As Rick has already noted, a couple of weeks ago the Supreme Court granted cert to review the Ninth Circuit's decision in U.S. Forest Service v. Pacific Rivers Council. Rick expressed pessimism about whether the Ninth Circuit's decision would be upheld in the Supreme Court. I think he's probably right about that, but there are different grounds upon which the Court might reverse, and it will matter a lot which grounds the Court chooses. The issues in this case are complicated, but they may have a significant broader impact on not just public lands litigation but environmental law. They are also another example of a pattern that I discussed in a recent blog post in which the Supreme Court has become increasingly skeptical of challenges to general government policies rather than specific government actions.

The case is an environmental group's challenge to the Forest Service's analysis of the environmental impacts of a revision to the forest plan that guides decision making on Forest Service lands in the Sierra Nevada. In 2004, the Bush Administration revised that plan to allow more logging on Forest Service lands. Pursuant to the National Environmental Policy Act (NEPA), the Forest Service prepared an environmental impact statement (EIS) examining the potential environmental impacts of the revision. PRC argued that the review did not adequately assess the impacts of increased logging on fish and amphibian species on Forest Service lands in the Sierra Nevada.

Up to now, this might just be seen as a garden variety lawsuit challenging a Forest Service land management decision. What makes it interesting (and why it's interesting the Supreme Court granted cert here) is that the government is arguing that these kinds of lawsuits shouldn't be heard by the courts in the first place – that the quality of the environmental review by the Forest Service shouldn't be litigated in court, at least not yet.

To understand why that might be, it's important to understand a little about how the Forest Service decisionmaking process operates. The agency is required by law to develop plans to guide its decisionmaking for the National Forests, and revise those plans on a regular basis. The plans do not necessarily have to directly produce on-the-ground impacts (e.g., specifically authorize a particular timber sale or construction of a particular road), and usually they don't (at least, not anymore). However, the plans do set an overall vision for the forest that often guides subsequent decisionmaking for site-specific projects. Moreover, the agency cannot implement site-specific projects that contradict the plan (e.g., issue a timber sale in an area of the forest that the plan indicates is unsuitable for timber harvesting).

Congress first imposed the planning requirements on the Forest Service in the mid-1970s, and over the next two decades there was a lot of litigation over whether those plans complied with substantive requirements Congress had imposed on the agency to protect environmental resources on National Forests.

But in 1998, the Supreme Court held in *Ohio Forest Ass'n v. Sierra Club* that courts could not hear challenges to the substantive adequacy of plan – e.g., whether the plans authorized too much logging on National Forests. Because plans generally didn't produce direct on-the-ground impacts – for instance, a later timber sale still required a subsequent decision by the agency, and the agency might never actually decide to do all the timber sales that a plan envisioned – the Supreme Court held that plans were generally "unripe" for judicial review. Plaintiffs who did not like the substance of plans had to wait until a site-specific decision (e.g., a timber sale) was implemented based on the plan. They could then challenge the substantive adequacy of the plan to the extent that the site-specific decision relied on the plan.

The Court, however, did indicate that there were two kinds of plan challenges that were ripe for judicial review. First, if the plan did directly authorize on-the-ground activities (e.g., opening or closing an area of a Forest to off-road vehicle use), then that specific aspect of the plan could be challenged immediately. Second, the environmental review of the impacts of the plan pursuant to NEPA could be challenged at the time the plan was issued.

It is this second exception that the government is asking the Court to reconsider in this case. It's a bold move. While the NEPA ripeness exception is technically dicta (since there were no NEPA challenges at issue in the *Ohio Forestry* case) and therefore not a binding rule, *Ohio Forestry* was a unanimous decision authored by Justice Breyer. While there has been some turnover on the Court since then (four new members, Roberts, Alito, Kagan, and Sotomayor), the government will have to still get at least one justice (and probably more) to change their minds from the prior case. The most probably group that might vote for the government here is Scalia, Thomas, Roberts, Alito, and either Kennedy or Kagan (Kagan is a possibility given her prior advocacy of significant executive power).

Another reason why I'm skeptical the court will reach out for the ripeness ruling here is because there is another, simpler ground for the Court to adopt to reverse the Ninth Circuit: standing. In order for plaintiffs to challenge a government decision, they must show they have standing to sue, which includes showing that they have suffered a particularized and concrete injury-in-fact from the decision. In

the case of a timber sale, this is fairly easy to show – the environmental plaintiffs can present evidence that they hike and recreate in the area of the timber sale, and that is usually enough. But a problem for showing injury-in-fact arises when the government decision is much broader in geographic scope – like a forest plan.

The Supreme Court addressed this issue just a few years ago, in the *Summers v. Earth Island Institute* case that I mentioned in my previous post. Environmental plaintiffs sought to challenge Forest Service regulations that constrained appeals of environmental review documents. The Supreme Court held that the plaintiffs had not established standing because they had not shown how they were adversely affected by a particular project authorized pursuant to the regulations.

The government here is making the exact same argument as an alternative reason to reverse the Ninth Circuit: The plaintiffs have not submitted adequate affidavits to establish that they use and enjoy specific locations affected by timber projects authorized by the revised 2004 plan and the allegedly improper environmental review for that plan. And without that evidence, the Court might conclude that there is inadequate standing, just as in *Summers.*

Summers was a 5-4 decision with an enigmatic Kennedy concurrence. So the resolution of this case probably depends on how Kennedy votes. But note that the Court ruling for the government in this case requires no vote-switching at all relative to the decision in *Summers*, unlike the ripeness argument.

So why does this all matter? This case is part of a long history of drawn-out litigation between the Forest Service and environmental groups in the Ninth Circuit and across the country over forest management. The agency has argued that this litigation has prevented it from taking active steps to manage fire risks and respond to climate change; environmental groups often suspect that those management efforts are just a front for commercial timber operations.

But if this case is just about delaying challenges until site-specific decisions occur, won’t environmental groups just raise those challenges then, raising the same problems for the agency? Yes, but it will inevitably be more costly for environmental groups to keep track of a wide range of site-specific decisions and choose the project that is most appropriate for a subsequent challenge. Moreover, it’s unlikely that a successful challenge to one decision implementing a plan because of flaws in that plan will result in the entire plan being rendered invalid. Each timber sale or other site-specific decision has its own context and its own

specific impacts. Thus, it should be fairly easy in most cases for the agency to argue that even if one particular timber sale is struck down based on flaws in the plan, different contexts or circumstances might mean that other projects are still permissible. Even if environmental groups won with respect to one decision, it might be very hard for that decision to translate into broader success. That of course does not mean that as a policy matter the Forest Service is in the wrong here. If you think there's too much litigation about forest management, that environmental groups are too concerned about logging on public lands, and/or you generally trust Forest Service decisionmaking, less litigation is a good policy outcome.

There's another reason why this decision matters for public lands management. There are a wide range of decisions that really are best decided at the plan level, and there are a wide range of environmental impacts that are best analyzed at the plan level. As an example of the former, the kinds of monitoring programs that an agency uses to determine impacts of its decisionmaking on Forest resources like wildlife are systemic decisions that are best made consistent across the entire Forest, rather than being decided in an ad hoc way from project to project. It's unlikely that a court would consider these issues at all, or have a good context for deciding them, when faced with a particular challenge to an individual timber sale, where the big-picture issues so essential to understanding the validity of a monitoring program will be hard to discern.

As for impacts best analyzed at the plan level, a classic example is the "death by a thousand cuts," where an important environmental resource (e.g., an endangered species) has its habitat degraded bit by bit by lots of individual projects. The impact of each of those projects is individually small, such that it may not seem like a big deal when considered on its own. But the cumulative impacts of all of the decisions may be devastating. Again, these are the kinds of impacts that are hard for courts to understand or for plaintiffs to explain, again because the focus is on one individual action.

In the end then, this case involves a question of which risk we think is more dangerous. On one side, the high litigation and administrative costs of doing these kinds of environmental impacts analyses and ensuring outside review of the analysis may deter the agency from doing all sorts of useful and important proactive management steps that might help the environment (or not, again, depending on your perspective). On the other side, the risk that we'll end up only looking at the individual decisions and miss the big-picture, cumulative impacts of

all of the decisions put together.

And framed that way, it’s also clear that this issue has broader ramifications for environmental law. So many of the harms we worry about in environmental law result from the accumulation of lots of small, individual decisions. From an environmental advocates perspective, often the best way to get a handle on those harms politically and legally is to try and look at the big picture. But the Court’s ripeness and standing doctrines might make that increasingly hard to do.

In terms of which grounds for reversal has broader implications, standing is probably the doctrine with less impact. A ruling based on standing allows advocates to use careful declarations to still get into court – while that may be tricky, especially if there isn’t yet any implementing decisions, it at least makes it possible. A blanket ripeness ruling would shut environmental groups out of court entirely in these kinds of cases. So if the Court is going to reverse, the route it chooses will be very important.