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MISUSING PROCEDURAL DEVICES TO DISMISS AN ENVIRONMENTAL LAWSUIT—*Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990).

Abstract: In *Lujan v. National Wildlife Federation*, the Supreme Court upheld a grant of summary judgment against the National Wildlife Federation for lack of standing. The Court held that the federation failed to sufficiently claim specific injury to federation members. The Court also stated in dicta that the federation's claims were not ripe for review. The opinion does not apply precedent regarding summary judgment to the standing inquiry, and fails to apply precedent regarding ripeness to the facts of the case. This Note examines the reasoning of the *Lujan* Court, and compares the results reached with those suggested by unapplied precedents. Because applying the precedents would lead to a contrary result that is more desirable for policy reasons, this Note concludes that the Court erred in disregarding precedent. This Note suggests that properly applying precedents would have led to more carefully considered agency decisions, greater protection of the environment, and closer compliance with duly enacted laws by administrative agencies.

Presently my soul grew stronger; hesitating then no longer,
"Sir," said I, "or Madam, truly your forgiveness I implore;
But the fact is I was napping, and so gently you came rapping,
And so faintly you came tapping, tapping at my chamber door,
That I scarce was sure I heard you"—here I opened wide the door;—
Darkness there and nothing more.

—Edgar Allen Poe[1]

The National Wildlife Federation (federation) came rapping at the federal courts' door. The Supreme Court majority, however, found that the federation did not have standing to come into court. This Note examines the federation's claim in *Lujan v. National Wildlife Federation*.[2] Because the federation had met the requirements for standing, this Note concludes that the majority decision was mistaken. In addressing the federation's standing, the majority failed to follow Supreme Court precedent governing summary judgment. Had the Court followed precedent, the Court would have held that the federa-

1. From Poe, "The Raven," in THE POEMS OF EDGAR ALLEN POE (F. Stovall ed. 1965).

2. 110 S. Ct. 3177 (1990). The suit made a long trek through the federal courts before reaching the *Lujan* decision, beginning with a preliminary injunction from the district court. National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 277 (D.D.C. 1985) (*Burford I*), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*), *on remand*, 699 F. Supp. 327 (D.D.C. 1988) (*Burford III*), *rev'd*, 878 F.2d 422 (D.C. Cir 1989) (*Burford IV*), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

tion had established its standing sufficiently to defeat a summary judgment motion. The majority also failed to follow precedent in its ripeness discussion. Had the Court applied this precedent, it would have found that the federation's complaint concerned agency action that was ripe for review. Failing to follow the applicable precedents led the majority to reject a claim presenting genuine issues of fact that were ripe for review. The Court should have applied these case precedents on summary judgment and ripeness and allowed the federation's suit to proceed.

I. THE STANDING AND RIPENESS DOCTRINES: ORIGINS AND REQUIREMENTS

The federal standing doctrine ascertains whether a particular litigant is properly before the federal courts.[3] The doctrine applies both to individual plaintiffs and to organizations suing on their members' behalf.[4] The United States Supreme Court has described standing as a determination of whether a plaintiff has a sufficient personal stake in the outcome of a case.[5] To determine a plaintiff's stake in a case, the Court uses a two-part system which considers constitutional requirements and court-imposed "prudential" concerns.[6] To have standing, a plaintiff must satisfy both the constitutional and prudential requirements.

Unlike standing, ripeness focuses primarily on the issues presented and not on the party bringing a claim.[7] The ripeness doctrine ascertains whether agency action is sufficiently complete and the issues sufficiently defined[8] to allow effective court intervention without disrupting the agency's decisionmaking process.[9] Issues that are sufficiently defined are ripe for review.

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3. *E.g.*, Allen v. Wright, 468 U.S. 737, 750–51 (1984).

4. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 342–43 (1977) (organizations may have standing on their members' behalf if members would have standing on their own, the organizations' interests are germane to the issue, and individual members' participation is not necessary).

5. Sierra Club v. Morton, 405 U.S. 727, 731–32 (1972).

6. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498 (1975).

7. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 21.01 (1972) [hereinafter DAVIS TEXT].

8. *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.1, at 350 (2d ed. 1983) [hereinafter DAVIS TREATISE].

9. Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967).

A. The Standing Doctrine

The standing doctrine derives from the "case or controversy" requirement in article III of the United States Constitution.[10] Article III prohibits federal courts from hearing cases where no specific and discernable injury exists.[11] The prohibition bars advisory opinions,[12] friendly suits,[13] and political suits.[14] The Supreme Court also has ruled that the Constitution requires a plaintiff to prove he or she has an injury caused by the defendant's alleged action, redressible by the relief sought from the court.[15] If the plaintiff cannot prove such injury in fact,[16] the plaintiff lacks standing and the federal courts cannot review the case.[17]

Federal courts also address prudential concerns when deciding if a party has standing.[18] These concerns involve whether the courts' proper functions will be fulfilled by hearing a plaintiff's case.[19] Only if the constitutional minimums are met will the courts consider prudential concerns.[20] The prudential concerns generally bar a plaintiff from bringing a case asserting third parties' rights or involving generalized grievances shared by widespread parts of the population.[21]

B. Standing Under the Administrative Procedure Act

The standing question arises when a plaintiff complains of government agency action.[22] To sue an agency, the plaintiff must show that

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10. U.S. Const. art. III, § 2, cl. 1. Detailing the intricacies of the standing doctrine is beyond the scope of this Note. Many qualified commentators have addressed the issue in depth. *See, e.g.,* Fletcher, *The Structure of Standing,* 98 YALE L.J. 221 (1988); Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1 (1984).

11. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3.7 (2d ed. 1988) (discussing article III limits on federal court jurisdiction).

12. Muskrat v. United States, 219 U.S. 346 (1911).

13. United States v. Johnson, 319 U.S. 302 (1943).

14. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

15. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also* Fletcher, *supra* note 10, at 224–28 (discussing origins of modern standing law).

16. "Injury in fact" is the term used by the Court to describe the type of injury, caused by defendant and redressible by the courts, which is necessary to meet the constitutional prerequisites for standing. *See Valley Forge,* 454 U.S. at 473; *see also* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

17. *See Valley Forge,* 454 U.S. at 473.

18. Warth v. Seldin, 422 U.S. 490, 498 (1975).

19. *Id.*

20. *See id.* at 498–99.

21. *See, e.g., Valley Forge,* 454 U.S. at 474–75. The zone of interest test is also a prudential concern. It is discussed *infra* at notes 27–34 and accompanying text.

22. *E.g.,* L. TRIBE, *supra* note 11, § 3.14, at 107.

some statute permits an injured party to seek judicial review.[23] A plaintiff may be able to sue an agency pursuant to a citizen suit provision within a statute, which expressly gives injured citizens standing to sue agencies.[24] Absent a citizen suit provision, certain types of agency action are reviewable under the Administrative Procedure Act (APA).[25] Section 702 of the APA allows judicial review of agency action for parties "adversely affected or aggrieved by agency action within the meaning of a relevant statute."[26]

In *Association of Data Processing Service Organizations v. Camp,*[27] the Supreme Court made its first ruling on judicial review under the APA. Sellers of data processing services sought review of a decision by the Comptroller of the Currency which allowed national banks to sell data processing services.[28] The Court held that the APA required the plaintiffs to satisfy a two-part test to show standing.[29] First, the plaintiffs had to demonstrate an injury in fact stemming from the agency action.[30] Second, the plaintiffs had to show that the statute the agency action allegedly violated included the plaintiffs within its statutorily protected zone of interest.[31] Because competition from the banks threatened the plaintiffs' profits, the Court found they were injured in fact.[32] The plaintiffs also fell within the zone of interest protected by a statute forbidding banks to perform non-banking services, because the statute was intended to prohibit unfair competition by banks.[33] Under *Data Processing,* the APA allowed judicial review of injuries that were neither recognized at common law nor specifically protected by some statute other than the APA.[34]

23. *See* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

24. *See, e.g.,* 33 U.S.C. § 1365 (1988) (allowing citizens to bring suits to enforce federal water pollution control statutes).

25. 5 U.S.C. §§ 551-706, 1305, 3105, 3344, 5372, 7521 (1988). The APA was enacted to make all agencies follow uniform procedures in their actions. *See* DAVIS TEXT, *supra* note 7, § 1.04, at 9; *see also* Proceedings in the Senate of the United States, Administrative Procedure Act of 1946, CONG. REC. March 12, 1946, *reprinted in* ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46, at 298 (1946) (remarks of Senator McCarran explaining purposes of the APA).

26. 5 U.S.C. § 702. Although the APA allows judicial review of agency action, it does not provide federal courts with jurisdiction to hear such cases. Califano v. Sanders, 430 U.S. 99, 105 (1977). Jurisdiction must be based on some other federal statute. *See id.* at 105-07.

27. 397 U.S. 150 (1970).

28. *Id.* at 151.

29. *Id.* at 152-53.

30. *Id.* at 152.

31. *Id.* at 153.

32. *Id.* at 152.

33. *Id.* at 155-56.

34. Rights recognized at common law include property rights, contract rights, rights to be free from tortious conduct, and rights specifically conferred by statute. *E.g.,* Tennessee Elec.

Supreme Court decisions following *Data Processing* showed that non-economic injuries could suffice for standing. In *Sierra Club v. Morton,*[35] harm to aesthetic values was recognized as potentially sufficient to grant standing. In *Sierra Club,* an environmental group sought to enjoin the building of a ski resort in the Sequoia National Forest.[36] Although the Court denied standing to the Sierra Club because it had not shown that any of its individual members would be injured, the Court acknowledged that harm to the enjoyment of aesthetic and ecologic values could qualify as injury sufficient for standing under the APA.[37] *Sierra Club* shows that, provided the constitutional requirements for standing are met, courts can review any agency action that injures a statutorily protected interest.

C. *The Ripeness Doctrine*

The ripeness doctrine allows agencies to make final decisions before courts review their actions. Like standing, the ripeness doctrine is derived from the "case or controversy" clause of article III.[38] Ripeness prevents courts from hearing a complaint about agency action that has not yet injured the plaintiff.[39] Until agency action causes actual harm or an imminent threat of harm, courts hesitate to interfere with agency decisionmaking.[40] This non-intervention approach allows agencies to use their expertise without interference from the courts.[41] When judicial review is sought through the APA, only final agency action can be ripe for review.[42]

Ripeness is determined by a two-part test set forth in *Abbott Laboratories v. Gardner.*[43] First, are the issues fit for judicial review?[44] Second, what hardship would the parties face if review is denied?[45] The

Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137–38 (1939), *overruled on other grounds,* Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970).

35. 405 U.S. 727, 734 (1972).

36. *Id.* at 730.

37. *Id.* at 734. A year after deciding *Sierra Club,* in United States v. Students Challenging Regulatory Agency Procedures (SCRAP), the Court granted standing to plaintiffs whose aesthetic interests were harmed. 412 U.S. 669, 689–90 (1973).

38. U.S. CONST. art. III, § 2, cl. 1; *see* DAVIS TREATISE, *supra* note 8, § 25.1, at 350.

39. *See* DAVIS TREATISE, *supra* note 8, § 25.1, at 350.

40. *See id.*; *cf.* Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967) (ripeness protects "agencies from judicial interference until" decisions are formal and parties affected "in a concrete way").

41. *See Abbott,* 387 U.S. at 148–49.

42. 5 U.S.C. § 704 (1988).

43. 387 U.S. at 149.

44. *Id.*

45. *Id.*

plaintiffs in *Abbott* were pharmaceuticals manufacturers challenging a labeling regulation promulgated by the Food and Drug Commissioner.[46] Because the agency had not yet enforced the regulation, the court of appeals held that the regulation was not ripe for review.[47] Applying the two-part test, the Supreme Court reversed the court of appeals' decision.[48] Because the issues presented were questions of law, the Court found they were fit for judicial review.[49] The Court held that the drug companies faced immediate hardship—costly compliance or potential fines for non-compliance.[50] The *Abbott* test remains the benchmark for ripeness.[51]

Informal agency action may also be ripe for review.[52] Informal agency action includes advisory letters, telephone calls, or agency policies carried out without adopting formal rules or orders.[53] The action is ripe if it represents the agency's final view on a matter and has an immediate effect on the plaintiff.[54] Determining whether informal action is final involves the same factors as determining whether formal action is final.[55] If informal action represents the agency's final view, judicial review will not risk interference with agency decisionmaking.[56]

II. STANDARDS FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

Federal Rule of Civil Procedure 56 (Rule 56) allows a party to move for summary judgment based on pleadings and evidence produced through discovery.[57] The summary judgment rule is designed to assess the evidence to determine if a trial is necessary.[58] One purpose of summary judgment is to allow a party to avoid defending against

46. *Id.* at 138–39.

47. Abbott Laboratories v. Celebrezze, 352 F.2d 286, 291 (3rd Cir. 1965), *rev'd sub. nom.* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

48. *Abbott,* 387 U.S. 136, 149–54, 156.

49. *Id.* at 149–52.

50. *Id.* at 152–54.

51. *See, e.g.,* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190, 3191 n.4 (1990).

52. *See* DAVIS TREATISE, *supra* note 8, § 25.14, at 402–03.

53. *See* DAVIS TEXT, *supra* note 7, § 4.01, at 88–90.

54. *E.g.,* Independent Bankers Ass'n v. Smith, 534 F.2d 921, 929–30 (D.C. Cir.), *cert. denied,* 429 U.S. 862 (1976).

55. *See* DAVIS TREATISE, *supra* note 8, § 25.14, at 402–03.

56. *Cf.* Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967) (ripeness policy is to protect courts from entanglement in ongoing agency decisionmaking).

57. FED. R. CIV. P. 56. A claimant may move for summary judgment after twenty days have passed following commencement of the action. *Id.* 56(a). A defendant may move for summary judgment at any time. *Id.* 56(b).

58. *Id.* 56(e) advisory committee's note to 1963 amendments.

baseless claims.[59] Because the Federal Rules of Civil Procedure have significantly reduced the need for specific pleadings,[60] summary judgment is an especially important procedural device.[61] Under Rule 56, summary judgment shall be granted when the evidence presents "no genuine issue as to any material fact."[62] A non-moving party that bears the burden of proof on an issue must come forth with evidence beyond the pleadings, such as affidavits.[63] To avoid summary judgment, the opposing party must show that issues exist that require a trial to resolve.[64] If summary judgment is granted, the suit is dismissed on the merits.[65] Conversely, if summary judgment is denied, the case proceeds to trial on the merits of the issues presented.[66]

Courts deny summary judgment if the evidence presented is subject to conflicting interpretations.[67] In *United States v. Diebold, Inc.*,[68] the Supreme Court held that, on summary judgment, inferences from facts in affidavits must be considered in the light most favorable to the non-moving party. In *Diebold*, the government brought an antitrust suit challenging Diebold's acquisition of another company's assets.[69] The district court granted Diebold's summary judgment motion against the government because the court held the acquisition did not implicate antitrust laws.[70] On direct appeal, the Supreme Court reversed because the evidence could be read to infer that the acquired assets were within the scope of the antitrust statutes.[71] The Court held that granting summary judgment was improper where the evidence could reasonably support the claims of the non-moving party.[72] Under this

59. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

60. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (a motion to dismiss based on the pleadings should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts" that would entitle the plaintiff to relief).

61. *Celotex*, 477 U.S. at 327.

62. FED. R. CIV. P. 56(c).

63. *Id.* 56(e); *see also Celotex*, 477 U.S. at 322–23.

64. Fed. R. Civ. P. 56(e); *cf.* 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2712, at 563 (1983).

65. *See* WRIGHT, MILLER & KANE, *supra* note 64, § 2712, at 584.

66. *See id.* § 2712, at 587.

67. *See id.* § 2725, at 106–09, and cases cited therein.

68. 369 U.S. 654 (1962) (per curiam).

69. *Id.*

70. *Id.* at 655.

71. *Id.*

72. *Id.*

standard, summary judgment is proper only if the evidence cannot reasonably be read to present an issue of disputed fact.[73]

III. *LUJAN V. NATIONAL WILDLIFE FEDERATION*

In 1985, the National Wildlife Federation sued the Bureau of Land Management (BLM) and Robert Burford, director of the BLM,[74] challenging the BLM's land withdrawal review program.[75] The program involved revoking protective classifications and withdrawals of federal land. These classifications and withdrawals protected federal lands from development of resources such as oil, gas, and minerals.[76] The program affected over 180 million acres of federal land.[77] The Federal Land Policy and Management Act (FLPMA) of 1976[78] charged the BLM with reviewing all classifications and withdrawals then existing. FLPMA enabled the BLM to remove those protections under certain circumstances.[79]

Plaintiffs claimed that the BLM carried out the land withdrawal review program without following certain procedural requirements of FLPMA and the National Environmental Protection Act (NEPA) of 1969.[80] These statutes require agencies to prepare statements detailing the impacts of federal action on the environment prior to implement-

73. *Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (court must believe the evidence of the non-moving party and draw all justifiable inferences within the party's evidence in that party's favor).

74. The suit also named the Department of the Interior and the Secretary of Interior as defendants. The Bureau of Land Management is an agency within the Department of Interior.

75. Joint Appendix to Parties' Briefs at 11, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640) [hereinafter Joint Appendix].

76. Various laws allow private parties to gain rights in federal land for development. *See, e.g.*, Mining Act of 1872, 30 U.S.C. § 22 (1988) (as amended in 1920). Several statutes gave the executive branch the power to classify and withdraw federal land, controlling whether development would take place on the federal lands. *See, e.g.*, Classification and Multiple Use Act, Pub. L. No. 88-607, 78 Stat. 986 (1964) (expired 1969). For a detailed analysis of executive withdrawals of federal land, see Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982).

77. Joint Appendix, *supra* note 75, at 65, 103 (affidavits of BLM assistant director Jack Edwards).

78. 43 U.S.C. §§ 1701–1784 (1988).

79. *Id.* at § 1714(l)(2) (the Secretary of Interior could recommend removal of withdrawals where doing so would be consistent with the purposes of the programs that had originally led to the withdrawals; after submission to the President, the recommendations could be carried out by the Secretary).

80. 42 U.S.C. §§ 4321–4370 (1988). The federation also claimed the program violated the Administrative Procedure Act, 5 U.S.C. § 706 (1988). Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3184 (1990).

ing the action,[81] and to prepare land use plans for public lands.[82] One purpose of these statutes is to ensure that decisions affecting the environment consider those environmental effects and include public input on the decisions.[83] Because neither FLPMA nor NEPA have citizen suit provisions, the federation sought judicial review through section 702 of the APA.[84] The federation complained that the program would lead to destruction of fish and wildlife habitat through opening of the public lands to mining and oil and gas exploration, thereby harming federation members' enjoyment of the lands.[85] Plaintiffs sought a permanent injunction against the program until the BLM prepared environmental impact statements and land use plans pursuant to NEPA and FLPMA.[86]

The District Court for the District of Columbia, in *National Wildlife Federation v. Burford,*[87] ruled that the federation lacked standing and granted summary judgment for the government.[88] The court held that the two affidavits of federation members submitted to establish the federation's standing on its members' behalf did not present allegations of injury specific enough to survive a summary judgment motion.[89] The two affidavits claimed injury to two federation members resulting from withdrawal revocations in Wyoming and Arizona.[90] Federation member Peggy Kay Peterson averred:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be affected in fact by the unlawful actions of the Bureau .... In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and

81. 42 U.S.C. § 4332(2)(C).

82. 43 U.S.C. § 1712(a), (d), (f).

83. *See* 42 U.S.C. §§ 4331(b), 4332(2)(C); 43 U.S.C. §§ 1712(a), 1739(e).

84. *Lujan,* 110 S. Ct. at 3185. Federal court jurisdiction was based on federal question jurisdiction, 28 U.S.C. § 1331 (1988), and on suit against officers of the United States, *id.* § 1346.

85. Joint Appendix, *supra* note 75, at 12 (plaintiff's amended complaint).

86. *Id.* at 22.

87. 699 F. Supp. 327 (D.D.C. 1988) (*Burford III*), *rev'd,* 878 F.2d 422 (D.C. Cir 1989) (*Burford IV*), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

88. *Id.* at 332. The district court had previously granted the federation a preliminary injunction against the program. National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 277 (D.D.C. 1985) (*Burford I*), *aff'd,* 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*). The district court here considered cross-motions for summary judgment filed by the parties while the case was pending before the appellate court. *Burford III,* 699 F. Supp. at 328 n.2.

89. *Burford III,* 699 F. Supp. at 331–32.

90. *Id.*

gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.[91]

The district court held that the affiants did not show that they used land actually affected by withdrawal revocation.[92] The court found the affiants claimed only use of land "in the vicinity" of affected areas, and their affidavits did not specify which parts of large land tracts they actually used.[93]

In *National Wildlife Federation v. Burford,*[94] the Court of Appeals for the District of Columbia Circuit reversed the district court's decision and held that the federation had established sufficient standing to survive a motion for summary judgment.[95] The court of appeals held that the affidavits alleged specific facts when read along with the whole record of the case.[96] The court remanded for trial on the merits,[97] but the Supreme Court granted defendants' petition for a writ of certiorari.[98]

In *Lujan v. National Wildlife Federation,* the Supreme Court held that the federation lacked standing.[99] In a five to four decision, the Court held that the federation's affidavits were insufficient to show injury to federation members, and presented no genuine issue of disputed fact for trial.[100]

In *Lujan,* the majority rejected the two affidavits as a basis for standing because the affidavits did not present any specific facts sup-

91. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3187 (1990). Federation member Richard Erman's affidavit was similar to Peterson's, except that it pertained to withdrawal revocations in Arizona. The court also rejected Erman's affidavit using similar reasoning. *Burford III,* 699 F. Supp. at 331–32.

92. *Burford III,* 699 F. Supp. at 331–32.

93. *Id.*

94. 878 F.2d 422 (D.C. Cir. 1989) (*Burford IV*), *rev'd sub nom.* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990).

95. *Id.* at 430–31. The court declined to reinstate the preliminary injunction, reasoning that a decision on the merits would soon be made. *Id.* at 425 n.2.

The court also held that the district court abused its discretion by refusing to accept four additional affidavits submitted to support the federation's standing. *Id.* at 433. The affidavits were filed after the deadline mandated for such filings by FED. R. CIV. P. 6(b). The Supreme Court ruled that, under Rule 6(b), the district court had discretion to deny the affidavits. *Lujan,* 110 S. Ct. at 3191–93. This Note does not contest the Court's opinion on this ground.

96. *Burford IV,* 878 F.2d 422, 430–31.

97. *Id.* at 434.

98. Lujan v. National Wildlife Fed'n, 110 S. Ct. 834 (1990). Manuel Lujan, Secretary of the Interior under President Bush, replaced Robert Burford as the named defendant.

99. 110 S. Ct. 3177, 3189 (1990) Justice Scalia wrote the majority opinion, in which Rehnquist, C.J., and White, O'Connor, and Kennedy, JJ., joined. Justice Blackmun wrote a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

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

porting injury to the affiants.[101] The majority adopted the district court's language, finding that the affidavits did not show that the affiants' recreational use and enjoyment of the lands extended to those lands actually affected by the program.[102] The court of appeals decision was overruled because that court had "assumed" that the affidavits embraced the specific facts necessary to present an issue for trial.[103] The *Lujan* majority argued that granting standing based on the affidavits would defeat the purpose of the summary judgment rule—allowing a party to protest a baseless claim.[104]

The *Lujan* majority also found that the land withdrawal review program was not ripe for review.[105] The majority suggested in dicta that even had the affidavits sufficed to show injury in fact, the federation could not challenge the program as a whole because it was not "final agency action."[106] Under the APA, the BLM's program was not sufficiently defined to be ripe for review.[107] The majority noted that no single order or rule was promulgated defining the program,[108] and described the program as continuously changing.[109] Absent specific definition, the program as a whole could not be ripe.[110] The majority declared that judicial review could be obtained only for each separate revocation of a withdrawal or classification.[111] The majority reasoned that improvements of the program more extensive than simple review of each revocation decision could only be made by the legislative and executive branches.[112]

The *Lujan* majority rejected the program as unripe for review based on its desire to limit the judiciary's role in reviewing agency action. The majority reasoned that plaintiffs seeking wholesale improvements of agency action must seek congressional or agency intervention, rather than judicial relief.[113] The Court emphasized that courts

101. *Id.*

102. *Id.* at 3188.

103. *Id.*

104. *Id.* at 3188–89.

105. In their ripeness discussion, the Court considered four additional affidavits submitted by the federation. *See supra* note 96.

106. *Lujan,* 110 S. Ct. at 3189–91.

107. *Id.* at 3190.

108. *Id.* at 3189.

109. *Id.*

110. *Id.* at 3189 & n.2, 3190.

111. *Id.* at 3191.

112. *Id.*

113. *Id.* at 3190. Note that the federation had sought improvement from the agency, *see* National Wildlife Fed'n v. Burford, 835 F.2d 305, 317 (D.C. Cir. 1987) (*Burford II*), and that Congress had attempted to improve land use decisions by enacting FLPMA and NEPA. 43

should not intervene in agency action until it has been reduced to manageable proportions and caused harm or an imminent threat of harm to the plaintiffs.[114] Because the program had not been sufficiently defined or caused imminent harm, judicial intervention was improper.[115]

Justice Blackmun, joined in dissent by Justices Brennan, Marshall, and Stevens, argued that the federation had asserted specific facts sufficient to avoid summary judgment.[116] The dissent found that the federation's affidavits, read as a whole, identified specific revocations of withdrawals that had allegedly caused them harm.[117] To support this finding, Justice Blackmun pointed out that the BLM identified the revocations that the federation claimed caused it harm based on the affidavits.[118] The dissenters disclaimed having "presumed" any facts, arguing that their reading drew inferences within the affidavits in favor of the federation in accordance with *Diebold.*[119] Justice Blackmun declined to address the issue of ripeness because it was not properly before the Court.[120] The dissent would have remanded to the district court to determine if the BLM's actions were in fact part of an overall plan.[121]

IV. DISREGARDING PRECEDENT LED TO AN UNDESIRABLE POLICY OF ALLOWING AGENCIES TO SHIELD THEIR DECISIONS FROM JUDICIAL REVIEW

The Supreme Court's decision in *Lujan v. National Wildlife Federation*[122] improperly terminated a lawsuit. The decision affirmed a grant of summary judgment where genuine issues of fact existed. The federation had standing to sue. Following the precedent set by *United States v. Diebold, Inc.*,[123] the *Lujan* Court should have refused summary judgment. Additionally, the issues raised were ripe for review

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U.S.C. §§ 1701–1784 (1988); 42 U.S.C. §§ 4321–4370 (1988). The federation alleged that the agency was not complying with the congressionally mandated programmatic improvements.

114. *Lujan*, 110 S. Ct. at 3190.

115. *Id.* at 3191.

116. *Id.* at 3195 (Blackmun, J., dissenting).

117. *Id.* at 3196 (Blackmun, J., dissenting).

118. *Id.* (citing the majority opinion at 3187).

119. *Id.* (Blackmun, J., dissenting) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). For a discussion of *Diebold*, see *supra* notes 68–74 and accompanying text.

120. *Lujan*, 110 S. Ct. at 3202 n.16 (Blackmun, J., dissenting).

121. *Id.* at 3201–02 (Blackmun, J., dissenting).

122. 110 S. Ct. 3177 (1990).

123. 369 U.S. 654 (1962) (per curiam). For a discussion of *Diebold*, see *supra* notes 68–74 and accompanying text.

under *Abbott Laboratories v. Gardner.*[124] By upholding summary judgment against the federation, the majority misused summary judgment and the standing doctrine to achieve a goal of judicial restraint.

A. *The Affidavits Presented Sufficient Evidence of Standing*

The *Lujan* majority disregarded precedent. By reading the federation affidavits supporting standing too narrowly, the majority ended a lawsuit that presented genuine issues for trial. The majority should have followed the rule expressed in *Diebold*:[125] inferences within the evidence submitted by a party opposing summary judgment must be drawn in the light most favorable to that party. By failing to apply the *Diebold* precedent, the majority held the federation to an overly strict standard to defeat a summary judgment motion.

The *Lujan* majority mischaracterized the court of appeals' opinion to show that federation members did not claim to use specific land. The *Lujan* majority erroneously asserted that the court of appeals assumed that general averments embraced specific facts.[126] To support that assertion, the *Lujan* majority innaccurately portrayed the court of appeals' opinion by presenting part of it out of context.[127] The Court omitted the court of appeals' finding that Peterson's affidavit could refer only to the parts of the South Pass-Green Mountain area not previously opened to mining.[128] By quoting the court of appeals' opinion only partially, the majority implied that the court of appeals read the affidavit to contain only general allegations. The omitted language and other language in the court of appeals' decision makes it clear that the court of appeals found that the affidavits alleged specific facts.[129]

The court of appeals inferred that the federation affidavits alleged specific injuries. To reach this ruling, the court did not presume any missing facts. In accordance with *Diebold,* the court inferred from the affidavit that Peterson identified the land with respect to which she was injured.[130] The court drew its inference from three undisputed

124. 387 U.S. 136 (1967). For a discussion of *Abbott,* see *supra* notes 43–51 and accompanying text.

125. *Diebold,* 369 U.S. at 655; *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

126. *Lujan,* 110 S. Ct. at 3188.

127. *Compare* National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 (D.C. Cir. 1989) (*Burford IV*) *with Lujan,* 110 S. Ct. at 3188 (omitting court of appeals' language explaining that reading Peterson's affidavit to claim use of specific land is logical).

128. *Burford IV,* 878 F.2d at 431.

129. *Id.*; *see also id.* at 430 (the federation affidavits "clearly alleged facts showing that [federation] members were 'among the persons injured' " by the program).

130. *Id.* at 431.

premises. First, Peterson claimed to be injured.[131] Second, she identified the source of her injury as the actions of the BLM in the South Pass-Green Mountain area.[132] Finally, the BLM's actions in the area only affected 4500 acres.[133] The court of appeals inferred that Peterson claimed injury because she used the affected 4500 acres.[134] While this is not the only logical reading of the affidavit,[135] it is a logical one. Because this was a summary judgment motion, the Court was obligated to accredit this logical interpretation of the federation's affidavits.[136]

B. The Issues Presented Were Ripe for Review

The land withdrawal review program was ripe for review. The Court should have applied the rule of *Abbott Laboratories v. Gardner*[137] to determine ripeness. Had the Court followed *Abbott*, it would have found the program ripe for review. Such a finding would have advanced the policy goals underlying the ripeness doctrine.[138] Finding the program ripe for review would also have encouraged agency compliance with laws enacted to protect the environment.

1. The Program Was Ripe for Review Under Abbott

Applying the *Abbott* standard to the facts in *Lujan*, the land withdrawal review program was ripe for review. The first part of the *Abbott* test asks whether the issues presented were fit for judicial review.[139] Like the issues in *Abbott*, the issues presented by the federation's complaint were questions of law.[140] The federation alleged that

131. *Lujan*, 110 S. Ct. at 3187. The *Lujan* Court did not dispute that Peterson claimed to be injured, only that she identified the land where her injury occurred. *See id.* at 3188–89. Because the defendants did not dispute Peterson's veracity, the Court should believe her claim of injury. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (on summary judgment motion, "evidence of non-movant *is to be believed*, and all justifiable inferences are to be drawn in his favor" (emphasis added)).

132. *Lujan*, 110 S. Ct. at 3187 (Peterson's affidavit).

133. *Id.* at 3188. The South Pass-Green Mountain area includes approximately two million acres. Of that area, 6500 acres were closed to mining prior to the BLM's program. The program opened 4500 of these 6500 previously closed acres to mining. National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331 (D.D.C. 1988) (*Burford III*).

134. *Burford IV*, 878 F.2d. at 431.

135. For the Supreme Court's interpretation, see *Lujan*, 110 S. Ct. at 3187–89.

136. *See* United States v. Diebold, Inc., 369 U.S. 654 (1962) (per curiam).

137. 387 U.S. 136 (1967).

138. For a discussion of ripeness policies, see *supra* notes 38–42 and accompanying text.

139. *Abbott*, 387 U.S. at 149.

140. One of the factors regarding whether issues are fit for judicial review is whether further development of a factual record would be helpful to a reviewing court. *See Abbott*, 387 U.S. at 148–49. Because the BLM had expressed its belief that no further questions existed as to the

the BLM acted illegally because it failed to follow the procedural requirements of FLPMA and NEPA.[141] The government defendants denied that these laws applied to the program.[142] Whether or not FLPMA and NEPA applied to the program were legal issues that courts are uniquely qualified to decide.

The issues in *Lujan* also were ripe under the second part of the *Abbott* test. *Abbott*'s second element asks what hardships the parties would face if review were denied.[143] The federation faced harm to the aesthetic enjoyment of the public lands that federation members used.[144] This hardship could have been ameliorated only by reviewing the program prior to completion of revocations. Once a revocation became effective, it would not help to consider the revocation's environmental impacts. Because the damage caused by mining and oil and gas exploration cannot be readily reversed, the program's potential for causing the plaintiffs hardship was great.

The *Lujan* majority viewed the program too broadly when considering its ripeness. Because the program was in a state of flux and no defining order existed, the majority found that the program was not a discreet agency action amenable to judicial review.[145] Instead of questioning whether all aspects of the program were ripe for review, the Court should have considered the narrow question whether the agency's decision on procedural requirements was ripe for review. Failing to apply the two-part *Abbott* test to the narrow issues presented impaired the Court from making an accurate determination of the issues' ripeness for review. By looking at the program abstractly instead of in concrete relation to the federation's suit, the majority found the BLM's action unreviewable. The majority failed to consider, however, whether further agency decisionmaking would clarify the issues.[146]

The land withdrawal review program represented the BLM's final view regarding FLPMA's and NEPA's applicability. The federation's complaint alleged that the BLM had an informal policy of carrying out the program without meeting preliminary procedural require-

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need for procedural requirements in compliance with NEPA and FLPMA, *see infra* notes 151–55 and accompanying text, this issue was fit for review under that factor.

141. *See* Joint Appendix, *supra* note 75, at 11–23 (plaintiff's amended complaint).

142. *See* National Wildlife Fed'n v. Burford, 835 F.2d 305, 317 (D.C. Cir 1987) (*Burford II*).

143. 387 U.S. at 149.

144. Joint Appendix *supra* note 75, at 12 (plaintiff's amended complaint); *cf.* Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (harm to aesthetic values is injury recognized by APA).

145. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 n.2 (1990).

146. For a discussion of the policy goal of ripeness to allow agencies to complete decisionmaking prior to court intervention, see *supra* notes 38–42 and accompanying text.

ments.[147] The complaint was directed at correcting inadequacies in the program's preliminary procedures, not the entire operation of the program.[148] The BLM had completed only a fraction of the procedures allegedly required by FLPMA.[149] Nonetheless, pursuant to the program, the BLM had terminated classifications and withdrawals affecting over 180 million acres.[150] Further, the agency had clearly expressed its opinion that the program was not subject to the FLPMA and NEPA requirements.[151] Because the agency had finalized its decision regarding the legal effect of the FLPMA and NEPA on the program, the action was final despite its informality.

2. *Finding the Program Unripe for Review Advances Undesirable Policy Goals*

The Supreme Court's decision in *Lujan* leads to an undesirable policy of allowing agencies to selectively ignore laws. The BLM was allowed to insulate its actions from judicial review. The majority found that without a defining order or regulation, the program could not be reviewed.[152] Because of the BLM's longstanding reputation for favoring development interests over environmental preservation,[153] immunizing the BLM from judicial review is cause for concern. Based on its reputation, it is not unlikely that the BLM would desire to avoid having the program's compliance with FLPMA and NEPA scrutinized. If the BLM chose to disregard FLPMA and NEPA, that decision could be insulated from review. Had the BLM issued a formal

147. *See* Joint Appendix, *supra* note 75, at 11–23 (plaintiff's amended complaint); *see also supra* notes 52–56 and accompanying text (discussing ripeness of informal agency actions).

148. *See* Joint Appendix, *supra* note 75, at 15–23 (plaintiffs' amended complaint).

149. *See* National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 277 (D.D.C. 1985) (*Burford I*), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*).

150. *See* Joint Appendix, *supra* note 75, at 65, 103 (affidavits of Frank Edwards, assistant director of Land Resources for the BLM). Technically, the classifications were terminated and the withdrawals were revoked.

151. *See* National Wildlife Fed'n v. Burford, 835 F.2d 305, 317 (D.C. Cir. 1987) (*Burford II*) (finding the BLM had determined public participation and new resource management plans were not required for the program).

152. Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3189 n.2 (1990).

153. President Carter's Secretary of the Interior, Cecil Andrus, characterized the BLM as the "Bureau of Livestock and Mining" in reference to the agency's "capture" by ranching and mining interests. S. DANA & S. FAIRFAX, FOREST AND RANGE POLICY 344 (2d ed. 1980). President Reagan's Interior Secretaries, James Watt and Donald Hodel, were both heavily criticized by conservationists for overemphasizing resource development over conservation. *E.g.*, N.Y. Times, March 3, 1986, at A12, col. 4. BLM director Robert Burford was also widely reputed to be "enthusiastically pro-development and anti-wilderness," Coniff, *Once the Secret Domain of Miners and Ranchers, the BLM is Going Public*, SMITHSONIAN, Sept. 1990, at 30, 33, and had been repeatedly fined and cited for violating BLM rules as a rancher in Colorado, *e.g.*, L.A. Times, May 21, 1989, pt. 1, at 24, col. 1.

order stating that revocations and terminations could be completed without the procedures mandated by the statutes, the Court would have allowed judicial review of the order.[154] Instead, the BLM did not issue an order, but began carrying out the program without formal action.[155] By implementing the program through informal channels, the alleged decision to disregard the statutes remained too undefined to meet the *Lujan* majority's requirements.[156] Avoiding judicial review by not promulgating regulations defining programs could result in agencies disobeying laws without being subject to effective control.[157] The Court should have avoided this undesirable result by finding the agency's informal action ripe for review.

Finding the program ripe for review would also encourage agency compliance with environmental laws. By rejecting the program as unripe, the majority allowed the BLM to construe FLPMA and NEPA to avoid compliance with the statutes.[158] This restricts the courts from carrying out their role of interpreting disputed points of law.[159] The *Lujan* Court should have allowed the district court to determine whether the environmental laws mandated the relief the federation sought. By failing to do so, the Court allowed decisions impacting huge areas of land to be made without the balanced decisionmaking required by NEPA and FLPMA.[160]

154. *Lujan,* 110 S. Ct. at 3189 n.2.

155. *See supra* notes 107–12 and accompanying text (discussing lack of formal BLM action).

156. The federation's complaint alleged that the BLM had "issued various directives, instructional memoranda, manuals and other documents" guiding BLM staff in carrying out the program instead of issuing formal orders or regulations. Joint Appendix, *supra* note 75, at 20 (plaintiff's amended complaint); *see also* Respondent's Brief at 8, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640) (citing government affidavits describing various informal methods of carrying out the program).

157. Although each revocation might be subject to review, the results of such disconnected judicial review may not have significant impact on the whole program. *See* K. Sheldon, NWF v. Lujan: *Justice Scalia Restricts Environmental Standing to Constrain the Courts,* 20 ENVTL. L. REP. 10557, 10565 (1990).

158. Some agency actions are committed to agency discretion, such as decisions to bring enforcement actions. *See* Heckler v. Chaney, 470 U.S. 821 (1985). Where such enforcement decisions are not involved, judicial review is precluded only if Congress has expressly legislated such preclusion, or if there is no law for the courts to apply. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). In *Lujan,* NEPA and FLPMA clearly provided law for the courts to apply. *See* 42 U.S.C. § 4332 (1988); 43 U.S.C. § 1740 (1988).

159. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

160. *See* 42 U.S.C. § 4321; 43 U.S.C. § 1701(a)(8).

C. *The* Lujan *Court May Have Been Trying to Reach an Unarticulated Result*

The *Lujan* majority misapplied the standing doctrine to reach a specific outcome. The majority may have wanted to terminate the federation's suit for several reasons. First, refusing to review the BLM's program is consistent with the Court's current trend towards judicial restraint. Second, the majority may have wished to avoid interfering with an agency program that had widespread effects on federal land. Third, the majority may have wanted to quash a complaint that sought environmental protection at the expense of development.

First, the Court's recent decisions have shown an increased desire to restrain the federal courts from risking interference with the political branches.[161] The *Lujan* decision can be explained as an extension of this trend. In *Lujan,* the majority went to great lengths to find an executive agency's actions unreviewable. The majority resorted to mischaracterizing the court of appeals' decision,[162] and neglected to apply or overturn precedent[163] to avoid scrutinizing the BLM's program. Judicial restraint in this case, however, does not advance significant protection of the political branches from judicial interference. Judicial review of the BLM's program would not interfere with the agency applying their expertise because the agency had already reached their final conclusions regarding the applicability of FLPMA and NEPA.[164] Judicial restraint is also undesirable when it leads to duly enacted laws being ignored by executive agencies.[165]

Second, the size of the land withdrawal review program may have influenced the majority's decision. The program extended to nearly 180 million acres—an area larger than the states of Idaho, Oregon,

161. For a discussion of judicial restraint in the Court and its political effects, see Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges,* 14 HASTINGS CONST. L.Q. 487, 488 (1987) ("'Judicial restraint' is the shibboleth of the new, powerful judicial right, just as 'judicial activism' was their war cry . . . in the Warren era.").

162. *See supra* text accompanying notes 129–32.

163. The *Lujan* Court cited *Abbott* as the appropriate precedent for ripeness determinations, 110 S. Ct. 3177, 3190, 3191 n.4 (1990), but did not apply that precedent to the facts before the Court. *See supra* text accompanying notes 149–50. The dissenting Justices had also brought *Diebold* to bear on the discussion of summary judgment, 110 S. Ct. at 3196 (Blackmun, J., dissenting), but the Court neither applied nor disavowed *Diebold*'s precedent.

164. For a discussion of the finality of the BLM's decision, see *supra* notes 151–55 and accompanying text.

165. *See* Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions,* 42 VAND. L. REV. 343, 364–68 (1989) (discussing hazard that judicial deference to administrative agency decisions will in effect lead to a choice by the courts of agency policies over Congressional policies).

and Washington combined.[166] Both the district court[167] and the Supreme Court noted the amount of land involved.[168] The Court should not have been deterred from reviewing the program, however, merely because it affected extensive lands. If an agency acts illegally, the courts should intervene, regardless of the action's extent.[169] Courts should be especially concerned when allegedly illegal agency action involves potential harm to millions of acres of public lands from mineral and oil and gas exploration.[170]

Finally, economic concerns may have swayed the *Lujan* majority to reach a desired decision. If the federation was successful on the merits, environmental concerns could have taken precedence over immediate economic gains. The government defendants in *Lujan* argued that this case would result in environmental protection at the expense of economic harm.[171] When faced with cases pitting environmental interests against economic interests, the Court over the last fifteen years has exhibited a reluctance to promote environmental interests.[172] Justice Scalia, the author of the *Lujan* opinion, has made no secret of his personal disdain for environmental lawsuits.[173] The Court's reluctance to protect the environment, however, is improper, particularly when Congress has explicitly legislated a policy that places environmental values on an equal footing with economic concerns. Both the

166. *See* Brief for the Petitioners at 13, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640). Idaho, Oregon, and Washington have an area of 156,910,080 acres. THE WORLD ALMANAC 1991, at 624, 637, 642 (M. Hoffman ed.).

167. National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 332 (D.D.C. 1988) (*Burford III*).

168. *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190 (1990).

169. *See, e.g.,* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687 (1973) (refusing to deny standing because harm complained of would affect large part of the population). Although the *SCRAP* decision has been justifiably criticized for allowing a tenuous chain of causation to serve as injury in fact, *see, e.g.,* Fletcher, *supra* note 10, at 258–61, the Court sensibly ruled that widespread harm from the government is irrelevant to the standing issue. 412 U.S. at 687.

170. Mining and oil and gas activities in the South Pass area of Wyoming, for example, could threaten "crucial moose habitat, deer habitat, some elk habitat and . . . small game and bird species." *Lujan,* 110 S. Ct. at 3195 n.2 (Blackmun, J., dissenting) (citing a BLM report).

171. Petitioner's Brief at 13–15, Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990) (No. 89-640) (citing the effects of the preliminary injunction originally ordered by the district court in National Wildlife Fed'n v. Burford, 676 F. Supp. 271, 277 (D.D.C. 1985) (*Burford I*), *aff'd,* 835 F.2d 305 (D.C. Cir. 1987) (*Burford II*)).

172. *See, e.g.,* Levy & Glicksman, *supra* note 165, at 347 (arguing that the Court's decisions since 1976 in environmental law cases have used restraint and activism alternatively to reach results placing development over environmental protection).

173. *See,* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 18 SUFFOLK U.L. REV. 881, 884 (1983) (criticizing the courts' "long love affair with environmental litigation").

FLPMA and NEPA express policy decisions recognizing both environmental and economic concerns as important.[174]

V. CONCLUSION

The *Lujan* majority incorrectly found that the National Wildlife Federation had not proven standing. The majority rejected the federation's claims, finding that the federation's allegations were conclusory. To reach and support their result, however, the majority disregarded precedent and mischaracterized the court of appeals' decision in the case. The majority failed to apply *Diebold* to the federation's evidence. Because the federation's evidence could logically be read to make specific allegations, summary judgment was improper under *Diebold.* By disregarding justifiable inferences, however, the Court was able to grant summary judgment even though the federation averred a genuine issue of fact.

The majority also incorrectly found that the land withdrawal review program was not ripe for review. The majority failed to follow *Abbott* when addressing the ripeness issue. Applying *Abbott* to the federation's claims would show that the BLM's decision regarding the procedures necessary prior to carrying out the program was ripe for review. Because the BLM had made a final decision, judicial review would not improperly interfere with the agency's decisionmaking. Instead, the majority relied on generalized characterizations of the BLM's informal program and declared the program unreviewable. Allowing the federation's suit to proceed would also have had the desirable result of encouraging agency compliance with duly enacted environmental laws.

On opening the courthouse doors to see who was rapping, the Court mistakenly found "darkness there and nothing more."[175] The federation had knocked on the door loud and clear, and had met the requirements of standing and ripeness.

Michael J. Shinn

174. 43 U.S.C. § 1701(a)(8) (1988) (ecological and environmental values should be protected in public land management); 42 U.S.C. § 4321 (1988) (the purpose of NEPA is to encourage harmony between population and environment and to promote protection of the environment).

175. Poe, *supra* note 1.