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Standing to Contest Administrative Action Under the Land Withdrawal and Review Program: *Lujan v. National Wildlife Federation*

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I. INTRODUCTION

In *Lujan v. National Wildlife Federation*,[1] the Supreme Court determined, in a five-to-four decision, that a private organization lacked standing to contest a proposed withdrawal of land. This note contends that the Supreme Court's decision to affirm the district court's grant of summary judgment, a common Supreme Court practice,[2] was not an efficient use of judicial resources.[3] Despite evidence supporting standing, the Court opted to decide the matter primarily on a procedural basis and thereby precluded a substantive analysis of the law in this sensitive area.

Part II of this note briefly summarizes the statutes and federal court decisions that provide the background for *Lujan*. Part III introduces the facts of *Lujan*. Part IV sets forth the Court's reasoning on the summary judgment issue. Part V analyzes the *Lujan* decision,

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1. 110 S. Ct. 3177 (1990). It is helpful at this point to indicate that *Lujan v. National Wildlife Federation*, the case before the Supreme Court, is cited as *National Wildlife Federation v. Burford* in the lower federal courts. In this note, therefore, references to *Lujan* and *Burford* are to this same case at different stages of litigation.

2. The notion of judicial restraint is often invoked by the Court to summarily dismiss cases; the Court occasionally relies upon notions of prudence and avoids "political questions" to abstain from deciding cases on their merits. *See, e.g.*, Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

3. The district court's summary disposition was somewhat surprising since the case had been through protracted litigation in the lower federal courts. In National Wildlife Fed'n v. Burford, 676 F. Supp. 271 (D.D.C. 1985), the district court originally granted the respondents a preliminary injunction and found they had standing to contest the withdrawal of the federal land. The D.C. Circuit subsequently affirmed the district court decision and remanded the case to the district court in National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987). On remand, the district court dissolved the preliminary injunction and granted petitioner's motion for summary judgment, finding that respondents lacked standing to contest the withdrawal order. National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988). The D.C. Circuit, however, reversed the district court and held that respondents did have adequate standing in the controversy. National Wildlife Fed'n v. Burford, 878 F.2d 422 (D.C. Cir. 1989). Subsequent to this decision of the D.C. Circuit, the Supreme Court granted certiorari. National Wildlife Fed'n v. Lujan, 110 S. Ct. 834 (1990). The Supreme Court then reversed the decision of the D.C. Circuit finding that the National Wildlife Federation lacked standing. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). Subsequently the Court vacated its decision in *Lujan*, stating "[t]he judgment is vacated and the case is remanded to the [D.C. Circuit] . . . for further consideration in light of Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990)." Mountain States Legal Found. v. National Wildlife Fed'n, 110 S. Ct. 3265 (1990).

stressing that the *Lujan* court missed an opportunity to solidify principles in this area of the law, and proffers a possible solution for actions similar to *Lujan* in the future. This note concludes that *Lujan* provided an occasion to review the program of public land withdrawal and that the Court should not have limited itself solely to the standing issue in deciding the case.

II. BACKGROUND

The Administrative Procedure Act of 1966 (APA)[4] allows the Court to review federal agency actions. The APA requires that a party establish standing in order to invoke judicial review.[5] A party establishes standing by demonstrating that first, they have been affected by some "agency action," and second, they have been "adversely affected or aggrieved" by the agency action.[6]

A number of cases illustrate how standing is obtained on an individual or organizational basis.[7] The Court in *Hunt v. Washington State Apple Advertising Commission*,[8] recognized that an organization can establish "representational standing"[9] when "(1) . . . its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[10] In *Sierra Club v. Morton*,[11] a case preceding *Hunt*, the Court provided additional guidance for obtaining representational standing when it stated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be *himself among the injured*."[12]

The Court of Appeals for the District of Columbia in *National Wildlife Federation v. Burford*[13] further described the type of injury

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4. Ch. 423, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1988)).

5. 5 U.S.C. § 702 (1988).

6. *Id.*

7. *See, e.g.*, International Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Brock, 477 U.S. 274 (1986); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

8. 432 U.S. 333 (1977).

9. Representational standing is the ability granted an organization to represent either itself or its members in a judicial proceeding. *See id.* at 342-43.

10. *Id.* at 343.

11. 405 U.S. 727 (1972).

12. *Id.* at 734-35 (emphasis added).

13. 835 F.2d 305 (D.C. Cir. 1987), *modified*, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878

necessary to provide standing and invoke judicial review. The court stated that "[the party asserting standing] must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members."[14] In environmental lawsuits, the injury requirement is particularly relevant since there exists the potential for involving numerous individuals and vast areas of land.[15] The Court provided guidance in examining the injury requirement in *Sierra*,[16] as intimated earlier,[17] and in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[18]

In *Sierra*, an environmental organization contested a government decision to permit the development of a "quasi-wilderness" national park by private developers.[19] The Sierra Club alleged that the private development of public lands would be injurious to the interests it was designed to protect, namely "the conservation and the sound maintenance of the national parks, game refuges and forests of the country . . . ."[20] The Sierra Club stated that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations."[21] Although the Court recognized the alleged injury as a "cognizable injury," the Supreme Court denied standing and declared that "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development."[22] From *Sierra*, therefore, it appears that a party must allege injury to all or specific members of an organization to ensure standing.[23] A mere allegation of a public injury, therefore, is not sufficient to establish standing.[24]

The *Sierra* limitation for group standing proved to be minor,[25] since the Court in *SCRAP* recognized group standing to contest an agency decision.[26] In *SCRAP*, a student organization sought to contest a

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F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), *vacated sub nom.* Mountain States Legal Found. v. National Wildlife Fed'n, 110 S. Ct. 3265 (1990).

14. *Id.* at 311 (citation omitted).
15. *See id.* at 311-15.
16. Sierra v. Morton, 405 U.S. 727 (1972).
17. *See supra* note 12 and accompanying text.
18. 412 U.S. 669 (1973).
19. *Sierra*, 405 U.S. at 728-30.
20. *Id.* at 730.
21. *Id.* at 734.
22. *Id.* at 735.
23. *See id.* at 734-35.
24. *Id.*
25. G. GUNTHER, CONSTITUTIONAL LAW 1549 n.4 (11th ed. 1985).
26. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412

federal agency rate increase. The plaintiffs alleged injury in fact resulting from the agency decision.[27] The group also alleged that the rate increase would impair their use of the "air" and "the forests, rivers, streams, mountains and other natural resources" in the Washington area.[28] The plaintiffs, undoubtedly in response to the Court's *Sierra* decision, alleged that they actually used "the forest, rivers, streams, mountains and other resources surrounding the Washington Metropolitan area."[29] The plaintiffs also claimed that the agency decision would disrupt their recreational and aesthetic enjoyment of the region.[30]

The D.C. Circuit in *Burford* relied upon the *SCRAP* analysis to affirm the district court's decision.[31] The D.C. Circuit concluded that the National Wildlife Federation (NWF) had satisfied the standing requirement as prescribed by *SCRAP* and other cases.[32] Although the Court in *Lujan* ultimately determined that the NWF did not have adequate standing to contest the agency action, the cases just cited support the NWF's position that the organization or its members were affected by an "agency action" and that their allegations were sufficient to overcome a motion for summary judgment in the matter.[33] Because the NWF demonstrated the requisite injury, it appears that the D.C. Circuit in *Burford* properly granted standing and review under the APA.

III. FACTS

In *Lujan*, the NWF argued that the D.C. Circuit's decision (which reversed the district court's decision granting summary judgment and found that the NWF did in fact have standing to contest the agency action) should be affirmed.[34] The primary concern before both the appellate and district courts was the standing of a private organiza-

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U.S. 669 (1973).

27. *Id.* at 678.

28. *Id.* (quoting SCRAP's amended complaint).

29. *Id.*

30. *Id.*

31. National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987), *modified*, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), *vacated sub nom.* Mountain States Found. v. National Wildlife Fed'n, 110 S. Ct. 3265 (1990). *See supra* notes 1, 3.

32. *Burford*, 835 F.2d at 311-17. The D.C. Circuit stated the synthesized rule to be: "[I]n order to establish injury in fact for representational standing, an organization must allege facts showing that one or more of its members is among the persons injured by the challenged agency action." *Id.* at 311.

33. *See supra* notes 18-29 and accompanying text; *see also* Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

34. For an explanation of the procedural posture of the case, see *supra* note 3 and accompanying text.

tion to contest a federal agency action. The NWF alleged that the Bureau of Land Management (BLM) had violated public and private interests[35] as established by the Federal Land Policy and Management Act of 1976 (FLPMA)[36] and by the National Environmental Policy Act of 1969 (NEPA).[37] Accordingly, the NWF sought judicial review and an injunction against the BLM's "land withdrawal and review program."[38]

The federal district court initially held that the NWF had standing in the matter and granted its motion for a preliminary injunction.[39] The D.C. Circuit affirmed,[40] stating that "we conclude that the federation has alleged facts that demonstrate that the actions of the Department threaten to harm the cognizable interests of the Federation's members. Consequently, we find that the Federation has alleged injury in fact sufficient to establish standing to pursue its . . . claims against the Department."[41] The D.C. Circuit also agreed with the district court's conclusion that a preliminary injunction should issue.[42] Finally, the D.C. Circuit issued a further order both reiterating the sensitive nature of the action and mandating that the district court hold a plenary hearing on the matter.[43]

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35. *See infra* notes 53-58 and accompanying text. The public violations involved were alleged to be actions taken under the "land withdrawal and review program" which were in violation of the expressly stated purposes of the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA) (e.g., to "provide for outdoor recreation and human occupancy and use [of public lands]." 43 U.S.C. § 1701 (a)(8) (1988)). The private violations, as supported by National Wildlife Federation (NWF) member affidavits, revolved around allegations of interference with the recreational use and aesthetic enjoyment of the public lands by private citizens. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

36. Pub. L. No. 94-579, 90 Stat. 2743 (1973) (codified as amended at 43 U.S.C. § 1701 (1988)).

37. Pub. L. No. 91-190, § 102, 83 Stat. 852, 853-54 (1970) (codified as amended at 42 U.S.C. § 4321 (1988)).

38. National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 273 (D.D.C. 1985), ***modified***, 676 F. Supp. 280 (D.D.C. 1986), ***aff'd***, 835 F.2d 305 (D.C. Cir. 1987), ***modified***, 699 F. Supp. 327 (D.D.C. 1988), ***rev'd***, 878 F.2d 422 (D.C. Cir. 1989), ***rev'd sub nom.*** Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), ***vacated sub nom.*** Mountain States Found. v. National Wildlife Fed'n, 110 S. Ct. 3265 (1990). The BLM's land withdrawal review program permits the BLM to remove land from the reserve of public lands and allows private parties to occupy and use the land for such activities as mining, forestation, and other private ventures.

39. *See id.* at 273.

40. *Burford*, 835 F.2d at 327.

41. *Id.* at 314.

42. *Id.* at 319. In determining that the preliminary injunction should issue, both the D.C. Circuit and the district court analyzed the following four factors: "(1) the plaintiff's likelihood of success on the merits; (2) the threat of irreparable injury to the plaintiff absent the injunction; (3) the possibility of substantial harm to other parties caused by issuance of the injunction; and (4) the public interest." *Id.* at 318-19.

43. National Wildlife Fed'n v. Burford, 844 F.2d 889 (D.C. Cir. 1988). The court stated that "this is a serious case with serious implications." *Id.* at 889 (quoting *Burford*, 835 F.2d at

At the plenary hearing, the district court granted the defendant's motion for summary judgment, concluding that the plaintiffs did not have proper "standing" to contest the agency action.[44] This decision prevented a complete review of the alleged violations resulting from the withdrawal of public lands. What followed in the D.C. Circuit and the Supreme Court was simply a review of the basis for summary judgment, the discretionary actions taken by the district court, and the indefinite standing requirements. The substantive question of whether there was agency action in violation of prescribed federal policy was limited by summarily deciding the case.

IV. REASONING

In *Lujan*, the Supreme Court reversed the D.C. Circuit's decision and concluded that the district court correctly granted summary judgment in *National Wildlife Federation v. Burford*.[45] The Court held that the NWF did not establish standing for the action, determining that it proved neither the requisite injury nor that its member(s) had been "adversely effected."[46] The Court also concluded that the district court did not abuse its discretion in refusing to consider additional affidavits submitted by the NWF.[47]

The Court's rationale for affirming the district court's decision rested upon its application of Rule 56(c) of the Federal Rules of Civil

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327). In the final paragraph of the decision, the D.C. Circuit stated:

> While this case continues to pend in our court, the district court has not gone forward with plenary consideration of the merits. The court here denies the petitions for rehearing and issues its mandate forthwith with directions to the parties and the district court to proceed with this litigation with dispatch.

Burford, 844 F.2d at 890.

44. National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990), *vacated sub nom.* Mountain States Found. v. National Wildlife Fed'n, 110 S. Ct. 3265 (1990).

45. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990). The relevant district court decision granting the motion for summary judgment against the NWF was National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988).

46. *See Lujan*, 110 S. Ct. at 3185-86.

47. *See id.* at 3191-93. The affidavits filed with the district court originally consisted of the "Peterson" and "Erman" affidavits. These affidavits, submitted by two members of the NWF, went to the standing requirement that either the organization or its members suffered an injury in fact as required by the *Sierra* and *SCRAP* decisions. *See supra* notes 19-30 and accompanying text. The district court ultimately determined that the NWF had failed to satisfy the standing requirement, finding that the "Peterson" and "Erman" affidavits were "vague, conclusory and lack[ed] factual specificity." *Burford*, 699 F. Supp. at 332. The NWF, to satisfy the standing requirement, attempted to submit four additional member affidavits alleging more specific injury due to the federal agency action. *See Lujan*, 110 S. Ct. at 3189-93. The Court determined that the district court did not abuse its discretion in refusing to consider the additional affidavits, finding them to be untimely under Rule 6(b) of the Federal Rules of Civil Procedure. *Id.* at 3191-93.

Procedure.[48] In applying the rule, the Court notably relied upon the now seminal case *Celotex Corp. v. Catrett*.[49] In *Lujan*, the Court quoted *Celotex* which pronounced:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, *against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.*[50]

The party seeking review under section 702 of the APA bears the burden to "set forth specific facts . . . showing that he has satisfied its terms."[51] Essentially, the Court concluded that the two members' affidavits did not give rise to a genuine factual dispute.[52]

The NWF, to satisfy the injury requirement of the APA and as compelled under the *Sierra* and *SCRAP* decisions, submitted affidavits from two of its members,[53] Peggy Peterson and Richard Erman.[54] These affidavits alleged interference with Peterson's and Erman's recreational use and aesthetic enjoyment of certain public lands which were withdrawn under the BLM's land withdrawal review program.[55]

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48. This procedural rule states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is *entitled to a judgment as a matter of law*." FED. R. CIV. P. 56(c) (emphasis added).

49. 477 U.S. 317 (1986). This case dealt with a wrongful death action wherein the respondent alleged that her husband's death was the result of exposure to asbestos products manufactured or delivered by the fifteen defendant corporations named in the action. *Id.* at 319. The district court granted summary judgment to the petitioners since the respondents were unable to produce evidence to support the wrongful death allegation before the court. *Id.* The evidence produced by the respondent in opposition to the motion for summary judgment consisted of three documents. *Id.* at 320. The three documents were challenged by the petitioners as hearsay and were not admitted at trial. *Id.* Petitioners concluded that since the evidence submitted by the respondents was inadmissible, the court should not be precluded from entering summary judgment. *Id.* The Supreme Court in deciding the case solidified its procedure of sustaining a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and clarified the ambiguity resulting from the decision in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), which states:

> Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .'

Celotex, 477 U.S. at 322 (quoting FED. R. CIV. P. 56(c)).

50. *Lujan*, 110 S. Ct. at 3186 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)) (emphasis added).

51. *Lujan*, 110 S. Ct. at 3187 (quoting Sierra Club v. Morton, 405 U.S. 727, 740 (1972)).

52. *See Lujan*, 110 S. Ct. at 3187-89.

53. *See Burford*, 699 F. Supp. at 331.

54. *Id.*; *see also supra* note 47.

55. These were the original affidavits that the NWF submitted alleging interference of the two respective NWF members' use of public lands. *See supra* note 47.

Based upon this alleged interference, the NWF sought to contest the BLM's land withdrawal review program as it related to FLPMA and NEPA.[56] The NWF tried to obtain judicial review of the federal program pursuant to the APA.[57] The Court determined, however, that the NWF failed to show that the land withdrawal review program was a final agency action and that its members had been "adversely affected or aggrieved."[58]

The Court emphasized that under the APA, there exists no right to a private cause of action.[59] A party is required, therefore, to provide evidence of an agency action which is final in nature and which demonstrates the party has "suffered a legal wrong" in order to obtain judicial review.[60] The Court failed to find a final agency action in *Lujan*, since the land withdrawal and review program did not constitute a single administrative act but referred to a general scheme.[61] Additionally, the Court concluded that the general statements contained in the Peterson and Erman affidavits did not constitute a sufficient aggrievement to justify judicial review.[62] The Court concluded its determination on standing by citing *Sierra*, which states that "[t]he burden is on the party seeking review under section 702 to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms."[63]

The NWF attempted to present four additional affidavits in order to overcome the alleged evidentiary insufficiencies.[64] The district court, however, refused to consider the supplemental affidavits.[65] The NWF

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56. The relevant interference is found within the statutes. For example, the purpose of the FLPMA is to insure that

> the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, *where appropriate, will preserve and protect certain public lands in their natural condition*; . . . *and that will provide for outdoor recreation and human occupancy and use* . . . .

43 U.S.C. § 1701(a)(8) (1988) (emphasis added).

57. 5 U.S.C. § 706 (1988).

58. *Lujan*, 110 S. Ct. at 3185-86.

59. *Id.* at 3185.

60. *Id.* at 3185-86.

61. *See id.* (citing 5 U.S.C. § 704 (1988)). Section 704 reads: "Agency action made reviewable by statute and *final* agency action for which there is not other adequate remedy in a court are subject to judicial review." *Id.* (emphasis added).

62. *Lujan*, 110 S. Ct. at 3187-89. This conclusion was reached primarily due to the vast amount of land included in the withdrawal area and the failure on the part of the affidavits to identify a specific area harmed. *See id.* at 3188.

63. *Lujan*, 110 S. Ct. at 3186-87 (quoting Sierra Club v. Morton, 405 U.S. 727, 740 (1972)).

64. *Lujan*, 110 S. Ct. at 3189.

65. *Id.* at 3191-92.

contended that the district court erred in refusing to consider this additional evidence. These additional affidavits, however, were not submitted within the prescribed time limit. Admission of tardy evidence is governed by Rule 6(b) of the Federal Rules of Civil Procedure which provides:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . .[66]

The Court recognized that under Rule 6(b) the acceptance of additional evidence fell completely within the discretion of the district court.[67] But as a preliminary matter to invoking Rule 6(b), NWF had to meet the requirements of the rule, which it had not done.[68] Therefore, the Supreme Court concluded that the district court acted within its discretion when it precluded the admission of the four subsequent affidavits.[69] The affirmation in this manner of the district court decision on a purely procedural basis allowed the Court to avoid discussing the politically sensitive issue of public land withdrawal.[70]

V. ANALYSIS

A. The Requisite Elements That Constitute "Standing" to Contest an Administrative Agency Ruling

The pertinent statute for relief from a federal administrative action is the Administrative Procedure Act (APA).[71] To establish standing, the APA requires that an aggrieved party show that it has been affected by some "agency action."[72] In addition, the party must prove that it has been "adversely affected or aggrieved" by the administrative

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66. FED. R. CIV. P. 6(b).

67. *Lujan*, 110 S. Ct. at 3192.

68. *Id.* The factors enumerated in order to invoke the Rule 6(b) discretion are: "First, any extension of a time limitation must be 'for cause shown[,]' [and] [s]econd, . . . any post-deadline extension must be 'upon motion made.' " *Id.*

69. *Id.*

70. *See supra* note 2.

71. *See* 5 U.S.C. § 702 (1988).

72. *Id.* "Agency action" is defined to constitute the following: " '[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . ." 5 U.S.C. § 551(13) (1988).

action "within the meaning of a relevant statute."[73] This requires a showing that the injury complained of falls within the "zone of interests" sought to be protected by FLPMA and NEPA.[74]

Moreover, neither the FLPMA nor the NEPA provides for a private right of action.[75] Rather, relief from a "final agency action" is required in order for a party to obtain redress.[76] It was therefore essential that the NWF, in the evidence submitted to the court, illustrate that a final administrative action had had an adverse effect.

The final area of contention accompanying the contest of an administrative action is the degree of specificity with which a party must allege and prove an injury suffered in order to prevent the courts from summarily disposing of a case.[77] It is in this area that the Court could have provided additional insight to solidify this genre of federal litigation.

1. Federal agency action which affects parties

The Court in *Lujan* articulated the requirement of demonstrating "agency action" as follows: "[T]he [party] claiming a right to sue must identify some 'agency action' that affects him in the specified fashion . . . ."[78] The specified fashion under section 702 of the APA is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or the denial thereof, or failure to act."[79]

The Court in *Lujan* did assert that the land withdrawal program was not a specified type of agency action under section 702 and therefore not a "final agency action."[80] The particular agency action was the withdrawal under the BLM land withdrawal program of 180 million acres of public land. There is a marked disagreement between the Supreme Court Justices whether action taken under the BLM land with-

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73. *Lujan*, 110 S. Ct. at 3185 (quoting 5 U.S.C. § 702).

74. *Lujan*, 110 S Ct. at 3186. For a listing of the interests or purposes of the FLPMA, see *supra* note 56.

75. *See Lujan*, 110 S. Ct. at 3185.

76. *Id.*

77. *See Burford*, 835 F.2d at 311-15. The D.C. Circuit stated with precision the holdings from the seminal cases in this area—*Sierra* and *SCRAP*. However, the tendency of various courts to vacilate in applying the principles of *Sierra* and *SCRAP* was also apparent. The primary difficulty appeared to be in determining the degree of specificity required in alleging and submitting evidence of injury due to the agency action, with *Sierra* precluding general allegations of injury suffered and *SCRAP* illustrating a successful case for supporting an allegation of injury in order to have the case decided on the merits. *Id.*

78. *See* Lujan, 110 S. Ct. at 3185.

79. 5 U.S.C. § 551(13) (1988).

80. *See Lujan*, 110 S. Ct. at 3189. The "final agency action" distinction is relevant since no private right of action exists under § 702, only review for "final agency actions." *Id.*

drawal program constitutes a "final agency action."[81] Arguably, however, the first requirement of identifying an agency action under the BLM land withdrawal program is satisfied and would entitle the NWF to judicial review.

The standing requirements for an individual or an organization, although essentially the same, can be different. The purpose behind the standing requirement is to ensure that the party before the court has a sufficient stake in the outcome of a controversy to justify that party's litigation of the claim.[82] The general standing requirements for both individuals and organizations for standing are: First, the party seeking standing must have suffered, or is likely to suffer, some type of injury in fact; second, the harm suffered or likely to be suffered must be individual and not an injury which is general, or one which a large group of others is also likely to suffer from; and finally, the action being challenged must be the cause in fact of the injury (i.e., the injury is not only the actual cause of the injury but also the relief being sought must be likely to redress the injury).[83] The "injury in fact" requirement, however, takes on added importance for a party seeking representational standing.[84]

The ability of an organization to obtain representational standing for its members in a federal administrative agency action is well established.[85] The Court in *Hunt v. Washington State Apple Advertising Commission*[86] established this principle and delineated the method by which an organization could obtain representational standing for its members. Representational standing is permitted when: "(1) one or more of the organization's members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3) neither the claim asserted nor the relief requested requires the participation of individual

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81. *See Lujan*, 110 S. Ct. at 3189-90 n.2 (Scalia, J., contending that the land withdrawal program is not a final agency action). *But see Lujan*, 110 S. Ct. at 3201-02 (Blackmun, J., dissenting) (arguing that land withdrawal under the control of the BLM does in fact constitute a "program" that would qualify as a final agency action under the APA).

82. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 107 (2d ed. 1988).

83. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (the *Schlesinger* case is particularly important because the Court determined that it was not willing to recognize standing for harms suffered to citizens in general).

84. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972).

85. *See, e.g.*, International Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Brock, 477 U.S. 274 (1986); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

86. 432 U.S. 333 (1977).

members in the lawsuit."[87]

In *Lujan* and the litigation preceding it, the courts have recognized that organizations are capable of obtaining representational standing.[88] The petitioners, however, contested whether the NWF and its members satisfied the *Hunt* requirements.[89] In particular, the petitioners argued against representational standing because the NWF failed to show that "each of its members ha[d] standing."[90] The petitioners asserted that the members of the NWF would not have individual standing due to their failure to properly allege the requisite injury in fact.[91] The assertion that each member must show injury in fact is incorrect; the D.C. Circuit correctly pointed out that "the [NWF] need only demonstrate that 'one or more' of its members would have standing to challenge the [BLM's] actions."[92]

2. *The party must prove that it has been "adversely affected or aggrieved"*

The Court in *Lujan* gave a concise explanation of what constitutes evidence sufficient to demonstrate that a party has been "adversely affected or aggrieved."[93] The Court stated that "the [party] must establish that the injury he complains of [(*his* aggrievement, or the adverse effect *upon him*)] falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[94] Therefore, the inquiry germane to determining whether or not a party has been "adversely affected" by an agency ruling is "what zones of interests does the statute in question protect."[95]

The relevant statutes for determining the zones of interests in *Lujan* were FLPMA[96] and NEPA.[97] The express language of these statutes illustrates that the respondents' contentions were within the zones of interests. The impairment to the respondents' recreational use and aesthetic enjoyment indicates that they had been "adversely affected" by the agency action.[98] FLPMA contains the following "zone of interest"

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87. *Id.* at 343.

88. *See supra* note 3.

89. *See Lujan*, 110 S. Ct. at 3189-91.

90. *Burford*, 835 F.2d at 314.

91. *Id.* at 311.

92. *Id.* at 314 (citations omitted).

93. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3186 (1990).

94. *Id.* at 3186 (citing Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 396-97 (1987)) (emphasis in original).

95. *Lujan*, 110 S. Ct. at 3186.

96. 43 U.S.C. § 1701 (1988).

97. NEPA, § 102, 42 U.S.C. 4321 (1988).

98. *See supra* note 56 and accompanying text. FLPMA and NEPA expressly state that they

language: "[to] provide for outdoor recreation and human occupancy and use . . . ."[99]

Based upon the express language of the applicable statutes, therefore, it appears clear that the respondents in *Lujan* were adversely affected. Nevertheless, the Court determined that the NWF did not have adequate standing to contest the federal agency action. In so doing, the Court decided that the respondents had failed to demonstrate the requisite specificity of injury to its members to guarantee standing.[100]

3. The degree of specificity required to allege and prove an injury

After *Lujan*, the degree of specificity with which a potential plaintiff must allege injury in order to establish standing in an agency action is unclear. The D.C. Circuit in *Burford* outlined the development of the "specificity requirement" prior to *Lujan*.[101] The degree of specificity had previously evolved under *Sierra*[102] and *SCRAP*.[103] Based upon *Sierra*, the D.C. Circuit noted that "the Federation [NWF] must demonstrate that 'the challenged action ha[d] caused [its members] injury in fact.' "[104] The application of the injury in fact rule was further refined under *SCRAP*, where the D.C. Circuit stated that "[t]he Federation must allege facts demonstrating a definable and discernible injury to its members and an adequate connection between that injury and the members."[105] The Court in *Lujan* never expressed its understanding of what constitutes the desired degree of specificity.

a. Requisite injury sufficient to establish standing. The requirement that a plaintiff allege actual injury in order to establish standing creates confusion in *Lujan*. This requirement dictates that the action being challenged must be the cause in fact of the injury.[106] In addition, the relief sought in the action must be likely to redress the injury suffered.[107] It is apparent that in *Lujan* the respondent's alleged injury—the loss of aesthetic enjoyment and recreational use—was the result of agency action under the land withdrawal and review program.

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are to protect the applicable federal land to encourage and preserve the land for aesthetic enjoyment and recreational use.

99. 43 U.S.C. § 1701(a)(8) (1988).

100. *See Lujan*, 110 S. Ct. at 3187-89; *see also supra* notes 90-92 and accompanying text.

101. *Burford*, 835 F.2d at 311-15.

102. Sierra Club v. Morton, 405 U.S. 727 (1972).

103. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

104. *Burford*, 835 F.2d at 311 (quoting *Sierra*, 405 U.S. at 733).

105. *Burford*, 835 F.2d at 311 (citing *SCRAP*, 412 U.S. at 688-89). For an enumeration of the general standing requirements, see *supra* notes 85-87 and accompanying text.

106. *See supra* notes 86-87 and accompanying text.

107. *Id.*

The difficulty in the Court's analysis, however, rests primarily with the remedy sought and the vast implications resulting if the respondents would have prevailed.[108]

In *Lujan*, the vast public land potentially affected and the sensitivity of the questions at issue probably influenced the district court and the Supreme Court to summarily dispose of the NWF's claim. The courts disposed of the action by applying Rule 56(c), concluding that the evidence submitted by the respondent was vague and did not meet the *Sierra* and *SCRAP* specificity requirements.[109] To determine whether the evidentiary requirement was met according to precedent, it is important to recognize that the degree of specificity is different depending upon the stage of litigation.[110]

b. Specificity required to establish injury. In *Sierra*, the Court denied representational standing for an organization where the alleged injury was a generalized public injury.[111] *SCRAP* seemed to extend standing to organizations capable of alleging specific injury to either the organization itself or its members.[112] However, the Court in *SCRAP* qualified this broad holding by stating that

> [a] plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial.[113]

Also implicit in the Court's holding is the view that the degree of specificity with which a plaintiff must allege injury may vary, depending upon the procedural posture of the case.[114] *SCRAP* indicates that greater specificity in alleging an injury is required in order for a party to overcome a motion for summary judgment. Unfortunately, in *Lujan*,

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108. For example, the preliminary injunction granted originally by the district court in National Wildlife Federation v. Burford, 676 F. Supp. 271 (1985), had the effect of freezing the status of approximately 180 million acres of public land.

109. *See* National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988); Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

110. *Burford*, 835 F.2d at 312; *see also* Wilderness Soc'y v. Griles, 824 F.2d 4, 16 (D.C. Cir. 1987).

111. Sierra Club v. Morton, 405 U.S. 727, 731-41 (1972); *see also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) (requiring that a litigant individualize the "injury in fact" requirement).

112. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); *see also supra* note 7.

113. *SCRAP*, 412 U.S. at 688-89.

114. *See id.* at 689; *see also* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 45 (1976) (dealing with several organizations representing the poor and attacking Internal Revenue rules reducing the amount of free medical care hospitals must donate to the poor).

the Court failed to state the precise degree of specificity a party must provide. This lack of specific guidance regarding the degree of specificity a party must allege and prove creates ambiguity which not only contributed to the extensive litigation in *Lujan* but will likely result in similar litigation in the future.

B. Proposed Establishment of a Uniform Standing Requirement

1. The general requirements to establish standing

In view of the uncertainty regarding the standing requirements as presently interpreted by the Court, this note proposes a solution. The proposal is comprised of both established precedent relating to representational standing to contest administrative action and part of a proposal by Judge Williams of the D.C. Circuit in his concurring opinion in *Burford*.[115] The general representational standing principles from *Hunt* provide the starting point.[116] The Court in *Hunt* stated these principles as follows: "(a) that its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[117] The *Hunt* test should provide general guidance for litigants at the initiation of the proceedings to determine in some broad sense whether or not they will be able to establish standing.

2. Judicial limitation for representational standing

The limitation on representational standing imposed by the *Sierra* and the *Schlesinger v. Reservists Committee to Stop the War*[118] decisions should also be retained. In other words, organizations should be required to demonstrate that "the challenged action [h]as caused [its members] *injury in fact*."[119] The D.C. Circuit in *Burford* demonstrated the type of injury which a plaintiff must allege to obtain standing by stating that "[the party asserting standing] must allege facts demonstrating a definable and discernible injury to its members."[120] The injury, therefore, must be individualized, and the Court should continue to deny standing where a litigant alleges general injuries suffered by the public at large.

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115. *Burford*, 835 F.2d at 327 (Williams, J., concurring).

116. *See supra* notes 8-10 and accompanying text.

117. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

118. 418 U.S. 208 (1974).

119. Sierra Club v. Morton, 405 U.S. 727, 733 (1972) (emphasis added).

120. *Burford*, 835 F.2d at 311 (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973)).

3. *The specificity to which allegations should adhere*

The degree of specificity necessary for a party to establish standing and avoid premature disposal of its action was best addressed by Judge Williams of the D.C. Circuit in his concurrence in *Burford*.[121] Judge Williams' opinion provided that to demonstrate the requisite specificity for standing, a party would have to "(1) identify lands that are affected by each program, (2) demonstrate that third parties are likely to respond to the regulatory changes with development activities, and (3) *identify activities of members in specific areas* that would suffer an adverse impact from such third-party conduct."[122]

Adopting Judge William's three requirements would expressly require litigants to identify not only the injury but also some type of a causal nexus between the agency action and the specific injury suffered. This requirement will undoubtedly be met with opposition by litigants claiming that they are required to prove their case before a trial on the merits. The preceding requirements should not be viewed this strictly; the "William's requirements" should merely be understood to require parties to form their complaints with greater caution, thus providing greater predictability in the area of representational standing.

4. *Benefits from adopting the proposed standing approach*

The Constitution generally limits the federal courts to hearing and deciding only "cases or controversies."[123] The approach proposed in this note will aid in sharpening the issues in order to avoid the substantial ambiguity relating to the "standing" issue. In addition, it will prevent courts from summarily dismissing cases which present politically sensitive issues if the litigants have met the requirements of litigation. Finally, it will present cases where standing is recognized to be proper, thus avoiding waste of valuable judicial resources for burdensome standing determinations.

V. CONCLUSION

The purpose of this note is not to point out that the federal courts entered an incorrect decision in *Lujan v. National Wildlife Federation*. The intent, rather, is to illustrate that the courts missed an opportunity to establish more certain parameters for representational stand-

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121. *See Burford*, 835 F.2d at 327 (Williams, J., concurring).

122. *Id.* at 327-28 (emphasis added) (citing Sierra Club v. Morton, 405 U.S. 727, 733 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688-89 (1973); Wilderness Soc'y v. Griles, 824 F.2d 4, 10-12 (D.C. Cir. 1987)).

123. *See* U.S. CONST. art. III.

ing, an area of the law which presents substantial ambiguity to litigants. This ambiguity is the result of differing interpretations of the *Sierra* and *SCRAP* cases and their progeny.[124] With a more definite standard to establish standing, the courts could have heard the entire case and decided on firmer guidelines in the politically sensitive area of federal land withdrawal and agency review. The proposed alterations in determining representational standing should provide guidance to help avoid protracted litigation, centering only upon the standing issue as evidenced by *Lujan* and supplying future guidance for courts and practitioners.[125]

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124. *See supra* notes 8-30 and accompanying text.
125. *See supra* notes 114-22 and accompanying text.