Denver Law Review

Volume 78
Issue 2 *Tenth Circuit Surveys*

Article 2

January 2000

Barriers to Successful Environmental and Natural Resources Litigation: Tenth Circuit Approaches to Standing and Agency Discretion

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AGENCY LAW

BARRIERS TO SUCCESSFUL ENVIRONMENTAL AND NATURAL RESOURCES LITIGATION: TENTH CIRCUIT APPROACHES TO STANDING AND AGENCY DISCRETION

INTRODUCTION

Environmental and natural resource plaintiffs that sue federal agencies must overcome two barriers that might prevent a federal court from addressing the merits of their arguments. One is the standing requirement, which assures that a proper plaintiff is before the court.[1] The other is agency discretion.[2] Plaintiffs that sue federal agencies must survive a court's tests regarding whether they should defer to the agency's decisions regarding the merits.[3] If the court decides the agency's approach is in accordance with the law, the environmental plaintiff likely has prepared its case in vain. Plaintiffs face a double-edged sword. They must meet standing requirements to withstand one slice of the sword: a chance for the court to dismiss the case. Plaintiffs then must withstand the second swing: a court's attempt to defer to agency discretion, which could effectively take the controversy away from the court.

These issues are especially important in the U.S. Tenth Circuit Court of Appeals. Due to its jurisdiction over six central and western states—including tens of thousands of acres of federal land and a number of important national parks, it hears many cases involving plaintiffs suing federal agencies over public lands, natural resources, and other environmental issues.[4]

The Tenth Circuit has decided over four hundred cases dealing with standing or agency discretion.[5] Usually, they involved local resource

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1. Plater, et. al. Environmental Law and Policy: Nature, Law, and Society, 398 (2nd ed. 1998).

2. *Id.* at 430. ("Deference to agencies' legal interpretations is most likely where a legislative scheme seems highly technical, with a wide range of details delegated to the agency's special expertise.").

3. *Id.*

4. The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. Yellowstone, Grand Tetons, Rocky Mountain, Zion and Canyonlands National Parks, as well as many national monuments, fall within the jurisdiction.

5. Author's count. Approximately thirty cases were decided at least in part on standing or agency discretion grounds during the survey period of September 1, 1999 to August 31, 2000. *See, e.g.*, Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (Pg. 12, this paper for more detail.)(Nonprofit organization, guide, and rock climbers challenged the National Park Service's approval of Final Climbing Management Plan for Devils Tower National Monument in Wyoming. The plaintiffs argued that climbing restrictions designed to reduce harm to Native American spiritual practices violated the establishment clause of the Constitution. The court held that plaintiffs suffered no injury in fact so lacked standing.); *See also*, Committee to Save the Rio Hondo v. Lucero, 102

users and environmental organizations suing federal agencies over agency decisions about popular local issues.[6] An understanding of the way the court assessed some of these issues might encourage environmental plaintiffs to reevaluate their cases to make sure they can effectively meet standing requirements and resist deference to agency decision-making in the Tenth Circuit.

Three cases concerning high-profile environmental issues exemplify these points.[7] One case addresses standing and two cases address agency discretion.[8] First, a fairly typical standing case, *Bishchoff v. Meyers*,[9] is reviewed. It involves federal-land grazing permits.[10] The Tenth Circuit ruled that the plaintiff did not have standing to bring suit.[11] This case also serves as an introduction to the next cases. The second case, *Wyoming Farm Bureau Fed. v. Babbitt*,[12] concerns a high-visibility endangered species topic: a US Department of Interior decision concerning the fate of endangered wolf reintroduction in Wyoming and Idaho,[13] an issue that has drawn expansive media attention and has inspired challenges by environmentalists, ranchers and other private land owners alike.[14] The plaintiffs argued that the U.S. Department of Interior abused its discretion by creating a wolf-release plan in conflict with what they considered guiding principles of the Endangered Species Act.[15] The court disagreed.[16] The last case, *Southern Utah Wilderness Alliance v. Dabney*,[17] concerns the National Park Service's Backcountry Manage-

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F.3d 445 (Environmental organization brought a NEPA action against Forest Service's challenging its decision to allow summer use of a ski area in national forest. The Tenth Circuit held that the organization had standing.); *See also*, Public Lands Council v. Babbitt, 167 F.3d 1287 (discretion of agency regarding livestock grazing permits); Mt. Emmons Mining Co. v. Babbitt, 117 F.3d 1167 (unlawful use of agency discretion).

6. *Id.*

7. Bischoff v. Myers, 216 F.3d 1086 (Table) (10th Cir. 2000), Wyo. Farm Bureau Fed. v. Babbitt, 199 F.3d 1224 (10th Cir. 2000), Southern Utah Wilderness Alliance v. Dabney, ___ F.3d ___ (10th Cir. 2000).

8. *Bischoff* is a standing case. *Babbitt* and *Dabney* involve agency discretion.

9. *Bischoff*, 216 F.3d 1086.

10. *Id.*

11. *Id.*

12. *Babbitt*, 199 F.3d 1224.

13. *Id.*

14. *See* National Public Radio, Wolves in Yellowstone, http://search.npr.org/cf /cmn/cmnps05fm.cfm?SegID=69171; *see also*, NATIONAL GEOGRAPHIC, NATIONAL GEOGRAPHIC PARK PROFILES: YELLOWSTONE COUNTRY, 12, 44, 98-99, 182 (1997); for possible reintroductions in Colorado, *see* Theo Stein, *Wolf reintroduction roams closer to Colorado*, Denver Post, February 17, 2001, at A1.

15. *Babbitt*, 199 F.3d. 1224; guiding principles such as an alleged requirement that introduced wolves should not mix with wolves already present in the ecosystem (*see* discussion in this article below, pp. 25-30).

16. *Id.*

17. *Dabney*, 222 F.3d 819.

ment Plan for Canyonlands National Park.[18] Environmental plaintiffs argued that the National Park Service abused its discretion by creating a plan that would allow off-road vehicle use.[19] This case was remanded for clarification of the effects of such use.[20]

I. STANDING

A. *Background*

1. Standing as defined by the US Supreme Court

A basic axiom of federal trial practice is that environmental plaintiffs must meet the "threshold constitutional and statutory tests" of standing to sue.[21] Fundamentally, Article III, Section Two of the Constitution requires that there be a present (or live) "case" or "controversy."[22] Moreover, the plaintiff must show that the defendant caused his injury,[23] and that he has been injured "in fact," usually proven by demonstrated economic injury.[24] Once injury in fact is established, plaintiffs also must meet "prudential limitations" on standing, created by the Supreme Court to allow for judicial discretion to restrict the kinds of parties that can bring suit.[25] One such limitation is that few third-party claims can be

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18. *Id.*

19. *Id.*

20. *Id.*

21. *See* PLATER *supra* note 1, at 398; standing in state court depends on state law.

22. U.S. CONST. art. III, § 2. Various cases have dealt with this issue, but the first instance of this doctrine occurred when President George Washington wanted the Supreme court's opinion on the United States' neutrality regarding the war between England and France. The court firmly rejected the offer, based on the Constitution's system of checks and balances requiring the Executive Branch to make decisions. *See* HART AND WECHSLER, FEDERAL COURTS 92-93 (4th ed., 1996); *see also*, Raines v. Byrd, 521 U.S. 811, 818 (1997); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998).

23. *See* Linda R.S. v. Richard D., 93 S.Ct. 114 (1972); *see also*, Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997); Warth v. Seldin, 422 U.S. 490, 518 (1975)("It is the responsibility of the complaintant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990)(Plaintiffs must "allege . . . facts essential to show jurisdiction. If [they] fail to make the necessary allegations [they have] no standing.").

24. *See* PLATER *supra* note 1, at 400-01; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-1 (1992); for a good summary, *see* Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc.., 120 S.Ct. 693, 704 (2000) ("A plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.").

25. *See* PLATER *supra* note 1, at 398-99; *see also* Japan Whaling Assoc. v. American Cetacean Soc'y, 106 S.Ct. 2860 (1986).

heard.[26] Another prudential limitation is that the plaintiff must fall within the "zone of interest" of the statute being challenged.[27] Also, a plaintiff must show that his injuries will be 'cured' by a favorable court decision, a requirement called redressability.[28] Also, many statutes authorize judicial review only if certain requirements are met.[29] For instance, the Administrative Procedure Act allows standing for "persons adversely affected or aggrieved . . . within the meaning of the relevant statute"[30] and when agency action is considered "final."[31]

Environmental cases provide the backbone of the Supreme Court's efforts to refine standing requirements during the last thirty years.[32] *Sierra Club v. Morton*,[33] a quintessential environmental standing case, proved plaintiffs do not necessarily need economic injury to meet the requirements of injury in fact.[34] The Sierra Club hoped to enforce federal conservation laws that allegedly would prevent the Walt Disney corporation from developing a ski resort on national forest lands in the California Sierras.[35] Yet, the plaintiffs did not claim any individual injuries that would satisfy the injury-in-fact requirement. They claimed only a general interest in environmental protection.[36] For example, the Sierra Club did not assert that any of its members camped or hiked in the national forest or otherwise personally benefited from use of the resource.[37] As a result, the US Supreme Court dismissed the organization's suit for lack of standing,[38] but ruled that if it had been shown that any member of

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26. Except, for example, when an environmental organization plaintiff alleges injuries to its members. *See*, e.g., PLATER *supra* note 1, at 398-99; Sierra Club v. Morton, 405 U.S. 727 (1972).

27. *See* Bennett v. Spear, 117 S.Ct. 1154 (1997); for detailed description, *see* this article below; *see also*, Assoc. of Data Processing Serv. Orgs., Inc. v. Camp. 397 U.S. 150 (1970).

28. PLATER *supra* note 1, at 398-99; *see also* Bennett, 117 S.Ct. 1154 (1997); *see also*, Friends of the Earth, Inc. v. Laidlaw (TOC), Inc., 120 S.Ct. 693 (2000).

29. PLATER *supra* note 1, at 399 ("like 'aggrieved' under §313(b) of the Federal Power Act ... or special citizen-enforcement authorizations for 'any person' who files a 60-day notice (included in many environmental statutes ... they are far more liberal than the Art. III. 'injury' requirement, and override prudential limitations.")); *see also, Sierra Club,* 405 U.S. at 727.

30. PLATER *supra* note 1, at 399 (citing 5 U.S.C. § 702).

31. 5 U.S.C. § 704.

32. As discussed next; A related issue is whether a claim is "ripe" for review; Abbott Lab v. Gardner, 387 U.S. 136, 148-49 (1967)(The purpose of the ripeness requirement "is to prevent the courts, though avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); Texas v. United States, 523 U.S. 296, 300 (1998)("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

33. Sierra Club v. Morton, 405 U.S. 727, 738 (1972).

34. *Id.*

35. *Id.* at 729-730.

36. *Id.* at 731.

37. *Id.* at 735.

38. *Id.* at 741.

the environmental group had suffered an aesthetic injury, that would have satisfied the injury-in-fact requirement.[39] Such aesthetic injuries are non-economic. They occur when a plaintiff cannot enjoy a resource through use or appreciation of it because the resource itself has been degraded.[40] Two conditions must be met: the plaintiff used a resource and it was devalued by the defendant's actions.[41]

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)[42] broadened the aesthetic injury requirement even further while expanding opportunities for a plaintiff to meet causation requirements as well. A group of Washington, D.C. law students sued the Interstate Commerce Commission over decisions to assess low transport tariffs on raw materials transported by rail.[43] The plaintiffs alleged such low tariffs discourage recycled-material use.[44] The Supreme Court granted standing even though the injury to the students was not "direct and perceptible."[45] The court described the long line of causation from the agency's rate decision to an eventual increase in non-recycled garbage along hiking trails in national parks in the Washington area, and found it met the causation requirement.[46]

Despite the liberalization of standing requirements in *Sierra Club* and *SCRAP*, two cases decided by the Supreme court in the early 1990s, *Lujan v. National Wildlife Federation*[47] (Lujan I) and *Lujan v. Defenders of Wildlife*[48] (Lujan II), raised the standing barrier for environmental plaintiffs. They required that plaintiffs' injuries be real, not speculative.[49] In *Lujan I*, the National Wildlife Federation challenged the federal government's potential parceling-out of public land for mining and logging.[50] The Supreme Court dismissed the case for lack of standing because the two alleged injuries were not sufficiently concrete.[51] Two members of the National Wildlife Federation claimed that they recreated in the vicinity of the lands at issue, but the plaintiff did not live there or actually recreated there.[52] Justice Scalia wrote that these were merely

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39. *Sierra Club*, 406 U.S. 727 at 738-740.
40. *See id.*
41. *Sierra Club*, 406 U.S. 727 at 738-740.
42. United States v. Students Challenging Regulatory Agency Procedures (*SCRAP*), 412 U.S. 669 (1973).
43. *Id.* at 669-670.
44. *Id.* at 670.
45. *Id.* at 689.
46. *Id.* at 687-690.
47. Lujan v. National Wildlife Federation (*Lujan I*), 497 U.S. 871 (1990).
48. Lujan v. Defenders of Wildlife (*Lujan II*), 504 U.S. 555 (1992).
49. *Id.* at 560-561.
50. *Lujan I*, 497 U.S. 871 (1990).
51. *Id.* at 899-900.
52. *Id.* at 871-872.

generalized grievances—plaintiffs were angry about something that did not directly affect them—and not injuries in fact.[53]

In *Lujan II*,[54] Defenders of Wildlife challenged a Reagan Administration regulation under which that the Endangered Species Act only applies to government agency projects in the United States, not around the world.[55] The plaintiff offered affidavits of two of its members.[56] One had visited Egypt and fell in love with the endangered Nile crocodile, though she did not witness the animal.[57] The other visited Sri Lanka and similarly came back to the United States with great affection for endangered leopard and elephant species, though she had not personally witnessed them.[58] Both were afraid that an Egyptian water-development project connected with the Aswan High Dam would destroy the creatures' habitats, and consequently the animals.[59] Defenders of Wildlife argued that the dam was to be completed in part with U.S. government (USAID) money, thereby forcing Endangered Species Act consideration.[60] The organization claimed its two members would like to go back to see the crocodiles again, but did not know when.[61] Justice Scalia wrote that standing did not exist because the injury alleged was not actual or imminent in the near, concrete future, despite the fact that the plaintiffs sued under the Endangered Species Act's citizen-suit provision:[62]

> It is clear that a 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 no longer exist. It is even plausible—though it goes to the outermost limits of plausibility—to think

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53. *Id.* at 886.

54. *Lujan II*, 504 U.S. 555 (1992); *see also*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, n.3 (1992) (Seventeen days after Justice Scalia wrote the majority opinion in *Lujan II*, he made a comment in footnote three that clarified a determining factor in *Lujan II*. That is, specific facts must be shown by sworn testimony at the summary judgment stage of trial. He wrote that "Lujan II involved the establishment of injury-in-fact at the summary judgment stage, [and] required specific facts to be added by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at a pleading stage, it would have been unsuccessful.").

55. *Id.*; regulation applied to ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

56. *Lujan II*, 504 U.S. at 563.

57. *Id.*

58. *Id.* at 563-564.

59. *Id.* at 563.

60. *Id.* at 562-563; ESA § 7, 16 U.S.C. § 1536(a)(2)(All federal agencies are required "to seek to conserve endangered species and threatened species . . . . [And,] each federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species."

61. *Lujan II*, 504 U.S. at 563-564.

62. *Id.* at 566-567; ESA § 11(g) (16 U.S.C.A. § 1540(g)). Perhaps if the members had purchased airline tickets to go back, that would be enough.

> that a person 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 is facing such harm, since some animals that might have been the subject of his interest will no longer exist.... It goes beyond that limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has not more specific connection."[63]

Notwithstanding his decisions in *Lujan I* and *II*, Justice Scalia effectively lowered the standing barrier (albeit for plaintiffs who were not environmental groups) by allowing ranchers not interested in preserving endangered species to use the Endangered Species Act's citizen-suit provision in *Bennett v. Spear*.[64] The case involved two ranchers who feared a loss of their water supply because river water was withheld from irrigation due to the presence of an endangered fish.[65] The district court held that the ranchers were not parties who fell within the zone of interest of the act—they opposed species protection rather than supported it.[66] Justice Scalia allowed them standing, though, holding that under the citizen-suit provision of the act, which expands the zone of interest, any person could file suit.[67]

One of the most important recent environmental cases involving standing is *Friends of the Earth, Inc. v. Laidlaw Environ. Serv.*[68] The plaintiff environmental groups, Friends of the Earth, Citizens Local Environmental Action Network and the Sierra Club, sued Laidlaw under the citizen-suit provision of the Clean Water Act.[69] The plaintiffs alleged that the defendant did not comply with its wastewater treatment plant National Pollution Discharge Elimination System permit, and discharged mercury and other toxics exceeding permit limits into South Carolina's North Tyger River.[70] Before the plaintiffs filed suit, the South Carolina Deptartment. of Health and Environmental Control settled with Laidlaw over the same permit violations for $100,000.[71]

The Supreme Court ruled that plaintiff-appellants had standing to sue the defendant chemical company because the group's members suffered injuries that were related to recreational use of the polluted river,

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63. *Lujan II*, 504 U.S. 555, 566-7. (1992).

64. Bennett v. Spear, 520 U.S. 154 (1997) (If plaintiff cannot meet Endagnered Species Act notice requirements, it may still bring an Endangered Species Act claim under the APA or NEPA).

65. *Id.* at 157.

66. *Id.* at 155.

67. *Id.* at 162-164.

68. Friends of the Earth, Inc. v. Laidlaw Environmental Serv. (TOC), Inc., 120 S.Ct. 693, 704-7 (2000).

69. *Id.* at 696; Clean Water Act citizen-suit provision, 33 U.S.C. §1365(a).

70. *Friends of the Earth*, 120 S.Ct. 693, 696 (2000); Clean Water Act 33 U.S.C. §1342(a)(1).

71. *Friends of the Earth*, 120 S.Ct. 693, 696 (2000).

and the "aesthetic and recreational value" of the river was lessened by defendant's mercury contamination.[72] More importantly, perhaps, the court held that the plaintiffs had standing because civil penalties levied on the defendant (as opposed to more traditional damages paid directly to plaintiffs) redressed plaintiff's injuries by deterring the defendant from polluting.[73]

Here is a summary of important environmental standing highlights. If there is a present controversy and the defendant—a polluter or government agency, for example—has caused the environmental plaintiff's injury, a plaintiff interest group whose members used a resource that was devalued by defendant's actions has injury-in-fact standing, even if aesthetic and recreational values are lessened.[74] Yet, generalized grievances are not enough for injury in fact[75] and the injury must be actual or imminent.[76] Furthermore, plaintiffs must fall within the zone of interest of applicable statutes.[77] Last, fines imposed on parties devaluing the resource might meet the redressability requirement.[78]

2. Pre-survey Period Tenth Circuit Standing Cases

The Tenth Circuit has decided a number of environmental standing cases in recent years. In *Park Lake Resources Ltd. Liability Co. v. U.S. Dept. of Agriculture*,[79] mining groups sued the U.S. Forest Service over its designation of land as a research natural area.[80] The district court affirmed the land designation, and the plaintiff appealed.[81] The Court of Appeals held, in part, that the agency's designation was not final agency action under the Administrative Procedure Act (APA) and therefore the suit was not ready (ripe) for review.[82]

Similarly, in *Colorado Farm Bureau v. U.S. Forest Service*,[83] trade groups sued state and federal agencies, asserting that the agencies' involvement in a Colorado Lynx reintroduction plan violated the APA.[84]

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72. *Id.* at 704-705 (Injuries included forgoing fishing, picknicking, bird watching, walking, wading, boating, driving, swimming and camping in and near polluted river.).

73. *Id.* at 706.

74. *Sierra Club*, 405 U.S. 727 (1972) and *Friends of the Earth*, 120 S.Ct. 693 (2000).

75. *Lujan I*, 497 U.S. 871, 889 (1990).

76. *Lujan II*, 504 U.S. 555, 563 (1992).

77. *Bennett*, 520 U.S. 154, 162-164 (1997).

78. *Friends of the Earth* at 706-707.

79. Park Lake Resources Ltd. Liability Co. v. U.S. Dept. of Agriculture, 197 F.3d 448 (10th Cir. 1999).

80. *Id.* at 449.

81. *Id.* at 448.

82. *Id.* at 450-452; *see* 5 U.S.C.A. § 704 (An important requirement for review of agency action is that the action be final. Only then is it ripe for review).

83. Colorado Farm Bureau Ass'n v. United States Forest Service, 220 F.3d 1171, 1173 (10th Cir. 2000).

84. *Id.*

The district court dismissed the case, and the groups appealed.[85] The Court of Appeals held that the groups did not have APA standing because the agency's action—involvement with the Lynx introduction plan—was not final.[86] Because APA standing was not established, the court did not assess whether the groups had Article III standing.[87]

In *Baca v. King*,[88] a federal public-lands grazing-lease case, the Tenth Circuit put forth what it considered the minimum constitutional standing requirements.[89] To satisfy the redressability requirement for constitutional standing, the court wrote, the plaintiff must show at least a 'substantial likelihood' that the relief requested will redress the injury claimed.[90] There, standing did not exist because "the loss of the possibility of obtaining a federal lease is not redressable by a favorable decision [of the court]."[91] The court continued: "No court has the power to order the BLM [Bureau of Land Management] or the Department of Interior to grant Mr. Baca another grazing lease, because the very determination of whether to renew grazing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion."[92]

Tenth Circuit cases have often involved injury in fact.[93] For example, a nonprofit organization, a climbing guide, and rock climbers sued the National Park Service (NPS) over approval of its Final Cimbing Management Plan for Devils Tower National Monument in *Bear Lodge Multiple Use Association v. Babbitt*.[94] They argued that climbing limitations designed to reflect Native American spiritual beliefs violated the establishment clause of the U.S. Constitution.[95] The Wyoming district court allowed adoption of the plan, and the plaintiffs appealed.[96] The Court of Appeals held that the plaintiffs did not suffer injury in fact so lacked

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85. *Id.* at 1171.

86. *Id.* at 1174.

87. *Id.* at 1173.

88. Baca v. King, 92 F.3d 1031 (10th Cir. 1996).

89. Id. at 1305 (citing Lujan I) "[They] require . . . (1) that the plaintiff "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical'; (2) that the injury is "'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court' "; and (3) that it is "likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

90. *Id.* at 1306.

91. *Id.* (quoting Mount Evans co. v. Madigan, 14 F.3d 1444, 1451 (10th Cir., 1994) (citing Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870-871, 875 (10th Cir., 1992))). In both of those cases, the court held that plaintiffs could not sue to make the court force an agency to do something.

92. *Id.*

93. *See* following discussion.

94. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

95. *Id.* at 815.

96. *Id.* at 814.

standing.[97] In *Committee to Save the Rio Hondo v. Lucero*,[98] an environmental group challenged a U.S. Forest Service decision to allow summer use of a National Forest ski area, alleging that the agency did not follow National Environmental Policy Act (NEPA) requirements.[99] The New Mexico district court granted summary judgment for the ski operator intervenor, and the plaintiffs appealed.[100] The Court of Appeals held that the organization had standing to challenge the agency's discretion under NEPA.[101]

Furthermore, in *Wind River Multiple Use Advocates v. Espy*,[102] an environmental group challenged a U.S. Forest Service decision to adopt the Bridger-Teton National Forest Land and Resource Management Plan, which would allow timber management unfavorable to the group.[103] The Wyoming district court found that Wind River lacked standing because the group did not show injury in fact or that any injury would be redressed by a decision in its favor.[104] As an alternative, the district court held that the plaintiff could not win on the merits as a matter of law.[105] "Specifically, the district court held that Wind River had failed to create a material fact issue with respect to whether the Forest Service decision to adopt annual timber harvests below levels authorized by federal law was arbitrary and capricious under the Administrative Procedure Act," held the Tenth Circuit.[106] The plaintiff appealed the decision concerning its lack of standing but did not challenge the ruling on the merits. Because the group did not challenge the merits ruling, the Court of Appeals affirmed.[107] Finally, *Ash Creek Min. Co. v. Lujan*[108] concerned a landowner's suit against the Department of Interior over the agency's plan to exchange coal lands in the state.[109] The Wyoming district court dismissed for lack of standing and the Court of Appeals held that the injury was not redressable.[110]

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97. *Id.* at 822.
98. Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445 (10th Cir. 1996).
99. *Id.* at 446.
100. *Id.*
101. *Id.* at 452.
102. Wind River Multiple Use Advocates v. Epsy, 85 F.3d 641 (10th Cir. 1996)(unpublished decision).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. Ash Creek Mining Co. v. Lujan, 969 F.2d 868 (10th Cir. 1992).
109. *Id.* at 870-871.
110. *Id.* at 872-876.

B. *Tenth Circuit: Standing*

1. *Bischoff v. Myers*[111]

In *Bischoff v. Myers*,[112] a very brief, unpublished case, the Tenth Circuit ruled on redressabilty while highlighting agency discretion.[113] The case involved a land transaction and grazing permit transfer.[114] The seller wanted the court to review a Forest Service refusal to reissue their grazing permits to them after the buyer of their land defaulted and quitclaimed the land back to them.[115] The Forest Service determined that the buyer remained the permittee.[116] Forest Service rules require that when land and livestock on it subject to grazing permits is sold, the buyer may obtain grazing permits for the property if the seller surrenders his permit to the Service in favor of the buyer.[117]

The Tenth Circuit found that the Bischoffs lacked standing to bring the action: "The injury they allege, the loss of their grazing leases, is not redressable in court because a court may not order the agency to perform what is a purely discretionary act."[118] The court wrote that its conclusion was required by *Baca v. King*,[119] and *Federal Lands Legal Consortium v. United States*,[120] under which the decision to issue a grazing permit is completely within Department of Interior discretion.[121] In doing so, the court connected redressability, a fundamental standing requirement, to agency discretion.[122]

2. Analysis

While *Bischoff* was decided on redressability grounds,[123] the case is unlike others in which redressability concerns the basic premise that a plaintiff's injury must be cured in some legitimate way by a court deci-

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111. Bischoff v. Myers, 216 F.3d 1086 (Table)(10th Cir. 2000).

112. *Id.*

113. *Id.* at 1086.

114. *Id.*

115. *Id.*

116. *Bischoff*, 216 F.3d at 1086.

117. *Id.*

118. *Id.*

119. *Baca*, 92 F.3d at 1035-37 (plaintiff lacked standing because court could not order government to renew grazing lease; no "court has the power to order the BLM or Department of Interior to grant . . . another grazing lease, because the very determination of whether to renew granzing permits and whether public lands should even be designated for grazing purposes are matters completely within the Secretary of Interior's discretion."); *see also*, McDonald v. Clark, 771 F.2d 560, 463 (Secretary of Interior has broad discretion in mineral leasing.)

120. 195 F.3d 1190 (10th Cir. 1999)(Secretary of Agriculture has discretion to issue or deny a grazing permit.)

121. *Id.* at 1198.

122. *Bischoff*, 216 F.3d 1086.

123. *Id.*

sion in plaintiff's favor.[124] Here, the court did not have the ability to act in plaintiff's favor because the plaintiffs wanted something that the court simply could not give them: reissued grazing permits.[125] Only the agency, within its expertise and discretion, could issue them.[126] The court was completely unable to provide such relief because purely discretionary agency decisions preclude the court's intervention.[127] In effect, the Bischoffs could appeal to Forest Service decision-makers, but beyond that, they lacked options for relief. This is an explicit example of how standing issues are connected to discretion. More often, as mentioned above in the double-edged sword analogy,[128] a plaintiff might meet standing requirements such as injury in fact only to lose on appeal because the Tenth Circuit defers to the agency's discretion to make the decision in the way it sees fit. The next two cases address this issue.

II. AGENCY DISCRETION

A. *Background*

Agency discretion cases arise when groups challenge the authority under which an agency makes decisions.[129] Usually an agency's action or inaction is challenged as being in conflict with the agency's mandates, typically statutes passed by Congress.[130] Agencies typically have wide-ranging discretion over a variety of issues under their control,[131] but might abuse it by going beyond mandated boundaries.[132] Such abuse might result in environmentally or otherwise unfavorable policies or conditions that plaintiffs seek to change.[133] Controversies especially arise when agency decisions are not clearly out of line with the intent of Congress, but might go against that intent.[134]

B. *Discretion Under Chevron and the APA*

In discretion cases, courts assess whether they should defer to the decision-making power of the agency, often relying on the 1984 Supreme Court case *Chevron USA v. Natural Resources Defense Council*.[135] There, the Court found that the Environmental Protection

124. *See* standing discussion, *supra*.
125. *Bischoff*, 216 F.3d at 1086.
126. *Id.*
127. *Id.*
128. In the introduction to this paper, page 1.
129. *See* PLATER *supra* note 1, at 378-83.
130. *Id.*
131. *Id.* at 379.
132. *Id.* at 380 (Courts analyze such decisions in part by looking at Congressional intent.).
133. *See See* PLATER *supra* note 1, at 381.
134. *Id.* at 378-379.
135. Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984). *See also,* United States v. Mead Corp. 121 S.Ct. 2164 (2001). This case may become extremely important to practitioners and

Agency's decision to define an air pollution "source" as a "bubble" was within the "reasonable construction" of the statutory term "source" in the Clean Air Act.[136] In doing so, the Court created a two-part conjunctive test that provides a "reasonable construction" analysis.[137]

The Court held, first, that if the intent of Congress is clear regarding the statutory language designed to guide the agency, that intent rules the agency's decision.[138] Second, if Congressional intent is not clear, the court must review the agency's decision with deference, and uphold it if it is based on a "permissible construction of the statute."[139] The agency's interpretation does not have to be the only permissible construction or the result the court would have reached.[140] Furthermore, "when a challenge to agency construction of a [statute] really centers on the wisdom of the agency's policy,"[141] that challenge must fail.[142]

The Court held that federal judges who do not have a public constituency for whom they work must respect the policy choices of agencies that do have a constituency.[143] "[If] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency."[144]

Another test used by courts reviewing agency decisions is found in the Administrative Procedure Act.[145] The statute, a general operating law controlling federal governmental agencies,[146] provides that the court

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courts concerned with the Chevron analysis. The decision was rendered slightly before the final edit of this paper. As of October 2001, no other decision has followed Mead's holding, so it is unlcear how far the U.S. Supreme Court's ruling will extend. The Court held that a U.S. Customs Service tariff classification ruling was not entitled to Chevron deference or any lesser deference. The Court held:

> Administrative implementation of a particlular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent. The Customs ruling at issue here fials to qualify.

As this ruling stands, environmental and natural resources plaintiffs should examine all administrative rulings that appear to fallunder the guise of informal rulemaking or adjudication to find out whether Chevron applies.

136. *Id.* at 865; *See generally*, Clean Air Act, 42 U.S.C. §§ 7401-7671.

137. *Chevron*, 467 U.S. at 842-843.

138. *Id.* at 842.

139. *Id.* at 843.

140. *Chevron*, 467 U.S. at 843, n. 11.

141. *Id.* at 865.

142. *Id.*

143. *Id.*

144. *Chevron*, 467 U.S. at 843-4.

145. Administrative Procedure Act, 5 U.S.C. §§ 701-706.

146. PLATER *supra* note 1, at Statutory Capsule Appendix, 51 ("The APA is the basic format statute for federal agencies' procedures for making law that affects persons outside the agencies (Title 5), and judicial review thereof (Title 7).").

must inquire as to whether an agency acted within the scope of its authority,[147] complied with proscribed procedures,[148] or acted arbitrarily and capriciously and thus, abused its discretion.[149] Title 7 of the Act "creates a 'generous review provision' that should be given 'a hospitable reception' in the reviewing courts."[150]

C. *Pre-survey Period Tenth Circuit Discretion Cases*

Tenth Circuit environmental cases often hinge on agency discretion.[151] Most often, the court has found that agencies have acted within their discretion.[152] In *Mount Evans Co. v. Madigan*,[153] a company that operated a forest service concession facility and a county that collected sales taxes from it wanted the court to review the Forest Service's decision not to rebuild the facility after it burned down.[154] The court held that the Forest Service's decision was not arbitrary or capricious.[155] In another case, nonprofit and livestock organizations in *Public Lands Council v. Babbitt*[156] challenged Department of Interior regulations regarding public-land livestock grazing.[157] The Court of Appeals held that the Secretary of Interior did not exceed his authority in approving three regulations, but one regulation which allowed permits for the use of public lands for conservation instead of livestock grazing was not authorized by statute.[158]

Similarly, in *Delgado v. Department of Interior*,[159] the agency had discretion (and the court commented on one approach to *Chevron* analysis). Delgado sued the department over a land-use lease and argued that the agency was required to cancel it when a violation of any of the relevant lease regulations occurred.[160] Delgado outlined the language of the guiding regulation: "A lease will be canceled by the Secretary ... if at any time the Secretary is satisfied that the provisions of the lease or of any

147. 5 U.S.C. § 706; *see also*, Camp v. Pitts, 411 U.S. 138, 142 (1973).

148. *Id.*

149. *Id.; see* Motor Vehicle Mfrs Assoc. v. State Farm, 103 S.Ct. 2856 (1983) (limits a court's review under APA's "arbitrary and capricious" test).

150. PLATER *supra* note 1, at Statutory Capsule Appendix, 51 (citing Abbott Lab v. Gardner, 387 U.S. 136 (1967)).

151. *See* the Tenth Circuit standing cases review, *supra*. Many of the plaintiffs sought review of agency discretion.

152. As the following cases express.

153. Mount Evans Co. v. Madigan, 14 F.3d 1444 (10th Cir. 1994).

154. *Id.* at 1447.

155. *Id.* at 1455.

156. Public Lands Council v. Babbitt, 167 F.3d 1287 (10th Cir. 1999).

157. *Id.* at 1289.

158. *Id.* at 1309.

159. Delgado v. Dept. of Interior, 153 F.3d 726 (Table) (10th Cir. 1998) (All page numbers are expressed as single numerals because this is a table case.).

160. *Id.* at 3-4.

regulations . . . have been violated," and argued that *Chevron* analysis should be the basis for the review.[161] The court held *Chevron* inapplicable, writing that it only applies when regulations are challenged because they are allegedly inconsistent with a ruling statute.[162] "When interpreting its own regulation," the court wrote, "an agency is entitled to exercise even broader discretion than it may under the second prong of *Chevron*."[163] Delgado also claimed that the agency decision was arbitrary and capricious.[164] "Our review under this standard is narrow, and we may not substitute our judgment for that of the agency," the court wrote.[165] The court concluded that the agency did not abuse its discretion.[166]

In *Biodiversity Legal Foundation v. Babbitt*,[167] the court again deferred to the agency.[168] There, an environmental group sued the U.S. Fish and Wildlife Service to enforce an Endangered Species Act (ESA) deadline to list an endangered grouse.[169] The Colorado district court granted summary judgment for defendants and the plaintiff appealed.[170] The Court of Appeals decided that the agency's use of listing priority guidance did not violate the Act's requirement that a 90-day deadline be achieved "to the maximum extent practicable."[171]

The court wrote, "At the outset, we note 'Congress delegated broad administrative and interpretive powers to the Secretary' when it enacted the ESA.[172] Although the Service 'must give effect to the unambiguously expressed intent of Congress,' courts must defer to the Service's interpretation of the ESA if Congressional intent is ambiguous or nonexistent and the Service's construction of the statute is a permissible one.[173] A challenge to an agency construction of a statutory provision must fail if, in light of Congress's ambiguity or silence, the agency's action 'is a reasonable choice.'"[174]

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161. *Id.* at 4-5.

162. *Id.* at 5.

163. *Id.* (citing Valley Camp, 24 F.3d at 1267).

164. *Delgado*, 153 F.3d at 726, 6.

165. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); *Also*, "[T]he agency need only demonstrate that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonable based on that consideration." (citing Lodge Tower Condo. Ass'n v. Lodge Properties, Inc., 85 F.3d 476, 477 (10th Cir. 1996) (quoting Mount Evans Co. v. Madigan, 14 F.3d 1444, 1453 (10th Cir.1994)).

166. *Delgado*, 153 F.3d at 726, 7.

167. Biodiversity Legal Foundation v. Babbitt, 146 F.3d 1249 (10th Cir. 1998).

168. *Id.* at 1257.

169. *Id.* at 1250.

170. *Id.* at 1252.

171. *Id.*

172. *Biodiversity*, 146 F.3d. at 1253 (citing Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)).

173. *Biodiversity*, 146 F.3d at 1253 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

174. *Biodiversity*, 146 F.3d at 1253 (citing Chevron, 467 U.S. at 866).

In *Maier v. U.S. E.P.A.*,[175] environmental groups challenged the Environmental Protection Agency's (EPA) decision not to include nitrogenous biochemical oxygen demand (NOD) controls for publicly-owned treatment works wastewater in its definition of "secondary treatment" in Clean Water Act regulations.[176] The Court of Appeals found in part that EPA's decision to refuse to include the NOD controls and instead limit NOD with permits was within the agency's discretion under the Clean Water Act.[177]

Furthermore, in *Sierra Club v. U.S. E.P.A.*,[178] environmental groups sought judicial review of the EPA's decision "to exempt counties from selected Clean Air Act (CAA) ozone nonattainment area requirements without first formally redesignating counties as attainment areas."[179] The Court of Appeals held in part that EPA's interpretation of the CAA provisions in such a way was within its discretion and not contrary to the Act.[180]

The Tenth Circuit does not always rule for the agency.[181] In *Mt. Emmons Min. Co. v. Babbitt*,[182] a mining company sued the Department of Interior to make the agency continue processing the company's mining patents application.[183] The Colorado district court granted summary judgment for the agency and the plaintiff appealed.[184] The Court of Appeals held that the agency's discontinuance of application processing was an "unlawful withholding of agency action."[185]

As the cases below further exemplify, arbitrary decision making, decisions without statutory authority, and agency discretion are factors that often govern the court's assessment of other controversial environmental issues.

D. *Discretion Cases from Other Circuits*

Other circuits have dealt with similar environmental cases in which agency discretion was the lynch-pin issue.[186] For example, in *SW Ctr. For Biological Diversity v. Babbitt*,[187] plaintiffs alleged that a goshawk

175. Maier v. U.S. Environmental Protection Agency, 114 F.3d 1032 (10th Cir. 1997).
176. *Id.*
177. *Id.* at 1045.
178. Sierra Club v. U.S. Environmental Protection Agency, 99 F.3d 1551 (10th Cir. 1996).
179. *Id.* at 1553.
180. *Id.* at 1558.
181. As described in the next example.
182. Mt. Evans Mining Co. v. Babbitt, 117 F.3d 1167 (10th Cir. 1997).
183. *Id.*
184. *Id.* at 1168.
185. *Id.*
186. As the following cases indicate.
187. SW Ctr. For Biological Diversity v. Babbit, 215 F.3d 58 (D.C. Cir. 2000).

should be listed under the Endangered Species Act. The district court remanded instructions to the Fish and Wildlife Service to census the hawks.[188] The D.C. Circuit held that Endangered Species Act requirements mandating the service to use "best results" in its decision making does not require it to do surveys, but rather gives the agency discretion to decide what is best.[189] Similarly, in *Defenders of Wildlife v. Bernal*,[190] plaintiffs tried to enjoin the construction of a new school on potential habitat of an endangered owl.[191] The appeals court held that evidence, analyzed by the agency, showed construction would not take the owl, and deferred to that decision.[192]

In *Shenandoah Ecosystem Def. Group v. U.S.F.S.*,[193] plaintiffs wanted to stop proposed logging because an endangered salamander lived on national forest land targeted for timber cutting.[194] The court of appeals held that there was no evidence that the agency's use of discretion was arbitrary or capricious.[195]

In *Wetlands Action Network v. U.S. Army Corps of Engineers*,[196] environmental groups sued the Corps under the Clean Water Act and the National Environmental Policy Act (NEPA), challenging a decision to give a developer a permit to fill wetlands and mitigate the fill by creating an artificial wetland system.[197] The Central California district court granted summary judgment to the groups on their NEPA claims, disallowed the permit, and enjoined the developer from further construction.[198] On appeal, the Ninth Circuit held that the Corps' finding of no significant impact (FONSI) was within its discretion, and not arbitrary and capricious.[199] Similarly, in *Central and SouthWest Services, Inc. v. U.S. E.P.A.*, [200] environmental and industry groups requested review of the Environmental Protection Agency's final rule regulating polychlorinated biphenyls (PCBs).[201] The Fifth Circuit held that the rule was not arbitrary and capricious.[202]

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188. *Id.* at 59.
189. *Id.* at 59-61.
190. Defenders of Wildlife v. Bernal, 204 F.3d 920 (9th Cir. 2000).
191. *Id.* at 922.
192. *Id.*
193. Shenandoah Ecosystem Def. Group v. U.S.F.S., 194 F.3d 1305 (Table) (4th Cir. 1999).
194. *Id.*
195. *Id.*
196. Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105 (9th Cir. 2000).
197. *Id.*
198. *Id.* at 1110.
199. *Id.* at 1122.
200. Central and SouthWest Services, Inc. v. U.S. E.P.A., 220 F.3d 683 (5th Cir., 2000).
201. *Id.*
202. *Id.*

Moreover, in *Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n*,[203] a radioactive waste disposal facility requested review of a Nuclear Regulatory Commission refusal to grant the plaintiff a hearing and intervention in proceedings to license a third party.[204] The D.C. Court of Appeals held that the agency's interpretation of the Atomic Energy Act to prevent intervention was reasonable.[205] In *Defenders of Wildlife v. Browner*,[206] environmental groups requested review of an EPA decision to issue National Pollution Discharge Elimination System permits to municipalities without numeric limits to satisfy state water-quality standards.[207] The Ninth Cicruit held in part that the EPA had discretion to require that such municipalities comply with state standards.[208]

In contrast, in *Sokol v. Kennedy*,[209] adjacent landowner plaintiffs challenged boundaries set by the National Park Service when it designated a scenic river.[210] The Eighth Circuit held that the agency failed to follow the Wild and Scenic Rivers Act, and that the agency's decision was not within its discretion.[211]

E. *Tenth Circuit*

1. *Wyoming Farm Bureau Federation v. Babbitt*[212]

In *Wyoming Farm Bureau Federation v. Babbitt*,[213] plaintiff ranchers and environmentalists challenged a Department of Interior decision to engineer final rules and a plan that would control the reintroduction of an experimental population of gray wolves into Yellowstone National Park and central Idaho pursuant to the Endangered Species Act (ESA).[214] The plaintiffs argued that the agency abused its discretion in making the rules because the Department did not follow statutory requirements of the ESA.[215] Throughout its opinion, the Tenth Circuit consistently deferred to the agency's interpretation of the ESA and supported the agency's decisions notwithstanding their controversial nature.[216] The court used

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203. Envirocare of Utah, Inc. v. Nuclear Regulatory Com'n, 194 F.3d 72 (D.C. Cir. 1999).
204. *Id.* at 73-74.
205. *Id.* at 78.
206. Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999).
207. *Id.* at 1161.
208. *Id.* at 1166-67.
209. Sokol v. Kennedy, 210 F.3d 876 (8th Cir. 2000).
210. *Id.* at 877.
211. *Id.*
212. Wyo. Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224 (10th Cir. 2000).
213. *Id.*
214. *Id.*; Endangered Species Act, 16 U.S.C. § 1529.
215. *Wyo. Farm Bureau Fed'n*, 199 F.3d. at 1224.
216. *Babbitt*, 199 F.3d, at 1228, 1239.

the classic *Chevron* and APA tests to pin down the agency's decisions, analyze them, and affirm them.[217]

The plaintiffs argued that if reintroduced wolves were allowed to combine with wild ones, ranchers (and others) would not be able to identify which wolves have full protected status and which do not under the ESA.[218] Therefore, under the reintroduction rules which would allow such mingling,[219] some wolves could be shot and killed if the animals become a nuisance. Yet, ranchers would not know which ones have protected status, so risk prosecution for shooting the wrong wolf.[220] Also, some environmentalists argued that all wolves, reintroduced or not, should be fully protected.[221]

The Department of Interior established rules for the reintroduction based primarily on ESA Section 10j.[222] Even though a naturally occurring colony of Montana wolves exists that could infiltrate the experimental population,[223] the plan allowed the "taking" (killing) of any wolves if found in the act of killing or wounding livestock, even though on at least a superficial level this seemed to go against the usual ESA restrictions on takings.[224]

The main question before the court was whether the Department of Interior abused its discretion by allowing the experimental population to incorporate naturally occurring wolves.[225] The plaintiffs argued that the ESA requires experimental populations to be wholly separate from natural ones, and that naturally occurring wolves as a result of the rules do not have full protection under the ESA.[226] The plaintiffs also argued that the Department Interior abused its discretion by going against ESA Section 10(j).[227] They argued that since individual, native wolves could enter the experimental population areas, this was an overlap of experimental and current-range wolf populations, prohibited by 10(j)'s requirement that experimental populations be completely separate geographically from nonexperimental populations.[228]

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217. *Id.* at 1230-1231.

218. Wyo. Farm Bureau Fed'n v. Babbitt, 987 F.Supp. 1349, 1361 (1999).

219. *See* discussion, *supra* p. 25-27.

220. *Id.*

221. *See generally, Babbitt*, 987 F.Supp. 1348 (1999).

222. ESA Section 10(j), 16 U.S.C. § 1539(j).

223. *Babbitt*, 199 F.3d at 1229.

224. *Id.*; *see generally* 16 U.S.C. §§ 1531-1544 (one typically cannot kill an endangered species).

225. *Babbitt*, 199 F.3d, 1224, 1230 ("The crux of this case, and hence this opinion, is the validity of the final rules governing the introduction of a nonessential experimental population of gray wolves in the entirety of Yellowstone and in central Idaho.").

226. *Id.* at 1232.

227. *Id.*; *see* discussion of section 10(j), pages 26-7.

228. *Id.*

The Administrative Procedure Act and *Chevron*[229] governed the court's review of whether the agency stayed within the bounds of its discretion dictated by Congress in the ESA.[230] The court held that it "will set aside the Agencies' factual determinations only if they are unsupported by substantial evidence" that the agency did not meet the Act's requirements.[231]

Applying *Chevron*, the court stated it would give "strict effect to the unambiguous intent of Congress if Congress has clearly spoken to the issue before us."[232] However, the court determined that if Congress was "silent on the issue and has delegated authority over the subject matter to the Agencies, [we will defer] to the Agency's construction unless, in the context of the Act, the Department's construction is unreasonable or impermissible."[233]

The court went on to consider the language of the statute in light of the policy and object of the law.[234] It found that Congress enacted the law generally to "provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction."[235]

The court then set forth the relevant portions of the ESA, sections 4(f), 7(a)(1) and 10(j).[236] The court wrote that section 4(f) directs the Secretary of Interior "to develop and implement recovery plans for the 'conservation and survival' of listed species 'unless he finds that such a plan will not promote the conservation of the species.'"[237] In addition, the court wrote, section 7(a)(1) authorizes the Secretary to 'live' trap and 'transplant' (reintroduce) rare species, if necessary, to bring an endangered or threatened species to the point at which the protective measures of the ESA are no longer necessary."[238]

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229. *Chevron*, 467 U.S. 837 (1984).

230. *Babbitt*, 199 F.3d at 1231 ("Our review of the rules and record is governed by the Administrative Procedure Act, 5 U.S.C. § 706. Essentially, we must determine whether the Agencies: (1) acted within the scope of their authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion. (citing *Olenhouse*, 42 F.3d at 1574.) Within this context, we will set aside the Agencies' factual determinations only if they are unsupported by substantial evidence. 'The substantial-evidence standard does not allow a court to displace the [Agencies'] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' (citing Trimmer v. United States Dep't of Labor, 174 F.3d 1098, 1102 (10th Cir.1999) (quotation marks and citations omitted))".

231. *Babbitt*, 199 F.3d at 1231.

232. *Id.*

233. *Id.* (citing Hoyl v. Babbitt, 129 F.3d 1377, 1387 (10th Cir.1997) (citing *Chevron*, 467 U.S. 837 (1984)).

234. *Babbitt*, 199 F.3d at 1231-32.

235. *Id.*

236. *Id.*; 16 U.S.C. §§1533(f), 1536(a)(1), and 1539(j), respectively.

237. *Babbitt*, 199 F.3d at 1231 (quoting 16 U.S.C. §1533(f)).

238. *Id*

The court then defined the Congressional intent of the ESA.[239] It concluded that Congress enacted section 10(j) to counter agency frustration over political opposition to reintroductions that were thought to conflict with human activity.[240] The court wrote that Section 10(j) gives the Secretary of Interior authority to release any population of endangered species outside its current range as long as "the Secretary determines that such release will further the conservation of such species."[241] Yet, the court found that an experimental population must be "separate geographically from non-experimental populations of the same species."[242] Also, the court held, the agency must determine "whether or not such population is essential to the continued existence" of an endangered or threatened species.[243]

The court further detailed the Congressional intent behind section 10(j):

> Congress hoped the provisions of section 10(j) would mitigate industry's fears that experimental populations would halt development projects, and with the clarification of the legal responsibilities incumbent with the experimental populations, actually encourage private parties to host such populations on their lands.[244] Congress purposely designed section 10(j) to provide the Secretary flexibility and discretion in managing the reintroduction of endangered species. By regulation, the Secretary can identify experimental populations, determine whether such populations are essential or nonessential, and, consistent with that determination, provide control mechanisms (i.e., controlled takings) where the Act would not otherwise permit the exercise of such control measures against listed species.[245]

The court did not agree with the plaintiffs that the agency abused its discretion in designing a reintroduction plan in which native and reintroduced wolves may co-mingle.[246] The court stressed that the ESA does not define the phrase "wholly separate geographically from nonexperimental populations," so does not provide an answer to "whether a reintroduced population of animals must be separate from every naturally occurring individual animal."[247]

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239. *Babbitt*, 199 F.3d at 1232.
240. *Id.*
241. 16 USC §1539(j)(2)(A).
242. 16 USC §1539(j)(2).
243. 16 USC §1539(j)(2)(B).
244. *Babbitt*, 199 F.3d at 1232 (citing H.R.Rep. No 97-567, at 8 (1982), reprinted in 1982 USCCAN 2807, 2808, 2817; *see also* 16 USC Section 1539(j)).
245. *Babbitt*, 199 F.3d at 1233.
246. *Id.*
247. *Id.* at 1234.

Due to the fact that the statute was unclear the court deferred to the Department of Interior's interpretation.[248] The court held that the agency defines "population" as "a group of fish or wildlife . . . in common spatial arrangement that interbreeds when mature."[249] Furthermore, the court held, "a 'geographic separation' is any area outside the area in which a particular population sustains itself."[250] Therefore, the court found that there was no conflict between the agency's interpretation and Congress' intent of section 10(j), because "the paramount objective of the Endangered Species Act [is] to conserve species, not just individual animals."[251] The court bolstered its reasoning by noting that some endangered species lose protected status when they move across state or international borders.[252]

Next, the court held that the Department of Interior does not have to give full ESA protection to any naturally occurring wolf found within the experimental areas.[253] It wrote that the district court's finding that the final reintroduction rules constituted a "de facto delisting" of naturally occurring lone wolves[254] and denied ESA protection to such wolves and their offspring was erroneous.[255] The Tenth Circuit held that the district court erroneously limited the administrative discretion that Congress put in section 10(j), "ignore[d] biological reality," and issued an opinion that did not fit with the larger purpose of the ESA.[256]

In upholding the Department of Interior's interpretation of the ESA, the Tenth Circuit defined the contours of the Department's discretion regarding its reintroduction plan.[257] It wrote that the Secretary of Interior could define an experimental population to include "imported wolves" and "lone dispersers," because the agency decided this was the best way to recover the species, and nothing in the ESA prevented it.[258] In particular, the court wrote that Section 10(j)'s language requiring geographical separation between experimental, released populations and native ones allows for agency discretion.[259] Furthermore, such language, the court wrote, does not restrict the agency's discretion to define a

248. *Id.*
249. 50 CFR Section 17.3.
250. *Babbitt*, 199 F.3d at 1234 (citing Wyo. Farm Bureau Fed'n v. Babbitt, 987 F.Supp. at 1373).
251. *Babbitt*, 199 F.3d at 1235.
252. *Id.*
253. *Id.*
254. *Babbitt*, 199 F.3d at 1236 (citing the district court); "De facto delisting" means the wolf effectively would be taken off the endangered list and lack protection of the Endangered Species Act.
255. *Babbitt*, 199 F.3d at 1236.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

population that may include wolves from other geographically separate populations.[260] "Such a narrow interpretation is not supported by the provision or the Endangered Species Act read as a whole," the court wrote.[261]

Moreover, the court stated that Congressional intent gave the agency wide flexibility.[262] Congress gave the agency authority to define an experimental population "'on the basis of location, migration pattern, or any other criteria that would provide notices as to which populations . . . are experimental.'"[263] So, the court said, Section 10(j) really protects the agency's authority "to designate when and where an experimental population may be established," instead of limiting the agency's flexibility.[264]

In further support of its decision to allow agency discretion, the court declared that the restrictive interpretation of the ESA sought by the plaintiffs could undermine the Department of Interior's ability to deal with biological reality.[265] That in turn, the court wrote, could undermine species recovery.[266] Moreover, the court held that a subspecies of the wolf that the plaintiffs claimed exists does not, based on the Department's research.[267] The court applied the arbitrary and capricious standard of review,[268] and deferred to the agency's discretion.[269] Finally, the

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260. *Id.*

261. *Babbitt*, 199 F.3d at 1237.

262. *Id.*

263. *Id.* (citing H.r. Conf. Rep. No. 97-835, 97th Congl, 2d Sess. at 34 (1982)).

264. *Babbitt*, 199 F.3d at 1237 ("While the protection of individual animals is one obvious means of achieving that goal, it is not the only means. It is not difficult to imagine that sound population management practices tailored to the biological circumstances of a particular species could facilitate a more effective and efficient species-wide recovery, even if the process renders some individual animals more vulnerable. However, neither Congress nor this court are equipped to make that type of species management decision. Recognizing that fact, Congress left such decisions to the Department. We conclude the Department reasonably exercised its management authority under section 10(j) in defining the experimental wolf population by location.").

265. *Babbitt*, 199 F.3d at 1236-37 (citing 59 Fed.Reg. at 60256, 60261) ("(1) There were no reproducing wolf pairs and no pack activity within the designated experimental areas, (2) wolves can and do roam for hundreds of miles, and (3) it would be virtually impossible to preclude naturally occurring individual gray wolves from intermingling with the experimental population.... The Secretary intentionally identified the experimental population as all wolves found within the experimental areas, including imported wolves and any lone dispersers and their offspring. The Department determined it could best manage the wolf reintroduction program to achieve species recovery in this manner. We find nothing in the Act that invalidates this approach by requiring the protection of individuals to the exclusion or detriment of overall species recovery, or otherwise limiting the Department's flexibility and discretion to define and manage an experimental population pursuant to section 10(j).").

266. *Babbitt*, 199 F.3d at 1236.

267. *Id.* at 1239.

268. *See* discussion, *supra*, of Administrative Procedure Act.

269. *Id.* (citing Trimmer, 174 F.3d at 1102; National Cattlemen's Ass'n v. EPA, 773 F.2d 268, 271 (10th Cir.1985) ("Applying the arbitrary and capricious standard of review, we cannot displace the Defendants' choice between two fairly conflicting views, and must defer to the agencies' view on

court held that as long as the agency "took a 'hard look'" at the environmental consequences of the wolf reintroduction, it would not second-guess the agency's environmental impact statement under NEPA.[270]

In conclusion, the Tenth Circuit in classic deference mode held that the Department of Interior had discretion to create its controversial wolf reintroduction plan despite its controversial nature because there was no Congressional intent otherwise.[271]

2. Analysis

Administrative agencies have the requisite resources, grounded in the specialized expertise of their employees, to make final decisions regarding day-to-day issues.[272] The Department of Interior and its subordinate agencies like the Fish and Wildlife Service are certainly examples.[273] In contrast, few, if any, Congresspersons have the knowledge, skill or experience to understand the technical, biological and ecological framework of decisions as critical as whether and how to reintroduce wolves into the northern Rockies.[274] Furthermore, political motivations that might underlie such decision making[275] likely would be a force preventing those in Congress from making unbiased, scientifically objective judgments without regard to influences such as economics, which are not supposed to be taken into account under ESA Section 10(j).[276]

The ESA, like many statutes passed by Congress, gives agencies direction and only provides a framework for guidance.[277] Agencies are left to put the substantive meat on the bones of the statute.[278] When a decision to list an endangered species under the statute is made, a public

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scientific matters within their realm of expertise. Because this is a scientific matter within the Agencies' expertise, and because there is ample evidence in the administrative record to support the Defendants' position, we uphold their subspecies conclusions.").

270. *Babbitt*, 199 F.3d at 1240.

271. *Id.*

272. *See* PLATER *supra* note 1, at 378. ("Agencies are just that: agents. Their only reason for existence, since they are not provided for in the federal Constitution or most state constitutions, is that the constitutionally created branches of government had too much detailed work to do than they could conveniently do themselves. [They] accordingly delegated some of their powers to standing agents in order to spread the workload and drudgery of performing investigations, day-to-day oversight, and hands-on administrative tasks of running a society.").

273. As agencies of the executive branch.

274. Because few lawmakers are trained experts in those fields.

275. For example, Western, states-rights, frontier-minded Congresspersons interested in protecting ranchers in their states might favor a policy that would limit Endangered Species Act protections for the wolves, while more liberal environmentally minded Congresspersons might prefer stronger restrictions.

276. *See* ESA, Section 10(j), 16 U.S.C. § 1539(j).

277. *See generally* the Endangered Species Act, 16 U.S.C. §§1531-44.

278. *Id.*

comment period is required before the final listing.[279] Yet, if concerned groups like the plaintiffs in *Babbitt* cannot change an agency's mind through commentary and persuasion, they must file suit.

Babbitt arguably is legally and socially important.[280] One commentator provided a context for its importance.[281] Scott Youngblood wrote, "the district court's [ruling] basically states that if naturally occurring . . . wolves are mixed with reintroduced . . . wolves, which are called experimental-nonessential wolves, the reintroduced or experimental-nonessential wolves must be removed."[282] He continued: "Ranchers who are allowed to kill nonessential wolves under certain circumstances[283] will not be able to tell the difference between endangered and nonessential wolves. Thus, ranchers will not be able to determine whether they are allowed to kill a particular wolf. Such a ruling by a federal district court is contrary to the Congressional intent set forth in the Endangered Species Act of 1973 (ESA)." [284] Youngblood went on to say that, "a dispute over an erroneous interpretation of a statutory definition is not a basis for condemning an animal to death."[285] Even some of those generally opposed to wolf reintroduction agree that the Department of Interior plan might work.[286] Youngblood quotes Senator James McClure of Idaho, who opposed reintroductions but recognized "'that a narrowly restrictive reintroduction would be less bad for the livestock industry than an unrestricted wave of natural immigration.'"[287] Youngblood also quotes biologists and wolf experts who agree flexible management plans are needed for reintroduction.[288]

If management plans (or other kinds of plans) require flexibility, and agencies are given court-backed discretion to use or create that flexibility, what can opponents of the plan do if they disagree with a decision made pursuant to this discretion? Opponents of any agency decision—regarding management plans or other issues—confront the same

279. *See* ESA, Section 4, 16 U.S.C. § 1533(b)(5)(B-E).

280. *See* National Public Radio, Wolves in Yellowstone, http://search.npr.org/cf /cmn/cmnps05fm.cfm?SegID=69171; *see also*, NATIONAL GEOGRAPHIC, NATIONAL GEOGRAPHIC PARK PROFILES: YELLOWSTONE COUNTRY, 12, 44, 98-99, 182 (1997); for possible reintroductions in Colorado, *see* Theo Stein, *Wolf reintroduction roams closer to Colorado*, Denver Post, February 17, 2001, at A1.

281. Scott Youngblood, Wildlife Restoration Projects: Hope for Life or a Death Sentence? A Look at the Reintroduction of Wolves to the Northern Rocky Mountains. 40 S. TEX. L. REV. 1045.

282. *Id.* at 1047.

283. *Id.* at 1047, 1047 n. 13 (citing 50 C.F.R. § 17.84(i)(3) (1998) ("Authorizing the killing of wolves under various circumstances such as seeing a wolf attacking livestock on private land, or if carrying a permit, when seeing a wolf attacking livestock on public lands if there are six or more breeding pairs of wolves in the area.").

284. 16 U.S.C. §§ 1531-1544 (1994).

285. Youngblood *supra* note 281, at 1047.

286. *Id.* at 1062.

287. *Id.* at 1066 (quoting Thomas McNamee, The Return of the Wolf to Yellowstone 31, 33 (1997)).

288. Youngblood *supra* note 1, at 1066.

garding management plans or other issues—confront the same question. They might be better prepared to challenge agencies if they conduct some straightforward research and test the agency decision themselves before setting foot into a courtroom.

First, potential plaintiffs should apply the APA's "arbitrary and capricious" test,[289] and the *Chevron* test[290] to the opposed agency decision.[291] Well-prepared plaintiffs should try to predict the Tenth Circuit's interpretation of the challenged decision, using the court's interpretations of prior, similar decisions under the tests. In analyzing the decisions under the tests, potential plaintiffs should read the entire statute in question with particular focus on the Congressional intent that supposedly gives the agency authority and discretion.

As the court did in *Wyoming Farm Bureau*,[292] plaintiffs could find the appropriate House or Senate reports and dissect them carefully to assess the actual intent of Congress. For example, the intent of the ESA arguably is to promote the reintroduction of endangered species so that the ESA does not have to be used anymore.[293] In other words, protecting endangered species today allows populations of those species to grow so that they are no longer endangered.

In that light, when the *Wyoming Farm Bureau* court held that Section 10(j)'s 'wholly separate geographically'[294] language did not force the agency to define a population that may not include wolves from other geographically separate populations, the court was doing what *Chevron* requires.[295] Even though 10(j) clearly states a preference for "wholly separate" populations, the court, looking at the entirety of the statute, allowed the Department of Interior's interpretation to gloss the statutory language.[296] The judges concluded that biological reality (the fact that native wolves and experimental ones might mix, thereby making all of them subject to takings by ranchers, etc.) was the best guiding principle. The Deptartment of Interior should, therefore, be able to release wolves in a way would advance the ESA's fundamental purpose of helping more individuals (not just single ones who risk being shot by ranchers), therefore the species itself, to survive. At the end of the day, the court empha-

289. 5 U.S.C. § 706.

290. *Chevron*, 467 U.S. at 843-844.

291. Moreover, before going to court, plaintiffs should explore every option available to influence the agency's decision, including use of the popular media to draw support for their cause, and emphatic lobbying of the agency.

292. *Babbitt*, 199 F.3d 1224 (2000).

293. *Id.* (As the *Babbitt* court stated in its analysis.).

294. *Babbitt*, 199 F.3d at 1232.

295. *Chevron* analysis allows such permissible construction of the statute. *See Chevron*, 467 U.S. at 842-43.

296. *Babbitt*, 987 F. Supp. at 1371.

sized the importance of fundamental propositions about species recovery that underlie the ESA over the specific statutory language.

Further inquiry into the Tenth Circuit's holdings could lead some potential plaintiffs to conclude that the Tenth Circuit often emphasizes agency discretion found in Congressional intent, even when that intent is not totally clear. For example, if plaintiffs were interested in a grazing permits issue, they could evaluate the Tenth Circuit's preference for deference to agency decisions, highlighted by a case like *Public Lands v. Babbitt*.[297] Alisha Molyneux, who commented on the court's grazing permits trend, wrote, "The court recognized that the judiciary should defer to an agency's decisions concerning how the agency interprets statutory commands. A court is not to substitute its judgment for the policies and decisions effected by an agency. Because the TGA [grazing act] authorizes the Secretary's discretion in issuing grazing permits, the Secretary's authority in making such decisions has been greatly increased by the Tenth Circuit's reading of both Chevron and the TGA."[298]

In conclusion, when confronting a potential court decision that might favor agency discretion, plaintiffs can take prophylactic measures to assure that they use the same guidelines the court does to assess whether agency thinking should prevail. By staying a step ahead of the court, plaintiffs might well avoid a courtroom loss that could have been foreseen.

3. *Southern Utah Wilderness Alliance v. Dabney*[299]

In *Southern Utah Wilderness Alliance v. Dabney*,[300] four-wheel-drive proponents who wanted continued access to a back country road challenged portions of the National Park Service's Backcountry Management Plan (BMP) for Canyonlands National Park in Southeastern Utah.[301] The

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297. 167 F.3d 1287 (10th Cir. 1999).

298. Alisha Molyneux, *Public Lands Council v. Babbitt: Tenth Circuit Decides that the Taylor Grazing Act "Breathes Discretion at Every Pore"* 20 J. LAND RESOURCES & ENVTL. L. 132.

299. Southern Utah Wilderness Alliance v. Dabney, 222 F.3d 819 (10th Cir. 2000).

300. *Id.*

301. *Id.* at 823; The relevant portion of the BMP (Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area, Backcountry Management Plan, at 13 (January 6, 1995)): "Salt Creek and Horse Canyon four-wheel drive roads in the Needles District will remain open to vehicular traffic, but travel will be by backcountry use permit only. A locked gate at the north end of the road (the location of the current gate) will control access. Day use permits for Salt Creek and Horse Canyon will be limited to ten (10) permits for private motor vehicles (one vehicle per permit), two (2) permits for commercial motor vehicle tours (one vehicle per permit), one (1) or more permits for up to seven (7) private or commercial bicyclists, one (1) or more permits for up to seven (7) pack or saddle stock . . . . All permits are available through the advance reservation system. Unreserved permits or cancellations will be available to walk-in visitors."; For a good overview of increased off-road vehicle use on public lands in the West, *see* Penelope Purdy, *Our scarred land: monitoring ORVs not an easy job*, Denver Post, February 11, 2001 at G1.

plan closed a one-half mile segment of the Salt Creek Road to four-wheel-drive traffic.[302]

The National Park Service (NPS) claimed the BMP's goal was to balance recreation and protection of park resources as a response to increased visitation and the resulting impacts on resources in the park.[303] Before the district court trial, the NPS interpreted its controlling statutory mandate[304] that the agency must prevent "significant, permanent impairment" of resources.[305] During litigation, though, the agency advanced draft policies that stated an even more restrictive interpretation of the National Park Service Organic Act of 1916 (Organic Act),[306] legislation that describes the focus, priorities and goals of the agency.[307] Management of Canyonlands National Park is controlled in part by its enabling legislation.[308]

The district court found that the Organic Act and Canyonlands enabling legislation did not allow the NPS to authorize activities that "permanently impair park resources," and that such impairment would occur if motorized vehicle use were allowed on the road.[309] The court then enjoined the NPS from allowing such use.[310] Interestingly, the NPS did not appeal.[311] Instead, intervenor Utah Shared Access appealed, arguing that the BMP[312] did not violate the NPS's Organic Act,[313] and that the district

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302. *Dabney*, 222 F.3d at 823.

303. *Id.* at 822.

304. The National Park Service Organic Act of 1916, 16 U.S.C. § 1.

305. *Dabney*, 222 F.3d at 825.

306. *Id.* at 827.

307. *Id.* at 824.; *see* U.S.C. § 1 ("The service thus established shall promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."); *see also*, 16 U.S.C. § 1a-1 ("The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.").

308. *Dabney*, 222 F.3d at 823; *see* 16 U.S.C. § 271 ("In order to preserve an area in the State of Utah possessing superlative scenic, scientific, and archeologic features for the inspiration, benefit, and use of the public, there is hereby established the Canyonlands National Park . . . ."; *see also* 16 U.S.C. § 271(d)(Canyonlands must be managed in accordance with the purposes of the Organic Act.).

309. *Dabney*, 222 F.3d at 822 (citing Southern Utah Wilderness Alliance v. Dabney, 7 F.Supp.2d 1205 (D.Utah 1998).

310. *Dabney*, 222 F.3d at 822.

311. *Id.*

312. *Dabney* at 823; *see* Canyonlands National Park and Orange Cliffs Unit of Glen Canyon National Recreation Area, Backcountry Management Plan, at 13 (January 6, 1995) ("Salt Creek and Horse Canyon four-wheel drive roads in the Needles District will remain open to vehicular traffic, but travel will be by backcountry use permit only. A locked gate at the north end of the road (the

court abused its discretion by enjoining the BMP's implementation.[314] The agency nonetheless submitted a brief to the appeals court "to advise the court as to the Department's view as to the proper legal construction of the [Organic] Act."[315]

Two questions arose on appeal.[316] One was whether the district court's finding that the BMP violated the Organic Act was correct under *Chevron*.[317] The other was whether the NPS's draft backcountry policies (those regarding whether to allow off-road vehicle use) submitted to the court were sufficiently formal to require *Chevron* deference to the agency's conclusions.[318] First, the court looked to the Administrative Procedure Act for guidance, and wrote:[319] "Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[320]

Next, the Tenth Circuit utilized the two-part conjunctive *Chevron* test to analyze the NPS's interpretation of the Organic Act and Canyonlands enabling legislation.[321] The court outlined the two steps in *Chevron*, and ruled that the district court erred in resolving the issue under the first inquiry alone, which requires adherence to the intent of Congress if that intent is clear.[322]

The court found the Congressional intent unclear.[323] The Tenth Circuit stated that the Organic Act neither defines the word "unimpaired" or the phrase "unimpaired for the enjoyment of future generations" in the Act.[324] Therefore, because the Congressional intent was unclear, it also was unclear how the "duration and severity of the impairment are to be

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location of the current gate) will control access. Day use permits for Salt Creek and Horse Canyon will be limited to ten (10) permits for private motor vehicles (one vehicle per permit), two (2) permits for commercial motor vehicle tours (one vehicle per permit), one (1) or more permits for up to seven (7) private or commercial bicyclists, one (1) or more permits for up to seven (7) pack or saddle stock . . . . All permits are available through the advance reservation system. Unreserved permits or cancellations will be available to walk-in visitors.").

313. *Dabney* at 824.

314. *Id.*

315. *Id.* at 822.

316. *Id.* at 825.

317. *Id.* at 826.

318. *Id.*

319. *Id.*

320. *Id.* at 824 (quoting Olenhouse v. Commodity Credit Corp., 42 F.3d 1560 (10th Cir. 1994), and the APA, 5 U.S.C. § 706(2)).

321. *Dabney*, 222 F.3d at 825 ("On appeal, Utah Shared Access argues that the district court erred in resolving the issue under the first Chevron inquiry. Utah Shared Access argues that the district court should have reached the second Chevron inquiry because of ambiguities inherent in the relevant statutes and their application to the issue of vehicular access. We agree.").

322. *Dabney* at 825-26.

323. *Id.* at 826.

324. *Id.*; *see* Organic Act text, note 262.

evaluated or weighed against the other value of public use of the park."[325]

Instead, the court ruled, the district court should have gone on to the second inquiry, whether agency interpretation is based on an acceptable interpretation of the statute in question when the intent of Congress is missing or unclear.[326] The court applied *Chevron*'s step two, whether the Department of Interior's answer was based on "permissible construction of the statute."[327]

The court analyzed the agency's brief, its oral argument, and its supplemental Draft Policies, all of which outlined the agency's position on the Organic Act.[328] The court found that the NPS's philosophical position in these documents differed from the position the agency adopted before the district court, so concluded that "there is currently no valid agency position worthy of deference."[329]

The court stated that although an agency can change its position on the meaning of a statute and still receive *Chevron* deference, a position taken while the litigation is ongoing is not worthy of deference.[330] The court held that the agency's policies were only in draft form and were not finalized or adopted by the agency, so deserved neither *Chevron* deference nor any lesser deference.[331]

Next, the court cited provisions of the Organic Act and the Canyonlands enabling legislation in order to compare them to the NPS's interpretation.[332] The Organic Act describes the NPS's purpose: "... to conserve the scenery and natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[333] Further, the Organic Act prohibits "authorization of activities that derogate park values: 'The authorization of activities ... shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.'"[334] The Canyonlands enabling legislation states that Canyonlands was created done in part to "preserve an area ... possessing superlative scenic, scientific, and arche-

325. *Dabney*, 222 F.3d at 826.
326. *Id.*
327. *Id.* at 827 (citing *Chevron*, 467 U.S. at 843).
328. *Dabney*, 222 F.3d at 827-28.
329. *Id.* at 828.
330. *Id.*
331. *Id.*
332. *Dabney*, 222 F.3d at 824-26.
333. *Id.* at. 825.
334. *Id.*

ologic features for inspiration, benefit and use of the public...."[335] In contrast, the NPS's BMP, designed with agency discretion, allowed permitted vehicle traffic in the backcountry.[336] Such traffic arguably could limit the public's enjoyment of the area and undermine the Canyonlands' preservation

The court reversed the district court's finding, and remanded the case so that the parties' conflicting views regarding the amount of permanent impairment the BMP would cause could be decided.[337] Also, it instructed the lower court to review the NPS's finding of 'temporary impairment'[338] from vehicle use.

The court held that, "on remand, the district court should not limit its analysis under step two of *Chevron* to whether the evidence demonstrates significant, permanent impairment.[339] Rather, it should assess whether the evidence demonstrates the level of impairment prohibited by the [Organic] Act."[340] Also, if the district court found that the agency has formalized and adopted its view on the Organic Act, the agency's decision deserved *Chevron* testing.[341]

In conclusion, the Tenth Circuit ruled that the BMP, created by the agency under its discretion, was not "clearly contrary" to the Organic Act, but remand was needed to find out if the interpretation was reasonable.[342]

4. Analysis

In assessing how an agency like the Park Service should interpret its own guiding Organic Act or other controlling legislation, a plaintiff should consider general trends in how courts and agencies have interpreted such legislation. University of Denver College of Law Professor Fred Cheever wrote: "The National Park Service Organic Act of 1916 declares that the purpose of the national parks is to 'conserve' scenery, 'natural and historic objects' and 'wild life' and provide for their enjoyment 'by such means' as to leave them 'unimpaired for the enjoyment of future generations.' [But,] Congress did not specify by what means the

335. *Id.*
336. *Dabney*, 222 F.3d at 823, 825.
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Dabney*, 222 F.3d at 829.

Park Service was to 'conserve' 'unimpaired' the national parks while providing for their 'enjoyment.'"[343]

Congress' failure to provide further guidance has left the door open for natural resources and environmental groups, agencies and the courts to do battle over the *true* meaning of legislation that controls agency action. Ecologically, economically or politically minded parties transformed into visionary plaintiffs might recognize opportunities to shape agency policy lurking in the mucky Congress-speak of statutory language.

Congress passes a vaguely worded guiding statutes in reliance on trust in agencies. Cheever claimed that one reason agency discretion is so bountiful is that mandates originally granted to agencies like the US Forest Service and the US Park Service were so broad they lacked substance.[344] "Paradoxical mandates were a particularly useful form of legislative carte blanche. They appear to have substance because they speak of general values in mandatory terms. However, they do not significantly constrain agency action. Almost anything can be justified between the two poles of 'use' and 'preservation,' extensive clearcuts and swank hotels as well as limitations on rafting access and livestock trains."[345] "The resolution of the paradox required balancing, and balancing traditionally fell within the expert agencies' discretion."[346] Cheever described ways in which "paradoxical agency mandates [have been] used to challenge agency action in court."[347] He wrote that, "the effect of paradoxical mandates reaches beyond cases in which the language of the statutes are at issue and color a range of legal disputes about the balance between preservation and use," citing the Endangered Species Act as an example.[348]

In particular, Cheever suggested a "gap" between what an agency does and what environmental plaintiffs think the agency should do.[349]

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343. Fredrico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625, 629.

344. *Id.* at 638.

345. *Id.*; *see generally*, Robin Winks, *The National Park Service Act of 1916: A Contradictory Mandate?* 74 DENV. U. L. REV. 575 (1997).

346. Cheever *supra* note 343, at 638.

347. *Id.* at 641.

348. *Id.* at 642-3. ("Efforts to enforce the act-- mostly in the form of federal court cases brought by environmental groups--have severely curtailed agency discretion in the Forest Service's two most valuable timber producing regions: the forests of the southeast—home of the Red-Cockaded Woodpecker --and the forests of the Northwest, home of the Northern Spotted Owl and various runs of protected salmon. Forest Service timber production has dropped precipitously in recent years and not as a result of agency decisions.").

349. *Cheever* at 643; *See also Chevron*, 467 U.S. at 843-44 (*Chevron's* "gap"; "[If] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency."); *see also* William J. Lockhart, New Nonimpairment Policy Projected for the National Park System, Environmental Law Reporter, September, 2000 ("It is critical for the NPS to recognize that

Dabney provides a good example. The NPS in their BMP allowed limited back-country vehicle use. The Organic Act and Canyonlands enabling legislation do not mention backcountry vehicle use, but do mention more general principles like preserving park resources and preventing their derogation.[350] Clearly, conceptual or philosophical differences exist between the NPS's notion of limited vehicular traffic and its association with resource preservation and preservation and management vision that absolutely prohibits such traffic for fear of the detrimental effects it might cause. Any number of arguments could be made as to how motorized vehicles simply do not fit under the generalized principles or ideals of the guiding statutes.

Nonetheless, Cheever wrote that when groups bring Organic Act claims against the NPS, the Service usually wins.[351] As an example, he cited *Wilkins v. Lujan,*[352] in which a federal district court used Organic Act language to demonstrate that the NPS had made a "clear error of judgment" in creating a plan to remove wild horses from the Ozark National Scenic Riverway.[353] The Eighth Circuit reversed, using Organic Act language regarding removal of "detrimental" animals to support Park Service discretion.[354] Nonetheless, the lone dissenter said, "I am hard-pressed to find a clearer example of arbitrary and capricious agency action."[355] "While a victory for the Park Service," Cheever wrote, "the decision demonstrates the willingness of judges at both the district and

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its policies regarding impairments caused by activities approved within the parks will almost certainly also set the bottom line for all protection that may ultimately be established to address impairments from external activities. For this reason, there is a great deal for advocates of park protection to cheer in the proposed draft of the new NPS Management Policies. If applied straightforwardly with a minimum of politically driven compromises, the policies should generate a new regime of more reliable protection against impairments generated by developments and uses within the parks. By the same token, however, if the NPS yields in the adoption or application of these new policies to the inevitable political demands for a freer 'discretionary' hand to 'balance' resource protection against the tourism goals of local promoters, damage to the future of our parks will come not just from the occasional concessions to internal park developments. Policies that permit continued compromise of the NPS' own protective obligations are also virtually certain to invite qualifications or limits that will compromise efforts to address external threats. In short, if the NPS does not set and enforce high standards for control of activities it permits within the parks, it is difficult to imagine any significant success in controlling the increasing threat from activities outside the parks. For this among other reasons, it is especially important to ensure that the standard established for in-park activities is as rigorous as the dictionary definitions of 'impairment' permit.").

350. *See* notes *supra* 307-8, 312.

351. *Id.* at 643.

352. *Id.*, citing Wilkins v. Lujan, 798 F.Supp. 557 (E.D. Mo. 1992), rev'd sub nom. Wilkins v. Secretary of Interior, 995 F.2d 850 (8th Cir. 1993).

353. Cheever *supra* note 343, at 643.

354. *Id.* at 643-4.

355. *Id.* at 644.

circuit level to question Park Service decisions about what 'preservation' means."[356]

Cheever highlighted some cases in which the Park Service has won on its interpretations of its Organic Act, concluding that some of the opinions "[spoke] directly to the balance between use and preservation and the discretion of the Park Service to strike that balance. Snowmobilers and hikers, like the environmental groups and local and state governments that batter the Forest Service, have the power to use the Park Service's ambiguous mandate against it, projecting their values—preservation (in the case of the hikers) or motorized use (in the case of the snowmobilers)—on Congress' ambiguous language."[357] In conclusion, Cheever wrote that, "it would be useful to have agency mission statements that were more than mirrors, reflecting back the values of each interest group on itself. A clearer mission statement, conveying the same message to all interested parties, would not guarantee enhanced agency stature and discretion, but would at least make it possible."[358]

This could save precious litigation time and costs because everyone would be clear about what Congress meant for agencies. On the other hand, clearer mission statements would deny plaintiffs opportunities to exploit the "gaps" between unclear guiding statutory language and agencies' actual decisions. If the NPS's Organic Act clearly allowed something as controversial as four-wheel-drive activity as in *Dabney*,[359] plaintiffs who opposed the plan would lose because the court would have to go no further than step one of the *Chevron* test.[360] Moreover, depending on the political composition of the Congress in power at the time, a less-confusing mission statement might be passed, but a "clearer" version of the NPS's mission statement might vary widely from the arguably pro-conservation notions upon which the National Park Service was originally founded. If such a statement were so clear as to force absolute adherence by the NPS, natural resources and environmental groups would be left to wait for a new Congress to change the statute. Again, under *Chevron*,[361] the agency would be forced to follow the bottom-line intent of Congress, regardless of whether any particular group of legislators were able to fashion reasonably preservationist guidance.

The implications of such 'micromanagement' by Congress take on even more ominous tones. In *Dabney*, for example, if Congress had decided whether four-wheel-drive use should be allowed in the Canyon-

356. *Id.*

357. Cheever *supra* note 343, at 645.

358. *Id.* at 646.

359. As in the previous discussion of *Dabney, supra.*

360. *Chevron*, 467 U.S. at 842-43; If Congressional intent is clear, that is generally the bottom line.

361. As previously discussed.

lands back country, Congress would be doing the jobs agencies were created to do. The NPS depends on its rangers, biologists, statisticians, geologists, engineers and other experts who work on location, collect and analyze data, and provide the basis for scientifically sound policies that balance conservation and recreation in highly informed ways. If Congress tried to accomplish such a balancing, the result would likely be sub-standard in quality because Congress does not have the resources required to responsibly grapple with such minutia.

A case decided in February, 2001 by the U.S. Supreme Court directly addressed this issue.[362] It had the potential to redefine the fundamental constructs of agency discretion. In November, 2000, the Court heard arguments in *Browner v. American Trucking Association*,[363] a case in which the D.C. Court of Appeals stuck down strict Environmental Protection Agency (EPA) limits on smog and soot, regulated under the Clean Air Act.[364] The main issue was "whether the EPA's loose construction of the Clean Air Act rendered the law an unconstitutional delegation of its legislative power."[365]

The EPA must follow and apply the Clean Air Act,[366] which requires the agency to set national air-quality standards "to protect and enhance the quality of the nation's air resources."[367] At the same time, the act requires the agency to base its decisions on the latest scientific knowledge about air pollution.[368] Since the EPA set new, stricter guidelines for limiting smog and soot, it was sued by the trucking industry.[369] The D.C. Circuit agreed that the agency did construe the law too loosely, thereby abusing its discretion.[370]

The Court also decided whether the EPA should do a cost-benefit analysis when deciding air quality standards.[371] Responding to a cross-petition filed by the plaintiffs, the Supreme court agreed to consider

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362. Browner v. American Trucking Ass'n (this has since become Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

363. *Id.*

364. Steve France, *Air of Authority*, A.B.A. J., 33, November 2000; *See generally*, Clean Air Act, 42 U.S.C. §§ 7401-7671.

365. *See* France *supra* note 364, at 33.

366. Clean Air Act, 42 U.S.C. § 7401(b).

367. *Id.*

368. *See* 42 U.S.C. §§ 7401-7671.

369. *See generally, Browner v. American Trucking Ass'n*; Steve France, Air of Authority, ABA Journal, page 33, November 2000; Associated Press, *Justices Study Clean-Air Rules Case*, http://www.nytimes.com/aponline/national/AP-Scotus-Clean-Air.html. ("Some observers believe that if the Supreme court decided the EPA took too much of Congress' power when it set the clean-air rules, it could affect the regulatory power of other federal agencies with broad Congressional mandates.").

370. *Id.*

371. *Id.*

overruling *Lead Industries Assoc. v. EPA*,[372] which held that EPA cannot do a cost-benefit analysis when setting clean air standards absent Congressional language telling it to do so.[373]

The Supreme Court did not overturn the case. If it had, it might have upheld a long-forgotten principle that a D.C. Circuit judge unearthed, the nondelegation doctrine.[374] It tests agency discretion as whether the agency has demonstrated an "intelligible principle" required by the guiding law in making a decision.[375] If the Supreme Court had decided to overturn the case, Congress may have had to give agencies much more specific instructions, thereby limiting agency discretion. Also, the Court could have decided to limit agencies' broad discretionary power even though Congress assigned them only vague mandates (like 'protect the public health') through statutes.[376]

Fortunately for those in favor of agency discretion, a unanimous Supreme Court upheld the EPA's use of discretion to set the stricter pollution guidelines, and decided that the agency does not need to undertake cost-benefit analysis when creating the guidelines.[377] Redefinition of agency discretion on a grand scale now must wait for another day in court or in the Capitol building.

In conclusion, while agencies generally have discretion to make day-to-day decisions based on their areas of expertise, plaintiffs can exploit differences between the often vague language of Congress expressed in statutes that guide the agencies and the agencies' interpretation of those statutes. By keeping in mind the kinds of tests courts use to assess whether decisions are allowed under the agency's discretion, plaintiffs can more effectively hold agencies to statutory standards.

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372. *Id.*; 647 F.2d 1130 (D.C. Cir. 1980).

373. *Id.*

374. *See* France *supra* note 364, at 33.

375. *Id.*

376. Associated Press, *Justices Study Clean-Air Rules Case*, http://www.nytimes.com/aponline/national/AP-Scotus-Clean-Air.html. ("Some observers believe that if the Supreme Court decided the EPA took too much of Congress' power when it set the clean-air rules, it could affect the regulatory power of other federal agencies with broad Congressional mandates.").

377. Theo Stein, *Clean Air Challenge Rejected*, Denver Post, February 28, 2001, at A1; Robert Greenberger, *Supreme Court Upholds EPA's Authority to Set Standards Under the Clean Air Act*, Wall Street Journal, February 28, 2001 at A2 ("The court held unanimously that the EPA can't consider compliance costs when setting clean-air standards. The court also overturned an appeals court ruling that the EPA usurped Congress' authority in interpreting the 1970 Clean Air Act. The implications of the decision go far beyond clean-air standards. A ruling for the American Trucking Associations, Inc. . . . would have cleared the way for other legal challenges that could have significantly weakened many health and safety rules promulgated by government agencies.").

CONCLUSION

Environmental and natural resources plaintiffs must be certain that they meet standing requirements. Standing is an easy step to overlook when preparing a case that otherwise seems solid. Many requirements, including injury in fact, zone of interest, and redressability, seem on a superficial level easy to meet. Many times they are not. The Tenth Circuit has many avenues by which it might find that the wrong plaintiff has appeared in its hallowed halls. Such a finding results in quick dismissal of an oft-surprised plaintiff.

Once standing is met, the prospect of a Tenth Circuit decision that bows to agency discretion looms. There are a number of avenues by which plaintiffs can prepare for the court's tendency toward such a decision. In effect, plaintiffs should put themselves in the place of the court, assess through the tests provided by the Administrative Procedure Act and *Chevron* how the court might balance factors in the case, then base their strategies on a prediction of the court's approach.

In approaching any case in which agency discretion is at issue, plaintiffs should pay special attention to the overall scope and intent of statutes guiding the agency, especially its controlling legislation. Typically, Congress writes instructions for agencies using a broad pen. Therefore, agencies must make specific, on-the-ground decisions that are based on the broad principles of the statute, but are often arguably discretionary in detail. Plaintiffs can take advantage of the difference between broad, general Congressional intent and specific agency action, and argue that the agencies' decisions did not fall fairly within the scope of the guiding principles. Moreover, plaintiffs should pay special attention to the ways the Tenth Circuit or other courts typically address standing or discretion issues. Finally, plaintiffs must pay attention to cases like *American Trucking* that potentially could undermine agency discretion. Through deliberate and intensive analysis of these points, environmental and natural resource plaintiffs might better avoid a court's acquiescence to agency decisions.

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