LOOKING TOWARD THE FUTURE OF JUDICIAL REVIEW FOR THE PUBLIC LANDS

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I. INTRODUCTION

Understanding how environmental law operates without courts depends in part in understanding what courts do and do not review. A government agency will consider the potential for judicial review in assessing what room for maneuvering it has in making a particular decision. Even if no litigation ever ensues, the shadow of judicial review can affect the options that an agency might consider.

Perhaps no part of environmental law makes this point clearer than the area that concerns the federal public lands. Federal public lands management is susceptible to ongoing, consistent swings in management philosophies depending on who is President: the shift from the Clinton Administration, to the George W. Bush Administration, back to the Obama Administration, and now to the Trump Administration. The President has significant power to shape public lands management—the Clinton Administration advanced the Roadless Rule, which set about 2 percent of the land area of the lower forty-eight states aside from commercial logging and road construction, while the George W. Bush Administration greatly expanded oil and gas leasing on federal public lands.

At the same time, the role that courts play in supervising public lands management has been highly contested, and it has led to some of the most significant Supreme Court cases assessing general principles of reviewability of agency decisions in administrative law: cases such as *Lujan v. National Wildlife Federation*,[1] *Summers v.*

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1. 497 U.S. 871 (1990).

Earth Island Institute,[2] *Ohio Forestry Association v. Sierra Club*,[3] and *Norton v. Southern Utah Wilderness Alliance*.[4]

These disputes will not go away. The outgoing Obama Administration took significant steps to constrain fossil fuel leasing on federal public lands, responding to pressure from the "Keep It in the Ground" movement, which has called for terminating all future fossil fuel leasing programs on federal public lands.[5] The incoming Trump Administration has emphasized expanding fossil fuel production on public lands. Litigation will surely ensue.

But I am more interested in the long view here. How has the possibility of judicial review shaped agency decision-making over the years, and what is the potential over the next ten to twenty years for the role of courts vis-à-vis land management agencies to change? And what lessons might fights over judicial review of federal public lands hold for administrative law more broadly?

One way of reading the case law on judicial review of federal public lands management is that the courts have given public lands agencies broad discretion to allow the development or degradation of those lands. But, while there is much truth to that view, I think it understates the ability of courts to dismiss challenges to agency decisions not to allow development. The view that reviewability case law benefits only development projects falls short in part because it focuses solely on the outcomes of the leading Supreme Court cases in the area, a focus that is misleading because of the nature of those cases and the agency decisions they involved.

II. WHY REVIEWABILITY MATTERS FOR AGENCIES

The presence or absence of the possibility of judicial review certainly matters for how agencies operate. Both agency officials and Congress act as if this fact is true. For instance, in order to facilitate U.S. Forest Service projects intended to reduce the risks of fire, Congress has imposed some significant limits on the ability of private parties to challenge those projects.[6] Setting aside the difficult question of whether those projects really will work as

2. 555 U.S. 488 (2009).
3. 523 U.S. 726 (1998).
4. 542 U.S. 55 (2004).
5. *Keep It in the Ground*, GREENPEACE, http://www.greenpeace.org/usa/global-warming/keep-it-in-the-ground/ (last visited Apr. 2, 2017); MICHAEL SAUL, TAYLOR MCKINNON & RANDI SPIVAK, CTR. FOR BIOLOGICAL DIVERSITY, GROUNDED: THE PRESIDENT'S POWER TO FIGHT CLIMATE CHANGE, PROTECT PUBLIC LANDS BY KEEPING PUBLICLY OWNED FOSSIL FUELS IN THE GROUND (2015) [hereinafter, CTR. FOR BIOLOGICAL DIVERSITY]; DUSTIN MULVANEY, ALEXANDER GERSHENSON & BEN TOSCHER, ECOSHIFT CONSULTING, THE POTENTIAL GREENHOUSE GAS EMISSIONS FROM U.S. FEDERAL FOSSIL FUELS 3–5 (2015).
6. *See* Healthy Forests Restoration Act of 2003, 16 U.S.C. §§ 6501, 6511, 6512, 6514, 6515, 6516 (2012).

intended,[7] Congress added those limits because it believed the Forest Service would be more likely to aggressively pursue fire reduction projects if judicial review was limited. That is in part because, as the agency itself has noted, the agency responds to the possibility of judicial review by adding additional justifications and analyses to support its decision, something that costs money and time, and therefore reduces the total number of projects that can be funded by a set budget.[8] But an agency that is concerned about the threat of judicial review will also be less likely to push the envelope in the substance of its decisions.

For example, consider the role that the Endangered Species Act (ESA) plays in agency decision-making.[9] Federal agencies have to comply with a range of substantive and procedural requirements under the ESA.[10] For a variety of reasons, these agencies have relatively limited leeway in how they interpret and implement the Act—in part because usually it is another, specialized federal agency (the U.S. Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration (NOAA)) that does the primary analysis and legal interpretation, but also in part because any person can sue the federal agency for failure to comply with the ESA.[11] In addition, courts considering agency decisions under the ESA may be less likely to defer to the agency's own interpretation and analysis if it conflicts with the interpretation and analysis of FWS or NOAA. It is perhaps no surprise, therefore, that the ESA has been widely characterized as the "pit bull of environmental law" in its ability to shape agency decision-making[12]—indeed, litigation under the ESA was a significant part of the ending of the cutting of old growth forests by the Forest Service in the Pacific Northwest, despite a powerful political resistance.[13] Because of the risk of citizen enforcement, agencies take their obligations under the ESA seriously—a point the Supreme Court itself has recognized.[14]

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7. *See* Diana L. Six, et al., *Management for Mountain Pine Beetle Outbreak Suppression: Does Relevant Science Support Current Policy*, 5 FORESTS 103 (2014).

8. U.S. DEP'T OF AGRIC., FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 35–37 (2002), https://www.fs.fed.us/projects/documents/Process-Predicament.pdf.

9. 16 U.S.C. §§ 1531–44 (2012).

10. *See id.*; *see also* DALE GOBLE, ET AL., WILDLIFE LAW: CASES AND MATERIALS 1023–86 (3d ed. 2017) (covering the requirements that federal agencies must comply with under the Act).

11. See 16 U.S.C. § 1541(g)(1)(A) (2012).

12. Robert B. Keiter, *Of Gold and Grizzlies: A Tale of Two Laws*, 24 J. OF LAND, RESOURCES & ENVTL. L. 233, 235 (2004) (quoting citation omitted).

13. *See* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 55–56 (2009).

14. Bennett v. Spear, 520 U.S. 154, 169 (1997) (noting how the ESA can have a "powerful coercive effect" on agencies).

III. THE SCOPE OF REVIEWABILITY IN FEDERAL PUBLIC LANDS MANAGEMENT

There are substantial limits on what kinds of public lands agency decisions might be subject to judicial review and on who can seek judicial review of public lands agency decisions. Again, both of these categories (but particularly the first one) have important ramifications beyond public lands.

A. Kinds of Decisions That Can Be Challenged

In terms of the kinds of agency decisions that are subject to judicial review, the Court has indicated that only specific agency decisions to act or not to act can be susceptible to judicial review. In *Lujan v. National Wildlife Federation*, the Court rejected a challenge by environmental groups to an agency "program" of reviewing whether federal lands should be opened to mining activities.[15] Because the program was not a specific agency decision, but instead was an amorphous collection of thousands of individual agency decisions, the Court concluded that the program as a whole was not judicially reviewable.[16] In *Norton v. Southern Utah Wilderness Alliance*, the Court considered a challenge to an agency's alleged failure to prevent degradation of wilderness quality lands from off-road vehicle use;[17] the relevant statute generally required the agency to prevent degradation but did not provide specific actions the agency was required to take to prevent degradation.[18] Because the statute did not provide a specific, mandatory duty the agency was required to take, the Court concluded that it could not order the agency to take action, citing *Lujan* for the proposition that only agency failures to take specific, discrete actions were reviewable.[19]

The specific agency action requirement for judicial review has broad implications for judicial involvement in agency decision-making. By their very nature, federal public lands management agencies are involved in lots of mundane operational tasks—where to send law enforcement personnel, whether to maintain a trail, whether to require a grazing lessee to take steps to reduce impacts

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15. 497 U.S. 871, 877–79 (1990).

16. *Id.* at 890 (stating that the plaintiffs could not "challenge the entirety of petitioners' so-called 'land withdrawal review program' [because it was] not an 'agency action' within the meaning of [the Administrative Procedure Act (APA)]"). The APA provides for judicial review of "agency action" that is "final." 5 U.S.C. § 704 (requiring agency action to be final in order for judicial review to occur). *See also* 5 U.S.C. § 702 (allowing for judicial review of "agency action" for parties "affected or aggrieved by agency action").

17. 542 U.S. 55, 59–60 (2004).

18. *Id.* at 59, 65–66 (discussing 43 U.S.C. § 1782(c)).

19. *Id.* at 64–66.

on rangeland, and so on. By requiring plaintiffs to point to specific, particular agency decisions that they wish to challenge, the Court made it significantly more difficult for plaintiffs to challenge an aggregation of many small individual decisions, even when they might accumulate to have major impacts. Plaintiffs could, of course, seek to challenge each of the individual decisions, but that would be costly and difficult to do, and demonstrating how each individual decision "matters" on the ground would also be difficult, as it is the cumulative impacts that would matter most.

Reciprocally, requiring plaintiffs to identify specific actions they would force the agency to undertake also reduces the ability of plaintiffs to force agency action—that is in part because the statutes are much more likely to contain generalized obligations by the agency to do something than they are to contain specific actions that the agency is mandated to undertake. And even if a specific action is mandated in the statute, there is no guarantee that that specific action would actually be the best approach (from the plaintiff's perspective) of forcing the agency to achieve the plaintiff's goals. The insulation of generalized agency failures to act from judicial review makes it easier for agencies to allow on-the-ground changes to occur without agency intervention, even if those changes might violate statutory standards—so long as those changes are the result of impacts from actions of others besides the agency. For instance, and most relevant for the future, as climate change causes major changes in conditions on the ground on federal public lands, plaintiffs will often have little ability to force agencies to respond to those changed conditions, even if they may result in violations of different federal statutory standards.[20]

These implications of the specific agency action requirement are no accident. It was concerns that allowing challenges to programs would entangle courts in "day-to-day" agency decision-making that the Court referred to in *Norton v. Southern Utah Wilderness Alliance* as the reason for the specific agency action requirement[21]—a requirement that is not explicitly in the text of the Administrative Procedure Act (APA) but is instead a gloss the Court has developed

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20. *See* Elisabeth Long & Eric Biber, *The Wilderness Act and Climate Change Adaptation*, 44 ENVTL. L. 625, 688–89 (2014) (making this point in the context of wilderness management).

21. *Norton*, 542 U.S. at 65–66 (expressing concern that allowing judicial review of failures to implement general statutory duties would mean that "it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management"). The Court appeared to allude to similar concerns in *Lujan*, where it stated that the agency action requirement meant that plaintiffs could not seek "*wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress." 497 U.S. 871, 891 (1990).

based on APA judicial review language.[22] These concerns can be understood as a judicial reluctance to be involved in agency decisions about how to allocate resources among a wide range of different policy goals or ways to achieve policy goals.

A second major barrier to judicial review of particular kinds of public lands agency decisions is the requirement that an agency decision be "ripe" for judicial review. Ripeness is a general doctrine in administrative law that prohibits judicial review of agency decisions, even if they are specific and even if they might otherwise be final.[23] But it is a doctrine with particular importance in the public lands context, as the Supreme Court has held that ripeness generally prohibits judicial review of public lands management agency planning documents.[24] Most federal public lands statutes require land management agencies to develop plans for their lands. Similar to zoning law, these planning documents identify areas where certain activities can or cannot occur. They may also lay out a range of goals for public lands management for the next ten to fifteen years, minimum standards for activities that occur in the public lands, possible projects the agency would ideally pursue in the future, and coordination in space and time among the many different, potentially conflicting uses of the public lands.

In *Ohio Forestry Ass'n v. Sierra Club*, the Supreme Court held that, in general, these planning documents were not ripe for judicial review since they usually did not create a legal obligation for the agency to do or not do something.[25] For instance, in *Ohio Forestry Ass'n* environmental groups argued that the forest-planning document allowed too much timber cutting on the forest.[26] The Court argued that this kind of claim was not ripe because the plan did not actually require any timber cutting to occur[27] and a series of independent decisions by the agency were required even after the plan to determine whether any timber project would proceed.[28]

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22. The decision in *Lujan* was based on the Court's interpretation of what the term "agency action" must require, rather than being based on the statutory definition of the term in the APA. *Compare Lujan*, 497 U.S. at 890–93 *with* 5 U.S.C. § 551(13) (defining agency action).

23. Finality is an explicit requirement of the APA for judicial review of agency decisions. 5 U.S.C. § 704.

24. *See Lujan*, 497 U.S. 871.

25. 523 U.S. 726, 733 (1998) (noting that the plans "do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations").

26. *Id.* at 731.

27. *Id.* at 733 (stating that the plan "does not give anyone a legal right to cut trees, nor does it abolish anyone's legal authority to object to trees being cut").

28. *Id.* at 729–30 (listing the series of independent decisions).

Given the broad discretion that these statutes give to many public lands agencies to balance many different, potentially conflicting goals, the ripeness requirement can be understood as an effort to avoid entangling the courts in abstract policy disputes where there is little statutory guidance as to outcomes—and that was an important reason for the doctrine articulated by the Court in *Ohio Forestry Ass'n*.[29]

Ripeness matters for public lands management because of the pervasiveness of planning requirements under federal public lands statutes. To the extent that planning helps drive much agency decision-making in the future, insulating planning decisions from judicial review might have a major effect on outcomes, albeit in a subtle manner. As with the specific agency action requirement, another major impact of the ripeness doctrine in the public lands context would be the limitations it places on the ability of plaintiffs to raise, and courts to consider, cumulative impacts of multiple smaller-scale, on-the-ground agency decisions. While the specific agency action requirement insulates many of those decisions by making it practically difficult for plaintiffs to challenge them, the ripeness requirement limits challenges to planning documents that—precisely because of their comprehensiveness—would serve well as a vehicle for judicial consideration of how aggregating many individual agency decisions cumulatively affects important resources.

In practice, the combination of the requirement that plaintiffs challenge specific agency actions and ripeness barriers to review can make it difficult for plaintiffs to enforce a range of statutory requirements against public lands agencies. For example, the National Forest Management Act (NFMA) requires that agency plans meet a number of minimum standards for environmental compliance, including protection of biodiversity, protection of water quality, and prevention of soil erosion.[30] However, the combination of the two doctrines of specific agency action and ripeness requires that environmental plaintiffs must focus on individual timber sale projects in their litigation. Challenges to plans are generally unavailable due to ripeness. But if the major impacts from timber sale projects are cumulative—e.g., how multiple timber sale projects

29. *Id.* at 736 (noting that review of unripe actions such as plans "threatens the kind of 'abstract disagreements over administrative policies' that the ripeness doctrine seeks to avoid") (citation omitted). There are exceptions to the ripeness requirements for review of plans. Courts will review allegations of procedural errors in the development and promulgation of plans—most importantly including compliance with environmental review requirements under the National Environmental Policy Act (NEPA). *Id.* at 737. Courts will also review decisions in planning documents that will result in immediate on-the-ground impacts, such as opening or closing public lands to motorized vehicle use. *Id.* at 738.

30. 16 U.S.C. §§ 1604(g)(3)(B), (E)(i), (E)(iii) (2012).

in a National Forest collectively fragment and degrade habitat for old-growth forest species—then challenging individual timber sales may not be an effective approach either. After all, each individual project may not have a significant negative impact that a plaintiff can readily demonstrate to a court. But challenging the collection of timber projects may run into reviewability concerns if a court understands that challenge as a programmatic, rather than a project-specific, lawsuit.[31] Of course, plaintiffs might try to aggregate multiple decisions into a single lawsuit, but that adds to complexity and cost—both based on gathering the relevant facts about the potential harms of a project and on the additional legal complexity of aggregating those kinds of claims.

B. Who Can Raise Challenges

Most significant in terms of limiting who can seek review of public lands management decisions are standing requirements. Plaintiffs have to demonstrate that they have specifically suffered or will suffer a concrete injury—a mere probability or likelihood of injury is usually insufficient.[32] This requirement can make challenges to national regulations more difficult. For instance, in *Summers v. Earth Island Institute*, the environmental plaintiffs challenged whether a Forest Service revision to agency procedures for providing notice of proposed development projects was adequate.[33] When the agency resolved the dispute over the specific project that the plaintiffs had litigated and had established harmed their interests, the question arose about whether the plaintiffs could still challenge the national regulation that had been the basis for dozens of other agency projects.[34] While the dissent noted the near certainty that the plaintiffs had been specifically harmed by one of these other projects on a national basis, that was not enough for the majority, which held that the plaintiffs had to establish that a particular project had definitively harmed (or would harm) them.[35]

Summers can be in part understood as requiring a particularized showing of harm based on a particular action in a particular place in order to meet standing requirements. So read, *Summers* is consistent with earlier Supreme Court case law that has required plaintiffs to demonstrate with geographic specificity that they have

31. *See* Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000) (*en banc*) (dismissing challenge to timber sales in Texas National Forests on grounds that the claims were not to a specific agency action, citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990)).

32. *See generally* Massachusetts v. EPA, 415 F.3d 50 (2007).

33. 555 U.S. 488, 490–92 (2009).

34. *Id.* at 496–500.

35. *Compare id.* at 505–10 (Breyer, J., dissenting), *with id.* at 496–500 (majority opinion).

been harmed by an agency action.[36] In *Lujan v. National Wildlife Federation*, the plaintiffs alleged that they suffered from aesthetic harms from the possible opening of millions of acres of federal lands to mining activities.[37] The Court held that these allegations were insufficient to support standing to challenge even individual decisions to open federal lands to mining because they were too generalized in space.[38]

The practical significance of these standing barriers is twofold. First, they can facilitate the government's role, as a repeat litigation player, in strategically choosing which cases to pursue and which ones to settle. By settling cases with unfavorable facts that have implications for national regulations, the government can use standing barriers to prevent plaintiffs from challenging the underlying regulations.

Second, and similar to the ripeness and specific agency action doctrine above, this standing doctrine has the effect of moving litigation away from challenges to large-scale agency decisions or programs and towards individual agency actions. Again, this can make it more difficult for plaintiffs to challenge overall agency policies they dislike or to raise questions about the cumulative impacts of agency decisions.

The other major barrier that is based on the identity of the plaintiff is exhaustion requirements—plaintiffs must have participated in administrative processes around the land management decisions before they challenge those decisions in court. These requirements are based in specific statutes, not the default provisions of the APA.[39] Most prominent of these specific statutes imposing exhaustion requirements is the Healthy Forests Restoration Act (HFRA), which imposes strict exhaustion requirements on plaintiffs seeking to challenge forest restoration projects covered under the statute.[40]

The practical implication of these exhaustion requirements is that they require additional investment of time and energy by plaintiffs when they challenge individual projects. Thus, they in effect complement the reviewability doctrines above—while those

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36. For an overview of this case law, *see* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505 (2008).

37. 497 U.S. 871, 886 (1990).

38. *Id.* at 887–89.

39. Those default provisions generally do not impose exhaustion requirements on plaintiffs, except when the agency requires by regulation that exhaustion occur and suspends the operation of the challenged decision until the administrative proceedings have completed. *See* 5 U.S.C. § 704 (2012). These regulatory requirements are relatively uncommon in public lands.

40. *See* 16 U.S.C. § 6515 (2012) (requiring parties seeking to challenge a project under the act to submit comments on the environmental analysis for the project and to participate in the predecisional administrative review process before they can litigate).

doctrines make challenging anything but individual, specific projects harder, the exhaustion requirements also raise the bar for challenging those individual, specific projects.[41]

IV. UNDERSTANDING THE IMPLICATIONS OF THE CASE LAW

As the overview of this case law makes clear, there is a lot of truth to the conventional wisdom. The Court and Congress have steadily erected barriers to challenges to federal public lands management agency decisions by plaintiffs—by channeling plaintiffs into challenges against individual projects and then (in certain circumstances) raising the barriers to challenges against individual projects as well. Moreover, all of the relevant Supreme Court cases have involved environmental groups challenging public lands management agency decisions. Thus, there is a story to be told about how reviewability doctrines are asymmetric, with environmental plaintiffs receiving the short end of the stick.

However, the nature of the litigation record is to some degree an artifact of who is in charge of the public lands and what kinds of options different interest groups choose to challenge public lands management decisions. The reviewability case law spans an arc over the past thirty-five years or so—of which about twenty years are covered by Republican presidencies, with the executive branch generally more favorable to development interests than environmental interests. In other words, for a good chunk of time in which the reviewability doctrines have developed, we have seen a lot of case law of environmental groups challenging public lands decisions precisely because that is the outcome of the political landscape.

Moreover, different interest groups may prefer to use different tools to challenge administrative agency decisions. While there are exceptions,[42] in general, environmental groups have pursued litigation, while industry and development groups have pursued congressional action to challenge executive agency decisions they do not like. That is in part because of structural characteristics in Congress that favor development interests in Western states—small

41. The tightened exhaustion requirements are often combined with streamlined administrative and environmental review processes that reduce the ability of the public to participate in decision-making, as in HFRA. *See, e.g., id.* § 6514 (restricting scope of environmental review for certain Forest Service projects); *id.* § 6515(a)(2) (time frame for predecisional challenges to certain Forest Service projects).

42. For instance, in 2009 Congress enacted legislation allowing for expedited reversal of a George W. Bush Administration revision of ESA regulations. *See* Allison Winter, *Interior Sends Revised Endangered Species Rule to OMB*, N.Y. TIMES (Apr. 24, 2009), http://www.nytimes.com/gwire/2009/04/24/24greenwire-interior-sends-revised-consultation-rule-to-om-10669.html.

population Western states that continue to heavily rely on resource extraction for economic development all have two senators, outweighing more populous states with different preferences. It is also in part because during the past thirty-six years, there has only been four years in which there has been a Democratic president with a fully Democratic Congress;[43] industry and development interests have had capacity to use Congress to challenge presidential land management decisions. Finally, and most speculatively, industry and development interests may feel they have better potential to succeed through the use of appropriations riders and other legislative tools to overturn agency decisions they oppose, rather than litigation.

One reason industry and development interests might pursue legislative remedies more than litigation has to do with the underlying legal regimes for the public lands management agencies. In contrast to the reviewability doctrine, the underlying statutory provisions tend to weigh in favor of environmental interests rather than industry: the enforceable substantive standards tend to protect environmental interests, rather than industry or development interests.

As an example, consider an agency decision to lease a particular parcel of land under the Mineral Leasing Act (MLA).[44] The MLA gives agencies broad discretion about whether and how to lease federal public lands for mineral development (principally but not exclusively coal, oil, and gas).[45] Because of this broad discretion, the Supreme Court has dismissed challenges by industry to particularized decisions by agencies about whether to issue leases in specific places.[46] One lower court went so far as to hold that individual decisions not to lease are unreviewable because of the broad agency discretion whether to lease means plaintiffs have no standing.[47] On the other hand, an environmental group dissatisfied with an agency decision to lease a particular parcel of land would have a range of options to pursue—whether the agency properly complied with the environmental review requirements of NEPA, whether the agency's leasing decision is consistent with

43. More generally, in the past thirty-six years there have only been eight years of unified government.

44. 30 U.S.C. §§ 181–287 (2012).

45. *See id.* § 181; *see also* 30 U.S.C. § 189 (2012) (authorizing the Secretary of Interior "to do any and all things necessary to carry out and accomplish the purposes of this chapter")

46. *See* Udall v. Tallman, 380 U.S. 1, 4 (1965); *see also* Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965).

47. *See* Marathon Oil Co. v. Babbitt, 966 F. Supp. 1024, 1026 (D. Colo. 1997).

the underlying land management plans,[48] or whether there are endangered or threatened species in the area that receive protection under the ESA, among others.

In short, one reason that we see more environmental cases in which reviewability doctrines are applied to exclude environmental plaintiffs is that litigation provides more upside for environmental plaintiffs given the landscape of the relevant substantive law. But that does not tell us much about the extent to which those reviewability doctrines would, or would not, apply to industry challenges to an adverse land management decision.

In fact, there is no reason to think that these reviewability doctrines would not have as much bite for industry plaintiffs as for environmental plaintiffs. For instance, consider a Forest Service regulation that provided substantial, additional public notice and comment provisions before the issuance of a timber sale contract. The effect of the regulation is to substantially raise the costs of timber sales for the agency, making them less likely to occur. For one thing, it would be difficult for a timber industry association to establish standing to challenge the regulation, because it would have to establish that (a) there was a particular timber sale that did not occur because of the regulation, and (b) one of the association's members would have received the sale. That would be exceedingly difficult to accomplish, especially given the standing rules established in *Summers*.[49] Similarly, a planning document that significantly reduced the total acreage available for logging would likely be unreviewable as unripe.[50]

V. LOOKING TOWARD THE FUTURE

One plausible prediction for the next four to eight years is that it will recapitulate much of the prior twenty years—a swing in

48. 43 U.S.C. § 1732(a) (2012) (requiring agency to manage public lands "in accordance with . . . land use plans").

49. *See, e.g.*, Fed. Forest Res. Coal. v. Vilsack, 100 F. Supp. 3d 21, 42–44 (D.D.C. 2015) (rejecting challenge by industry to revisions of planning rule issued by Forest Service because plaintiffs could only provide speculation that rule would reduce timber production, citing Summers v. Earth Island Inst., 555 U.S. 488 (2009)).

50. This would be particularly true if the plan kept the same total amount of timber that was predicted to be harvested, as required under 16 U.S.C. § 1611(a). This level is a ceiling of total timber production that can occur on the forest in the next ten-year period, so if that ceiling is not lowered, there would be no on-the-ground decision for timber interests to challenge in the plan, so long as some land was still available for harvest. However, if a plan did reduce the total amount of timber that can be harvested from a forest, that might create standing and a reviewable decision. *See e.g.*, Mountain States Legal Foundation v. Glickman, 92 Fd.3d 1228, 1335–38 (D.C. Cir. 1996) (finding standing for timber industry challenge to forest plan that reduced total amount of timber to be harvested from national forest).

the pendulum of public lands management as one administration replaces another.

But what about longer term? Understanding the long-term imperative of reducing fossil fuel consumption and combustion to address climate change, policymakers will have to consider steps to keep coal, oil, and natural gas in the ground rather than in the atmosphere. This is the basis for the "Keep It in the Ground" movement, which has pursued its objectives through lobbying and litigation.[51] Activists have argued that the President, through unilateral authority, can terminate the issuance of new fossil fuel leases.[52]

To what extent would those decisions be judicially reviewable? If the agency follows the right procedural steps—in particular NEPA review and requirements that the agency report relevant decisions to Congress[53]—then it is not clear that they would be reviewable at all. This might be particularly true if the agency framed its policy as a series of independent, individual, low-level decisions—similar to how the Reagan Administration conducted its review of whether public lands should be open to mining in the early 1980s. Individual decisions about whether to lease individual parcels seem like the quintessential "day-to-day" management decision that courts have said they should not become entangled with. Certainly, challenging such a program would run into questions about whether the challenge would be barred by *Lujan*. And a challenge to an overall agency decision about whether and how much to lease public lands for fossil fuels also seems like the kind of abstract policy decision that the Court in *Ohio Forestry Ass'n* cautioned courts against getting involved in. In other words, when the inevitable time comes when the public lands pendulum swings again and agencies are considering major steps to restrict development—particularly fossil fuel leasing—on public lands, the reviewability doctrines may protect those agencies as much then as they do now.

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51. *Keep It in the Ground*, *supra* note 5.

52. *See* CTR. FOR BIOLOGICAL Diversity, supra note 5.

53. *See, e.g.,* 43 U.S.C. § 1714(c) (requiring reporting requirements to Congress for Bureau of Land Management decisions to exclude one or more major uses from public lands). For an overview of the process, see generally Thomas R. Delehanty, *Executive Authority to Keep It in the Ground: An Administrative End to Oil and Gas Leasing on Federal Land*, 35 UCLA J. ENVTL. L. & POL'Y (forthcoming 2017).

VI. CONCLUSION—BROADER LESSONS FOR ADMINISTRATIVE LAW

The public lands reviewability cases also have broader lessons for the field of administrative law. Cases such as *Lujan v. National Wildlife Federation* and *Norton v. Southern Utah Wilderness Alliance* highlight important questions about the proper role of courts in "day-to-day" agency management. It is unclear the extent to which the APA was really intended or designed to deal with these kinds of issues. Much of the APA focuses on procedure and judicial review for high-stakes decisions to permit an individual party to do something (through licensing) or to control how a group of parties do something (through rulemaking). This is consistent with the standard theory of the APA as legislation that was focused on the disputes between New Deal regulatory agencies and the interests of regulated parties subject to a range of economic regulatory programs.[54]

The APA talks a lot less about how the agency constrains itself and manages its own operations. Indeed, the APA in theory exempts agency internal procedural regulations from notice-and-comment procedural requirements, and it also has an exemption from those notice-and-comment requirements for regulations concerning public property, grants, and administration.[55] A focus on specific agency action—the need to challenge individual agency decisions rather than attacking an agency's entire policy program—makes much more sense when the purpose of the APA is to guide or constrain individual licensing or regulatory decisions vis-à-vis regulated entities, decisions that have significant economic stakes.

But we are now into a new century in which human impacts on the planet become more and more pronounced and more and more significant. Many of those impacts are the result of the accumulation of a wide range of individually small but collectively significant activities.[56] Leasing of federal public lands for fossil fuel development has obvious implications for climate change. But there are many more decisions that are smaller scale but are also important. For instance, decisions about whether, when, and how to harvest trees from forests have implications for the ability of those forests to store and sequester carbon, and therefore these

54. *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 38–44 (1988).

55. *See, e.g.,* 5 U.S.C. § 553(a)(2) (2012) (exempting from procedural requirements for rulemaking agency decisions "relating to agency management or personnel or to public property, loans, grants, benefits or contracts"); *id.* § 553(b)(3)(A) (exempting from notice and comment requirements for rulemaking "rules of agency organization, procedure, or practice").

56. *See* Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. (forthcoming 2017).

decisions have important relevance for climate change. Grazing practices on rangeland may affect the ability of the soil to store carbon. And so on.

It is therefore harder and harder to identify decisions that are *de minimis* relative to the global challenges we face—the stakes will be higher for each of these small scale decisions as time goes on. That will put more and more pressure for a wide range of parties to challenge these decisions in court—putting pressure on an administrative law system that was more focused on major decisions rather than day-to-day management. Courts will have to decide whether they want to be drawn in or stay out.