The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute

Part 2

by

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this requirement; the forest plan is implemented through site-specific projects, "and all projects must be consistent with the LRMP [Land and Resource Management Plan]."[370]

In 1990, the Chief of the Forest Service issued a directive emphasizing the non-discretionary nature of forest plan standards and guidelines:

> There should be no doubt in anyone's mind about which takes precedence if there is a conflict between standards and guidelines and program outputs: if there is a conflict between standards and guidelines and program outputs; we expect every project to be in full compliance with standards and guidelines as set forth in Forest Plans.[371]

Forest plan standards and guidelines range from broad statements of policy[372] to specific resource requirements that affect management decisions on an acre-by-acre basis.[373] While forest managers must insure that projects such as timber sales, grazing permits and special uses comply with the forest plan, the situations in which forest plan standards and guidelines can be enforced in court are not clear.

The issue has been addressed in only a few cases. In timber sale litigation in South Dakota, the Sierra Club sued over the Forest Service's lack of compliance with forest plan standards for snags, old growth and white-tailed deer cover.[374] The harvest area was not in compliance with forest plan standards at the time the timber sale project was approved. The Sierra Club argued that further harvest and related road construction should not occur until the timber sale area was in compliance with forest plan standards.

The district court disagreed, finding that the Forest Service was taking reasonable actions in light of existing conditions by taking steps to insure future compliance with forest plan standards.[375] In its opinion, the

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maintained throughout the Forest in carrying out the Forest Plan." U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., BLACK HILLS NAT'L FOREST LAND AND RESOURCE MANAGEMENT PLAN III-10 (1983).

370. Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 977 (D. Colo. 1989); *see also* Sierra Club v. Robertson, 764 F. Supp. 546, 554 (W.D. Ark. 1991).

371. F. Dale Robertson, *Forest Plan Implementation* (Feb 23, 1990) (memorandum to regional foresters) (unpublished) (copy on file with author).

372. *See, e.g.*, BEAVERHEAD NAT'L FOREST PLAN, *supra* note 86, at II-30 (stating in Watershed Standard No. 3 that all timber sales will comply with state water quality laws).

373. For example, to provide habitat for cavity-dwelling bird species, the Black Hills National Forest snag management standard requires, at a minimum, 4-6 snags per 10 acres of the following minimum diameters where biologically feasible: ponderosa pine, spruce, aspen, and oak: 8 inches dbh. BLACK HILLS NAT'L FOREST PLAN, *supra* note 369, at III-12.

374. Sierra Club v. U.S. Forest Service, No. 92-5101 (D.S.D. Oct. 28, 1993).

375. *Id.*, slip op. at 40-41. For example, the sale area contained only 1% old growth, while the forest plan standard required 5%. The Forest Service designated certain acres as "future old growth" by labeling such areas on the map. Plaintiffs argued that this designation was non-binding, and that the

court made somewhat contradictory statements about the enforceability of forest plan standards. For example, it acknowledged the need for the Forest Service to comply with forest plan standards,[376] but then stated, "It is also important to remember that the Forest Plan standards represent forest conditions which the Forest Plan desires the forest to attain in the future."[377] This decision does not shed much light on the enforceability of forest plan standards.

By contrast, the Montana District Court has held that forest plan standards on the Flathead National Forest "operate as parameters within which all future development must take place."[378] In *Swan View Coalition v. Turner*, plaintiffs sought to overturn the U.S. Fish and Wildlife Service's biological opinion on the Flathead National Forest Plan.[379] The gravamen of plaintiffs' claim was that the biological opinion failed to consider the site-specific impacts of forest plan implementation with respect to grizzly bears and their habitat.[380]

The district court reviewed numerous provisions designed to protect grizzly bears that were incorporated into the forest plan's standards, including the Interagency Grizzly Bear Committee Guidelines.[381] Because the standards act as "safeguard mechanisms" to prevent developments such as timber sales from going forward if they violate forest plan standards, the court found no need for a more detailed biological opinion at the time the forest plan was adopted.[382] The Forest Service's commitment to follow forest plan standards, coupled with the Fish and Wildlife Service's commitment to prepare a site-specific biological opinion if a future project departed from those standards, assured the court that future impacts would be properly addressed at the time future development

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continued loss of mature timber delayed compliance with old-growth standards. The court found the Forest Service actions reasonable because "old growth cannot be created overnight," and because by cutting trees, the Forest Service was meeting forest plan standards for creating wildlife forage areas. *Id.*

376. *Id.* at 44.

377. *Id.* at 46.

378. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 935 (D. Mont. 1992).

379. *Id.* at 933. Section 7 of the Endangered Species Act requires a biological opinion. 16 U.S.C. § 1536(b)(3)(A). In *Swan View Coalition*, the Forest Service determined that the forest plan might affect grizzly bears, a threatened species, and therefore prepared a biological opinion. Plaintiffs claimed the opinion was inadequate. *Id.* at 932-33.

380. *Id.* at 932-33.

381. *Id.* at 933. The Interagency Grizzly Bear Committee (IGBC) is a multi-agency group that promulgated regional land management standards designed to assist grizzly-bear recovery to the point where the bears no longer need the protection of the Endangered Species Act. IGBC standards adopted in the Flathead Forest Plan included scheduling timber harvests at times that are the least disruptive to bears, and maintaining hiding and thermal cover at proper levels after timber sale projects are completed. U.S. FOREST SERVICE, FLATHEAD NAT'L FOREST LAND AND RESOURCE MANAGEMENT PLAN (1985).

382. *Swan View Coalition*, 824 F. Supp. at 935.

occurred.[383]

Swan View Coalition presents the strongest language to date on the binding nature of forest plan standards. Forest plans would be largely meaningless if land managers were free to ignore their standards and guidelines. Forest plan standards will likely play a much greater role in NFMA litigation in the future. In the northern Rockies alone, for example, cases are pending over grazing standards on the Beaverhead National Forest,[384] management standards for wild and scenic portions of the Salmon River,[385] and forest plan standards for grizzly bears on the Flathead National Forest.[386] *Swan View Coalition* defines the relationship between forest plan standards and management activities, and correctly enforces the underlying logic of forest plan standards. Courts should follow this interpretation and require the agency to adhere to management standards adopted through the forest planning process.

III. Procedural Obstacles

Unlike other environmental statutes, NFMA does not have a citizen-suit provision or other provision allowing judicial review.[387] Judicial review under NFMA must be secured under the Administrative Procedure Act (APA),[388] which permits aggrieved persons to challenge administrative actions and allows reviewing courts to set those actions aside.

Judicial review under the NFMA has taken two basic tracks. One line of cases involves litigation over forest plans, i.e., challenges to a forest plan as violating NFMA, and/or to the accompanying EIS as violating NEPA. The other line of cases focuses on challenges to specific actions, usually timber sales.

A. *Getting to the Courthouse Door*

Before a court ever gets to the merits of a NFMA claim, plaintiffs must first overcome a series of obstacles. These hurdles include standing, ripeness of the issue for judicial review, and exhaustion of administrative remedies. All operate to limit, and sometimes prevent, judicial review in NFMA cases. The Forest Service has frequently invoked these defenses, resulting in a fairly well developed body of law in these areas in less than a decade.

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383. *Id.* at 934.

384. National Wildlife Fed'n v. Kulesza, No. CV-94-23-BU (D. Mont. filed March 30, 1994).

385. Wilderness Watch v. United States, No. 91-103-M-CCL (D. Mont. filed Aug. 5, 1991).

386. *Swan View Coalition*, 824 F. Supp 923.

387. *See, e.g.*, 16 U.S.C. § 1540(g) (allowing private citizens to seek judicial review for violations of the Endangered Species Act).

388. 5 U.S.C. §§ 701-706 (1988).

1. *Standing*

Standing is a constitutional requirement arising from the Article III "case or controversy" requirement.[389] Standing asks whether a court has subject matter jurisdiction to hear a particular case[390] and is one element of a court's requirement that there be a "justiciable" controversy.[391] It is not a particularly clear doctrine, making it difficult for both litigants and judges to articulate and analyze.[392] Standing is reviewed de novo;[393] the nature of the review depends upon the plaintiff's burden of proof at the relevant procedural stage.[394]

To prove constitutional standing, a plaintiff must first demonstrate an "injury in fact"; second, an injury that is fairly traceable to the defendant's conduct; and third, an injury that is redressable by the court.[395] An injury in fact is "an invasion of a legally-protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not "conjectural" or

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389. U.S. CONST. art. III, § 2, cl. 1.

390. Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 807 (11th Cir. 1993). Standing can therefore be raised at any time, and can be raised by the court on its own motion, as was done in *Region 8 Forest Service Timber Purchasers*. *Id.* at 807 n.9.

391. Justiciability is a term of art encompassing two major limitations placed on federal courts by the case or controversy doctrine: that the courts limit themselves to questions presented in an adversarial context, and that the questions be capable of being resolved through the judicial process. Flast v. Cohen, 392 U.S. 83, 95 (1968). Plaintiffs who raise general grievances about actions or inactions of the government, for example, but who are not uniquely affected or injured by the action or inaction, do not satisfy the Article III standing requirements. *See* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2143 (1992).

392. The Ninth Circuit recently observed, "Through its tangled and fluctuating formulations, the doctrine of standing might well have become 'a word game played by secret rules. . .' " Idaho Conservation League v. Mumma, 956 F.2d 1508, 1513 (9th Cir. 1992) (quoting *Flast*, 392 U.S. at 129) (Harlan, J., dissenting)).

393. *Idaho Conservation League*, 956 F.2d at 1513; *Region 8 Forest Service Timber Purchasers*, 993 F.2d at 806.

394. The nature of review reflects the procedural requirements of the litigation stage. At the motion to dismiss stage, the plaintiff can rest on the allegations of the complaint, which must be taken as true. FED. R. CIV. P. 56(e); *Defenders of Wildlife*, 112 S.Ct. at 2137; *accord Region 8 Forest Service Timber Purchasers*, 993 F.2d at 806. At the summary judgment stage, the plaintiff must set forth specific facts via affidavit. *Defenders of Wildlife*, 112 S.Ct. at 2137; *accord* Wind River Multiple-Use Advocates v. Espy, 835 F. Supp. 1362, 1368 (D. Wyo. 1993).

395. Allen v. Wright, 468 U.S. 737, 751 (1984). The Supreme Court has stated that a plaintiff must have a "personal stake in the outcome," Baker v. Carr, 369 U.S. 186, 204 (1962), which developed into the first two components of the three-part test: 1) injury to the plaintiff, 2) with a "fairly traceable" causal connection between the alleged conduct and the injury. Duke Power Co. v. Carolina Envtl. Study Group, Inc. 438 U.S. 59 (1978) (plaintiffs challenging Price-Anderson Act held to have standing).

After Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), and *Defenders of Wildlife*, 112 S.Ct. 2130, plaintiffs must include affidavits specifying their use and enjoyment of particular areas affected by the agency action. These affidavits have been found to be sufficient even when they are limited in their detail about particular areas due to the fact that the forest plan does not specify exact areas of development. *See Idaho Conservation League*, 956 F.2d at 1517.

'hypothetical." "[396] An interest in the proper administration of the laws is not sufficiently "concrete" for standing purposes.[397] Therefore, a plaintiff who seeks judicial review of an agency action, such as a forest plan, must adduce facts which show that the plaintiff will suffer personal harm as a result of the agency's allegedly illegal action in order to have standing to bring the suit.

Some statutes, such as the Endangered Species Act (ESA),[398] contain "citizen-suit" provisions allowing private citizens to commence civil litigation against other individuals allegedly violating the statute, or against the applicable agency secretary for failing to follow or apply the statute.[399] These provisions do not obviate the need for plaintiffs to establish Article III standing, however.[400] Because neither NEPA nor NFMA contain citizen-suit provisions, the authority for judicial review under those statutes arises from the APA.[401] The standing inquiry therefore looks not only at the constitutional requirements, but also at the APA requirements.[402] Specifically, under the APA, a plaintiff must identify a final agency action that has injured him, and must show that he has been "adversely affected or aggrieved" by the action within the meaning of the statute the plaintiff claims is being violated.[403] To be "adversely affected," the plaintiff's injury must fall within the "zone of interests" protected by the statute at issue.[404] Finally, some courts will also look for "associational standing" for voluntary membership organizations.[405]

In 1972, the Supreme Court held that injury to a person's aesthetic or recreational interests satisfied the "injury-in-fact" requirement.[406] Although the plaintiffs were found to lack standing in *Sierra Club v. Morton*,[407] the Court indicated that an environmental group could have

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396. *Defenders of Wildlife*, 112 S.Ct. at 2136 (citations omitted).

397. *Id.* at 2147 (Kennedy, J., concurring).

398. 16 U.S.C. §§ 1531-1543.

399. *See, e.g.*, 16 U.S.C. § 1540(g)(1).

400. *Defenders of Wildlife*, 112 S.Ct. at 2145.

401. 5 U.S.C. §§ 701-706.

402. *See, e.g., Wind River Multiple-Use Advocates*, 835 F. Supp. at 1368. *See also* George K. Pash, *NEPA: As Procedure It Stands, As Procedure It Falls: Standing and Substantive Review in Idaho Conservation League v. Mumma*, 29 WILLAMETTE L. REV. 365, 370 (1993).

403. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).

404. *Id.* at 883.

405. *See, e.g.*, Hunt v. Washington Apple Growers Advertisers Ass'n, 432 U.S. 333 (1977); Sierra Club v. Morton, 405 U.S. 727 (1972); *Region 8 Forest Service Timber Purchasers*, 993 F.2d at 805 n.3.

406. *Morton*, 405 U.S. at 734-35. *See also* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) [hereinafter *SCRAP*].

407. 405 U.S. 727, 741 (1972).

standing on behalf of its members.[408] The following year, the Court held that an organization's allegations that members used certain areas for recreation was sufficient to confer standing to challenge an order of the Interstate Commerce Commission allowing railroads to collect a surcharge on freight rates for recyclable materials.[409] Together, these cases paved the way for litigation initiated by environmental-group plaintiffs challenging federal agency actions.

Plaintiffs suing under NFMA usually challenge a forest plan, its accompanying EIS or a timber sale. The standing jurisprudence applicable to NFMA cases arises from two recent environmental standing cases, *Lujan v. National Wildlife Federation*[410] and *Lujan v. Defenders of Wildlife*.[411] In *National Wildlife Federation*, the Supreme Court held that the affidavits submitted by two of plaintiff's members were not specific enough to show that the members would be "adversely affected" by the agency action.[412] Although the Court acknowledged "there is some room for debate as to how 'specific' must be the 'specific facts' " required to overcome a summary judgment motion, it further stated that "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory" were not sufficient.[413]

Defenders of Wildlife addressed the constitutional requirement that an injury be "actual or imminent."[414] The purpose of this requirement, wrote Justice Scalia, is to "insure that the alleged injury is not too speculative for Article III purposes."[415] Both of these issues—specificity of plaintiffs' affidavits and imminence of harm—became the focus of standing arguments in NFMA cases. One issue that was not called into question by *National Wildlife Federation* or *Defenders of Wildlife*, however, was the cognizability of an injury to an individual's "recreational or aesthetic interest,"[416] which is in many ways the bedrock of environmental standing.

It is not surprising that the government tried to extend standing

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408. *Id.* at 739.

409. *SCRAP*, 412 U.S. at 689-90; *but see National Wildlife Fed'n*, 497 U.S. at 889 (stating that *SCRAP's* "expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court").

410. 497 U.S. 871 (1990).

411. 112 S.Ct. 2130 (1992).

412. *National Wildlife Fed'n*, 497 U.S. at 888-89.

413. *Id.* at 889.

414. *Defenders of Wildlife*, 112 S.Ct. at 2137-38.

415. *Id.* at 2138 n.2.

416. *National Wildlife Fed'n*, 497 U.S. at 886 (stating that "recreational use and aesthetic enjoyment" are among the interests the Federal Land and Policy Management Act and NEPA were designed to protect); *Defenders of Wildlife*, 112 S.Ct. at 2137 (stating that "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing" (citing Sierra Club v. Morton, 405 U.S. 727, 734 (1972)).

limitations to all plaintiffs challenging forest plans after *National Wildlife Federation* and *Defenders of Wildlife*. What is surprising, however, is that cases interpreting *National Wildlife Federation* and *Defenders of Wildlife* have resulted in standing requirements that are, in many ways, no more difficult for environmental-group plaintiffs than before. This is especially true in the Ninth Circuit as a result of *Idaho Conservation League v. Mumma*.[417]

In *Idaho Conservation League*, plaintiffs challenged the Flathead National Forest Plan EIS's recommendation for roadless-area development.[418] The court framed the standing issue as whether the "alleged procedural failure in the EIS" harmed the plaintiffs by creating a risk that environmental impacts would be overlooked in the future.[419] Although the court acknowledged that plaintiffs' claims involved alleged violations of NEPA and NFMA,[420] it analyzed the statutory component of plaintiffs' standing under NEPA only.[421] After finding that plaintiffs' interests were legally protected by NEPA,[422] the court analyzed whether the potential harm was too remote to be an injury in fact, and whether plaintiffs had shown that their personal interests were affected.[423] Each of these issues can be framed in terms of the earlier U.S. Supreme Court decisions, i.e., determining whether an injury is too "remote" addresses the *Defenders of Wildlife* issue of whether the threatened harm is imminent, and determining whether the plaintiff's interests are personally affected goes to the specificity of the affidavits discussed in *National Wildlife Federation.*

a) Remoteness of the Threatened Injury

The district court in *Idaho Conservation League* held that plaintiffs'

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417. 956 F.2d 1508 (9th Cir. 1992); *accord* Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1484, 1488 (W.D. Wash. 1992) ("[t]he threatened injury to plaintiffs from further logging of old growth habitat for the spotted owl is concrete, specific, imminent, caused by the agency conduct in question, and redressable by a favorable ruling); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) (threatened harm to owl viability from logging meets the three-part constitutional standing test); Oregon Natural Resources v. Lowe, 836 F. Supp. 727, 732 (D. Or. 1993).

418. *Idaho Conservation League*, 956 F.2d at 1512-13.

419. *Id.* at 1514 (citing Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987).

420. *Id.* at 1512.

421. *Id.* at 1514-15. Given that the Ninth Circuit later held that NFMA standing cannot be derived from NEPA standing, Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 n.2 (9th Cir. 1993), the court's analysis should extend to all relevant statutes rather than ending with the first one under which plaintiff has standing.

422. *Idaho Conservation League*, 956 F.2d at 1515. The Ninth Circuit generally begins its environmental standing analyses by applying the APA "zone of interests" test to determine whether plaintiffs' interests are legally protected by the statute being invoked. *See, e.g., id.* at 1514; *Nevada Land Action Ass'n*, 8 F.3d at 716.

423. *Idaho Conservation League*, 956 F.2d at 1515.

alleged injury was "too speculative" for purposes of standing,[424] reflecting the language used by Justice Scalia in *Defenders of Wildlife* in discussing imminence of injury.[425] The Ninth Circuit did not cite *Defenders of Wildlife* in its discussion of remoteness, and held that a threatened injury which is contingent upon intervening events is adequate to support standing.[426] Even though the challenged Forest Service decision was not irrevocable, it created the possibility that wilderness development would occur, and "[p]ursuant to NEPA and NFMA, these are injuries that we must deem *immediate*, not speculative."[427]

This was a significant ruling for plaintiffs challenging forest plans. The Forest Service has consistently argued that a forest plan does not constitute an "irretrievable commitment of resources,"[428] but is instead merely "direction to control future decisionmaking."[429] On that basis, the agency has argued that without any specific actions mandated by the plan, a plaintiff's alleged injury is too speculative and remote to support standing.[430] That is, because the forest plan did not directly implement timber sales in roadless areas, it did not create an injury in fact. If plaintiffs want to challenge a specific development, the Forest Service has argued, it can and should do so when that particular development is proposed.[431]

This argument persuaded the district court in *Idaho Conservation League*, which noted that any future development would be subject to NEPA, and would therefore require an EIS.[432] It has not persuaded many

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424. *Id.*

425. *Defenders of Wildlife*, 112 S.Ct. at 2138 n.2.

426. *Idaho Conservation League*, 956 F.2d at 1515-16.

427. *Id.* at 1516.

428. This language is from the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(C)(v) (1988).

429. *See, e.g.*, Sierra Club v. Marita, 843 F. Supp. 1526, 1531 (E.D. Wis. 1994) (quoting defendants' brief as stating that the plan "merely state[d] guidelines and parameters to be followed in the event a project is undertaken"). The *Marita* court, however, like the Ninth Circuit, did not accept the Forest Service's characterization of the plan, noting that it included a "whole array of exceedingly specific management "prescriptions" that are in no sense conditional or optional." *Id. See also* GIPPERT, *supra* note 339, at 20.

430. *See, e.g. Idaho Conservation League*, 956 F.2d at 1515; Sierra Club v. Robertson, 764 F. Supp. 546, 553 (W.D. Ark. 1991) [hereinafter *Robertson I*] ("[T]he defendants essentially base this part of their motion on the assertion that the LRMP and FEIS are of so little import that their approval can neither injure the plaintiffs nor be described as any sort of action.").

431. *Idaho Conservation League*, 956 F.2d at 1515.

432. Idaho Conservation League v. Mumma, 21 Envt. L. Rep. (Envt. L. Inst.) 20,666 (D. Mont. Aug. 8, 1990); *accord* Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1533-34 (D. Mont. 1991), *aff'd in part, rev'd in part*, 8 F.3d 1394 (9th Cir. 1993). In fact, the Forest Service usually does an Environmental Assessment (EA), which it "tiers" onto the Forest Plan EIS. *See supra* note 363. Frequently, unless the development is taking place in a roadless area, the EA will lead to a Finding of No Significant Impact (FONSI), which means an EIS does not have to be prepared. The EA process, unlike the EIS process, does not require public participation, although the Forest Service regularly notifies interested parties.

other courts, however.[433] The Ninth Circuit relied on underlying statutes to hold that the Forest Service has a particular statutory duty that is represented by the development of a forest plan, and plaintiffs have a corresponding statutory right.[434] According to the court, "The standing examination . . . must focus on the likelihood that the defendant's action will injure the plaintiffs *in the sense contemplated by Congress.*"[435] The injuries were deemed immediate because of rights and duties created by NEPA and NFMA.[436] By casting the injury as immediate, not speculative, the Ninth Circuit avoided a direct confrontation with the holding of *Defenders of Wildlife*, although it is certainly arguable that Justice Scalia would disagree with the court's reasoning.

b) Specificity of Plaintiff's Interest

The second issue raised in *Idaho Conservation League* was whether plaintiffs had a sufficiently personal interest in the outcome of the agency action.[437] Here, the Ninth Circuit immediately cited *National Wildlife Federation*, but distinguished it on the facts.[438] The *National Wildlife Federation* plaintiffs simply stated that they used lands "in the vicinity of lands that would be open to mining," while the *Idaho Conservation League* plaintiffs named "*specific* areas they are accustomed to visit and enjoy."[439] The Ninth Circuit acknowledged that no one could identify the specific areas to be developed because those decisions would not be made until some time in the future, but rather than use that to deny standing, the court said the plaintiffs had provided all possible detail, and had adequately proved that individual members would be injured.[440]

As in the remoteness discussion, the Ninth Circuit appears to be more willing to grant standing and decide the merits of the plaintiffs' case than to deny judicial review until a specific project is proposed. Similarly, the

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433. *See, e.g., Idaho Conservation League*, 956 F.2d at 1515-16 (holding that the plan and wilderness designation "represent important decisions"); *Marita*, 843 F. Supp. at 1531; *Robertson I*, 764 F. Supp. at 554 (stating that the "Supreme Court in *Lujan* [*v. National Wildlife Fed'n*] clearly did not intend to preclude review of a plan simply because a project level decision, in this case a particular timber sale, has not been made"); Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993) ("Speculation that logging might not occur because of as yet unknown intervening circumstances, or because redrafting the EIS might not adopt the Secretary's decision to adopt the ISC strategy as its owl management plan is not relevant to standing.").

434. *Idaho Conservation League*, 956 F.2d at 1516.

435. *Id.*

436. *Id.*

437. *Id.* at 1516-17.

438. *Id.* at 1517.

439. *Id.*

440. *Id.*

district court in *Sierra Club v. Robertson (Robertson I)*[441] found that a forest plan is mandated by NFMA, and that the EIS stated it was to be used in making management decisions.[442] In granting standing, the court construed the plaintiffs' challenge as one going not only to the validity of the forest plan and its accompanying EIS, but to the management tools and methods allowed by those documents as well.[443] Like the Ninth Circuit in *Idaho Conservation League*, the district court in *Robertson I* appeared to be troubled by the question, "If not now, when?"[444]

c) Industry-Group Plaintiffs

The Forest Service has consistently challenged the standing of all plaintiffs, whether they represent industry or environmental interests. Environmental group plaintiffs seeking judicial review under NFMA and the APA have had little difficulty in proving standing, as long as they can provide detailed affidavits which specify individuals' use of affected areas.[445] Industry groups and user groups, however, such as multiple-use advocates[446] or ranchers with grazing permits on forest land,[447] face a much more difficult hurdle in standing challenges.[448] The difficulty for

441. 764 F. Supp. 546 (W.D. Ark. 1991).

442. *Robertson I*, 764 F. Supp. at 554.

443. *Id.*

444. *See id.* at 554-55 (stating that "such a result would put plaintiffs 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"); *Idaho Conservation League*, 956 F.2d at 1516 ("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. That point is now, or it is never.").

445. *Idaho Conservation League*, 956 F.2d at 1513-18; *accord Espy*, 998 F.2d at 702-03; Oregon Natural Resources Council v. Lowe, 836 F. Supp. 727, 732 (D. Or. 1993); *Resources Ltd.*, 8 F.3d at 1398. *See also* Susan L. Gordon, *The Ninth Circuit Standing Requirements for Environmental Organizations*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 264 (1993); Pash, *supra* note 402.

446. Wind River Multiple-Use Advocates v. Espy, 835 F. Supp. 1362, 1368-69 (D. Wyo. 1993).

447. Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993) (holding that ranchers had standing to challenge forest plan under NFMA, but not NEPA).

448. *See generally Region 8 Forest Service Timber Purchasers*, 993 F.2d 800; *Nevada Land Action Ass'n*, 8 F.3d at 716 (stating that "a plaintiff who asserts purely economic injuries does not have standing to challenge agency action under NEPA"); *Wind River Multiple-Use Advocates*, 835 F. Supp. at 1368-69.

This is a troubling result. If the Forest Service is required to follow particular procedures under NEPA, ESA, and NFMA, why should it matter whether an environmental-group plaintiff or an industry-group plaintiff challenges the legality of the agency's actions? *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 264-65 (1988) (rather than analyzing injury-in-fact, the court should look to the underlying statute). The D.C. Circuit has reasoned that because "NEPA creates a right to information on the environmental effects of government actions . . . any infringement of that right constitutes a constitutionally cognizable injury, without further inquiry into causation or redressability," but even then, the right to information under NEPA extends "only when the information sought relates to the *environmental* interests that NEPA was intended to protect." Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 123 (D.C. Cir. 1990). Justice Scalia has further stated that even "informational standing" under a procedural statute

these plaintiffs is in establishing a legally protected interest, given that NEPA and NFMA protect environmental values, not economic interests.

Neither MUSY nor NFMA requires forests to be managed primarily for economic reasons.[449] The NFMA regulations state that plans shall "[p]rovide, so far as feasible, an even flow of national forest timber in order to facilitate the stabilization of communities and of opportunities for employment,"[450] but the stabilization of local economies must be balanced against timber management constraints.[451] In addition, the "so far as feasible" language divests the regulation of any absolute requirement that the national forests be managed to promote local economies.[452] Some industry- and user-group plaintiffs have argued that the Forest Service is required to sell the Allowable Sale Quantity (ASQ) listed in each forest plan.[453] However, the regulations state that targets set in the plans are maximum amounts,[454] and more importantly, the courts have consistently held that timber companies have no legally protected right to harvest timber in the national forests in the future.[455]

Standing under NEPA appears to be more difficult for an industry- or user-group plaintiff to prove than under NFMA,[456] and does not necessarily result from standing under NFMA.[457] The circuits that have addressed the issue have come to similar conclusions, although via different routes. The Ninth Circuit first analyzes the APA "zone of interests" protected by the applicable statute, which eliminates standing for all plaintiffs asserting economic-based injuries.[458] The Eleventh Circuit, in one case with an industry-group plaintiff, applied the three-part constitutional test as well as the prudential standing test and found that the plaintiff lacked standing under NEPA and NFMA.[459]

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does not eliminate the need for a plaintiff to prove personal injury. *Defenders of Wildlife*, 112 S.Ct. at 2142 n.7.

449. Intermountain Forest Indus. Ass'n v. Lyng, 683 F. Supp. 1330, 1337-38 (D. Wyo. 1988).

450. 36 C.F.R. § 221.3(a)(3).

451. *Intermountain Forest Indus. Ass'n*, 683 F. Supp. at 1339.

452. *Id.*

453. *See, e.g. Wind River Multiple-Use Advocates*, 835 F. Supp. at 1365, 1371.

454. *Intermountain Forest Indus. Ass'n*, 683 F. Supp. at 1340 (relying on 36 C.F.R. § 221.3(a)(5) in reviewing a pre-NFMA plan); *accord Wind River Multiple-Use Advocates*, 835 F. Supp. at 1371-72.

455. *See Wind River Multiple Use Advocates*, 835 F. Supp. at 1369; *Intermountain Forest Indus. Ass'n*, 683 F. Supp. at 1340; *Region 8 Forest Service Timber Purchasers*, 993 F.2d at 808.

456. *Nevada Land Action Ass'n*, 8 F.3d at 716 (stating that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA").

457. *Id.* at 716 n.2.

458. *Id.* at 715-16. The Ninth Circuit took the same approach in *Idaho Conservation League*, 956 F.2d at 1514.

459. *Region 8 Forest Service Timber Purchasers*, 993 F.2d at 808.

d) Prudential and Associational Standing

Prudential standing involves judicially created policy requirements which may, to some extent, overlap with constitutional standing requirements.[460] Like constitutional standing, prudential standing has evolved into a three-part test: first, that the plaintiff must assert its own rights and interests, second, that the plaintiff may not plead "generalized grievances" that are best left to the political branches of government, and third, that the plaintiff's injury must fall within the "zone of interests" protected by the statute in question.[461] Congress can override the prudential standing requirements by inserting a citizen suit provision in a legislative act.[462] Prudential standing has been applied inconsistently in NFMA cases. In general, it is rarely mentioned if the court is finding for the plaintiff[463] and almost always mentioned if the court is finding for the defendant.[464]

Although rarely applied in NFMA cases,[465] associational standing consists of yet another three-part test: first, that the voluntary membership organization's members "have standing to sue in their own right," second, that the interests the group seeks to protect are "germane to the organization's purpose," and third, that "neither the claim asserted nor the relief requested must require the participation of the association's individual members."[466]

While standing has been a central issue in NFMA litigation, it has generally not prevented judicial review for environmental-group plaintiffs. Unless courts recognize a legally protected interest in all citizens seeking to enforce procedural statutes,[467] industry- and user-group plaintiffs face an almost insurmountable obstacle in proving standing under NEPA.[468] In the Ninth Circuit, it appears such plaintiffs will be able to establish

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460. Valley Forge Christian College v. Americans United For Separation of Church and State, Inc. 454 U.S. 464, 474-75 (1982).

461. *Id.*; Allen v. Wright, 468 U.S. 737, 751 (1984); *accord Idaho Conservation League*, 956 F.2d at 1513; *Region 8 Forest Service Timber Purchasers*, 993 F.2d at 806-07.

462. Pash, *supra* note 402, at 370. *See also supra* notes 387, 398-400 and accompanying text.

463. *See Idaho Conservation League*, 956 F.2d at 1513-18; *Resources Ltd.*, 8 F.3d at 1397-98; *Espy*, 998 F.2d at 702-03; *Moseley*, 798 F. Supp. at 1476.

464. *See Region 8 Forest Service Timber Purchasers*, 993 F.2d at 805; *Wind River Multiple-Use Advocates*, 835 F. Supp. at 1367.

465. In fact, it has only been mentioned in a few NFMA cases, but never actually applied. *See, e.g., Region 8 Forest Service Timber Purchasers*, 993 F.2d at 805 n.3.

466. *Id.* (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

467. *See* Competitive Enter. Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107, 123 (D.C. Cir. 1990).

468. The likelihood of this occurring at the U.S. Supreme Court may depend upon Justice Scalia's influence over his colleagues. Justice Scalia adheres to strict standing requirements, including the apparent belief that procedural injuries are not adequate to give rise to standing. *See Defenders of Wildlife*, 112 S.Ct. at 2143 nn. 7-8; *see also* Pash, *supra* note 402, at 375.

standing under NFMA.[469] However, the full impact of such a bifurcation is unclear, given that many NFMA cases include a challenge to the EIS that accompanies the forest plan, and plaintiffs lacking standing under NEPA cannot challenge the EIS except to the extent that it violates NFMA.

2. *Ripeness*

Ripeness is closely related to standing, as it, too, arises from the Article III "case or controversy" requirement.[470] The Forest Service's claim that a forest plan is a programmatic document lacking any specific action creating an injury leads to the contention that the forest plan itself does not present any issues that are "ripe" for review.[471] In *National Wildlife Federation*, the Supreme Court held that the Secretary of the Interior's reclassification of lands was not a final agency action under the APA,[472] and therefore was not ripe for review.[473] The announcement of the agency's intent to grant permission for activities such as mining was not a "final agency action" because no permit had actually been granted.[474] Until that time, "it is impossible to tell where or whether mining activities will occur," or "whether mining activities will even be permissible."[475] The rule as stated in *National Wildlife Federation* is that "[e]xcept where Congress explicitly provides for our correction of the administrative process at a higher level of generality, [courts] intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect."[476]

In *Idaho Conservation League*, the defendants argued that *National Wildlife Federation* applied, and the forest plans would not be ripe for review until the Forest Service authorized site-specific actions.[477] The Ninth Circuit distinguished *National Wildlife Federation* from *Idaho Conservation League* on the basis that "the ICL is not challenging an entire program . . . but rather their implementation in a particular instance."[478] The court then went on to say, "We emphasize once again

469. *Nevada Land Action Ass'n*, 8 F.3d at 716 n.2.

470. U.S. CONST. art. III, § 2, cl. 1.

471. For example, in Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993), the Forest Service contended that a challenge to its owl management plan would not be ripe until a specific timber sale was authorized pursuant to the plan. Similar arguments were made in *Idaho Conservation League*, 956 F.2d at 1518-19, and *Resources Ltd.*, 8 F.3d at 1398.

472. *National Wildlife Fed'n*, 497 U.S. at 890; *see also* 5 U.S.C. § 702.

473. 497 U.S. at 891.

474. *Id.* at 892 n.3.

475. *Id.* at 893.

476. *Id.* at 894.

477. *Idaho Conservation League*, 956 F.2d at 1518.

478. *Id.* at 1519. The plaintiffs were challenging one aspect of the forest plan, i.e., the decision to recommend certain roadless areas for either timber harvesting or wilderness. *Id.* at 1512.

that, to the extent the EIS and ROD have an impact on Congress' final decision, waiting until the Department acts on a specific project would not be an adequate remedy."[479]

The Ninth Circuit has followed its holding in *Idaho Conservation League* even when plaintiffs are challenging entire plans.[480] The court expressed its reasoning in *Idaho Conservation League*, where it said, "[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."[481] In other words, the fact that further decisions must still be made before ground-disturbing action occurs does not minimize the finality or potential impact of the underlying forest plan.[482] *National Wildlife Federation* is readily distinguishable on its facts, as it involved a nationwide program that was not mandated by statute. All national forests must develop forest plans and must do so in accordance with NFMA. An inability to challenge the plans would strip NFMA of any substantive or procedural meaning.

3. *Exhaustion*

Unlike standing and ripeness, the doctrine of exhaustion does not limit a court's jurisdiction.[483] It is a judicially created doctrine that allows a district court to exercise comity toward administrative agencies by requiring a plaintiff to "exhaust" his administrative remedies prior to seeking judicial review.[484] The comity afforded the administrative branch from the judicial branch arises from the right of the administrative agency to make a factual record[485] and the technical expertise the agency is presumed to have.[486] The NFMA regulations reflect the exhaustion

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479. *Id.* at 1519.

480. *See, e.g.*, Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993) (plaintiffs challenging Forest Service owl management plan); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993) (plaintiffs challenging decision not to supplement forest plan EIS); *Resources Ltd.*, 8 F.3d at 1398 (plaintiffs challenging forest plan).

481. *Idaho Conservation League*, 956 F.2d at 1519.

482. *See also* Sierra Club v. Marita, 843 F. Supp. 1526, 1532 (E.D. Wis. 1994) (holding that the forest plan was ripe for review because "the collection of decisions that make up the forest plan *is* formally treated as a single agency action . . . notwithstanding the need to develop site-specific projects").

483. *Robertson I*, 764 F. Supp. at 549 (quoting Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc. 811 F.2d 1209, 1223 (9th Cir. 1987)).

484. *Robertson I*, 764 F. Supp. at 549.

485. Sierra Club v. Robertson 784 F. Supp. 593, 598 (W.D. Ark. 1991) [hereinafter *Robertson II*] ("Plaintiffs' failure to exhaust denied the agency an opportunity to make a factual record.").

486. This is often seen in the overall deference of a court toward an agency's technical expertise. *See infra* notes 565-75 and accompanying text. For example, in a disagreement between an agency expert and an expert for the plaintiff, the court will invariably defer to the agency expert. *Robertson II*,

doctrine, although it is not binding upon the courts.[487]

Until October 1992,[488] the Forest Service appeals process was completely discretionary; that is, the agency was not legally required to provide a procedure for appealing agency actions.[489] However, the agency has provided some sort of appeals procedure since 1907.[490] The current procedure for appealing forest plans is described in the NFMA regulations.[491] Appeals of individual timber sales are now governed by a different section than are appeals of forest plans.[492]

To appeal a proposed forest plan, a plaintiff must file an appeal within 90 days of a date specified in the legal notice of the plan's approval.[493] The Forest Service provides for two "tiers" of review.[494] The agency must make a decision on an appeal of a forest plan within 160 days of the filing of the appeal.[495] A second-level review, which may be discretionary depending on who made the initial decision,[496] must be made within 30 days of receipt of the appeal record.[497]

A forest plan is still valid while a forest plan appeal is pending.[498]

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784 F. Supp. at 598, 608; *see also* Marsh v. Oregon Natural Resources, 490 U.S. 360, 378 (1989).

487. 36 C.F.R. § 217.18 states, "It is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part . . . ."

488. Forest Service Decisionmaking and Appeals Reform, Pub. L. 102-381, § 322, 106 Stat. 1374, 1419-20 (1992) (to be codified at 16 U.S.C.A. § 1612).

489. Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 58 Fed. Reg. 58,904 (1993) (to be codified at 36 C.F.R. § 215 and § 217); *see also* Robertson, *supra* note 277.

490. Review and Comment and Appeal Procedures for National Forest Planning and Project Decisions, 58 Fed. Reg. 19,369 (1993) (to be codified at 36 C.F.R. § 215 and § 217) (proposed Apr. 14, 1993).

491. 36 C.F.R. § 217.

492. Final Rule, Fed. Reg. 58,904 (U.S. Forest Service 1993) (to be codified at 36 C.F.R. § 215). The Forest Service amended the appeals section in response to the congressional statute passed in 1992. Forest Service Decisionmaking and Appeals Reform, Pub. L. 102-381, § 322, 106 Stat. 1374, 1419-20 (1992) (to be codified at 16 U.S.C.A. § 1612). Section 322 requires a "notice and comment process" for "projects and activities" that implement forest plans. *Id.* § 322(a). The Forest Service proposed rules that would have amended 36 C.F.R. § 217, but because the agency received very few comments on this section, and because the entire forest planning process is being revised and may result in a new rule, the final rule applies only to site-specific activities or significant amendments or revisions of forest plans. Final Rule, 58 Fed. Reg. 58,904 (1993).

493. 36 C.F.R. § 217.8(a)(3).

494. 36 C.F.R. § 217.7.

495. 36 C.F.R. § 217.8(f)(2).

496. 36 C.F.R. § 217.7.

497. 36 C.F.R. § 217.8(f)(3).

498. Implementation of the plan takes place seven days after the publication of legal notice. 36 C.F.R. § 217.10(a). "Requests to stay the approval of land and resource management plans . . . shall not be granted." 36 C.F.R. § 217.10(b). Appellants can request stays of projects, such as timber sales. *Id.*

Some plaintiffs go to court while their appeals are pending simply because the agency has not taken any action on the appeal and the plaintiffs are frustrated.[499] Others bypass administrative proceedings completely, which will inevitably lead to dismissal of their claims.[500] In the former situation, the court may be sympathetic toward the plaintiff.[501] In the latter, the court will have little or no sympathy.[502] The court may strike a balance between the two by finding that the agency's projected time for completing the appeal is reasonable, even though plaintiffs claim that irreparable harm may result in the interim.[503] The court may simply chide the agency for its prolonged review process.[504] Occasionally, the court will waive the requirement, but only when the agency conduct is found to be particularly egregious.[505]

Not only must plaintiffs appeal to the administrative agency before going to court, they may only raise issues for judicial review that they

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499. *See, e.g., Robertson I*, 764 F. Supp. at 548-49. There, the court stayed proceedings briefly to allow the agency to conclude its review, but noted that the plaintiffs had been "involved in protracted and complex administrative proceedings that seem to be unending." *Id.* at 549.

500. *See, e.g.*, Sharps v. U.S. Forest Service, 823 F. Supp. 668 (D.S.D. 1993) (holding that plaintiff's failure to administratively appeal the initial decision memo led to dismissal of all claims arising from that decision, including all "derivative" claims arising out of a later implementation decision); *Robertson I*, 764 F. Supp. at 549 (stating that Eighth Circuit requires dismissal of claims where plaintiff bypasses the administrative process).

501. *See Robertson I*, 764 F. Supp. at 549.

502. *See Sharps*, 823 F. Supp. at 679 (stating that plaintiff's failure to exhaust was "particularly inexcusable" because he was actively involved in public review of the decision); *Robertson II*, 784 F. Supp. at 599 ("Plaintiffs should not be permitted to go over the Forest Service's head and avoid making their case to the agency first; because of the technical nature of the subject matter, these matters are best left to the initial consideration of the Forest Service.").

503. Sierra Club v. Lyng, 694 F. Supp. 1256, 1258 (E.D. Tex. 1988) (finding that eight to fifteen more months for an administrative decision was "not excessive"; staying plaintiff's claim pending administrative resolution).

504. *Robertson I*, 764 F. Supp. at 550 ("[T]he Forest Service has developed a practice of making, withdrawing, and reinstating timber sales and forest policy decisions in a way that might forestall judicial review indefinitely if left unchecked. Such a result cannot be encouraged.").

505. Sierra Club v. Espy, 822 F. Supp. 356, 360-61 (E.D. Tex. 1993) ("The Court must waive the administrative exhaustion requirement in this case because of the excessive 'delay' in (or, rather, the absolute *shut-down* of) Defendants' administrative appeal apparatus."). This case involved the same plaintiffs as Sierra Club v. Lyng, 694 F. Supp. 1256 (E.D. Tex. 1988), where the court refused to waive the exhaustion doctrine because the agency assured the court the appeals would be resolved in eight to fifteen months. *Id.* at 1258. In 1989, the chief of the Forest Service announced that no decision would be made on plaintiffs' appeal because a new forest plan and EIS were being developed in response to a related lawsuit. *Espy*, 822 F. Supp. at 359 n.5. Upon referral of the case to a magistrate, the magistrate found that plaintiffs were unable to exhaust their administrative remedies through no fault of their own. *Id.* at 360. The court had no difficulty in deciding to waive the exhaustion requirement at this point. *Id.* at 360-61.

In *Lyng*, the court stated that the Fifth Circuit requires a finding of irreparable injury to waive exhaustion of administrative remedies. 694 F. Supp. at 1259. In making its decision to waive exhaustion five years later, though, the court made no mention of irreparable injury; it instead focused solely upon the agency's refusal to issue an administrative decision. *Espy*, 822 F. Supp. at 360-61.

raised at the administrative appeal level.[506] This exhaustion requirement mirrors the requirement that a party may not raise an issue before an appellate court that it raised in district court. Issues exhaustion is based on the recognition that the agency's role is to find facts, while the courts' role is limited to reviewing issues of law. Unlike most litigants, however, many citizens who administratively appeal Forest Service actions do so without legal assistance. The requirement that all issues be clearly raised during the administrative appeals process can therefore place a heavy burden on citizen appellants, prohibiting them from obtaining judicial review of legitimate legal issues.[507] The court may exercise its equitable discretion and read the record below liberally to find that an issue was raised, even if not explicitly.[508]

Exhaustion is a fact-specific doctrine. It does not preclude judicial review, but forces plaintiffs to use the Forest Service administrative appeal process prior to seeking judicial review. The potential consequences of this are that the Forest Service may implement a plan while a plaintiff's appeal is pending, thereby endangering wildlife habitat or species.[509] Nonetheless, before a court will waive this doctrine, it will have to be convinced of both a plaintiff's good-faith efforts at obtaining an agency decision and either the high probability of irreparable harm to the environment[510] or the low probability of an agency decision in the near future.[511]

Even if a plaintiff survives these procedural challenges, however, obstacles remain. The plaintiff may have a chance to present his or her case to the court, but the court's power to review the agency action may be limited by precedent, statute, or most importantly, by deferential review.

B. *Scope of Judicial Review*

Before determining how to apply the complex array of laws and regulations governing a challenge under the NFMA and related environmental laws,[512] a court must first decide the scope of the evidence it will

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506. *See, e.g., Sharps*, 823 F. Supp. at 674 n.3; Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 992 (D. Colo. 1989) (refusing to rule on issue not previously brought up before agency).

507. While the plaintiffs may return to the administrative appeal level on particular issues, that process can take years to resolve.

508. *See Sharps*, 823 F. Supp. at 674 n. 3 (court allowed NEPA claim even though not raised by name at administrative level, because facts supporting it were raised several times).

509. 36 C.F.R. § 219.10.

510. *See* Sierra Club v. Lyng, 694 F. Supp. 1256 (E.D. Tex. 1989), *aff'd, vacated and remanded on other grounds sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

511. *See, e.g., Espy*, 822 F. Supp. at 360-61.

512. NFMA claims are usually interwoven with NEPA claims, whether the lawsuit challenges a specific timber sale or the entire forest plan. *See, e.g.*, Big Hole Ranchers Ass'n v. U.S. Forest Service, 686 F. Supp. 256 (D. Mont. 1988) (challenge to timber sale projects on Beaverhead National Forest); Oregon Natural Resources Council v. Lowe, 836 F. Supp. 727 (D. Or. 1993).

consider. The cornerstone for judicial review of administrative actions is the record of the agency at the time the challenged decision was made.[513] This is based upon the premise that consideration of evidence outside the record undermines the administrative process and opens the door for the court to substitute its judgement for that of the agency.[514]

In formal legal proceedings at the administrative level, such as a dispute under the Labor Management Relations Act,[515] the administrative record can be as fully developed as one in district court. Formal administrative proceedings may include depositions, briefs, direct and cross examination of witnesses, and submission of exhibits.[516] By contrast, the administrative record in Forest Service decisions is often developed informally by line officers and field personnel. Critical reviews and scientific studies challenging the agency's decision usually find their way into the record only through the administrative appeals process,[517] which is very limited in scope. A group involved in the appeals process is not required to be represented by an attorney, and often does not seek legal representation until litigation is contemplated.[518] The appeals process is entirely "in house," lacking formal hearings and independent review by an administrative law judge. The 45-day time frame[519] allowed to file an appeal for project-level decisions, such as timber sales, does not allow outside groups much opportunity to develop detailed studies or analyses for inclusion into the record. When the administrative record reaches the district court it can be fairly limited in scope, and is heavily weighted in favor of materials prepared by the Forest Service.[520] It is not surprising that attorneys

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513. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

514. *Id.* at 416.

515. 29 U.S.C. §§ 141-197 (1988).

516. *See* NATIONAL LABOR RELATIONS ACT RULES AND REGULATIONS MANUAL §§ B-102.30, B-102.39, B-102.43, B-102.45 (1992).

517. Appeals of forest plans and timber sales decided since 1991 are governed by 36 C.F.R. § 217 (1993).

518. This statement is based upon the personal experience of the author, Jack Tuholske, who has reviewed dozens of administrative appeals and brought several of them to trial. All of these appeals were prepared by citizens' groups who often did not understand concepts such as issues exhaustion and scope of judicial review and therefore failed to ensure that facts supporting their position became part of the administrative record, or even failed to raise crucial issues. This is not meant to imply that all administrative appeals are brought by lay persons; some of the significant pieces of NFMA litigation discussed in this article involved sophisticated legal challenges at the administrative appeal stage. *See, e.g.*, Resources Ltd., Inc. v. Robertson, 8 F.3rd 1394 (9th Cir. 1993).

519. 36 C.F.R. § 217.8(a)(2).

520. For timber sale litigation, the record typically consists of the Environmental Assessment, the forest plan, reports from the interdisciplinary team's various specialists, background information about the project's impacts, and the comments and appeals filed by those opposing the sale. The record compiled by the Forest Service contains all of the information used by their specialists in assessing and approving the project. The administrative record will contain information from those opposing the project only if they have had the foresight to include such material in written comments or in their

representing groups challenging a Forest Service decision often seek to expand the administrative record through expert testimony, or seek discovery to explain the basis for the agency's conclusions.

Courts have created exceptions to the general rule confining judicial review to the administrative record. Under NFMA, courts have allowed additional evidence in order to assist the court in understanding complex issues, while under NEPA, courts have allowed additional evidence to prove that the agency has not taken a "hard look" at the possible environmental consequences of its proposed action.

The leading case on extra-record evidence in NFMA cases is *Citizens for Environmental Quality v. United States*.[521] At issue were affidavits submitted by plaintiffs' experts that explained the inadequacies of the FORPLAN computer model used by the Forest Service in the forest planning process. The court rejected the agency's request to strike the affidavits of plaintiffs' experts as beyond the administrative record, stating:

> The affidavits are helpful to our understanding of the complex issues presented by this case and therefore necessary to effective judicial review. The affidavits illuminate the information contained in the administrative record and serve as points of reference therein.[522]

The South Dakota District Court followed this rationale in allowing affidavits from plaintiff's experts on computer programming and habitat fragmentation.[523] In allowing the affidavits as evidence, the court noted that it was not using the affidavits to expand the record, but only for the narrow purpose of explaining the record that was before the government at the time it approved the timber sales.[524]

Consideration of extra-record evidence has been more thoroughly considered in the context of NEPA litigation. Because NEPA requires the agency to take a hard look at all of the environmental consequences of its action,

> allegations that an EIS has neglected to mention a serious

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appeal.

521. 731 F. Supp. 970 (D. Colo. 1989).

522. *Citizens for Envtl. Quality*, 731. F. Supp. at 982-83.

523. Sierra Club v. U.S. Forest Service, No. 92-5101, slip. op. at 6, 8 (D.S.D. August 27, 1993). The court found the affidavit of Brian Brademeyer admissible under the *Citizens for Envtl. Quality* rationale because it more thoroughly explained how the agency's HABCAP (wildlife habitat capability) model worked and what its shortcomings were than did the record compiled by the Forest Service. *Id.* at 6.

524. *Id.* at 8. *See also* Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923 (D. Mont. 1992). This case involved forest plan standards under NFMA and claims under the ESA. The District Court also allowed plaintiffs to file affidavits beyond the administrative record, and then relied on those affidavits as probative evidence to deny the government's motion for summary judgement. *Id.* at 939.

> environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn or serious criticism . . . under the rug . . . raises issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with respect to technical matters, both in challenges to the sufficiency of an environmental impact statement and in suits attacking an agency determination that no such statement is necessary.[525]

This rationale has been followed in NFMA cases that include a NEPA claim,[526] and is obviously broader than the "complex issues" rationale derived from cases based on NFMA alone. When a court allows an affidavit to assist in explaining complex issues, the affidavit is illustrative rather than probative evidence of a NFMA claim. The court should not use the affidavits in evaluating the "battle of the experts." In contrast, evidence that issues were "swept under the rug" is probative in NEPA cases, and may be used to support plaintiffs' allegations.[527]

Plaintiffs challenging the Forest Service are not always successful in expanding judicial review beyond the administrative record, however. Substantial case law supports the premise that challenges to Forest Service actions are no different from other administrative law cases, and exceptions are therefore to be made only in very rare circumstances.[528] Perhaps the strictest interpretation of this doctrine comes from the Seventh Circuit in *Cronin v. U.S. Department of Agriculture*.[529] There, Judge Richard Posner espoused the view that only in a dire emergency should a district court ever consider evidence outside of the administrative record.[530] The court went to great lengths to characterize forestry as a technical field

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525. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *accord* Atlantic Terminal Urban Renewal Area Coalition v. New York City Dep't of Envtl. Protection, 740 F. Supp. 989, 993 (S.D.N.Y. 1990); Manatee County v. Gorsuch, 554 F. Supp. 778, 782-83 (M.D. Fla. 1982); Monarch Chem. Works, Inc. v. Exxon, 466 F. Supp. 639, 647 (D. Neb. 1979).

526. *See, e.g.*, National Audubon Soc'y v. U.S. Forest Service, 4 F.3d 832, 841-42 (9th Cir. 1993), where the court upheld the admission of an affidavit explaining impacts on habitat fragmentation caused by timber sales in roadless areas. The Ninth Circuit followed the *County of Suffolk* rationale.

527. *Id.* at 841. The district court adopted portions of plaintiffs' expert affidavit in its findings of fact and used his testimony to formulate the scope of its injunction. The Ninth Circuit upheld this use of extra-record testimony, which went to the heart of the issues under consideration. The court in essence did substitute its judgement for that of the agency on the matters contained in the affidavit. Had the court declined to use the information in the affidavit, the record would have been devoid of information about the problems caused by further fragmentation of roadless areas, thus allowing the agency to effectively "sweep the problem under the rug." *See id.*

528. Inland Empire Public Lands Council v. Schultz, 807 F. Supp. 649, 651 (E.D. Wash. 1992); Cronin v. U.S. Dep't of Agric., 919 F. 2d 439, 444 (7th Cir. 1990).

529. *Cronin*, 919 F.2d 439.

530. *Id.* at 444.

requiring nearly absolute deference by "generalist judges."[531]

Finally, plaintiffs are rarely afforded the opportunity to conduct discovery in NFMA cases. In the only reported case on NFMA discovery, *Inland Empire Public Lands Council v. Schultz*,[532] plaintiffs were denied the opportunity to depose Forest Service officials who prepared the Colville National Forest Plan. The court noted the exceptions to the doctrine of allowing review beyond the record, but found they did not apply.[533] The court did not want to hold a trial de novo, and plaintiffs' broad discovery requests clearly headed in that direction.[534]

These cases show that the Forest Service has consistently opposed expanding the record for judicial review. It has sought to exclude additional expert affidavits and evidentiary materials and attempted to bar discovery through protective orders.[535] Fundamental rules of administrative law—confining review to the record and deferring to agency expertise—remain strong. The use of extra-record evidence will continue to surface in the context of NFMA litigation, both because of the complex nature of the issues and because of the limited opportunities to develop a record through the Forest Service administrative appeals process. The split of authority means that cases will be decided on their particular facts. The best way to avoid the issue is submit all supporting evidence during the appeals process, but the nature of the citizens'-appeal process makes that unlikely in many circumstances.

C. *Standard of Review*

The standard for judicial review of claims under NFMA is derived from the Administrative Procedure Act (APA): the familiar "arbitrary and capricious" standard widely applied in environmental and other administrative law cases.[536] In general, to determine whether an agency's action is arbitrary and capricious, a court must determine if there was "a consideration of all the relevant factors and whether or not there was a clear error of judgment."[537]

The cornerstone of judicial review in this regard, at least on the

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531. *Id.*

532. 807 F. Supp. 649.

533. *Inland Empire Public Lands Council*, 807 F. Supp. at 652.

534. *Id.* The court also faulted the plaintiffs for failing to physically examine the record after it was officially compiled, which defeated their claim that it was incomplete and needed to be supplemented through depositions.

535. *See generally Id.* at 649.

536. 5 U.S.C. § 706(2)(a). This provision requires a court to set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." *Id.*; *see also* Sierra Club v. Cargill, 11 F.3d 1545, 1548 (10th Cir. 1993).

537. Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 983 (D. Colo. 1989) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

surface, is deference: deference to the agency's factual determinations,[538] to its methodology, and to its interpretation of regulations and statutes.[539] The Supreme Court has strongly cautioned the judiciary against rethinking administrative decisions both on issues of fact and law.[540] However, deference to administrative actions is not reflexive; courts must "resist the temptations to rubber stamp" agency actions.[541] As the Court recently noted, "Deference does not mean acquiescence."[542] While the deferential arbitrary and capricious standard under NFMA and NEPA is generally acknowledged, it is not always followed.

1. *Judicial Review of the Agency's Interpretation of Statutory Law*

Judicial review of administrative interpretation of statutes is controlled by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[543] When statutory language is clear on its face, the court is the "final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent."[544] When statutory language is broad or ambiguous, however, the court must defer to "reasonable" agency interpretations.[545]

The Forest Service's efforts to convince courts to defer to its interpretation of the substantive provisions of the NFMA have been largely unsuccessful. This result is not surprising, given some of the

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538. *Cargill*, 11 F.3d at 1548 (stating that deferential standard is especially important where agency's determination is "extremely fact bound").

539. Big Hole Ranchers Ass'n v. U.S. Forest Service, 686 F. Supp. 256, 263 (D. Mont. 1988).

540. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Some scholars argue that the judicial deference endorsed by *Chevron* results in agency immunity from legal challenge. The agency is correct in its facts, unassailable in its methodology, and properly interprets the laws that govern it. Statutory interpretation becomes an aspect of policy making. *See* Farina, *supra* note 297, at 502. Furthermore, Professor Farina argues, "the dominance of the executive that has followed the delegation of regulatory power cannot be squared with the original commitment to separation of powers." *Id.* at 523. *See also* Cass R. Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 287-92 (1986).

At least one district court has invoked the Constitution and separation of powers in its discussion of deferential review:

> Were the Court to abdicate to the agency defendants its Constitutional responsibility to hold them to their duty to enforce unambiguous environmental laws, the Court would effectively "repeal" the oft-times "last chance" environmental protection validly championed into the United States Code by the citizenry. . . . The Court simply will not enlist itself in such a would-be *contra*-Constitutional "silent coup."

Sierra Club v. Espy, 822 F. Supp. 356, 370 (E.D. Tex. 1993).

541. *Citizens for Envtl. Quality*, 731 F. Supp. at 983.

542. Presley v. Etowah County Comm'n, 112 S. Ct. 820, 831 (1992); *see also Espy*, 822 F. Supp. at 361.

543. 467 U.S. 837 (1984).

544. *Chevron*, 467 U.S. at 843 n.9.

545. *See id.* at 842-44, 865-66.

interpretations advanced by the agency. For example, the District Court of Colorado held that attempts by the Big Horn National Forest to implement a seven-year regeneration standard as part of the forest plan directly violated the NFMA's five-year regeneration requirement.[546] The statute is clear on its face; therefore, its plain language controls.

Similarly, in *Sierra Club v. Espy*,[547] the statutory provisions regarding the use of clearcutting were found to be unambiguous, and the agency's interpretation was not entitled to deferential review. In that case, another in a long-standing battle between conservationists and the Forest Service over clearcutting in Texas, the Forest Service promulgated a forest plan that provided for 100 percent of the timber base to be in even-aged management.[548] The 9 timber sales at issue were to be cut using 90 percent even-aged management.[549] The court found that the NFMA provision allowing even-aged management only when consistent with the protection of other resources "could not have been more clearly expressed." [550] The court declined to defer to the agency's interpretation of this provision, calling it "nothing less than a bald attempt at exorbitant agency self-aggrandizement."[551]

These cases illustrate that courts have not automatically deferred to the Forest Service's interpretation of NFMA, at least when the statute is clear and unambiguous. While the agency has prevailed in some cases involving statutory interpretation,[552] judicial review of the NFMA has taken a track largely independent of the agency's view of the statute.

2. *Judicial Review of Forest Service Regulations*

The regulations developed by the Committee of Scientists in 1979 describe in considerable detail the NFMA forest planning process.[553] Courts have been willing to grant the agency a measure of deference when

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

547. 822 F. Supp. 356 (E.D. Tex. 1993).

548. *Espy*, 822 F. Supp. at 358. Even-aged management includes clearcutting (removing all the trees in one harvest), seed-tree cutting (leaving a few large trees per acre to seed the cut), and shelterwood cutting (leaving 16 percent trees per acre to assist regeneration). For the latter two methods, the large trees are removed after regeneration has occurred, resulting in an even-aged stand of saplings. *Id.* (citing Sierra Club v. Lyng, 694 F. Supp. 1260, 1265 n.2 (E.D. Tex. 1985)).

549. *Id.* at 364.

550. *Id.*

551. *Id.* at 365.

552. *See, e.g.*, Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985).

553. Congress authorized the Committee of Scientists in 16 U.S.C. § 1604(h)(1). Members could not be Forest Service employees, but were appointed by the Secretary of Agriculture. The Committee was charged with the duty of providing detailed guidance to the Forest Service in implementing NFMA for the forest planning process. The Committee published the regulations in 1979. 44 Fed. Reg. 53,928 (1979). The Forest Service revised the regulations in 1982. 47 Fed. Reg. 7,678 (1982). Those regulations remain in effect today. *See generally* 36 C.F.R. § 219.

interpreting these regulations. Such deference is mandated by the Supreme Court's standard that an agency's interpretation of its regulations is to be upheld unless it is "plainly erroneous."[554]

A recent Tenth Circuit case illustrates judicial deference to the agency's interpretation of the forest planning regulations. In *Sierra Club v. Cargill*,[555] the court upheld the agency's determination under 36 C.F.R. section 219.10 that an amendment to the forest plan changing the regeneration standard from seven to five years was "insignificant," and did not require an EIS.[556] The court noted that according to forest planning regulations, the determination of the significance of a forest plan amendment is largely committed to the discretion of the agency, based on information developed by the agency. The appellate court chastised the District Court for requiring the agency to perform an analysis and consider information beyond that required by the regulations.[557]

Ironically, the district court in *Cargill* originally enjoined timber harvesting on most of the Big Horn National Forest for violating the five-year regeneration standard also contained in the planning regulations.[558] The merits of that decision were not appealed, and thus the Tenth Circuit did not address the five-year regeneration issue.[559]

The distinction between regulations at issue in the two district court decisions in *Cargill* illustrates when a court is more likely to defer to the Forest Service's interpretation of its planning regulations. In the first instance, the lower court refused to follow the Forest Service's interpretation of the five-year regeneration standard because Congress had spoken directly on the subject in NFMA.[560] The second district court decision in *Cargill* involved the method by which the agency conducted its timber suitability analysis, which is not defined by the NFMA and involves a high level of technical expertise. The Court of Appeals held that Congress left interpretation of this suitability regulation to the agency, and further noted, "Applying the deferential standard is especially important where, as here, the agency determination is extremely fact bound."[561]

The Ninth Circuit has also upheld the Forest Service's interpretation of its duties under the forest planning regulations. In *Nevada Land Action*

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554. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (citations omitted).

555. 11 F.3d 1545 (10th Cir. 1993).

556. *Cargill*, 11 F.3d at 1550.

557. *See id.* at 1548-50.

558. Sierra Club v. Cargill, 732 F. Supp. 1095, 1101-02 (D. Colo. 1989), *rev'd on other grounds*, 11 F.3d 1545 (10th Cir. 1993).

559. *See Cargill*, 11 F.3d 1545.

560. *Cargill*, 732 F. Supp. at 1101-02; *see also Citizens for Envtl. Quality*, 731 F. Supp. at 984 (discussing judicial review of an agency's interpretation of NFMA planning regulations).

561. *Cargill*, 11 F.3d at 1548.

Ass'n v. U.S. Forest Service,[562] the court rejected challenges to the Forest Service's alleged violation of its public participation and record keeping regulations.[563] The court held that the agency's interpretation of its own regulations is deemed "controlling," unless plainly erroneous or the action is inconsistent with those regulations.[564]

3. *Standard of Review of Agency's Factual Determination and Methodologies*

Courts are most deferential when reviewing specific factual determinations made by an administrative agency.[565] As part of its fact-finding process, the agency is generally accorded wide latitude in choosing the methods by which it collects data and generates information to use in the decision-making process. This premise has held true in judicial review of NFMA, especially in the area of forest planning.

The dispute over FORPLAN provides an example. FORPLAN, the linear computer model used by the Forest Service to generate information about resource outputs (e.g., timber levels, wildlife populations, and grazing allotments) projected in forest plans, was highly controversial from the beginning,[566] but the Forest Service continued to use it through the first round of forest plans. Predictably, the validity of the FORPLAN model was the subject of numerous administrative appeals[567] and two court battles. FORPLAN was the subject of litigation initiated by both conservationists[568] and pro-commodity organizations.[569] In both instances, the agency's use of the FORPLAN model was upheld. These cases are

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562. 8 F.3d 713 (9th Cir. 1993).

563. *Nevada Land Action Ass'n*, 8 F.3d at 717-19.

564. *Id.* at 717.

565. *See generally* Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989). In *Marsh*, the Supreme Court emphasized the need for courts to avoid accepting a plaintiff's factual contentions over those of an administrative agency, particularly when those facts relate to complex technical subjects. In the Court's view, the agency should always win the "battle of the experts." *Id.* at 376-77.

566. *See generally O'Toole*, *supra* note 71. Critics like O'Toole charge that FORPLAN was rigged with mandatory harvest levels, used unrealistic growth predictions for timber, and used unrealistic assumptions about timber sale economics, all of which led FORPLAN to provide unrealistic harvest levels. *See id.* at 53-69.

567. For example, the issue of FORPLAN was raised in the appeal of the Bitterroot Forest Plan, Appeal # 2215. The appellants, a coalition consisting of the National Wildlife Federation, Trout Unlimited, the Montana Wilderness Association, and others, charged that forest planners used improper data and placed harvest level constraints that "rigged" the FORPLAN model, leading to an Allowable Sale Quantity that was too high. On the surface, at least, this argument has proven correct, as the Bitterroot has never offered the 33.4 million board foot ASQ envisioned by the Forest Plan. In 1992, the Bitterroot National Forest offered 6.2 million board feet of timber for sale. (Forest Plan appeal and timber volume statistics on file with the author).

568. *Citizens for Envtl. Quality*, 731 F. Supp. 970.

569. *Nevada Land Action Ass'n*, 8 F.3d at 717.

consistent with the notion that an administrative agency engaged in fact-gathering should be accorded wide latitude in methodology selection, and the use of information generated by that process.

The same result was reached in *Sierra Club v. Marita*.[570] There, the Nicolet National Forest Plan was challenged for failing to use methodology based on principles of conservation biology[571] to satisfy NFMA's requirement that forest plans maintain biological diversity.[572] While the court recognized the validity of the general principles of conservation biology,[573] the court accepted the Forest Service's determination not to apply those principles because of the lack of research showing how those principles applied to the habitat types found on the Nicolet.[574] The district court accepted the agency's method of analyzing forest plan impacts on biological diversity.[575]

In sum, courts have consistently upheld the Forest Service's methodology used in preparing forest plans. Because modern forest management is highly technical, those objecting to forest plans are likely to find greater success by focusing on substantive areas of the NFMA rather than debating methodology.

IV. CONCLUSION

> One of the Nation's most precious possessions is its National Forest System lands, 187 million acres of forest and rangeland held for and managed for the people. The lands serve the public by providing, among other things, timber resources, scenic areas, wildlife and fish habitats, and watershed areas.... The protection and enhancement of the land is basic to our national survival. It is upon the quality of our stewardship of that land that our society will ultimately be judged.[576]

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570. 843 F. Supp. 1526 (E.D. Wis. 1994).

571. Proponents of the science of conservation biology urge that impacts of human activities must be examined on an ecosystem level, and that such factors as habitat fragmentation, biological corridors, habitat patch size, and interconnectivity of habitat types are the keys to understanding how to maintain biological diversity. *See, e.g., Marita*, 843 F. Supp. at 1537-38; *see generally* LARRY D. HARRIS, THE FRAGMENTED FOREST (1984).

572. *Marita*, 843 F. Supp. at 1530.

573. *Id.* at 1541.

574. *Id.* at 1541-42.

575. *Id.* at 1542. The Forest Service's methodology for analyzing impacts on biodiversity at the timber sale level has also been upheld. In *Sierra Club v. U.S. Forest Service*, the district court upheld the agency's use of the HABCAP computer model, despite plaintiffs' objection that the model did not provide site-specific information about impacts on wildlife populations. No. 92-5101, slip op. at 26-27 (D.S.D. Oct. 28, 1993).

576. S. REP. No. 893, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6668.

The late Senator Hubert Humphrey, one of the principal architects of the NFMA, stated that the NFMA was designed to "allow enough flexibility so that professional foresters can do the job, rather than lawyers and judges."[577] If that was Congress's sole intent, then the NFMA is a failure. As this article illustrates, judges and lawyers have frequently been involved in forest management—overturning policies, enjoining harvests, managing wildlife habitat.

However, the NFMA was not designed only to give professional foresters flexibility to manage the national forests. Indeed, as Dean Arnold Bolle has noted, "Congress, in effect, said to the Forest Service: 'Give us a different concept of good forestry, one that gives full respect to recreation, wildlife, and watershed values.' "[578] Viewed in this context, the NFMA has been more successful. In many national forests, clearcutting is becoming a relic of the past, forest management places greater emphasis on wildlife and recreation, and most significantly, the annual timber harvest has declined dramatically throughout many parts of the country. Clearly the NFMA has played a role in these reforms, although laws such as the Endangered Species Act as well as changing societal values have also profoundly influenced national forest management. To the extent that the NFMA has served as a catalyst for these changes, it has begun to fulfill its mandate.

NFMA has received disparate treatment by the federal bench, however. Some trends are clear. Environmental groups have standing to seek review of agency actions under NFMA's procedural and substantive components.[579] Courts have established that NFMA has certain substantive components, which unlike NEPA, define the parameters of the agency's authority.[580] Courts have rejected attempts by the Forest Service to cultivate interpretations that run counter to the plain language of NFMA,[581] or dismiss the importance of the statute altogether.[582] It is equally well established that the Forest Service retains wide discretion in developing methodologies for its planning efforts. Courts have validated the agency's view that forest plans and their accompanying programmatic Environmental Impact Statements are broad planning documents, and that plaintiffs' quest for more specific evaluation of forest plan impacts will

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577. *Joint Hearings Before the Subcomm. on Environment, Soil Conservation & Forestry of the Senate Comm. on Agric. and Forestry*, 94th Cong., 2d Sess. 262 (1976).

578. Arnold Bolle, Foreword, CHARLES F. WILKINSON & H. MICHAEL ANDERSON LAND, AND RESOURCE PLANNING IN THE NATIONAL FORESTS 4 (1987).

579. *See supra* notes 389-469 and accompanying text.

580. *See supra* Section II(A).

581. *See, e.g.*, Sierra Club v. Cargill, 732 F. Supp. 1095 (D. Colo. 1990).

582. *See, e.g.*, Sierra Club v. Espy, 822 F. Supp. 356, 363-64 (E.D. Tex. 1993).

therefore have to occur when specific projects are proposed.[583]

Overall, though, it is difficult to reconcile the contradictory judicial interpretations of NFMA. It is hard to find a "common thread" when one compares, for example, the judicial deference given to Forest Service timber management practices in *Sierra Club v. Robertson (Robertson II*[584] and *Robertson III*[585]) and *Cronin v. U.S. Department of Agriculture*[586] with *Sierra Club v. Espy*,[587] where the court called the agency's interpretation of NFMA "exorbitant agency self-aggrandizement."[588] Similarly, Judge Dwyer's refusal to defer to the agency on practically any issues of fact or law in the spotted owl litigation[589] differs markedly from, for instance, the Oregon district court's complete deference on an analogous issue.[590] Well-settled principles of administrative law, such as deference to the expertise of administrative agencies, cannot fully explain or predict judicial interpretation of NFMA.

The adage that "bad facts make bad law" may well be a better paradigm for predicting judicial interpretation of NFMA in any particular case. The pinnacles of judicial deference, exemplified by *Robertson II* and *Cronin*, both involved minuscule timber sales.[591] The NFMA was not created to micro-manage the national forests. In situations where courts have invoked the substantive provisions of the NFMA, such as the spotted owl cases and clearcutting in Texas, much larger areas of land and a species' entire existence were at stake.[592] In those cases, courts properly used the NFMA as a bulwark against timber primacy.

We have only briefly touched upon NFMA's procedural components in this article, but they have had an obvious impact on Forest Service planning. With the exception of the Pacific Northwest forests, every national forest has a forest plan, although many are being appealed. The public has had an opportunity to be involved in the planning process,[593]

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583. *See, e.g.*, Resources Ltd., Inc. v. Robertson, 8 F.3d 1394 (9th Cir. 1993).

584. 784 F. Supp. 593 (W.D. Ark. 1991).

585. 810 F. Supp. 1021 (W.D. Ark. 1992).

586. 919 F.2d 439 (7th Cir. 1990).

587. 822 F. Supp. 356 (E.D. Tex. 1993).

588. *Espy*, 822 F. Supp at 365.

589. *See generally* Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1494 (W.D. Wash. 1992); Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1484 (W.D. Wash. 1992); Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992); Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991).

590. Oregon Natural Resources v. Lowe, 836 F. Supp. 727 (D. Or. 1993).

591. *Robertson II* involved a 40-acre timber sale, a 61-acre timber sale, and 87 acres of prescribed burning. 784 F. Supp. at 597. *Cronin* involved several .25- to 2-acre sale parcels, which together totalled 26 acres. 919 F.2d at 442.

592. *See generally Seattle Audubon Soc'y*, 798 F. Supp. 1484; *Moseley*, 798 F. Supp. 1484; *Espy*, 822 F. Supp. 356.

593. "[W]e have come to appreciate the essential wisdom of the NFMA planning process. It

although citizens are not always happy with the final product. Nonetheless, in this sense too, the NFMA has been a success.

Courts will continue to refine and enhance NFMA's substantive meaning through future decisions. Nonetheless, a new political era may have begun which will have a profound effect on Forest Service timber practices, and consequently on NFMA litigation. The vision and will of those in power may well have changed the implementation of NFMA in substantial ways.[594] The Clinton Administration came into office in January 1993; during the ensuing year, Forest Service personnel and policies began to change dramatically. Some of these changes began during the Bush administration, presumably in response to growing public concern about the environment. The most important of these was the announcement by then-Chief of the Forest Service F. Dale Robertson in June 1992 that the Forest Service would adopt "ecosystem management" in the national forests, and would reduce the use of clearcutting by 70 percent.[595] Although both the timber industry and environmental groups greeted the announcement with skepticism,[596] it signalled a political change with the potential for eventually affecting on-the-ground management practices.[597]

An even greater change occurred with the election of President Clinton, the removal of the Forest Service chief and associate chief from

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creates valuable inventories, offers the potential of engaging the public and diverse disciplines, and holds out the promise of creating ordered and principled decision-making." Wilkinson & Anderson, *supra* note 3, at 14. "Not only has the agency increased its knowledge, but so have the citizens' groups involved. . . . We all now have a far better and broader understanding of national forest issues." Bolle, *supra* note 578, at 4-5.

594. For example, Dean Bolle has observed:

> Forest planning was conceived as a bottom-up process in which the conditions, hazards and limitations would be clearly identified. Forest uses, including timber harvesting, were to be based on the capabilities of the land. The process became top-down in the 1980s, partly because of the budget emphasis in the Reagan administration. The interests favoring timber maximization prevailed and increased the timber harvest on forest plans in progress. The higher goals imposed from the RPA budgets were unrealistic and out of step with the goals of the NFMA.

Bolle, *supra* note 578, at 4.

595. *See, e.g.*, Keith Schneider, *U.S. Forest Service Increases Protection of Timber*, N.Y. TIMES, June 4, 1992, at B10; George Graham, *Change in U.S. Forests May Curb Logging*, FINANCIAL TIMES, June 5, 1992, at 6. It is important to note that one month before this announcement, the Bush Administration voted to exempt itself from the Endangered Species Act in order to allow logging on 1,700 acres of spotted-owl territory. Schneider, *supra*, at B10.

596. *Both Sides Deride New Curb on Timber Clear-cutting*, REUTERS, June 7, 1992, *available in* LEXIS, Nexis Library, CURNWS File; Robert L. Koenig, *Hew and Cry: Clear-Cutting of Forests Hotly Debated in House*, ST. LOUIS POST-DISPATCH, June 17, 1992, at 1B; Jon R. Luoma, *New Government Plan for National Forests Generates a Debate*, N.Y. TIMES, June 30, 1992, at C4.

597. In discussing the Forest Service's new ecosystem plan, Chief Robertson said the new policy would allow clear-cutting only "where it is the optimum method of timber harvest." Koenig, *supra* note 596, at 1B. This, of course, is the specific language of 16 U.S.C. § 1604(g)(3)(F)(i).

their jobs,[598] and perhaps most importantly, the appointment of wildlife biologist Jack Ward Thomas as the new Chief of the Forest Service.[599] During his second week on the job, Thomas issued a memo to all senior officials in the Forest Service stating six "messages" he wanted them to use in communicating with employees and the public: "We will: Obey the law. Tell the truth. Implement ecosystem management. Develop new knowledge, synthesize research, and apply it to management of natural resources. Build a Forest Service organization for the 21st Century. Trust and make use of our hard-working, expert work force."[600] Apart from what this memo implies the Forest Service has *not* been doing, it clearly suggests a new direction for the agency that could lead to fewer conflicts with environmental groups, which would in turn mean fewer appeals and fewer lawsuits. On the other hand, pressures on the Forest Service come from all sides of the "multiple-use" debate; as the nation's resource base dwindles, conflicts will inevitably escalate.

In fact, the Forest Service has experienced as much or more controversy over its management of national forests in the past few years as it did in the early 1970s.[601] Protection of roadless areas in national forests has become a nationwide concern, while at the same time local communities in the West whose economies depend on timber production have become more vocal in their calls to maintain current timber harvesting levels.[602] There has been considerable grassroots support for a congressional bill that would impose even stricter regulations on forest management, the Northern Rockies Ecosystem Protection Act,[603] and President Clinton convened the famous "timber summit" to forge a compromise over

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598. Tom Kenworthy, *Top 2 Forest Service Officials Shifted Amid Criticism of Agency's Direction*, WASH. POST, Oct. 29, 1993, at A13.

599. *Spotted Owl Defender Is Chosen to Be Chief of the Forest Service*, N.Y. TIMES, Nov. 18, 1993, at B19; *Key Player in Northwest Forest Summit Named by USDA to be Chief of Forest Service*, BNA DAILY REPORT FOR EXECUTIVES, Nov. 18, 1993, at A221.

600. Al Kamen, *Code of the Forest (Service)*, WASH. POST, Dec. 22, 1993, at A19.

601. The total number of pending Forest Service appeals increased from 1,163 at the beginning of fiscal year 1986 to 1,453 at the beginning of fiscal year 1992. Robertson, *supra* note 277. On more than 25 national forests, almost every timber sale is being appealed. *Id.* Controversy has even revisited the famous Monongahela Forest, where college students sought and received an administrative stay of a timber contract allowing clearcutting of 1,000 acres in the Monongahela. *Swarthmore; No Trees Fall in Forest, and 3 Hear Triumph*, N.Y. TIMES, Apr. 5, 1992, at 39.

In addition, there is growing scientific concern about Forest Service management practices. *See, e.g.*, Catherine Dold, *Study Casts Doubt on Belief in Self-Revival of Cleared Forests*, N.Y. TIMES, Sept. 1, 1992, at C4; John Hendren, *House Report Says Cut Forests Not Being Fully Replaced*, STATES NEWS SERVICE, June 15, 1992, *available in* LEXIS, Nexis Library, CURNWS file.

602. For example, timber industry executives, coal miners, farmers, and big landowners have formed a coalition called the "Wise Use" movement. *See, e.g.*, Keith Schneider, *Environmental Policy: It's A Jungle Out There*, N.Y. TIMES, June 7, 1992, at Sec. 4, p. 1; *see generally* NORTHERN LIGHTS MAGAZINE, Winter 1994 (featuring several essays on the Wise Use movement).

603. H.R. 2638, 103d Cong., 1st Sess. (1993).

timber harvesting in spotted-owl territory.[604] Clearly, neither the NFMA nor the Forest Service exist in a vacuum; political and social forces exert tremendous influence over the agency and the public.

Regardless of whether the Forest Service voluntarily changes its management practices, the NFMA will continue to be a vehicle for change in national forest management. For the Forest Service, NFMA provides much of the substantive direction the agency needs to adopt a more holistic approach to forest management and secure not only the timber our nation needs, but the fish, wildlife, water, recreation, and wilderness the nation needs and wants as well. For the public, the NFMA provides an opportunity to be involved in national forest planning and to hold the Forest Service accountable for its decisions. NFMA gives all parties interested and involved in forest use and management not only a process in which to engage, but substantive rules, however ill-defined, with which to protect and enhance the nation's forest lands. It provides the rudimentary tools needed to achieve that elusive goal of responsible stewardship, toward which both the public and the Forest Service consistently strive.

In order for NFMA to be an effective tool, though, courts must be willing to interpret it as having substantive strength. They must read and interpret the statute as a whole rather than analyze statutory sections in isolation from each other. They must be willing from time to time to go beyond the agency record in order to determine whether an agency finding is arbitrary or capricious. They must be willing to enforce the underlying policy and purpose of NFMA by imposing substantive limitations on Forest Service management practices and balancing timber production against other values. They must, in short, stand as independent arbiters of the law and, from time to time, the facts. Judicial deference toward the executive branch may be an important component of a constitutional democracy, but as noted by Judge Parker of the Eastern District of Texas, "Deference does not mean acquiescence."[605] Judicial acquiescence in agency actions that fall outside the boundaries of NFMA undermines the legislative branch and renders the judicial branch an unimportant observer in the democratic process. Congress enacted NFMA 18 years ago to rein in unbridled Forest Service discretion. To automatically defer to that same discretion without critically examining the statutory and regulatory requirements that bind the agency is to "return to the 'bad old days' . . . which were supposed to be left behind by NFMA."[606]

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604. The "timber summit" was held April 2, 1993, in Portland, Oregon. *See, e.g.*, Egan, *supra* note 7, at A22, and § 1 at 6.

605. *Espy*, 822 F. Supp. at 366.

606. *Id.* at 365.