyzed these issues under the standing doctrine first, and then tacked on a discussion of ripeness that resolves the issue "for much the same reason."[199] Only the Eleventh Circuit has analyzed this issue solely as a question of ripeness.[200] In fact, from either a standing or a ripeness approach, the question is ultimately distilled to the imminence of the injury.[201] Given this commonality, the following discussion focuses primarily on the analyses of the standing

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196 *See id.*

197 *See id.* at 388.

198 I use the phrase "procedural injury" to refer to procedural violations that result in threatened injury to concrete, underlying substantive rights. I recognize that such procedural violations can cause substantive injuries, and I do not intend this shorthand to mean that all procedural violations result only in "procedural injuries." *See, e.g.*, Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 929-30 (D. Mont. 1992) (discussing both procedural and substantive injuries caused by a procedural violation).

199 Sierra Club v. Marita, 46 F.3d 606, 614 (7th Cir. 1995); *see Alcock*, 867 F. Supp. 1026, 1042 (N.D. Ga. 1994). *Robertson* does not address the ripeness issue at all. *Mumma* briefly addresses the issue, and gives slightly more than a "for the same reasons" justification. *See* 956 F.2d at 1518-19. Generally, however, subsequent Ninth Circuit decisions simply state the same reason for granting ripeness as they give for granting standing. *See Resources Ltd.*, 35 F.3d at 1303-04; *Portland Audubon*, 998 F.2d at 708; *Seattle Audubon*, 998 F.2d at 703.

200 *See Alcock*, 83 F.3d at 390.

201 *See supra* notes 148-50 and accompanying text.

question as analyzed by three circuits and will tie in the Eleventh Circuit's ripeness analysis as appropriate.

### *A. Injury Caused by Procedural Violations*

The cognizability of "procedural injuries" presents the central question in the *Mumma* court's decision to grant standing.[202] Because *Mumma*, like all NFMA cases, was brought pursuant to the APA, the court first asked whether the plaintiff's alleged injury was within the "zone of interests" protected by the statute governing agency action.[203] When Congress defines the legal obligation at issue, as it did with the NEPA, courts are to "look to the statute to define the injury."[204] The purpose of the NEPA is to ensure that the environmental effects of government actions are known, and that they are considered before an action is taken.[205] Thus, the injury inflicted when an agency does not follow the procedural dictates of the NEPA is a "risk that environmental impact will be overlooked."[206] After establishing that threatened procedural rights could be enforced, the *Mumma* court then asked whether this "procedural injury" was too remote. The court concluded that, so long as real injury is threatened, contingent, or at all present, the injury must be considered "*immediate*, not speculative."[207]

The *Mumma* decision, however, came before the Supreme Court's decision in *Defenders*.[208] The question thus arose whether the *Mumma* analysis survived *Defenders*. Strangely, the Eighth Circuit expressed no opinion on this question in *Robertson*.[209] It is unclear from reading *Robertson* whether this omission was a litigation strategy, an oversight on behalf of the plaintiffs, or a judicial refusal to acknowledge the issue. While *Robertson* raised proce-

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[202] *See Mumma*, 956 F.2d at 1514-16.

[203] *See id.* at 1514 & n.12 (quoting Sierra Club v. Morton, 405 U.S. 727, 733 (1972)).

[204] *Id.* at 1514.

[205] *See* 42 U.S.C. § 4321 (1994).

[206] *Mumma*, 956 F.2d at 1514 (quoting Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987)). In another case, the Ninth Circuit rejected a standing argument based on a procedural claim, made by a group representing the interests of persons holding grazing rights on national forest lands. *See* Nevada Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993). Such economic interests, the court held, are not within the zone of interests protected by NEPA. *See id.*

[207] *Mumma*, 956 F.2d at 1516-17 (emphasis in original).

[208] 504 U.S. 555 (1992).

[209] *Robertson*, 28 F.3d 753 (8th Cir. 1994).

dural issues, a "procedural injury" argument was not part of the court's analysis.[210]

The issue was squarely raised in the *Alcock* litigation, however, and the federal district court in that case held that *Defenders* completely eliminated any claim of "procedural injury."[211] This proposition was then directly contested in *Marita*, and the Seventh Circuit adopted the Ninth Circuit's position in *Mumma*, holding that *Defenders* did not undermine but, in fact, substantiated the "procedural injury" argument: "The Supreme Court explicitly stated in *Lujan v. Defenders of Wildlife* that a plaintiff clearly has standing to sue where there is a concrete injury underlying the procedural default even if the plan were not implemented immediately."[212] Inexplicably, however, even after this exchange between the Seventh Circuit and the district court, the Eleventh Circuit opinion in *Alcock* failed to raise this question.[213]

The Seventh Circuit makes the most cogent argument on this question. *Defenders* held that the citizen-suit provision of the Endangered Species Act did not give members of the public standing to sue for correction of a procedural violations of that Act.[214] Rather, in order to be able to challenge such a procedural violation, a potential plaintiff must have a concrete interest at risk.[215] In fact, the *Defenders* opinion emphasized that it was not a case where "plaintiffs [were] seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs."[216] Thus, the standing of individuals who have concrete interests (as statutorily defined) at risk due to a government agency's failure to follow a mandated procedure is nearly irrefutable.

Competing theories of how imminent a "procedural injury" must be to establish standing thus highlight the critical issue to be resolved in this area: the question of temporal imminence, which, as stated above, seems to be more an issue of ripeness than of

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210 *See id.* at 758-60.

211 *See* Wilderness Soc'y v. Alcock, 867 F. Supp. 1028, 1039 (N.D. Ga. 1994).

212 *Marita*, 46 F.3d at 612 (citing *Defenders*, 504 U.S. at 572 n.7 ). *See also* Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 929-30 (D. Mont. 1992) (noting that procedural injury is sufficient for standing purposes if the plaintiff uses the area at issue).

213 *See Alcock*, 83 F.3d at 390-91. A likely explanation for the omission is the court's analysis under the ripeness rubric, under which "procedural injuries" have heretofore not been distinguished as they have in standing cases. It is unclear whether the Eleventh Circuit's ripeness analysis would be different regarding procedural claims.

214 *See Defenders*, 504 U.S. at 571-73.

215 *See id.* at 573 n.7.

216 *See id.* at 572.

standing. Only the Ninth Circuit, however, has addressed the ripeness issue specifically with respect to procedural claims in forest plan challenges.[217] In *Mumma* the court distinguished the ICL's complaint from the plaintiffs' claim in *National Wildlife Federation*, by noting that the ICL was challenging a particular implementation of the NEPA and the NFMA in a specific case: the decision not to recommend certain roadless areas for wilderness designation.[218] Unlike *National Wildlife Federation*, *Mumma* was not a case of a challenge to "rules of general applicability."[219] "To the extent that the [procedural decisions] have an impact on [the final decision to designate these areas as wilderness]," the court stated "waiting until the [Forest Service] acts on a specific project would not be an adequate remedy."[220]

### *B. Injury Caused by Substantive Violations*

The lower courts also diverge on the issue of whether potential substantive injuries are imminent enough to be considered concrete and not speculative. The central question in this debate is whether the injuries are "certainly impending."[221] The *Robertson* court cited *Defenders* for the proposition that the injury, if only threatened, must follow the challenged action with a "high degree of immediacy."[222] The *Alcock* court likewise held that forest plans, while making an injury more likely, "do[ ] not make the injury imminent enough for purposes of judicial decisionmaking" because a second stage of agency decisionmaking is undertaken subsequent to the plans' adoption — before any site-specific actions are taken.[223] Both of these courts adopted the view that national forest plans are simply general planning tools that are non-binding and subject to change and revision and which do not themselves require that any direct, specific, on-the-ground environmental changes occur.[224] Moreover, both courts claimed that challenges to forest plans are analogous to the situation in *National Wildlife Fed-*

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217 *See* Idaho Conservation League v. Mumma, 956 F.2d 1508, 1518-19 (9th Cir. 1992). Not only did the *Robertson* court not address ripeness in this context (not surprising since it did not address procedural claims at all), but it failed to address the ripeness issue at all. *See* Sierra Club v. Robertson, 28 F.3d 753, 757-60 (8th Cir. 1994). In addition, the *Marita* ripeness analysis implicitly addresses only substantive claims. *See Marita*, 46 F.3d at 614.

218 *See Mumma*, 956 F.2d at 1519.

219 *Id.* (citations omitted).

220 *Id.*

221 *Robertson*, 28 F.3d at 758 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

222 *Id.* (quoting *Defenders*, 504 U.S. at 564 n.2).

223 *See Alcock*, 83 F.3d at 390.

224 *See Robertson*, 28 F.3d at 758; *Alcock*, 83 F.3d at 390.

*eration*, in that between the time a plan is adopted and the time any site-specific action actually takes place, a site-specific action will have to be proposed, and a potential plaintiff will have an opportunity to challenge the plan at that time.[225]

For its part, the *Marita* court again found in favor of standing and ripeness, noting that the fact that the injury has yet to be inflicted does not make it "conjectural or speculative."[226] Three factors led the court to conclude that the injury caused by the plans was "certainly impending": (1) the "mandatory terms" of the plans as enforced by the NFMA regulations;[227] (2) the fact that the plans "clearly require certain projects to be undertaken and indicate what their effects may be";[228] and (3) the Forest Service's explicit admission that, at least in the case of the diversity issues raised by the plan appeal, "all decisions relevant to those issues at the project level would be guided by the plan."[229] Finally, the court noted that standing is designed to ensure the adversary nature of the parties and thereby to guarantee that questions are decided in a concrete factual context,[230] and reasoned that "arguments over the plans' sufficiency as a whole or the procedures followed in developing the plans with regard to diversity are as concrete [at the time of the plans' adoption] as they will ever become."[231]

Finally, the *Marita* court reiterated its standing argument that the plans, unless amended, will direct the specific management activities that occur in the forest.[232] A party "need not wait to challenge a specific project when their grievance is with an overall plan."[233] Moreover, the court distinguished the case before it from *National Wildlife Federation* because the former involved a final plan that is binding on subsequent action, while the latter concerned a general rule of indefinite applicability.[234]

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225 *See Robertson*, 28 F.3d at 758-59 (citing *National Wildlife Federation*, 497 U.S. at 892); *Alcock*, 83 F.3d 390-91 (citing *National Wildlife Federation*, 497 U.S. at 892).

226 *See Marita*, 46 F.3d at 611-12.

227 *Id.* at 611 (citing 36 C.F.R. §§ 219.1(b), .10(e)).

228 *Id.* (citing Wilkinson & Anderson, *supra* note 5, at 74).

229 *Id.*

230 *See id.* at 613.

231 *Id.*

232 *See id.* at 614.

233 *Id.* (quoting *Resources Ltd.*, 35 F.3d 1300, 1304 (quoting *Seattle Audubon*, 998 F.2d 699, 703)).

234 *See Marita*, 46 F.3d at 614.

### *C. Now, Later, Both, or Never?*

A final point of division between the lower courts must be addressed before moving on to assess the merits of the arguments for and against standing and ripeness in a forest-plan-challenge context. The courts also are divided on the question of whether an overall forest plan can be challenged as part of a challenge to a site-specific action taken under the auspices of that plan. To a certain degree, such a query is simply to engage in the hardship inquiry of the ripeness doctrine.[235] If a party cannot challenge the plan later, and she may be injured by it, then she had better be able to challenge it now. Thus, that courts ask this question, even when they claim only to be discussing standing,[236] may indicate again that this whole issue is more one of ripeness than of standing.

The lower courts diverge on both a legal and a practical level on this issue. On a legal level, the Ninth Circuit alone holds that once the plan is approved, "the underlying programmatic authorization would forever escape review. To the extent that the plan predetermines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now, or it is never."[237] All three of the other circuits have stated in dicta that the whole plan could be attacked as part of a challenge to a site-specific action.[238] In fact, it is improbable that a judge hearing a timber sale appeal would agree to evaluate a forest plan record many years after the plan's adoption.

On a practical level, the Ninth Circuit raises another important point in *Mumma*. Once adopted, the court argued, a forest plan will gather a momentum of its own and will become more difficult to question as time passes. Whether brought in an administrative appeal or in litigation, "a future challenge to a particular, site-spe-

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[235] *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)).

[236] For example, although the court in *Robertson* never explicitly raises the issue of ripeness, it does make the point that only site-specific actions will "flesh out" the factual components of the controversy. *See* Sierra Club v. Robertson, 28 F.3d 753, 759 (8th Cir. 1994) (citing Lujan v. National Wildlife Fed'n 497 U.S. 871, 891 (1990)). Likewise, the *Marita* court made the point as part of its standing analysis, not its ripeness analysis, that waiting until site-specific action occurs will not clarify the issues further. *See* 46 F.3d at 613. Asking if the issues have developed sufficiently to allow courts to make a meaningful decision is traditionally a part of the ripeness inquiry.

[237] Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992) (footnotes omitted).

[238] *See Alcock*, 83 F.3d 386, 390 & n.8; *Marita*, 46 F.3d at 613 n.5; *Robertson*, 28 F.3d at 759. Such a challenge, moreover, would be limited to those parts of the forest plan that were specifically implicated by the proposed site-specific action. *Robertson*, 28 F.3d at 759.

cific action would lose much force once the overall plan has been approved — especially if the challenge were premised on the view that the overall plan grew out of erroneous assumptions."[239]

The same prediction could be made with respect to a ripeness analysis. If a plan as a whole were held not ripe for review before any site-specific actions were taken, it would likely not be challengeable as a whole at any time.[240] In other words, if site-specific action is not imminent before *any* action has been taken, nothing will make a second site-specific action any more imminent after a first action has been completed. It is therefore possible that only site-specific actions could be challenged, and the overall plan would forever escape review. This conclusion is stark. If a plan cannot be challenged now or later because of standing or ripeness barriers, it becomes a final agency action virtually insulated from judicial review in contravention of the APA's "basic presumption of judicial review."[241]

## V. FOREST PLANS CAUSE "INJURY-IN-FACT"

As discussed in Part III above, both the standing and ripeness doctrines require that plaintiffs be personally injured before they may bring a case in court. Furthermore, with respect to forest plan challenges, the doctrines require very similar injury inquiries, although couched in slightly different terms. It is certain, at least, that both require that the injury be "concrete and particularized" not hypothetical.[242] But that is not to say that the injury must have already occurred. "[C]ertainly impending" or imminent injuries are enough to satisfy the injury requirement of both doctrines.[243] Moreover, statutorily defined injuries will suffice to satisfy the injury in fact rule.[244] The key is that the person bringing suit must be affected in an individualized way, different from the general

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[239] *Mumma*, 956 F.2d at 1519.

[240] *See National Wildlife Fed'n*, 497 U.S. at 893 ("[F]laws in the 'entire program' — [both actions taken and actions yet to be taken] — cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects" a potential plaintiff.).

[241] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967).

[242] *See supra* notes 146, 148 and accompanying text; Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996).

[243] *See Defenders*, 504 U.S. 555, 564-65 n.2 (1992) (citation omitted); *Alcock*, 83 F.3d at 390.

[244] *See Defenders*, 504 U.S. at 578 (citing Warth v. Seldin, 422 U.S. 490, 500 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973)).

public.[245] The legislature may not authorize suit by any individual upset with agency action — such generalized grievances must be settled within the political process.[246]

In order to clarify the analysis of standing and ripeness, courts should frame the standing inquiry to focus on *who* may bring suit and the ripeness inquiry on *when* they may sue.[247] The standing doctrine acts to keep third party interlopers or those with general grievances out of court. The ripeness doctrine excludes cases where, although injury will result when further action occurs, the specific facts have not yet progressed to a sufficient point for meaningful judicial resolution of the issue.

In these terms, the Supreme Court correctly analyzed both *Defenders* and *National Wildlife Federation* as standing decisions, at least in terms of the facts as the Court viewed them. In both cases, the plaintiffs' geographical connection to the place where land-disturbing activities would take place was tentative at best. The *Defenders* Court focused on the plaintiffs' other "nexus" arguments because the connection to the site of the injury was in doubt.[248] If an injury would occur, it was not clear that those plaintiffs would be among the injured.[249] The concreteness requirement of the injury test ensures that the plaintiffs' plans to use the area are certain and not contingent.

The Court also properly analyzed *National Wildlife Federation* as a ripeness case. Even if it could be assumed that potential site-specific activities would take place in areas which the plaintiffs were certain to use, it was not certain that those potential activities would ever occur. The challenged rule was too general in nature; it was a national policy rule that was not considered a final agency action.[250]

If this standing-who, ripeness-when method of analysis is applied to the case of challenge to a national forest management plan, the justiciability question is greatly illuminated. The standing doctrine

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[245] This is not to say that widespread injury, affecting a large group of individuals, is insufficient to have standing. "[S]o long as each person can be said to have suffered a distinct and concrete harm," as compared with other non-injured persons, standing can exist. Michel v. Anderson, 14 F.3d 623, 626 (D.C. Cir. 1994) (citing Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 449-50 (1989)).

[246] *See Defenders*, 504 U.S. at 573-78.

[247] *See* Brilmayer, *supra* note 139, at 298-99; CURRIE, *supra* note 140, at 71; *see also Alcock*, 83 F.3d at 390 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4.1 (1989)).

[248] *See Defenders*, 504 U.S. 565-67.

[249] *See id.* at 563.

[250] *See National Wildlife Fed'n*, 497 U.S. at 890-94.

requires potential plaintiffs to show that they use the national forest in a regular way, and that they will continue to do so in the future. Thus, if actions are taken that violate the NFMA in any way, these plaintiffs are sure to be among those harmed. A committed environmentalist who believes forests are important and wants to save them at all costs, but who never visits them or uses them at all, would not have standing.[251] This, however, is not the disputed issue in forest plan challenges.

The ripeness doctrine, on the other hand, focuses on the temporal imminence of the challenged action. It requires a court to ask whether, if an injury is about to occur, the facts have progressed to such a degree that the extent of the injury can be known, and whether judicial involvement could resolve the matter.[252] Just as standing does, the ripeness doctrine requires inquiry into the concreteness of the alleged injury, but its focus is on time — on when the injury, if any, will occur. This is the precise point of contention in forest plan challenges.

As has been explained, under both the standing and ripeness doctrines the justiciability of challenges to forest management plans turns on whether the plaintiffs can show an injury in fact. As has also been noted, a determination of justiciability must be consistent with the principle of separation of powers. In the remaining pages, I will argue (1) that plaintiffs challenging national forest management plans can satisfy the injury in fact requirement in two ways — (a) as the result of a threatened injury to a concrete interest protected by a procedural right, or (b) due to imminent or actual harm to an interest directly protected by a substantive right, (2) that it would be consistent with the Supreme Court's view of the separation of powers principle to hold that challenges to forest plans are justiciable, and (3) that to hold these challenges justiciable is good public policy considering the need for judicial efficiency.

### *A. Forest Plans Can Inflict an Injury in Fact to Both Procedural and Substantive Rights*

In *Defenders*, the Supreme Court explicitly recognized that "procedural injuries" are legally cognizable.[253] If the Forest Service violates a procedural duty (under either the NFMA or the NEPA)

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[251] *Defenders*, 504 U.S. at 574-75.

[252] *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996).

[253] *See Defenders*, 504 U.S. at 572 n.7, 573.

which exists to ensure that the environmental consequences of an action not be overlooked, and if an on-the-ground action is at all likely, the imminence requirement should be held to be satisfied. Knowing and planning for the environmental consequences of government action are explicit purposes of both the NFMA[254] and the NEPA,[255] and knowledge of these consequences is thus an injurable right. An injury has occurred, and individuals who use the affected should have standing to sue.

In the forest plan context, it makes sense to hold that procedural claims require a level of imminence less than that required for standing or ripeness based on substantive violations. When a procedural right has been violated, as, for example, when the Forest Service has not scrutinized the environmental consequences of a proposed action, any on-the-ground action that does occur will violate the underlying concrete interest that the procedural requirement is designed to protect. In this context, it does not matter whether the specific action will in fact cause harm. The potential for harm is there, and the statutes are designed to require documentation of these potential effects before they occur.

Moreover, so long as some action will definitely occur, there is no reason to postpone litigation until after a site-specific proposal is made. Given the mandatory nature of forest plans,[256] it is indisputable that some on-the-ground actions will be proposed to implement the forest plan.[257] The time to resolve whether or not the agency has met all of its procedural responsibilities is the time at which the plan is adopted, not later.

In the case of a substantive claim, on the other hand, a relatively more exacting imminence requirement is appropriate. When a plaintiff claims to have been injured because of the violation of a substantive right, there will almost certainly be a class of cases involving on-the-ground impacts which do not implicate the exact

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[254] *See* 16 U.S.C. § 1600 (1994) ("to serve the national interest, the renewable resource program must be based on a comprehensive assessment [of those resources] . . . through analysis of environmental . . . impacts, . . . and public participation in the development of the program").

[255] *See* 42 U.S.C. § 4332 (1994) ("insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking").

[256] *See infra* Part V.A.1.

[257] This is true notwithstanding the court's opinion in *Alcock*, presuming that no such actions had occurred several years after the plan had been put into effect. *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 391 n.9 (11th Cir. 1996). To presume that no actions have been taken to implement a forest plan several years after the plan had been approved is nothing short of ludicrous.

substantive issue that is the basis of the challenge.[258] It makes sense, therefore, to wait a little longer to see exactly what the nature of the agency's proposed line of action will be — to wait for the action to become even more imminent — so that the court will know that the action implicates the substantive right in question.

For an injury based on a substantive violation to be justiciable, if the injury has not already occurred, the imminence requirement is that it be "certainly impending."[259] The injury to parties challenging forest plans should be held "certainly impending" for three reasons. First, a plan is a mandatory, binding legal document that the Forest Service must follow when implementing the plan through site-specific actions. Second, when the scope of the alleged injury is forest-wide, the cause of that injury is the plan that presents the comprehensive management agenda for the forest. Third, because decisions made at the forest-plan level are not revisited at later stages of implementation, it may be either legally impossible to challenge the entire plan through a challenge of a site-specific action, or practically impossible for plan decisions to be impartially analyzed at the later stage.

### *1. Plans are Mandatory*

The claim that forest plans cause no injury in fact is belied by the fact that the management requirements adopted in forest plans are legally binding and mandatory. A plan zones the forest into separate management areas and specifies the standards and guidelines by which those areas will be managed. The Forest Service does not consider non-conforming uses, and the plans provide the impetus for the agency to propose site-specific development activities. If an area is not in conformity with the standards and guidelines, the Forest Service will implement projects to bring it into compliance.[260]

As will be developed below, there are six reasons why forest plans should be seen as mandatory and binding. First, the NFMA and its implementing regulations specifically require that the plan be followed. Second, the plans themselves declare their binding

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[258] Thinking about the issue in this way highlights the fact that the standing determination, while ostensibly made without regard to the merits of a case, is actually inextricably linked to the merits. *See, e.g.*, Sunstein, *supra* note 180, at 188-91.

[259] *See, e.g.*, Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 201 (1983) (quoting Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923)); *see also Defenders*, 504 U.S. at 564-65 n.2 (disussing standing).

[260] *See supra* notes 54-58 and accompanying text.

nature. Third, the Forest Service has officially declared, and routinely argues, that the plans are mandatory and legally binding. Fourth, implementation of the forest plans does not depend on the intervening acts of third parties. Fifth, as a factual matter, the Service always implements forest plans, which results in on-the-ground impacts. Sixth, to amend or alter a plan requires compliance with the full procedures required for initial adoption.

The first and most important factor showing the binding nature of forest plans is the NFMA itself, which requires that all site-specific activities "shall be consistent with the land management plans."[261] The NFMA regulations implement this requirement by stating 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 and suitability of lands for resource management."[262] The regulations further require the Forest Service to "ensure that . . . all [site-specific projects] are consistent with the plan," and mandate that "[s]ubsequent administrative activities affecting such lands, including budget proposals, shall be *based* on the plan."[263] In the words of learned commentators, "Once the plans become final and are determined to be valid, they themselves become law."[264]

In addition, it is undisputed that the plans are "final agency actions."[265] As such, they are administratively appealable under the APA and are subject to judicial review.[266] Unlike the general land withdrawal review program at issue in *National Wildlife Federation*, the forest planning process is not an indefinite, general administrative program. Rather, it specifically requires that plans be developed and followed. Moreover, each plan is applicable only to one specific forest, not to the National Forest System gener-

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261 16 U.S.C. § 1604(i) (1994).

262 36 C.F.R. § 219.1(b) (1996).

263 *Id.* § 219.10(e) (emphasis added). *See also id.* § 223.30 (mandating that all timber sales be consistent with the applicable forest plan).

264 Wilkinson & Anderson, *supra* note 5, at 74.

265 *See* Wilderness Soc'y v. Alcock, 83 F.3d 386, 388 & n.5 (11th Cir. 1996); *see also* 16 U.S.C. § 1604(j) ("Land management plans and revisions shall become effective thirty days after completion of public participation . . . as required under subsection (d) of this section."). *But see* Wilderness Soc'y v. Alcock, 867 F. Supp. 1026, 1041 (N.D.Ga. 1994) (noting that "final agency action does not necessarily confer standing"), *aff'd* 83 F.3d 386 (11th Cir. 1996).

266 *See* 5 U.S.C. § 702.

ally.[267] As the Supreme Court noted in *National Wildlife Federation*, the NFMA is a statute that allows a "broad regulation[ ]," a forest plan, "to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt."[268]

As a second factor, the plans themselves declare the mandatory nature of their requirements. For example, the forest plan for the Cherokee National Forest in Tennessee states that "[a]ctivities . . . will be implemented to carry out the direction in this Plan."[269] In addition, it explicitly directs that the plan's results are to be achieved.[270] Moreover, in those management areas that have been determined to be suitable for timber development, the plan requires harvesting to occur,[271] and it sets a ten year timber sale action plan.[272] Like the Cherokee plan, the Black Hills National Forest forest plan requires that "'[t]he management requirements in [the plan] . . . set the baseline conditions that must be maintained throughout the Forest in carrying out the Forest Plan.'"[273]

Third, Forest Service statements reveal that it too considers forest plans to be binding and mandatory. In 1990, for example, the Forest Service Chief stated, "'[W]e expect every project to be in full compliance with standards and guidelines as set forth in Forest Plans.'"[274] Other Forest Service statements also reveal that the agency considers forest plans to be mandatory. In *Mumma*, for example, the Ninth Circuit cited specific instances where the Ser-

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[267] In some cases, however, the Forest Service develops a single forest plan for two adjoining forests.

[268] *National Wildlife Fed'n*, 497 U.S. at 891.

[269] U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, CHEROKEE NATIONAL FOREST LAND & RESOURCE MANAGEMENT PLAN I-1 (1986) (on file with the Southern Environmental Law Center, Charlottesville, Virginia).

[270] *See id.* at IV-1.

[271] *See id.* at IV-149-93.

[272] *See id.* at Appendix C.

[273] Tuholske & Brennan, *supra* note 66, at 103-04 n.369 (quoting the Black Hills National Forest forest plan III-10 (1983)). The author reviewed more than a dozen other forest plans and found that this mandatory language was consistently included.

[274] *Id.* at 104 (quoting F. Dale Robertson, Forest Plan Implementation (Feb. 23, 1990) (memorandum to regional foresters)). Notably, courts have enforced this compliance requirement. *See* Swan View Coalition v. Turner, 824 F. Supp. 923, 935 (D. Mont. 1992); Sierra Club v. United States Forest Serv., 878 F. Supp. 1295, 1314-17 (D.S.D. 1993). Some commentators have questioned whether Forest Service standards and guidelines are mandatory. *See, e.g.*, Tuholske & Brennan, *supra* note 66, at 104-05. The case they cite to support their uncertainty, however, *Sierra Club v. United States Forest Service*, held only that when different standards and guidelines conflict, the Forest Service has the discretion to choose between them. *See* Sierra Club v. United States Forest Serv., 878 F. Supp. at 1314-17.

vice had rejected administrative challenges of site-specific actions on the ground that the challenged decisions had already been made by the plan.[275] The statements regarded the agency's decision not to recommend certain roadless areas for wilderness designation. The agency said that it would "not revisit[ ] the land allocation decisions made in the Forest Plan" and that "management decisions . . . which were made at the Forest Planning level are excluded from appeals of decisions made [at the site-specific level]."[276]

The fourth reason why forest plans must be seen as mandatory and binding is that the Forest Service itself implements the plans;[277] that is, implementation of forest plans does not depend on the indefinite actions of third parties. Thus, the case of plan challenges is very different from the situations in *National Wildlife Federation* and *Defenders*. In the former, the ultimate injury was contingent on the occurrence of mineral exploration and development activities by third parties,[278] and in *Defenders*, the injury was contingent on the plaintiffs' revisiting sites where projects were actually implemented.[279] In the case of forest plans, a single agency decides how the forest will be managed over the course of a ten year period and then implements its plan of action. When a federal agency declares, "This is our plan of action for these lands and it is a legally binding mandate that we implement this plan," are we to take them at their word? Such a proclamation should not be heard simply as a wholly contingent announcement.

Fifth, the fact is that, to a significant degree, forest plans are faithfully implemented. For example, the forest plan for the Cherokee National Forest, adopted in 1986, set an annual timber harvesting "allowable sale quantity" (ASQ) goal of 34.5 million board feet per year.[280] In its five-year review of the implementation of the plan, the Forest Service reported that it had sold an annual

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[275] Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 n.17 (9th Cir. 1992) (quoting Idaho Panhandle National Forest, Horizon Forest Resource Area-Record of Decision, at 9, & West Moyie Record of Decision, at 33) (internal quotations omitted).

[276] *Id.*

[277] *See id.* at 1515-16.

[278] *See National Wildlife Fed'n*, 497 U.S. at 892 n.3. Obviously timber sales cannot be completed without third parties (timber companies). Given the timber companies' ongoing battle to harvest more and more timber from the national forests, however, this cannot be considered a discretionary role akin to the mineral development at issue in *National Wildlife Federation*.

[279] *Defenders*, 504 U.S. at 564.

[280] *See* Brief for Appellants, Wilderness Soc'y v. Alcock, 83 F.3d 386 (11th Cir. 1996) (No. 94-9369).

average of 33.8 million board feet per year, thus selling almost 98% of the timber it had planned to sell.[281] While not all forests achieve such a high rate of compliance, many others do meet their ASQ goals to a significant degree.[282] The only way to meet the ASQ is to sell timber in the areas designated for timber development in the forest plan.

Sixth, and finally, in order to significantly amend a plan, the Forest Service must follow the full range of procedures that are required upon plan adoption.[283] Even minor variations from a plan's mandates must, at the very least, be announced and opened to comment,[284] giving the public an opportunity to administratively challenge the action and, potentially, to seek judicial review of it. In other words, plans must be complied with, and, if they are not, the agency must have analyzed the action and must explain why it has determined that the noncompliance is insignificant.

### 2. *Scope of Injury is Forest-wide*

The second reason to find challenges to forest plans justiciable is that in many cases a plan will result in forest-wide injuries. In those cases where the alleged injury is not forest-wide, plaintiffs' claims should be rejected as not yet ripe. When the injury is forest-wide, however, the issues and the imminent injury are as concrete at the time the plan is adopted as at any later time.[285]

Numerous substantive NFMA issues are decided at the plan level or primarily affect the forest as a whole. One court has held, for example, that a blatant violation of a substantive NFMA standard which has an effect on development projects across the forest cannot stand.[286] And, in another case, an unexplained emphasis on

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281 *See id.*

282 *See, e.g.*, U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, ROCKY MOUNTAIN REGION ANNUAL REPORT 12 (1989) (summarizing outputs of five national forests and showing that, over a five year period, planned average annual ASQ was 510 million board feet (mbf), while actual average annual output was 411 mbf); U.S. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FOREST PLAN MONITORING EVALUATION REPORT II-2 (1994) (showing that approximately 100 million board feet (mbf) were sold annually over first four years of plan, compared to ASQ of approximately 85 mbf). Copies of the relevant portions of these documents are on file with the author.

283 *See* 36 C.F.R. § 219.10(f) (1996).

284 *See id.*

285 *See* Sierra Club v. Marita, 46 F.3d 606, 613 (7th Cir. 1995).

286 *See* Sierra Club v. Cargill, 732 F. Supp. 1095, 1102 (D. Colo. 1990).

timber production goals as part of a plan's designation of lands suitable for timber production was held illegal.[287]

Perhaps the best example of an issue that is resolved at the plan level because its effects are forest-wide is that of biological diversity.[288] As previously discussed, the NFMA requires that forest plans insure the viability and habitat of species living in the forest.[289] Many conservation biologists now believe that the single biggest threat to biological diversity is the fragmentation of forests.[290] As the Seventh Circuit in *Marita* described the theory:

> Conservation biology, the Sierra Club asserted, predicts that biological diversity can only be maintained if a given habitat is sufficiently large so that populations within that habitat will remain viable in the event of disturbances. Accordingly, dividing up large tracts of forest into a patchwork of different habitats, as [forest plans do], would not sustain the diversity within these patches unless each patch were sufficiently large so as to extend across an entire landscape or regional ecosystem.[291]

Although the court failed to find that the Forest Service violated its viability and diversity mandate, such claims may well prevail in the future, as the widely accepted science of conservation biology expands.[292] In fact, the Forest Service itself has acknowledged that diversity issues should be resolved at the plan level and has argued that diversity requirements do not apply to site-level actions.[293]

In summary, when plaintiffs challenge forest plans on the basis of injuries that are forest-wide in scope, such as biological diversity,

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[287] *See* Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 981, 988 (D. Colo. 1989).

[288] Diversity claims were raised in both *Marita*, 46 F.3d at 610, and Wilderness Society v. Alcock, 867 F. Supp. 1026, 1034-36 (N.D.Ga. 1994).

[289] *See supra* notes 44-49 and accompanying text.

[290] *See* LARRY D. HARRIS, THE FRAGMENTED FOREST: ISLAND BIOGEOGRAPHY THEORY AND THE PRESENTATION OF BIOTIC DIVERSITY (1984).

[291] *See Marita*, 46 F.3d at 610 (citing Reed F. Noss, *Some Principles of Conservation Biology, As They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893 (1994)).

[292] *See* Patricia Smith King, Comment, *Applying Daubert to the "Hard Look" Requirement of NEPA: Scientific Evidence Before the Forest Service in Sierra Club v. Marita*, 2 WIS. ENVTL. L.J. 147 (1995) (criticizing *Marita* on the merits and arguing that courts should not defer to agency scientific decisions if countervailing views are accepted by an overwhelming majority of scientists in the discipline).

[293] *See* Sharps v. United States Forest Serv., 823 F. Supp. 668, 678-79 (D.S.D. 1993); *see also* Krichbaum v. Kelley, 844 F. Supp. 1107, 1116 (W.D. Va. 1994) (in a challenge to site-specific action, Forest Service agreed that the policy regarding fragmentation effects must be established by the forest plan and is not appropriately addressed in the challenge of a site-specific action). *But see* Tuholske & Brennan, *supra* note 66, at 74-76 (citing *Sharps* and arguing that diversity issues should be appealable at both the plan and site levels).

their claims should be heard. Such claims are justiciable because the mandatory nature of forest plans makes the injury certainly impending, and the issues do not need to be further developed to allow for meaningful judicial resolution.

### 3. *A Challenge to an Entire Plan May Not be Possible, and Would Likely be Ineffectual, if Brought in Conjunction with a Site-Level Challenges*

The lower courts are split as to whether a plaintiff may challenge a forest plan as part of the challenge of a site-specific project.[294] Furthermore, there is a strong argument that the ripeness doctrine would prohibit such a challenge — if a plan-based complaint is unripe because site-specific actions are as yet unproposed, why would the proposal of some site-specific projects make the overall complaint any more ripe?[295] Thus, the *Mumma* court may well be right in its view that the time to challenge a forest plan is either when it is passed or never.[296]

This argument is thus a corollary to the argument in subsection V.A.2, above. The best time to challenge those decisions that are made at the plan level is when the plan is adopted. There are two reasons for this. First, as these challenges are brought pursuant to the APA, the record for purposes of judicial review is the administrative record.[297] If the agency refused to revisit decisions it made in the plan at the site-specific level, a plaintiff might not be able to build an appropriate record to challenge the entire plan.[298] Second, allowing plan challenges would end attempts by the Forest Service to play a "shell game," claiming that forest plan challenges

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[294] *See supra* notes 235-41 and accompanying text.

[295] *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 893 (1990). *But see* Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 & n.8 (11th Cir. 1996) (denial of ripeness of claim depends on concession that "[p]lan-level decision(s) underlying the specific action at the second stage" are challengeable). Of course, if this means only site-specific issues can be raised, the entire plan will nevertheless escape review.

[296] *Mumma*, 956 F.2d at 1516.

[297] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

[298] *See* Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355 n.15 (9th Cir. 1994) (making this point regarding the ability to challenge procedural NEPA violations in a forest plan at the time of a site-level challenge); *see also Mumma*, 956 F.2d at 1516 n.17 (citing specific instances where the Forest Service rejected administrative challenges of site specific actions because the challenged decisions had already been made by the forest plan).

are not justiciable, but then defending site-level proposals on the grounds that decisions made in the plan may not be revisited.[299]

Finally, there is also a practical issue to consider. If a plan were challenged at the time of a site-specific suit, long after it had gone through the course of administrative appeals, would a court give it a thorough and objective hearing? It seems likely that a court would treat the plan at that time as a *fait accompli*, especially since the court may not be privy to the entire administrative record that was developed during the administrative appeal stage. As the Ninth Circuit stated in *Mumma*, "[A] future challenge to a particular, site-specific action would lose much force once the overall plan has been approved —- especially if the challenge were premised on the view that the overall plan grew out of erroneous assumptions."[300]

### *B. Holding that Forest Plan Challenges are Justiciable is Consistent with Separation of Powers*

Courts have implemented the standing and ripeness doctrines as specific manifestations of the separation of powers principle, that is, to exclude from court the airing of generalized grievances. Under our divided system of government, the political branches are deemed the appropriate place to fight over such general policy arguments. If an individual has only been harmed in the same way as the rest of society, that individual does not have any special nexus to the source of the injury, and is held not to have standing.[301] In addition, this theory allows the executive branch, which is given the duty to see that the "laws [are] faithfully executed,"[302] to "lose" some laws in the course of their administration. Someone who was challenging such a law, one that was not being enforced, would therefore never be injured, and her claim would never ripen.[303]

In either case, for the legislative branch to declare that a plaintiff may bring such a claim in court would be to use the courts to usurp power from the executive branch. The appropriate role for courts in our system of government is to protect minority rights —- that

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[299] *See* Smith v. United States Forest Serv., 33 F.3d 1072, 1075-76 (9th Cir. 1994); *Mumma*, 956 F.2d at 1516 n.17; Krichbaum v. Kelley, 844 F. Supp. 1107, 1116 (W.D. Va. 1994).

[300] *Mumma*, 956 F.2d at 1519.

[301] *See supra* notes 161-64 and accompanying text.

[302] U.S. CONST. art. II, § 3.

[303] *See supra* notes 165-69 and accompanying text.

is, the rights of individuals who have been harmed by the application of the laws in a greater way than has the majority. Courts appear to legislate when they rule on issues that affect the populace generally, and this violates the separation of powers principle.

In the case of forest plan challenges, none of these concerns is implicated. To begin with, plaintiffs in these cases have shown that they will be injured in a particular way when the plans are implemented. The grievances they have are not general, but rather are specific to their use and enjoyment of a particular national forest. Failure to comply with the procedural and substantive requirements of the NFMA when developing forest plans does result in imminent injury to specific individuals, namely, those who enjoy the forests for aesthetic or scientific purposes.

### *C. Granting Standing and Ripeness is Good Public Policy*

Finally, resolving the legality of plan-level decisions in plan appeals is good public policy, as it will preserve judicial resources and will most efficiently bring such contentious issues to resolution. The Ninth Circuit's experience in *Mumma*, for example, is instructive on this point. Once the court had ruled on the Forest Service's environmental evaluation of its decision not to recommend certain roadless areas for wilderness designation, "a twenty-year legal battle over [that] still-contentious issue" was ended.[304] By bringing to judicial resolution such contentious issues, the courts do not have to rehear them over and over, resurfacing in each site-specific appeal. This is especially important with respect to an issue like biological diversity. If such a forest-wide issue is not resolved at the plan level, plaintiffs can re-argue it time and again in site-level appeals, always claiming that this project is the one that raises the plan's overall impact to the level that violates the NFMA's diversity requirements. Moreover, the Forest Service can get its procedures approved at a single time and move forward with plan implementation. And if the plan can be implemented more smoothly, resource industry interests will also benefit by being able to plan on the sustained yields of resource production that the NFMA and the other forest planning statutes were designed to insure.

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[304] Tuholske & Brennan, *supra* note 66, at 102-03 (citing *Mumma*, 956 F.2d at 1508).

## VI. CONCLUSION

Recently, four United States Courts of Appeals have considered whether a plaintiff may, consistent with the standing and ripeness doctrines, challenge the adoption of a Land Resource Management Plan for a national forest before the plan is implemented via site-specific projects. The Seventh and Ninth Circuits have held that such challenges are justiciable, while the Eighth and Eleventh Circuits have denied justiciability, the former for a lack of standing and the latter for a lack of ripeness.

For three primary reasons, courts facing this issue should decide in favor of justiciability. First, a forest management plan may inflict procedural and substantive injuries which are concrete and imminent enough to satisfy the requirements of both standing and ripeness. When the Forest Service acts in violation of a procedural right granted by one of the statutes governing national forest management, parties with concrete interests protected by that procedure are injured regardless of any future action by the Service. If, for example, the Service adopts a plan without being fully informed as to the effects the plan will have on the biological diversity of a forest, the plan should be immediately challengeable, because the rights of persons that use the forest for work or play to have the Service make a fully-informed decision have already been violated. A plan should likewise be challengeable at the time of its adoption if a substantive right has already been violated. Given the binding nature of forest plans, the likelihood that injuries from plans will be forest-wide, and the fact that, from both a legal and a practical perspective, it may become impossible to challenge plans in their entirety as time passes, courts hearing substantive claims should not require that some site-specific action be taken before holding that the injury requirement of standing and ripeness is satisfied. Second, holding forest plan challenges justiciable is consistent with the separation of powers rationale which undergirds the standing and ripeness doctrines. Third, it is good public policy to find plan challenges justiciable, because doing so may preserve judicial, administrative and private resources. Resolving plan challenges once, at the beginning of the process, will save courts and private parties countless hours of time spent in litigation each time a specific action is taken to implement the plan. In addition, having resolved plan challenges early on, the parties will be able to plan for the future based on more accurate expectations of how the forest will be managed.

Since many plan challenges are meritorious, a denial of justiciability may have tremendously important consequences. In many cases, a denial may result in harm to the economic, recreational, aesthetic, scientific and other resources of our national forests. Given the stakes, the arguments advanced in this Note merit careful consideration.