Public Land & Resources Law Review

Volume 15 Article 9

June 1994

# Environmental Standing in the Ninth Circuit: Wading through the Quagmire

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# ENVIRONMENTAL STANDING IN THE NINTH CIRCUIT: WADING THROUGH THE QUAGMIRE

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I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing.[1]

## I. INTRODUCTION

Standing is a justiciability doctrine designed to control access to federal courts and determine who is entitled to have a case adjudicated in the federal court system.[2] Standing is an important doctrine because a court can use it to dictate minority or majority access to the federal judicial system.[3] Originating in Article III of the United States Constitution, the standing doctrine limits judicial power to "cases" and "controversies."[4]

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* The authors wish to thank Professor Larry M. Elison and Assistant Professor Sharon K. Snyder for their insightful comments on earlier drafts of this article.

1. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2160 (1992) (Blackmun, J., dissenting).

2. Allen v. Wright, 468 U.S. 737, 750-51 (1984); Warth v. Seldin, 422 U.S. 490, 498 (1975); Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972); Flast v. Cohen, 392 U.S. 83, 94-95 (1968).

3. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881-82 (1983); Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B. C. ENVTL. L. REV. 135, 150 (1987); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1267 (1961). For Justice Scalia, standing appropriately restricts courts from meddling with political processes and protecting the minority from the tyranny of the majority. Scalia, *supra*, at 881-83. However, pragmatically, executive agencies have grown in power and size and do not always represent the majority through traditional political processes. The courts seem to be the appropriate entity to adjudicate these minority versus minority interests.

4. Article III, section 2 states in part that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this

However, the Constitution does not articulate the breadth of the "cases" and "controversies" language. Consequently, courts have turned to history, court priorities, and case law in defining standing.[5] The touchstone of standing in the federal system has become whether a plaintiff has a personal stake in the outcome of a controversy, placing primary concern on the party bringing the action and secondary concern on the issues brought before the court.[6]

Courts approach standing in two ways. The first approach focuses on the constitutional requirements that courts have placed on standing. The second approach focuses on the prudential restrictions that courts use to deny standing, preserve judicial credibility, or defer to agency actions.[7] Courts often commingle and confuse the two approaches, openly acknowledging that they are not easily defined.[8]

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Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; [between a State and Citizens of another state;—] between Citizens of different States—between Citizens of the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. . . .

U.S. CONST. art. III, § 2.

5. However, the history and tradition of standing has varied wildly. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) (conceding that the words "cases" and "controversies" "have virtually no meaning"); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (admitting that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases by this Court which have discussed it"); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1513 (9th Cir. 1992) (describing past application of the standing doctrine as "tangled and fluctuating formulations"). Yet in *Allen*, the Supreme Court stated: "The absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing. Like most legal notions, the standing concepts have gained considerable definition from developing case law." 468 U.S. at 751 (citation omitted). Moreover, Raoul Berger and Professor Louis Jaffe find that history and tradition do not necessarily support the interpretation of "cases" and "controversies" as it stands now, but in fact support a far broader interpretation. Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 638-39 (1992); Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 819-27 (1969); Jaffe, *supra* note 3, at 1267.

6. *See Sierra Club*, 405 U.S. at 731-32; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1380 (1973). Standing should not be a factual question, nor should it involve the merits of a claim; it should only determine if the proper party is bringing a claim that passes the threshold requirements for federal judicial review. *Flast*, 392 U.S. at 100.

7. *See Valley Forge*, 454 U.S. at 471.

8. *See, e.g., Allen*, 468 U.S. at 751 (describing both approaches as "incorporat[ing] concepts concededly not susceptible of precise definition"); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970) (stating that "[g]eneralizations about standing to sue are largely worthless as such"); *Flast*, 392 U.S. at 99 (noting that "standing has been called one of 'the most amorphous

Standing presents a significant hurdle to organizational plaintiffs in environmental litigation that must assert harm to their members resulting from harm to the environment. For several reasons, the Ninth Circuit is a hotbed of environmental litigation, second only to the District of Columbia Circuit.[9] The Ninth Circuit has interpreted standing requirements liberally.[10] To comport with recent United States Supreme Court decisions, however, the Ninth Circuit has curtailed its liberal stance when considering constitutional requirements or reviewing prudential restrictions for environmental organizations.

This Article analyzes both the constitutional requirements and the prudential restrictions on standing, including their component parts. The Article follows the application of each component by the United States Supreme Court and the Ninth Circuit Court. Within this discussion, the Article suggests how environmental organizations might avoid the pitfalls that have cost them standing in the past.[11]

## II. CONSTITUTIONAL REQUIREMENTS

The approach to standing based on judicial interpretation of the

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[concepts] in the entire domain of public land law' "). The confusion is only furthered when courts blend discussions of standing and ripeness, as cases often raise both issues. Moreover, courts may overlap their analysis of the doctrines of standing and ripeness because the tests for the doctrines overlap. *See Defenders*, 112 S. Ct. at 2140-47; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 915 n.16 (1990); Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1534 (D. Mont. 1991). Both doctrines determine the ultimate question of whether the merits of the case should even be decided by the federal court; however, they raise different issues and should be analyzed separately. *See* Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 684 (1973).

9. First, the sheer size of the Ninth Circuit renders it significant in the environmental context. It encompasses nine western states (Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii). Second, federal public lands are heavily concentrated in these states, especially Alaska, which has one-half of all public lands; additionally, "the United States retains reserved mineral interests under some 60 million acres in the west." GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 2 (1981). Third, the very nature of the region's industries, such as timber, ranching, and mining, breeds conflict with environmental concerns. The District of Columbia plays a significant role because Congress has given it exclusive jurisdiction over EPA rule-making decisions under many environmental statutes. *See* Karen M. Wardzinski, *The Doctrine of Standing: Barriers to Judicial Review in the D.C. Circuit*, ENVIRONMENTAL LAW MANUAL 50, 50 (Theodore L. Garrett ed., 1992).

10. *See* Pacific Legal Found. v. Watt, 703 F.2d 576 (9th Cir. 1983) ("imposing a relatively low threshold with respect to environmental litigation in general and the Endangered Species Act in particular"); Susan L. Gordon, *The Ninth Circuit Standing Requirements for Environmental Organizations*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 264, 270 (1993); George K. Pash, *NEPA: As Procedure It Stands, As Procedure It Falls: Standing & Substantive Review in Idaho Conservation League v. Mumma*, 29 WILLAMETTE L. REV. 365 (1993).

11. For helpful insights on drafting affidavits, see James M. McElfish, Jr., *Drafting Standing Affidavits after Defenders: In the Court's Own Words*, 23 [News & Analysis] Envtl. L. Rep. (Envtl. L. Inst.) 10,026 (1993).

constitutional requirements has three components.[12] First, a plaintiff must suffer an injury in fact, ensuring that the plaintiff suffers an imminent and not merely conjectural harm.[13] Second, the defendant's action must have caused the harm, ensuring that the harm is not the result of an independent or third-party action.[14] Third, the relief requested must redress the harm, ensuring that the court has the ability to remedy the problem.[15] While these components seem straightforward, there is no rhyme and little reason to the haphazard application of the constitutional requirements by both the Supreme Court and the Ninth Circuit.

### A. *Injury in Fact*

Injury in fact is the threshold component of the constitutional requirements.[16] The injury in fact component ensures that a party has suffered an injury to a personal and cognizable interest that warrants judicial intervention.[17] In other words, the injury must be (1) concrete and particularized,[18] and (2) actual or imminent.[19] A merely conjectural or

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12. The United States Supreme Court interpreted the constitutional requirements as the "irreducible minimum" that a plaintiff must establish to have standing. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also* Allen v. Wright, 468 U.S. 737, 751 (1984) (requiring that a plaintiff "allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief"); Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

13. *See Allen*, 468 U.S. at 751.

14. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

15. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992).

16. Whether a case involves statutory review or non-statutory review under the APA, a plaintiff must establish injury in fact. Scott, *supra* note 8, at 654. Some statutes provide for judicial review within their language. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); Noise Control Act, 42 U.S.C. § 4911(b)(1)(A) (1988); Endangered Species Act, 16 U.S.C. § 1540(g) (1988); Deepwater Ports Act, 33 U.S.C. § 1515 (1988); Toxic Substances Control Act, 15 U.S.C. § 2619 (1988); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1988). For example, the Clean Air Act provides for citizen suits whereby any person may seek injunctive relief to enforce the provisions of the Act. 42 U.S.C. § 7604(a) (1988). However, many statutes do not specifically provide for judicial review within their language, requiring plaintiffs to turn to the Administrative Procedure Act (APA) to gain judicial review of a defendant agency's actions. *See generally* National Environmental Policy Act, 42 U.S.C. § 4321-33 (1988); 5 U.S.C. § 702 (1)(a) (1988). In *Abbott Labs. v. Gardner*, the Court found that section 702 of the APA, read in conjunction with section 704, creates a "basic presumption of judicial review" for qualified plaintiffs. 387 U.S. 136, 140 (1967). Section 702 of the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702. For a good overview of injury in fact, see LAURENCE H. TRIBE, American Constitutional Law, §§ 3-15 to -17 (2d ed. 1988).

17. *Sierra Club*, 405 U.S. at 732, 734-35. The injury in fact test is very similar to the imminent or actual requirement of ripeness, often causing confusion between the two standards. *See Defenders*, 112 S. Ct. at 2136-37; Lujan v. National Wildlife Fed'n, 497 U.S. 871, 915 n.16 (1990).

18. *See Defenders*, 112 S. Ct. at 2136; *Allen*, 468 U.S. at 756; *Sierra Club*, 405 U.S. at 740-41

hypothetical injury does not confer standing.[20]

Traditionally, a plaintiff had to allege injury to an economic interest or a property right to establish standing.[21] In 1970, the Supreme Court lowered the hurdles for environmental groups by holding that non-economic injuries could satisfy the injury in fact component.[22] The Court recognized that injury to " 'aesthetic, conservational, and recreational' as well as economic values" could qualify as injury in fact.[23] In 1972, the Supreme Court again lowered those hurdles, when in *Sierra Club v. Morton*, it stated:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.[24]

However, the Court still required more than an injury to a cognizable interest; it required a particularized and personal-stake injury.[25]

In 1973, the Supreme Court lowered the hurdles of standing even further, to an extent not likely to be followed.[26] In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the plaintiffs alleged that a railroad surcharge would discourage the use of

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n.16 (discussing Alexis de Toqueville's observation "that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular concrete injury").

19. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

20. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (finding that the alleged injury may not be abstract, hypothetical, or conjectural). In *Allen*, the Court found that the if the alleged harm is "distinct and palpable... and not 'abstract' or 'conjectural' or 'hypothetical'," the injury in fact component would be met. 468 U.S. at 751. For a discussion of the nexus requirement, see *infra* Part IV.

21. *Sierra Club*, 405 U.S. at 733-34 (citing Barlow v. Collins, 397 U.S. 159 (1970)).

22. Association of Data Processing Servs. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

23. *Id.* at 153 (emphasizing that standing may stem from noneconomic values as well as from economic injury on which petitioners relied).

24. *Sierra Club*, 405 U.S. at 734; *see also National Wildlife Fed'n*, 497 U.S. at 3187.

25. *Sierra Club*, 405 U.S. at 735. The majority denied the Sierra Club standing because it "failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development." *Id.* Dissenting Justice Douglas, whom Justice Blackmun joined, suggested fashioning a federal rule that allows environmental issues to be litigated in the name of the inanimate object about to be despoiled, defaced, or invaded. *Id.* at 741. Justice Douglas believed the problem to be not one of judicial interference but of assuring that nature will not be destroyed before being considered. *Id.* at 752. Justice Douglas used John Dunne in his dissenting opinion to warn the majority that the law should not be so rigid and inflexible so as to preclude review of ecological disturbances and the deteriorating environment. *Id.* at 760. *See also* Christopher D. Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 45, 89 (1972).

26. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). The plaintiffs claimed that an increased rate on recycled goods injured their recreational, economic, and aesthetic interests. The plaintiffs supported their allegations with specific affidavits stating that they used the affected areas. *Id.* at 675-76.

"recyclable" materials and adversely affect the environment by encouraging unwarranted use of raw materials.[27] The Court held that the allegations were sufficient to withstand a motion to dismiss and distinguished *Sierra Club* because the *SCRAP* plaintiffs' affidavits showed harm to individual members of the organizations.[28] In 1975, the Court ensured that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' "[29]

In 1990, in *Lujan v. National Wildlife Federation*,[30] the Court started to curtail its previously broad interpretation of standing. Specifically, it clarified the technicalities needed in an affidavit to establish injury in fact.[31] In *National Wildlife Federation*, the Supreme Court denied standing to the National Wildlife Federation (NWF) for failing to establish injury in fact.[32] NWF challenged the Bureau of Land Management's (BLM) land withdrawal program that opened public lands to mineral exploration,[33] claiming violations of the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).[34]

The Court did not follow a tripartite constitutional approach to standing. Instead, it focused on statutory requirements, specifically NWF's right to relief under section 702 of the APA.[35] The court found that

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27. *Id.* at 676.

28. *Id.* at 687.

29. Warth v. Seldin, 422 U.S. 490, 500 (1975). Dissenting Justice Douglas touched on the problems of strict standing requirements. He thought that the Court read the complaint and record with antagonistic eyes, stating "There are in the background of this case continuing strong tides of opinion touching on very sensitive matters, some of which involve race, some distinctions on wealth." *Id.* at 518. Therefore, the court used standing as "a barrier to access to the federal courts, just as the 'political question' was in earlier decades." *Id.* at 519.

30. 497 U.S. 871 (5-4 decision). Scalia, J. wrote for the majority, in which Rehnquist, White, O'Connor, and Kennedy, J.J., joined. Blackmun, J. filed a dissenting opinion, in which Brennan, Marshall and Stevens, J.J., joined. The district court granted Defenders' motion for preliminary injunctive relief and denied the government's motion to dismiss on the basis of standing. The First Circuit Court of Appeals affirmed both orders. National Wildlife Fed'n v. Burford, 835 F.2d 305 (1st Cir. 1987). On remand, the district court granted the government's Rule 56 motion to dismiss. National Wildlife Fed'n v. Burford, 699 F. Supp. 327 (D.D.C. 1988). The Court of Appeals reversed. National Wildlife Fed'n v. Burford, 878 F.2d 422 (D.C. Cir. 1989).

31. *National Wildlife Fed'n*, 497 U.S. at 889. The Supreme Court also examined the issue of ripeness in *National Wildlife Fed'n*, although neither the lower court nor the parties addressed the issue. *Id.* at 890-94, 915 n.16.

32. *Id.* at 889.

33. *Id.* at 879. NWF sought to invalidate many of the withdrawal revocations made by the BLM from 1981 to 1985. *Id.*

34. *Id.* (citing 43 U.S.C. § 1701 (1982); 42 U.S.C. § 4321 (1969)). FLPMA directs the Secretary of the Interior to inventory public lands, classifying them for their proper use. 43 U.S.C. §§ 1711(a), 1712(d) (1988).

35. *National Wildlife Fed'n*, 497 U.S. at 882.

NWF had to satisfy two requirements under the APA: first, it had to be affected by a final agency action; and second, it had to be adversely affected or aggrieved by the agency action within the meaning of the relevant statutes, FLPMA and NEPA.[36] The Court applied the first APA requirement as the injury in fact component of the constitutional requirements and applied the second test as the zone of interests component of the prudential restrictions. The Court found that the affidavits established adverse effects or aggrievement to recreational and aesthetic interests, and therefore the affidavits established harm within the meaning of the relevant statutes. Because *National Wildlife Federation* involved a motion for summary judgment, the Court required a more stringent showing of fact than it requires to survive a motion to dismiss, thereby distinguishing *SCRAP*'s broad holding, which was based on a motion to dismiss.[37]

NWF's affidavits failed to establish that the members were affected by an agency action.[38] They lacked sufficient specificity to meet the injury in fact component because the affidavits merely alleged use of land "in the vicinity" of certain BLM land withdrawal projects.[39] The Court held that a party must allege with specificity a concrete injury to a particular resource in a particular area enjoyed and used by members of the organization.[40] In addition, the Court held that to establish an actual or imminent threat, a party must show individualized harm to a member's use of the location caused by the impact of the final agency action.[41]

In dissent, Justices Blackmun, Brennan, Marshall, and Stevens rejected the majority's strict interpretation of injury in fact.[42] They believed that the question was not whether NWF proved standing to bring its action, but whether there was a genuine issue for trial concerning

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36. *Id.*

37. *Id.* at 888-89.

38. *Id.* at 887.

39. For example, the Peterson affidavit 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 adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

*Id.* at 886.

40. For example, the Peterson affidavit failed to show that the plaintiffs' recreational use and enjoyment extended to the particular 4,500 acres covered by the decision. *Id.* at 887. "At a minimum, the [plaintiff] is ambiguous regarding whether the adversely affected lands are the ones she uses." *Id.* at 888.

41. *Id.* at 889. *National Wildlife Fed'n* appeared to limit injuries contingent on subsequent third party actions. *See* Gordon, *supra* note 10, at 269.

42. *National Wildlife Fed'n*, 497 U.S. at 900-01.

NWF's standing.[43] The dissent argued that the affidavits were "sufficiently precise to enable [BLM] officials to identify the particular termination orders to which the affiants referred," and that they presented adequate evidence to overcome a motion for summary judgment.[44] Moreover, the dissent stated that if the BLM did not administer the land withdrawal program in accordance with the law, NWF should be able to challenge the BLM program.[45] In summary, *National Wildlife Federation* illustrates the split on the Court and the heightened specificity needed for injury in fact.

Four months before *National Wildlife Federation*, the Ninth Circuit decided *People for the Ethical Treatment of Animals (PETA) v. Department of Health & Human Services*.[46] In *PETA*, the Ninth Circuit parallelled the Supreme Court's reasoning in *National Wildlife Federation*, granting the defendant's motion for summary judgment and denying the plaintiffs' standing. The plaintiffs sued several federal agencies, alleging that funding granted to institutions in the San Francisco area without preparation of Environmental Impact Statements (EIS) adversely affected their use of the Bay area for recreation, aesthetic, quality of life, and health purposes.[47]

Since *PETA* involved a motion for summary judgment as did *National Wildlife Federation*, the Ninth Circuit dismissed the broad view of standing enunciated in *SCRAP* on the grounds that *SCRAP* involved a motion to dismiss. A motion to dismiss "presumes that general allegations embrace those specific facts that are necessary to support the claim[,]" whereas a motion for summary judgment entails no such presumption.[48] The court found that the plaintiffs' generalized affidavits might have defeated a motion to dismiss but not a motion for summary judgment.[49] The Ninth Circuit followed *National Wildlife Federation*'s injury in fact analysis, requiring PETA to file affidavits alleging specific facts and

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43. *Id.* at 903. The dissent stated that "[t]he Peterson and Erman affidavits doubtless could have been more artfully drafted, but they were definitely sufficient to withstand the federal parties' summary judgment motion." *Id.* at 904.

44. *Id.* at 902.

45. *Id.* at 913-14.

46. 917 F.2d 15 (9th Cir. 1990).

47. *PETA*, 917 F.2d at 16. The Ninth Circuit upheld the district court's grant of summary judgment in the agencies' favor based on the plaintiffs' failure to allege specific facts that demonstrated their use had been or would be injured by the funding granted. *Id.* at 17.

48. *Id.* (quoting *National Wildlife Fed'n*, 497 U.S. at 889).

49. *Id.* The court intimated that it took exception to the lack of specificity found in the plaintiffs' form declarations when it stated: "Six of these declarations contain identical language which asserts very generally that the declarant is aware that . . . ." and conceivably used the procedural difference between a motion to dismiss and motion for summary judgment to impose a stricter interpretation of injury in fact. *Id.* at 16.

detailing their use of specific areas within a larger geographic area.[50]

The Ninth Circuit applied *National Wildlife Federation's* approach to injury in fact to reach a different holding in *Idaho Conservation League v. Mumma*.[51] In *Idaho Conservation League*, the Idaho Conservation League (ICL) challenged the Forest Service's decision to recommend against wilderness designations in forty-three of the forty-seven roadless areas of the Idaho Panhandle National Forests, claiming violations of the APA, NEPA, and National Forest Management Act (NFMA).[52] ICL also claimed that the Forest Service violated NEPA by failing to examine the Land and Resource Management Plan's (LRMP) full environmental effects,[53] thus, sacrificing roadless areas without considering all available alternatives.[54]

The Ninth Circuit followed the Supreme Court's analysis of injury in fact, applying the APA's two requirements for judicial review.[55] The court looked to NEPA's statutory language to define the injury.[56] Because "NEPA is essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decisionmaking process," the court found that an injury resulting from the violation of this procedural right conferred standing.[57] The court diverged from *National*

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50. *Id.* at 17.

51. 956 F.2d 1508, 1517 (9th Cir. 1992); *see National Wildlife Fed'n*, 497 U.S. at 882.

52. *Idaho Conservation League*, 956 F.2d at 1510. NFMA directs the Secretary of the Interior to "develop, maintain, and, as appropriate, revise land and resource management plans [LRMP] for units of the National Forest System." *Id.* at 1515 (citing 16 U.S.C. § 1604(a)). In developing an LRMP, the Secretary must "include coordination of outdoor recreation, range timber, watershed, wildlife and fish, and wilderness" *Id.* (citing 16 U.S.C. § 1604(e)). During this process, the Secretary must recommend primitive areas to Congress for wilderness designation. *Id.* (citing 16 U.S.C. § 1131(a)).

53. *Id.* at 1513. In compliance with NEPA, Final Environmental Impact Statements (FEIS) must accompany the LRMP's NEPA analysis. *Id.* at 1511 (citing 16 U.S.C. § 1604(g)(1)). The Forest Service must also conduct a NEPA analysis to evaluate a range of alternative actions, including a "no action" alternative. *Id.* (citing 42 U.S.C. 4332(2)(C)).

54. *Id.* at 1513. Specifically, ICL alleged that the Forest Service should have included an alternative that discussed timber activity in already developed areas and not in the roadless areas. *Id.*

55. *Id.* at 1515; *see also National Wildlife Fed'n*, 497 U.S. at 3185. The Ninth Circuit suggested a streamlined approach to standing when interpreting NEPA's right to information; any infringement of that right creates cognizable injury. *Idaho Conservation League*, 956 F.2d at 1513-14 n.10 (citing Competitive Enterprise Inst. v. NHTSA, 901 F.2d 107, 123 (D.C. Cir. 1990)). Moreover, the court noted that one commentator has persuasively argued that in cases of statutory review, courts should look to the underlying statute instead of following an injury in fact test. *Id.* (citing William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988)).

56. *Idaho Conservation League*, 956 F.2d at 1513-14 n.10. "[The] statute defines the duty, it characterizes the injury and, if not explicitly, implicitly describes those who are entitled to enforce it." *Id.* (citing Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72, 77 (1991)). Under the APA, a person "adversely affected or aggrieved by agency within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

57. *Idaho Conservation League*, 956 F.2d at 1514 (quoting Trustees for Alaska v. Hodel, 806 F.2d 1378, 1380, 1382 (9th Cir. 1986)); *see also* Friends of the Earth v. United States Navy, 841 F.2d

*Wildlife Federation* in its application of the specificity and remoteness criteria to the threatened injury posed by future development.[58] The court noted that the affidavits could not specifically name the areas that would be harmed because the Forest Service had yet to decide the specific locations to develop.[59] Additionally, the Ninth Circuit did not require the plaintiffs to allege the high degree of imminence that the Supreme Court required the plaintiffs to allege in *National Wildlife Federation*, finding that a threatened harm does not defeat a claim.[60]

The Forest Service attacked the specificity of ICL's general allegations that stated over 100,000 acres had been denied wilderness status, questioning ICL's personal interest in the controversy.[61] The court restated the specificity requirement, requiring a geographical nexus to the site of the challenged project, and found that ICL established this geographical nexus.[62] The court distinguished ICL's allegations from the vague affidavits in *National Wildlife Federation* and *PETA*.[63] In *National Wildlife Federation*, the plaintiffs alleged that they used locations "in the vicinity" of lands that would be open to mining; however, most of the lands had already been opened to mining activities.[64] In *PETA*, the plaintiffs alleged use of unspecified portions of a large metropolitan area.[65] In contrast, ICL members named specific areas of use but "[b]ecause no development ha[d] yet to be authorized, plaintiffs [could not] provide any more detail than they ha[d]."[66]

Recently, in *Lujan v. Defenders of Wildlife*, the Supreme Court continued to curtail its broad interpretation of standing, applying an even stricter interpretation of injury in fact.[67] In *Defenders*, the plaintiffs challenged a regulation promulgated by the Secretary of the Interior and the Secretary of Commerce which limited the geographic scope of section 7(a)(2) of the Endangered Species Act (ESA) to the United States and the

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927, 931 (9th Cir. 1988) (noting that the Ninth Circuit "has long recognized that failure to follow procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing").

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

59. *Id.* at 1517.

60. *Id.*

61. *Id.* (relying on *National Wildlife Fed'n*, 497 U.S. at 889); *PETA*, 917 F. 2d at 15.

62. *Idaho Conservation League*, 965 F.2d at 1517. For further discussion of the geographical nexus requirement, see *infra* Part IV.

63. *Id.* at 1516.

64. *National Wildlife Fed'n*, 497 U.S. at 886.

65. *PETA*, 917 F.2d at 17.

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

67. 112 S. Ct. 2130 (splintered opinion). In effect, the Court enunciated the requirements for non-statutory review, melding the constitutional requirements of standing with the prudential requirements.

high seas.[68] Justice Scalia, writing for the majority, found that the plaintiffs failed to meet their burden of establishing standing.[69]

In *Defenders*, the majority held that to establish injury in fact, plaintiffs must establish, inter-alia, that they suffered an invasion of a legally protected interest which is (1) concrete and polarized, and (2) actual or imminent.[70] The Court focused on the imminence of the harm, requiring specific affidavits showing the imminent harm. The plaintiffs failed to show that the contested regulation would directly affect one or more of their members apart from that member's special interest in the subject of endangered species.[71] The Court required the plaintiffs to specify the particular areas that would be harmed. For example, a member using part of a contiguous ecosystem must establish imminent harm from damage to the particular area affected by the challenged agency action.[72] The majority caustically stated that a person does not have standing merely because he has an interest in studying or seeing endangered animals anywhere on the globe.[73]

The Court also stated that parties seeking to enforce a procedural requirement must show harm to the procedural interest and to a separate substantive interest.[74] Specifically, a procedural injury invokes standing

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68. *Defenders*, 112 S. Ct. at 2135. The Court quoted Section 7(a)(2) of the ESA which provides in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.

*Id.* (quoting 16 U.S.C. § 1536(a)(2)).

69. *Id.* at 2146. Although the ESA contains a citizen suit provision, the majority analyzed the plaintiffs' claim as though the ESA does not have a citizen suit provision. *See* Gene R. Nichol, *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1141 (1993).

70. *Defenders*, 112 S. Ct. at 2136.

71. *Id.* at 2138-40. The plaintiffs' affidavits described speculative and non-concrete injuries even though the desire to use or observe an animal species for purely aesthetic reasons is "undeniably a cognizable interest for the purpose of standing." *Id.* at 2137 (citing *Sierra Club*, 405 U.S. at 734-35).

72. *Id.* at 2139.

73. *Id.* The nexus requirement originated in taxpayer suits. Flast v. Cohen, 392 U.S. 83, 102 (1968). In *Flast*, the Supreme Court analyzed the nexus requirement under the zone of interests component of the prudential restrictions. *Id.* at 102-03; *see also infra* Part III. To further confuse the application of the nexus requirement, the Ninth Circuit applied it to an injury in fact analysis, stating that:

> "[One] who observes or works with a particular animal threatened by a federal decision" clearly faces "perceptible harm," and one "who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision" may plausibly claim such harm, "since some animals that might have been the subject of his interest will no longer exist."

Didrickson v. United States Dept. of Interior, 982 F.2d 1332, 1339 (9th Cir. 1992) (quoting *Defenders*, 112 S. Ct. at 2139-40).

74. *Defenders*, 112 S. Ct. at 2142. "[A] plaintiff . . . claiming only harm to his and every citizen's

only when disregard of the procedure in question could impair a separate substantive interest.[75] This essentially requires a personal-stake injury in addition to the procedural injury; a procedural injury alone will not confer standing.

In dissent, Justices Blackmun and O'Connor stated that the majority mischaracterized the holding in *National Wildlife Federation* "as establishing the general rule that a party claiming injury from environmental damage must use the area affected by the challenged activity."[76] They pointed out that the majority failed to recognize that "environmental injuries . . . can cause harm distant from the areas immediately affected by the challenged action. Environmental destruction may affect animals travelling over vast geographical ranges."[77] Destruction of one part of an ecosystem affects other parts of that ecosystem as well as other contiguous ecosystems. Moreover, in his concurrence to judgment only, Justice Stevens noted that even though an environmental harm may affect large areas, the impact of the harm will not fall indiscriminately upon every citizen. Only those who use the area will feel the alleged harm.[78]

Justices Blackmun and O'Connor also expressed concern over the new limitation the majority placed on Congress' authority to allow citizen suits in federal courts for injuries deemed procedural in nature.[79] The majority's dismissal of the ESA's citizen suit provision calls into question procedural statutes and Congress' power to grant citizens the right to sue.[80] First, if an agency's failure to follow its legally mandated process does not establish standing and therefore precludes judicial review, procedural statutes such as the APA, NEPA, FLPMA, and NFMA could be rendered meaningless.[81] For example, the APA provides judicial review of an interest protected by a relevant statute.[82] If that statute is purely procedural, and

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interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 2143.

75. *Id.* at 2142. However, Justice Stevens concurred in the judgment because he found that the government did not intend section 7(a)(2) to apply to activities in foreign countries. He also found that the plaintiffs did not lack standing. Although the plaintiffs did not establish actual harm, their injury was imminent and not speculative. A person with a professional interest in preserving an endangered or threatened species or its habitat who intends to revisit the area should have standing. *Id.* at 2147; *see also infra* Part IV.

76. *Defenders*, 112 S. Ct. at 2154.

77. *Id.* (citing Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986)).

78. *Id.* at 2148 n.2 (Stevens, J., concurring) (citing *Sierra Club*, 405 U.S. at 735).

79. *Id.* at 2152.

80. The ESA states that "any person may commence a civil suit on his own behalf . . . to enjoin . . . [the] violation of any . . . provision of [the Act]." 16 U.S.C. § 1540(g) (1988).

81. *But see Warth*, 422 U.S. at 500 (holding an injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing).

82. *See* 5 U.S.C. § 702.

procedural injuries do not confer standing, agencies are left with unfettered discretion to ignore their statutory mandates.[83] Additionally, it would leave the executive branch largely unchecked, and therefore upset the balance between the three branches of government and defeat the purpose of separation of powers from which standing derives.[84]

Second, the majority questioned Congress's power to grant citizens the statutory right to sue.[85] Even if Congress drafts legislation granting citizens the right to sue, Justice Scalia stated those citizens still must meet the constitutional requirements of standing to gain judicial review.[86] In other words, regardless of what legally protected interests Congress creates, an injury to a legally protected interest must pass constitutional muster to gain judicial review.[87] Although Congress has the power to create legally protected interests, it lacks the power to grant any citizen harmed by a statute access to the federal judicial system.[88]

The *Defenders* decision enhanced the injury in fact requirement that plaintiffs must satisfy regardless of whether the statute confers a right to judicial review. Specifically, the Court tightened its interpretation of "imminent."[89] Affidavits must demonstrate the imminence of injury by pinpointing the specific location of the alleged harm.[90] For example, even if the affidavits contained facts showing that agency-funded projects threatened listed species, the affidavits would not satisfy the imminence definition unless they show how damage to the species would imminently injure the affiants.[91] Additionally, the majority seems to require that affidavits allege specific dates when the affiants use the areas. The majority found that a Defenders member's affidavits were not specific enough because she had no current plans or tickets to show when she would return

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83. *See* Nichol, *supra* note 69, at 1144 (noting that legislatively pronounced public rights cannot provide a basis for standing in the federal courts unless they coincide with the Justice Scalia's views of concrete injury).

84. *Id.* at 1160-62.

85. *Defenders*, 112 S. Ct. at 2136. Scalia reasons that Congress does not have the power to grant citizens the right to judicial review in cases where the Constitution has not granted the judiciary that same power. *See* Nichol, *supra* note 69, at 1147. However, the Constitution does not delineate what "cases" and "controversies" include or do not include. In fact, Justice Scalia has written that the "law of standing roughly restricts courts to their traditional undemocratic role of protecting . . . minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the *majority itself*." Scalia, *supra* note 3, at 894.

86. Nichol, *supra* note 69, at 1160.

87. *Defenders*, 112 S. Ct. at 2139; *see* Nichol, *supra* note 69, at 1160.

88. *See* Nichol, *supra* note 69, at 1160.

89. *Defenders*, 112 S. Ct. at 2137-40.

90. *Id.* at 2137-38.

91. *Id.* at 2138.

to Sri Lanka.[92] Thus, the Supreme Court narrowed its interpretation of injury in fact, requiring more specificity than ever before.

In 1993, the Ninth Circuit chose not to adopt the *Defenders* approach to injury in fact in *Seattle Audubon Society v. Espy*.[93] The Ninth Circuit expressly distinguished *Defenders* and applied a more traditional interpretation of injury in fact.[94] In *Seattle Audubon Society*, citizen groups[95] challenged the FEIS issued by the Forest Service and the record of decision (ROD) issued by the assistant Secretary of Agriculture, which adopted the Interagency Scientific Committee (ISC) Report as the Forest Service's spotted owl management plan.[96]

The Ninth Circuit found that the plaintiff environmental organization, Seattle Audubon Society (SAS), had standing and that the decision was ripe for review.[97] The Forest Service claimed that SAS could not demonstrate actual or imminent injury as required under *Defenders*, arguing that *Defenders* and *National Wildlife Federation* materially altered standing requirements.[98] The court distinguished SAS's claim from the plaintiff's claim in *Defenders*, on three grounds: 1) SAS challenged a final agency action; 2) SAS presented specific affidavits showing that members lived in close proximity to the owl habitat; and 3) members frequently visited the area for aesthetic and scientific purposes.[99]

The court conferred standing because "[t]here [did] not appear to be any dispute over whether further logging in old-growth forests [would] adversely affect the remaining owl population throughout its range. Thus, the asserted harm SAS members complain[ed] of [would] occur if logging [took] place."[100] The court reiterated that intervening circumstances

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92. *Id.*

93. 998 F.2d 699 (9th Cir. 1993).

94. *Seattle Audubon Soc'y*, 998 F.2d at 702.

95. Including Seattle Audubon Society, Pilchuck Audubon Society, Washington Environmental Council, and Washington Native Plants Society.

96. *Seattle Audubon Soc'y*, 998 F.2d at 701. Seattle Audubon Society (SAS) first filed suit claiming that the Forest Service violated NFMA by failing to prepare a plan for managing spotted owl habitat on national forests in northern California, Oregon, and Washington. The district court granted permanent injunctive relief of timber sales in owl habitat pending preparation of an owl management plan pursuant to NFMA and NEPA. Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1092-93 (W.D. Wash. 1991). The Ninth Circuit affirmed the district court's order. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 298 (9th Cir. 1991). The Forest Service then published an FEIS and in the subsequent ROD, adopted the ISC's Report and owl management plan. *Seattle Audubon Soc'y*, 998 F.2d at 701. SAS then filed this action in district court. Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992).

97. *Seattle Audubon Soc'y*, 998 F.2d at 703 (upholding the district court's decision that the Forest Service violated NFMA and NEPA by adopting the ISC Report without considering alternatives and without considering additional information on the status of the owl).

98. *Id.* at 702.

99. *Id.* at 703.

100. *Id.*

which might prevent logging were not relevant to the standing issue.[101] SAS's injury arose from the Forest Service overlooking environmental consequences in violation of procedural mandates. The plaintiffs in *Idaho Conservation League* asserted the same injury.[102] The Ninth Circuit concluded in *Seattle Audubon Society* that SAS had standing because:

> the threatened harm to owl viability resulting from further logging in old-growth forests, in the absence of an owl management plan which complies with the requirements of NEPA and the NFMA, is concrete, specific, imminent, caused by agency conduct in question, and redressable by a favorable ruling.[103]

The Ninth Circuit did not depart from the recent Supreme Court cases; it merely distinguished them on their facts.

The Ninth Circuit decided *Portland Audubon Society v. Babbitt*[104] on the same day it decided *Seattle Audubon Society*. Following a series of court actions,[105] Portland Audubon Society (PAS) sought declaratory relief claiming that the BLM violated NEPA by authorizing timber sales in spotted owl habitat without preparing a new EIS on the effects of logging on the spotted owl. PAS also sought an injunction to prohibit the BLM from authorizing any land-altering timber sales in spotted owl habitat.[106]

The Ninth Circuit held that PAS had standing and prevailed on the merits of the case.[107] As in *Seattle Audubon Society*, the government contended that *National Wildlife Federation* and *Defenders* "materially alter the standing principles which previously applied and that these Supreme Court decisions require dismissal of plaintiff's challenges."[108] The Ninth Circuit found the government's contention no more compelling than in *Seattle Audubon Society*.[109]

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101. *Id.*

102. *Id.* at 701; *Idaho Conservation League*, 956 F.2d at 1513.

103. *Seattle Audubon Soc'y*, 998 F.2d at 703.

104. 998 F.2d 705 (9th Cir. 1993).

105. Portland Audubon Society (PAS) initially sought declaratory and injunctive relief to protect the habitat of the spotted owl in Oregon and Washington. Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456 (D. Or. 1989) (following remand, 866 F.2d 302, granting BLM's motion for summary judgment). The Ninth Circuit then affirmed that the NEPA claims were prohibited and reversed that the group's non-NEPA claims were barred by the doctrine of laches. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989). The Supreme Court denied certiorari. 494 U.S. 1026 (1990). PAS filed an amended complaint in 1992. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D.Or. 1992) (granting summary judgment in favor of PAS). The Secretary of the Interior and other parties appealed. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

106. *Portland Audubon Soc'y*, 998 F.2d at 707.

107. *Id.* at 707, 709 (affirming the district court's grant of summary judgment and injunction in favor of PAS).

108. *Id.* at 707.

109. *Id.*; *Seattle Audubon Soc'y*, 998 F.2d at 702 (stating that "[t]he Forest Service's position is not well founded.").

The court specifically noted that PAS members submitted affidavits alleging a pattern of continuous use of spotted owl habitat.[110] Because the members have used and will continue to use the forests on BLM land and "[t]he continued viability of the northern spotted owl is tied directly to the continued existence of the old-growth forests which comprise its habitat," PAS demonstrated injury in fact.[111] The BLM even admitted that any further loss of habitat could severely compromise the ability of the owl to survive as a species.[112] Therefore, the court reasoned that absent NEPA compliance, logging will result in loss of habitat, which will harm the spotted owl and harm PAS members who will no longer be able to study the owl.[113]

Most recently, in November 1993, in *Resources Limited, Inc. v. Robertson*,[114] the Ninth Circuit again distinguished *Defenders*. The plaintiffs[115] challenged the adequacy of the Flathead National Forest Land and Resource Management Plan (Flathead LRMP) and its accompanying EIS. They asserted that the Forest Service violated NEPA, NFMA, and the ESA.[116]

In *Resources Limited*, the Forest Service tried to develop the Flathead LRMP and EIS to accommodate several threatened and endangered species[117] while allowing logging and other uses. The Forest Service approved the Flathead LRMP and EIS in 1986. The plaintiffs claimed that the EIS was inadequate and disputed the Forest Service's conclusion that implementation of the LRMP would not jeopardize the survival of listed species.[118]

The Ninth Circuit held that the plaintiffs had standing to challenge the decision because "[t]o the extent that the Plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge."[119] The Ninth Circuit limited its analysis to

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110. *Portland Audubon Soc'y*, 998 F.2d at 708.

111. *Id.*

112. *Id.*

113. *Id.*

114. 8 F.3d 1394 (9th Cir. 1993).

115. Resources Limited, Inc., Swan View Coalition, Inc., Friends of the Wild Swan, and Five Valleys Audubon Society.

116. *Resources Ltd.*, 8 F.3d at 1396.

117. Including the grizzly bear, gray wolf, bald eagle, and peregrine falcon. *Id.*

118. *Id.* at 1397.

119. *Id.* (quoting *Idaho Conservation League*, 956 F.2d at 1516). The district court found that the Flathead LRMP merely allowed for the possibility of development in the future. Therefore, the future action was too remote to confer an injury in fact and grant access to the judicial system. Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1533-34 (D.Mont. 1991). The court also held that NFMA's requirement of economic analysis before clearcutting need not be addressed in the Flathead LRMP but that an economic analysis can be done any time before implementation of a timber project. *Id.*

injury in fact.[120] The court recognized that the LRMP is an important decision even if it does not represent a site-specific decision, quoting key language from *Idaho Conservation League*: "[S]hort of assuming that congress imposed useless procedural safeguards, ... we must conclude that the management plan plays some, if not a critical, part in subsequent decisions."[121] The court further noted that if Resources Limited did not have standing to sue at this procedural step, the program would forever escape review.[122]

The Forest Service claimed that the Supreme Court's recent decisions in *National Wildlife Federation* and *Defenders* do not coincide with the Ninth Circuit's decision in *Idaho Conservation League*.[123] However, the Ninth Circuit had just decided *Seattle Audubon Society* and *Portland Audubon Society* in July of 1993, validating *Idaho Conservation League* in light of *National Wildlife Federation* and *Defenders*.[124] In *Resources Limited*, the plaintiffs filed affidavits on behalf of individual members alleging use of the Flathead National Forest on a regular basis. The intervenor, Intermountain Forest Industry Association, claimed that the affidavits must specify the particular area of the forest where the injury will occur. The Ninth Circuit, however, does not require plaintiffs to specify the exact location of the injury if the agency has not yet determined the location of the action; therefore, the court conferred standing.[125]

The court in *Resources Limited* also rejected the argument that an injury is hypothetical because it is subject to intervening circumstances.[126] By expressly dismissing the strict imminence and specificity requirements of injury in fact, the Ninth Circuit moved further away from the Supreme Court's approach to injury in fact in *Defenders*. In *Idaho Conservation League*, however, the Ninth Circuit carefully reasoned a lower threshold of imminence, without explicitly stating why affidavits that depend on intervening circumstances do not necessarily defeat standing.[127]

### B. *Causation and Redressability*

After a plaintiff has established injury in fact, courts turn to the

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120. *Resources Ltd.*, 8 F.3d at 1397.

121. *Id.* (quoting *Idaho Conservation League*, 956 F.2d at 1516).

122. *Id.*

123. *Id.* at 1397-98.

124. *Id.* at 1398; *see Portland Audubon Soc'y*, 998 F.2d 705 and *Seattle Audubon Soc'y*, 998 F.2d 699 (denying that *Defenders* established a new stricter burden to specify an injury in fact).

125. *Resources Ltd.*, 8 F.3d at 1398 (stating that the Ninth Circuit has not imposed a specificity requirement to point to the precise area where the injury will occur); *see Seattle Audubon Soc'y*, 998 F.2d at 702-03; *Idaho Conservation League*, 956 F.2d at 1516-17.

126. *Resources Ltd.*, 8 F.3d at 1398 (referring to *Seattle Audubon Soc'y*, 998 F.2d at 703; *Idaho Conservation League*, 956 F.2d at 1515).

127. *Idaho Conservation League*, 956 F.2d 1515-17.

second and third components of the constitutional requirements for standing: causation and redressability.[128] These two elements appear inextricably intertwined, and courts often combine them.[129] The second component requires that a causal connection exist between the injury and the defendant's alleged misconduct, or that the injury is fairly traceable to the action being challenged.[130] The third component requires that the relief requested will redress the plaintiff's injury.[131] Mere speculation fails.[132] Redressability relies on both injury in fact and causal connection: If an actual injury does not exist, it would not be redressable. Similarly, if the causal connection does not exist, the requested relief would not redress the conduct complained of.

In *Allen*, the Supreme Court distinguished causation and redressability, acknowledging "that there is a difference, [in] that the former examines the causal connection between the asserted unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."[133] In *Simon v. Eastern Kentucky Welfare Rights Organization*, the Supreme Court required only that the injury be likely to be redressed.[134]

In *Defenders*, the Court stated that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."[135] The plaintiffs in *Defenders* failed to meet the redressability component for two reasons. First, the Court found that the plaintiffs could not successfully attack a generalized level of government action but must wait to challenge separate decisions to fund particular projects.[136] The Court reasoned that "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever

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128. *See* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976); *see also* TRIBE, *supra* note 16, § 3-18.

129. *See* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2140-41 (1992); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517 (9th Cir. 1992); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993).

130. *See* Allen v. Wright, 468 U.S. 737, 751 (1984) (commenting that the "terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise").

131. *Simon*, 426 U.S. at 38; *see also Idaho Conservation League*, 956 F.2d at 1517 ("deal[ing] with the two components together, for they are both 'alike in focusing on the question of causation' ").

132. *Allen*, 468 U.S. at 753 n.19.

133. *Id.*

134. 426 U.S. at 38.

135. *Defenders*, 112 S. Ct. at 2137.

136. *Id.* at 2140 (holding that programmatic review is rarely appropriate).

appropriate for federal-court adjudication."[137] Second, the plaintiffs named the Secretary of the Interior as a party to the suit but did not name the implementing agencies. The majority relied on a procedural technicality and found that the Secretary's regulations would not necessarily bind the funding agencies and therefore, without naming the implementing agencies, the plaintiffs' injuries were not redressable.[138]

Redressability raises questions similar to those raised by ripeness, which is perhaps why the majority in *Defenders* used ripeness language to analyze the redressability component.[139] Unlike the Supreme Court, the Ninth Circuit has shied away from combining the two discussions. In addressing the constitutional component of redressability, the Ninth Circuit analyzes the underlying statutory scheme. For example, in *Idaho Conservation League*, the Ninth Circuit's analysis hinged on the legal interest Congress intended to protect when enacting NEPA and NFMA.[140] The Forest Service's alleged failure to follow procedural mandates made possible development that full compliance with procedural mandates would have denied. The court found that even when the threat of development depends on third party actions, the procedural safeguards established by NEPA and NFMA confer an enforceable right at the LRMP stage.[141] Short of assuming Congress imposed useless procedural safeguards, these are the immediate injuries that NEPA and NFMA aimed to avoid.[142]

The Ninth Circuit looked to a Seventh Circuit case that ruled in favor of plaintiffs challenging the Nuclear Regulatory Commission's (Commission) decision not to revoke a permit to construct a plant, even though the plant could not operate without the Commission granting an operating permit.[143] The court granted standing in light of the risk that the

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137. *Id.* (citing *Allen*, 468 U.S. at 759-60).

138. *Id.* In the dissent, Justice Blackmun simply "cannot agree [with the majority] that the Government is free to play 'Three-Card Monte' with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme." *Id.* at 2155.

139. *Id.* at 2140 (stating that suits challenging a generalized level of government action are rarely appropriate for federal-court adjudication).

140. *Idaho Conservation League*, 956 F.2d at 1514 n.12.

141. *Id.* The court stated:

> [I]f the agency action only could be challenged at the site-specific development stage, the underlying programmatic authorization would forever escape review. To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge. That point is now or it is never.

*Id.* at 1516. Moreover, the administrative procedures for evaluating wilderness recommendations are separate from the procedures employed to consider site-specific activities. In fact, regulations direct the Forest Service to evaluate wilderness recommendations during the forest planning process. 36 C.F.R. § 219.18 (1993).

142. *Idaho Conservation League*, 956 F.2d at 1514.

143. *Id.* at 1516 (analogizing Rockford League of Women Voters v. United States Nuclear

Commission, faced with a construction permit and a completed plant, would be "stampeded into granting an operating permit as well."[144] Similarly, the LRMP and wilderness designation signify important decisions with broad-reaching effects.[145]

In *Idaho Conservation League*, the court addressed the traceability and redressability components together. The Forest Service argued that ICL's injury failed these tests because the actual development of the wilderness areas depended on third-party actions. Yet the court focused on whether ICL's injury was dependent on the Forest Service's policy or on the result of independent forces governing third-party decisionmaking. The injury—failure to make wilderness recommendations—would not have occurred but for the Secretary's decision allegedly made without following the proper procedures.[146] The fact that the development might never take place did not eliminate the injury that "environmental consequences might be overlooked and reasonable alternatives ignored as a result of deficiencies in the final EIS and ROD."[147] The court concluded that ICL's injury was dependent on the Forest Service's policy and therefore withstood the traceability and redressability requirements.[148]

The Forest Service argued that the threatened injury of development in roadless areas was too remote for standing purposes because the Forest Service makes site-specific decisions regarding development after the LRMP stage and each subsequent decision still requires a NEPA analysis.[149] Therefore, the Forest Service argued that the threat of injury was numerous steps away and each of those steps had inherent procedural safeguards. However, the court rejected the Forest Service's argument because an injury that is threatened rather than actual may confer standing.[150] The court also stated that even though third parties control the development and thus the threatened harm, ICL may still establish standing.[151]

In *Portland Audubon Society*, the Ninth Circuit applied a straightforward redressability analysis. The plaintiffs drafted artful affidavits and

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Regulatory Comm'n, 679 F.2d 1218 (7th Cir. 1982)).

144. *Rockford League of Women Voters*, 679 F.2d at 1221-22.

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

146. *Id.* at 1517-18.

147. *Id.* at 1518.

148. *Id.* The court analyzed the threatened injury of development as a tangent of the procedural injury; according to the court, the one buttressed the other. The threatened injury could not stand on its own and pass the imminence of injury in fact. Similarly, the threatened injury buttressed the redressability requirement for the procedural injury. *Id.*

149. *Id.* at 1511.

150. *Id.* at 1515 (finding "that the potential injury would be the result of a chain of events need not doom the standing claim").

151. *Id.*

requested relief that could redress their injuries.[152] In fact, the BLM and experts agreed that continued logging without NEPA compliance would cause harm to the owls and the plaintiffs, who would no longer be able to observe or study the owls.[153] Moreover, the Ninth Circuit found that the plaintiffs' "injury-in-fact [was] clearly redressable by the district court's enjoining the Secretary to comply with the requirements of NEPA."[154]

## III. PRUDENTIAL RESTRICTIONS

After a court finds that a plaintiff has satisfied the constitutional requirements,[155] it usually turns to the judicially created prudential restrictions,[156] which may require the plaintiff to survive three policy-based[157] components before granting standing.[158] Like the constitutional requirements, the self-imposed prudential restrictions are inconsistent, leaving to the particular court the decision of whether to apply any one, or all of them. The guesswork is left to the plaintiffs.

Traditionally, to survive a court's prudential scrutiny, the plaintiff's injury must fall within the "zone of interests" protected by the relevant statute[159] and involve the plaintiff personally, not as a third party[160] nor as a member of a larger class of potential plaintiffs alleging a "generalized grievance."[161] However, *Lujan v. Defenders of Wildlife*[162] and recent Ninth Circuit decisions may have changed the manner in which courts apply these prudential restrictions.

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152. *Portland Audubon Soc'y*, 998 F.2d at 708.

153. *Id.*

154. *Id.*

155. Often courts mention the prudential restrictions, especially the zone of interests test, and then fail to address those restrictions because the plaintiffs have failed to satisfy the constitutional requirements. In *Sierra Club v. Morton*, for example, the Supreme Court mentioned the zone of interests test, but never analyzed it because the plaintiffs failed the threshold injury in fact test. 405 U.S. 727, 733 & n.5 (1972).

156. Justice O'Connor, writing for the majority in *Allen v. Wright*, characterized the prudential restrictions as "judicially self-imposed limits on the exercise of federal jurisdiction." 468 U.S. 737, 751 (1984).

157. *See* Flast v. Cohen, 392 U.S. 83, 97 (1968) ("find[ing] their source in policy, rather than purely constitutional considerations").

158. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (acknowledging "other limits on the class of persons who may invoke the courts' decisional and remedial powers"). *See generally* Fletcher, *supra* note 55, at 251-53.

159. *See* Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); *see also* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS, § 5.4, at 130 (2d ed. 1992) (noting the Supreme Court's haphazard application of the zone of interests test).

160. *Warth*, 422 U.S. at 499.

161. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2145 (1992); Schlesinger v. Reservists Comm. to Stop War, 418 U.S. 208, 216-17 (1974).

162. 112 S. Ct. 2130.

When courts considered prudential restrictions in the past, they often focused on the zone of interests component while seldom discussing the latter restrictions, third-party standing and generalized grievances. This was especially true in environmental litigation because plaintiffs usually alleged procedural injuries resulting from a government agency's failure to follow its statutory guidelines. The Supreme Court initially rendered prudential restrictions moot where Congress provided a citizen suit provision that defined a statute's scope of review, or otherwise expressed an intent to eliminate prudential restrictions through statutory language.[163] Nonetheless, confused courts would apply prudential restrictions in situations of both APA and non-APA review.

When a court engages in prudential analysis, it essentially reconsiders the same concepts as in the constitutional approach.[164] The Supreme Court intimated this in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, where the Burger Court stated that the prudential restrictions "are generally satisfied when the constitutional requisites are met."[165]

### A. *Zone of Interests*

Like the injury in fact component of the interpreted constitutional requirements, the zone of interests test is threshold. It focuses on the statute through which plaintiffs seek review of defendant's alleged misconduct. The problem is that the zone of interests test was intended to grant presumptive review in APA cases only,[166] not to limit court access as a prudential restriction.[167] In *Association of Data Processing Service Organizations, Inc. v. Camp*,[168] the Supreme Court first articulated this prudential restriction while interpreting section 702 of the APA. The Court defined its attendant query as "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[169]

In determining whether the interest at issue is *arguably* within a statute's zone of interest, courts look to the text and structure of "the

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163. *See Data Processing*, 397 U.S. at 156-57.

164. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 386 n.6 (1993).

165. 438 U.S. 59, 81 (1978).

166. *See, e.g.*, Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 394-403 (1987).

167. *See* Allen v. Wright, 468 U.S. at 737, 751 (1984) (characterizing the zone of interests test as a prudential restriction); AMAN & MAYTON, *supra* note 164, § 12.7.7.

168. 397 U.S. 150 (1970).

169. *Data processing*, 397 U.S. at 153-54. Section 10(a) of the APA provides in pertinent part that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to review thereof." 5 U.S.C. § 702 (1988).

statute whose violation is the gravamen of the complaint."[170] Courts, however, have also turned to the relevant statute's legislative history,[171] because "the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed."[172]

Following *Data Processing*, courts began to mischaracterize the zone of interests test as an arbitrarily applied prudential restriction.[173] The Supreme Court revisited the zone of interests test in *Clarke v. Security Industry Association*,[174] reiterating its origin yet modifying its future application. In *Clarke*, the defendant association of securities brokers challenged the permission granted by the Comptroller of Currency to two national banks to establish out-of-state offices as discount brokerage services. According to the Comptroller's interpretation of the McFadden Act, the discount brokerage services would not constitute "branches" of the national banks because none of the branch functions prohibited by the act would be performed at the discount brokerage services. However, both the district court and the D.C. Circuit rejected the Comptroller's interpretation. The Comptroller challenged the defendant's standing, arguing that the defendant associations fell outside the zone of interest of the McFadden Act, which was intended "to establish competitive equality between state and national banks."[175]

Under a strict interpretation of the zone of interests test, the Comptroller may have prevailed. The Supreme Court, however, loosely interpreted the test, holding that the defendant had standing because "the interest [it] asserts has a plausible relationship to policies underlying [the act]."[176] The Court reversed the circuit court's decision, finding that the banks could open out-of-state brokerage offices in compliance with the act. The Court summarized the zone of interests test as denying review only when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."[177] The Court in *Clarke* went on to stress the test's intended flexibility, saying that "there need be no indication of congressional purpose to benefit the would-be plaintiff."[178]

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170. Air Courier Conference v. American Postal Workers Union, 49 U.S. 517, 529 (1991) (citing *National Wildlife Fed'n*, 497 U.S. at 886).

171. *See* Scanwell Labs, Inc. v. Shaffer, 424 F.2d 859, 865-68 (D.C. Cir. 1970).

172. *Clarke*, 479 U.S. at 400.

173. *See, e.g.*, *Allen*, 468 U.S. at 751 (citing Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-75 (1982)).

174. 479 U.S. 388 (1987).

175. *Clarke*, 479 U.S. at 390-93.

176. *Id.* at 403.

177. *Id.* at 399.

178. *Id.* at 399-400.

A year after the *Clarke* decision, the Ninth Circuit decided *Friends of the Earth v. United States Navy*.[179] In *Friends of the Earth*, the court determined that the environmental plaintiffs had standing to enjoin the Navy's proposed construction of a homeport because the Navy failed to obtain all necessary permits pursuant to the National Defense Authorization Act (NDAA). In finding that the plaintiffs' alleged injuries fell within NDAA's zone of interests, the Ninth Circuit relied on *Clarke*, including *Clarke*'s distilled explanation of the limited circumstances under which review should be denied.[180]

Two years later in *Lujan v. National Wildlife Federation*,[181] the Supreme Court found that NWF met the zone of interests test because Congress designed both FLPMA and NEPA to protect recreational and aesthetic enjoyment. NWF's affidavits established adverse effects or aggrievement to recreational and aesthetic interests, and therefore established harm within the meaning of the relevant statutes.[182] However, NWF failed to show actual harm to these interests.[183]

The Ninth Circuit also looks closely to the interests protected by the relevant statute, perhaps more closely than other courts. Recently, the Ninth Circuit elaborated on the zone of interests test in *Mt. Graham Red Squirrel v. Espy*.[184] In *Red Squirrel*, the defendant University argued that the environmental organizations' interests were beyond Congress's intended purpose of the Arizona-Idaho Conservation Act (AICA). The court responded that even if the plaintiffs' interests were inconsistent with underlying purpose of the AICA, the defendant still must show "that this inconsistency is so fundamental as to make it *impossible* to believe that Congress intended to permit [the plaintiffs] to bring suit."[185] Since impossibility is an extremely high hurdle for defendants, the circuit court's broad interpretation of underlying statutes indicates that the zone of interests test presents less of an obstacle to environmental plaintiffs in the

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179. 841 F.2d 927 (9th Cir. 1988).

180. *Friends of the Earth*, 841 F.2d at 931-33. The court in *Friends of the Earth* incorporated the following language from *Clarke* in its opinion:

> if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

*Id.* at 932 (quoting *Clarke*, 479 U.S. at 399-400).

181. 497 U.S. 871 (1990).

182. *National Wildlife Fed'n*, 497 U.S. at 883-86. Because *National Wildlife Fed'n* involved a motion for summary judgment, the Supreme Court required a more stringent showing of fact than it requires in a motion for judgment on the pleadings. *Id.*

183. *Id.* at 886-89.

184. 986 F.2d 1568 (9th Cir. 1993).

185. *Red Squirrel*, 986 F.2d at 1582-83 (emphasis added).

Ninth Circuit. Congress' failure to expressly state an intent in the AICA to preclude such suits enabled the court to reject the defendant's argument and grant the plaintiffs standing.[186]

Later in 1993, in *Nevada Land Action Ass'n v. United States Forest Service*,[187] an organization of ranchers who held Forest Service grazing permits challenged the Toiyabe National Forest LRMP for violating NEPA and NFMA. The Ninth Circuit noted that the zone of interests test weeds out suits that "are more likely to frustrate than to further statutory objectives."[188] The court looked to the purpose of NEPA, which is "to encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."[189] Since the ranching organization asserted economic injuries, not environmental injuries, the court determined that the organization lacked standing under NEPA.[190]

The organization also alleged that the LRMP affected the human environment which caused its members lifestyle loss. However, the court held that the organization could not "invoke NEPA to prevent 'lifestyle loss' when the lifestyle in question is damaging to the environment."[191] The court never applied the constitutional tests of standing because it found that the organization was not entitled to judicial review under the APA.[192] Thus, *Red Squirrel* and *Nevada Land Action* illustrate that while judicial review is presumptive under the APA, plaintiffs in the Ninth Circuit must still tailor their complaint to the relevant statute under which they seek review, explaining why their particular interests fall within that statute's zone of interests.

### B. *Generalized Grievances*

The underlying concept of the generalized grievances restriction is that plaintiffs must assert their own rights, not those shared with a larger class of potentially injured plaintiffs nor with the general public.[193] While sometimes couched in prudential terms, this restriction is not unlike the prohibition on purely ideological plaintiffs often discussed in injury in fact

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186. *Id.* at 1583.

187. 8 F.3d 713 (9th Cir. 1993) (presenting an interesting twist because Nevada Land Action is not an established environmental organization).

188. *Nevada Land Action*, 8 F.3d at 715 (citing *Clarke*, 479 U.S. at 397 n.12).

189. *Id.*; 42 U.S.C. § 4321 (1988).

190. *Red Squirrel*, 926 F.2d at 715.

191. *Id.*

192. *Id.*

193. *See* Warth v. Seldin, 422 U.S. 490, 499-500 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974).

analysis.[194] The similarity is evident in *Lujan v. Defenders of Wildlife*, where Justice Scalia used the generalized grievances restriction within his procedural injury analysis to reject plaintiff's claim under the ESA:

> We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.[195]

Since *Defenders*, courts are more apt to discuss the generalized grievances component when reviewing environmental plaintiffs' standing. This is largely a reaction to Justice Scalia's use of the generalized grievances restriction before focusing on the separation of powers,[196] which, according to the Court in *Allen v. Wright*, is the inherent "single basic idea" behind prudential restrictions.[197]

Justice Scalia has argued that some litigated issues are better left to the legislative branch of the government, and that prudential restrictions are the Court's preferred tool of deference.[198] Following his lead, the Supreme Court has only recently liberally applied prudential restrictions to further limit access to the courts for environmental plaintiffs. The Ninth Circuit, on the other hand, has followed the traditional analysis, exercising conservative use of these restrictions.

However, even before *Defenders*, courts sometimes mentioned separation of powers when discussing generalized grievances.[199] Finding a window of opportunity through which he might implement an agenda,[200] Justice Scalia went on to express his separation of powers ideas in *Defenders*.[201] Justice Scalia's interpretation, which is arguably dicta, would essentially eliminate any distinction between APA and non-APA

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194. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474-75, 482-87 (1982); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

195. 112 S. Ct. 2130, 2143 (1992).

196. *See Defenders*, 112 S. Ct. at 2144-45.

197. 468 U.S. 737, 752 (1984); *see also Warth*, 422 U.S. at 498-99 (stating that these "other limits" were "about the proper—and properly limited—role of the courts in a democratic society"); *Schlesinger*, 418 U.S. at 222 (ruling on a claim without injury "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction' "); Flast v. Cohen, 392 U.S. 83, 97 (1968) (noting that prudential restrictions "find their source in policy, rather than purely constitutional considerations").

198. *See* sources cited *supra* note 3.

199. *See, e.g., Schlesinger*, 418 U.S. at 222, 226-27.

200. *See* Scalia, *supra* note 3; *see also* Perino, *supra* note 3, at 149-56, 175-78.

201. *Defenders*, 112 S. Ct. at 2144-45.

review for courts engaging in standing analyses.[202] To recognize the distinction, according to Justice Scalia, enables Congress to empower the individual with a duty explicitly reserved for the executive branch under Article II's take care clause.[203]

While the implications of the Court's decision in *Defenders* remain unknown, the Court's generalized grievances discussion may encourage Congress to opt for more specific language when drafting citizen suit provisions. Likewise, *Defenders* should encourage environmental plaintiffs to be more specific as to their injury when drafting their pleadings, to avoid "in the vicinity" language, and to individualize their injuries as much as possible, setting themselves apart from the general populace.

### C. *Third-Party Standing*

The underlying concept of this prudential restriction is that a plaintiff cannot assert the legal rights of another.[204] Before declining to impose this restriction under the facts in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, the Court justified imposing the third-party standing restriction "when the rights of third parties are implicated [because it avoids] the adjudication of rights which those not before the court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."[205]

The third-party standing restriction invokes comparison to and confusion with the broader concepts of zone of interests and injury in fact. It is like the zone of interests test in that a plaintiff whose interest falls outside the relevant statute's zone of interests is asserting a claim based on the rights of others—namely, those whose interests fall within the statute's zone of interests.[206] Since the injury in fact must have a close relationship with the asserted right, third-party standing concepts may also appear in a court's discussion of injury in fact or nexus.

Likewise, courts draw similarities between third-party standing and associational standing concepts. In *Warth v. Seldin*,[207] local low-income residents, taxpayers, organizations to assist low-income residents, and a

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202. *Id.*

203. *Id.* Article II, section 3 imposes on the President the duty to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

204. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (holding that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties"); *see also* TRIBE, *supra* note 16, § 3-19 at 134-45. *See generally* Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

205. 438 U.S. at 80 (citing Singleton v. Wulff, 428 U.S. 106, 113-14 (1976)).

206. *See* TRIBE, *supra* note 16, § 3-19 at 144 (citing *Singleton*, 428 U.S. at 123 & n.2 (Powell, J., concurring in part and dissenting in part)).

207. 422 U.S. 490.

home builders company challenged a town board's zoning ordinance but were denied standing. In that opinion, the Supreme Court recognized "that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."[208] The alleged injury to the group suing on its own behalf, however, must be concrete and demonstrable, alleging more than a mere abstract organizational interest.[209] In *UAW v. Brock*, the Court further justified associational standing to sue by acknowledging that "[b]esides financial resources, organizations often have specialized expertise and research resources relating to the subject matter of the lawsuit that individual plaintiffs lack."[210]

In litigation, environmental groups usually assert the interests of their members in addition to their own interests. Under this approach to standing, if one member of an association or group meets all applicable standing requirements, including the threshold requirement of injury in fact, the association itself has standing—at least, its standing is usually not challenged.[211] For example, although it ultimately denied standing in *National Wildlife Federation*, the Court stated: " We assume, since it has been uncontested, that the allegedly affected interests set forth in the affidavits—'recreational use and aesthetic enjoyment'—are sufficiently related to the purposes of respondent association that respondent meets the requirements of § 702 if any of its members do."[212]

Other prongs to the associational standing test exist, however. In *Hunt v. Washington Apple Advertising Commission*,[213] the Supreme Court defined the associational standing test as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) 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.[214]

The Supreme Court has continued to recognize this form of standing and to reaffirm its holding in *Hunt* despite further challenges.[215]

In environmental cases, courts usually do not delineate the test as the

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208. *Warth*, 422 U.S. at 511.

209. Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

210. 477 U.S. 274, 289 (1986) (quoting Note, *From Net to Sword: Organizational Representatives Litigating Their Members Claims*, 1974 U. ILL. L. FORUM, 663, 669).

211. *See, e.g., National Wildlife Fed'n*, 497 U.S. at 885.

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

213. 432 U.S. 333 (1977).

214. *Hunt*, 432 U.S. at 343.

215. *See, e.g., Brock*, 477 U.S. at 281-90.

Court did in *Hunt* but rather focus on determining whether an association's named members have standing.[216] This is due in part to (1) the manner in which environmental groups plead their cases, naming several group members as plaintiffs in addition to the group itself, and (2) the fact that the first prong of the associational standing test incorporates the general standing requirements that everyone seeking standing must meet, including the association's named members.

Thus, an environmental organization will not only want to set out its interests in detail, but to distinguish its interests from those of its individual members and from those of the public at large. The plaintiff in *Animal Lovers Volunteer Association, Inc. v. Weinberger*[217] failed to do this. Animal Lovers Volunteer Association (ALVA) was a recently organized group aimed at preventing the inhumane treatment of animals. ALVA brought suit to enjoin the Navy from eradicating the goat population on San Clemente Island. Following its injury in fact and zone of interests analysis,[218] the Ninth Circuit discussed the abstract nature of ALVA's claim, taking into consideration ALVA's lack of "longevity and indicia of commitment."[219] To a relatively young organization, then, "its age or fame . . . become highly relevant" factors, worth detailing in its pleadings, but not nearly as important as "differentiat[ing] its concern . . . from the generalized [concern] of the public."[220]

## IV. THE NEXUS REQUIREMENT

The nexus requirement originated in *Flast v. Cohen*,[221] which involved taxpayer standing and required that the plaintiff establish a relationship between the injury suffered and the constitutional right on which the claim is based.[222] Repeatedly, the Supreme Court has rejected the argument that the nexus requirement applies universally to all standing cases.[223] Within the taxpayer standing context, courts consider the nexus requirement to be a constitutional requirement usually discussed within the injury in fact analysis.[224] Beyond that, however, confusion exists as to

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216. *See, e.g., Defenders*, 112 S. Ct. at 2137-38.

217. 765 F.2d 937 (9th Cir. 1985).

218. The Ninth Circuit found that ALVA failed to satisfy (1) the constitutional injury in fact requirement because neither ALVA nor members alleged a cognizable injury—aesthetic, economic, or otherwise, and (2) the zone of interests test because their alleged psychological injury lacked a "direct sensory impact." *Animal Lovers*, 765 F.2d 938-39.

219. *Id.* at 939.

220. *Id.*

221. 392 U.S. 83 (1968); *see* United States v. Richardson, 418 U.S. 166, 170 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973); *see also* TRIBE, *supra* note 16, § 3-17 at 124-29.

222. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 78-79 (1978).

223. *See id.*; Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225 (1974).

224. *See Flast*, 392 U.S. at 102-03; *Richardson*, 418 U.S. at 174-75; *see also* TRIBE, *supra* note

whether the nexus requirement is a constitutional requirement or a prudential restriction.[225]

Since *Flast* involved standing under the APA, courts have carried the nexus discussion into that context.[226] In *Lujan v. National Wildlife Federation*, for example, the Supreme Court required a "geographical nexus" between the injured plaintiff and the specific area endangered by agency action, although the Court couched its discussion in terms of "actually affected."[227] Not long after, in *Idaho Conservation League*, the Ninth Circuit distinguished *National Wildlife Federation*'s specificity requirement, finding that the plaintiffs satisfied the "geographical nexus" requirement despite their inability to specify threatened areas because the proposed development areas had not yet been determined.[228]

Even more recently, the Ninth Circuit reconsidered the geographical relationship between the plaintiffs and the affected area of Alaska in *Didrickson v. Department of the Interior*, finding the fact that the plaintiffs lived in Alaska and frequented the affected areas sufficient.[229] While *Didrickson* involved an APA approach, the court nonetheless briefly touched on the prudential restriction of generalized grievances when it stated that the plaintiffs' "interests and those of their members are clearly of a greater nature than the interest of the general public."[230]

In its discussion of injury in *Lujan v. Defenders of Wildlife*, the Supreme Court intimated that the nexus requirement can be satisfied by a direct link between one's demonstrated work with ("vocational nexus") or interest in an endangered animal ("animal nexus") or habitat ("ecosystem nexus") and an agency's pending action.[231] The Court stated: "It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will not longer exist."[232]

The geographical nexus, however, tempers the application of these "novel standing theories" by requiring that the interested plaintiff establish a reasonable, direct, and specific connection with the affected area. The *Defenders* Court found it unreasonable, for example, that a Bronx Zoo keeper or patron have "standing to sue because the Director of AID did not

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16, § 3-19 at 143-44.

225. *See, e.g., Duke Power*, 438 U.S. at 79 & n.25; *Flast*, 392 U.S. at 120, 130-31 (Harlan, J., dissenting); *Richardson*, 418 U.S. at 181, 196 n.18 (Powell, J., concurring).

226. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

227. 497 U.S. 871, 885-89 (1990).

228. 956 F.2d at 1517.

229. *Idaho Conservation League*, 982 F.2d 1332, 1340-41 (9th Cir. 1992).

230. *Didrickson*, 982 F.2d at 1341 (citing Sierra Club v. Morton, 405 U.S. 727, 739-40 (1972); Animal Lovers Volunteer Ass'n, Inc. v. Weinberger, 765 F.2d 937, 939 (9th Cir. 1985) (per curiam)).

231. 112 S. Ct. 2130, 2139-40 (1992).

232. *Defenders*, 112 S. Ct. at 2139.

consult with the Secretary regarding the AID-funded project in Sri Lanka."[233]

While some may characterize the Court's example as dicta, the Ninth Circuit cited it approvingly in *Didrickson* as one way to satisfy the "specific connection" or nexus requirement.[234] In their dissent in *Defenders*, Justices Blackmun and O'Connor espoused and advanced the ecosystem nexus theory, acknowledging that "[m]any environmental injuries . . . cause harm distant from the area immediately affected by the challenged action . . . . such as rivers running long geographical courses."[235] Likewise, the dissent impliedly endorsed the "animal nexus" theory in stating that "[e]nvironmental destruction may affect animals traveling over vast geographical ranges."[236]

For future environmental plaintiffs to employ any of the nexus theories advanced in *Defenders*, they must establish an ongoing and direct link between themselves—as individuals or as a group through economic, recreational, or scientific injury, and the endangered ecosystem or animal. The nexus theories may overlap, in that one's vocation may be linked to either the geographical area or the animal and that one's vocational injury may be both economic and scientific. All theories should be plead with as much detail and completeness as possible.

## V. CONCLUSION

There is no doubt that standing is a complex doctrine, defying generalizations and analytical structuring. Although there are two approaches to standing, constitutional requirements and prudential restrictions, plaintiffs never know whether the reviewing court will follow a traditional standing analysis or impose an arbitrary and attenuated restriction to deny standing. As the Supreme Court's decision in *Lujan v. Defenders of Wildlife*[237] illustrates, courts not only pick and choose what components to apply but intertwine them, leaving environmental organizations to plead and prove every component of both the constitutional requirements and the prudential restrictions. Yet the irreducible minimum requirements set forth in *Allen v. Wright*[238] still provide the core framework to establishing standing. Injury in fact has emerged as a threshold and seemingly indispensable component. In *Defenders*, the Supreme Court

233. *Id.*
234. 982 F.2d at 1340-41.
235. *Defenders*, 112 S. Ct. at 2154.
236. *Id.* (citing, for example, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986)).
237. 112 S. Ct. 2130 (1992).
238. 468 U.S. 737 (1984).

used the injury in fact to require suffocatingly specific affidavits yet left open the possibility of using a geographical nexus to establish a direct connection to an affected area.[239] The Ninth Circuit has since seized the opportunity to advance the nexus theory.[240] Since standing is determined on a case-by-case, fact-specific basis, environmental organizations should carefully draft their pleadings, focusing their attention on the irreducible minimum requirements. The procedural setting will also play an important role in the determination of the standing issue before either court. The Ninth Circuit has used the *Lujan* decision to exercise a lower standard of specificity for reviewing a motion to dismiss than a motion for summary judgment.

It is clear that Justice Scalia has led a trend of restraining courts from granting judicial review to environmental organizations when agency actions are at issue.[241] The Ninth Circuit appears to have minimized the severity of the Supreme Court's decisions in *Lujan v. National Wildlife Federation*[242] and *Defenders* by narrowly interpreting those decisions and broadly interpreting the statute relevant to the claim. The Ninth Circuit has consistently looked to the interests that the relevant statute aims to protect.[243] In conclusion, the Ninth Circuit has carefully side-stepped restricting judicial review for environmental organizations challenging agency actions.

239. 112 S. Ct. at 2138, 2139.

240. Didrickson v. Department of the Interior, 982 F.2d 1332, 1340-41 (9th Cir. 1992).

241. *See* sources cited *supra* note 3.

242. 497 U.S. 871 (1990).

243. *See* Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 715 (9th Cir. 1993); Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1582-83 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992).

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