IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE WILDERNESS SOCIETY; AMERICAN WILDLANDS; and PACIFIC RIVERS COUNCIL, Plaintiffs, vs. MARK REY, Under Secretary of Agriculture, Natural Resources and Environment; ANN VENEMAN, Secretary of Agriculture; and DALE BOSWORTH, Chief, United States Forest Service, Defendants.	CV 03-119-M-DWM ORDER

I. Introduction and Factual Background

Plaintiffs Wilderness Society, American Wildlands, and Pacific Rivers Council challenge the U.S. Forest Service's promulgation of three regulations that are intended to implement the 1992 Forest Service Decisionmaking & Appeals Reform Act

("ARA"). Before the Court are motions for summary judgment by all parties.

In 1992, Congress passed the 1992 Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322, 106 Stat. 1419 (1992)(codified as 16 U.S.C. § 1612 note.). The statute requires the Secretary of Agriculture, through the Chief of the Forest Service, to establish a public notice and comment process for projects implementing certain land and resource management plans and to modify the appeals procedure for such decisions. ARA § 322(a). The Forest Service first promulgated regulations to fulfill its duties under the ARA in 1993. On December 18, 2002, the Forest Service published proposed revised regulations in the Federal Register, took comments on them, and then published final new regulations on June 4, 2003. See Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582 (2003)(codified as 36 C.F.R. § 215); Administrative Record ("A.R.") Doc. No. 75.

The provisions of the revised regulations to which Plaintiffs object are 36 C.F.R. § 215.20(b), which states that "[d]ecisions of the Secretary of Agriculture or Under Secretary, Natural Resources and Environment are not subject to the notice, comment, and appeal procedures set forth in this part. A decision by the Secretary or Under Secretary constitutes the

final administrative determination of the Department of Agriculture"; 36 C.F.R. § 215.13(a), which narrows the parties holding a right to appeal from those who have notified the Forest Service of their interest in the proposed action to those who have filed "substantive comments"; and 36 C.F.R. § 215.12(f), which exempts from the regulations all Forest Service projects that have been "categorically excluded" from public comment under the National Environmental Policy Act ("NEPA").[1]

II. Analysis

Plaintiffs, Defendants, and Intervenors have all filed motions for summary judgment. Defendants assert jurisdictional arguments challenging standing and ripeness in addition to their substantive arguments. Intervenors join these jurisdictional arguments.

A. Jurisdictional arguments

1. Standing

Defendants claim Plaintiffs have failed to establish a "concrete and particularized" injury sufficient to convey standing. Defendants argue that the deprivation of an "opportunity to participate in the Forest Service administrative process," as alleged in the Complaint, is not cognizable as an

[1]In Plaintiffs' brief in support of their motion for summary judgment, they also ask for 36 C.F.R. § 215.4(a) to be remanded. This request is not in the Complaint and is therefore not properly before the Court on the parties' motions for summary judgment.

injury that bestows standing. A general interest in having laws and procedures followed is not sufficient to establish standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-574 (1992).

Plaintiffs respond that they face an "injury in fact" in two ways. First, they face an environmental injury because they use the natural areas that may be harmed, in Plaintiffs' view, by these new regulations, which may allow activities to proceed to which Plaintiffs would object. Second, Plaintiffs claim they suffer an "informational injury," an injury that arises when one is deprived of information to which one is legally entitled.

The burden of establishing standing falls on Plaintiffs. Defenders, 504 U.S. at 559.

> First, the plaintiff must have 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. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 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. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-561 (citations, internal quotation marks omitted).

In Defenders, the Supreme Court concluded that the plaintiffs did not have standing for several reasons. That case considered the reach of the Endangered Species Act ("ESA") and whether its provisions requiring consultation applied to actions overseas funded in part by the United States. The Court

concluded that plaintiffs, though they expressed legitimate and deep interest in observing endangered species overseas, could not demonstrate that their hopes to do so, or to do so again some unspecified time in the future were sufficient to establish an imminent concrete injury. Id. at 564.

Defenders carefully maps the situations in which a plaintiff's concern for the environment can establish standing even when the individual is not the immediate object of government action. The Court explained:

> "When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." Id. at 561-562 (emphasis in original).

This situation does not fit easily into the dichotomy discussed in Defenders. On the one hand, the ARA regulates the Secretary of Agriculture and not Plaintiffs. On the other hand, the purpose of the ARA is to bestow a right on those who would wish to receive notice and comment, i.e., people similarly situated to Plaintiffs, whose affidavits demonstrate their use of the notice and comment procedures. In Defenders, the ESA had nothing to do with individuals in the plaintiffs' position, but

rather was written for the benefit of endangered species. In this case, Plaintiffs are the object of "forgone action," in Defenders' terms, if they are entitled to notice and comment and certain appeals by law.

The Defendants here characterize Plaintiffs' claim as a "procedural injury," which Defenders makes clear is sufficient for standing only in limited circumstances. The Defendants' use the term "procedural" as it was used in Defenders, which addressed whether one has standing because one wants the procedures of the ESA to be followed, regardless of whether the law vests the plaintiff with a particular role in that procedure. Plaintiffs also refer to their injury as an injury to "procedural rights," but they understand those rights to be much more substantial. Plaintiffs mean that the law guarantees for them a particular procedure, i.e., notice and comment, and not a particular result.

In this instance, Plaintiffs' injury, if it is deprivation of congressionally-mandated notice and comment and appeals procedures, is more than the affront to all citizens that occurs any time the law is not followed. But in any case, the Defenders Court wrote, "We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." 504

U.S. at 573 n.8 (emphasis in original). See also Citizens for Better Forestry v. U.S.D.A., 341 F.3d 961, 969-70 (9th Cir. 2003). The thrust of the Defenders opinion is that a citizen does not have standing to sue simply because the law was not followed. 504 U.S. at 573-578. That is not the situation here, where citizens have been guaranteed certain rights of participation, and the Plaintiffs have been actively exercising those rights. See Spooner Dec., ¶¶ 4, 5, 7; Anderson Dec., ¶¶ 4-9. "The . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." Defenders, 504 U.S. at 578. The ARA, unlike the ESA at issue in Defenders, creates for the public a specific right, that is, the right to a notice and comment and appeals procedures.

Plaintiffs claim a likelihood of environmental injury if they are not allowed to comment on and appeal forest management decisions. Congress created the notice and comment period in order to ensure public participation and thereby improve decision making through greater information, but the right created by the ARA is not the right to better decisions; it is the right to comment and appeal, regardless of the eventual outcome. Plaintiffs' affidavits demonstrate how they use the areas affected by the Service's action and are therefore injured by their inability to participate, as allegedly mandated by law, in

the management of those areas, but the danger of specific environmental effects resulting form the Plaintiffs' exclusion from the process does not itself confer standing.

This injury is sufficiently concrete and particularized because the harm is the loss of the opportunity to comment and appeal, not the specific impact or lack thereof of the Plaintiffs' comments. Plaintiffs "need not assert that any specific injury will occur in any specific national forest that their members visit. The asserted injury is that environmental consequences might be overlooked as a result of deficiencies in the government's analysis under environmental statutes." Citizens for Better Forestry, 341 F.3d at 971-972 (internal quotation marks omitted). The injury occurs before any negative environmental consequences. "This becomes particularly clear if we bear in mind the statutory source that defines appellants' right and imposes appellees' duty. That standing examination, in other words, must focus on the likelihood that the defendants' action will injure the plaintiff in the sense *contemplated by Congress*." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1516 (9th Cir. 1992) (emphasis in original). Because the ARA's purpose is to establish notice and comment and appeals procedures, deprivation of the procedures injures the Plaintiffs in a sense contemplated by Congress.

Plaintiffs also claim an "informational injury" as explained

in Federal Election Commission v. Akins, 524 U.S. 11 (1998). In Akins, a group of voters sued the Federal Election Commission for failing to require the American Israel Public Affairs Committee to disclose information regarding membership, contributions and expenditures under the Federal Election Campaign Act of 1971 (FECA). The plaintiffs' case was dismissed for lack of standing in the trial court. The United States Supreme Court reversed and remanded, concluding plaintiffs had standing under FECA.

> The injury of which respondents complain-their failure to obtain relevant information-is injury of a kind that FECA seeks to address . . . . Given the language of the statute and the nature of the injury, we conclude that Congress, intending to protect voters such as respondents from suffering the kind of injury here at issue, intended to authorize this kind of suit . . . . The "injury in fact" that respondents have suffered consists of their inability to obtain information . . . that, on respondents' view of the law, the statute requires that AIPAC make public . . . . [T]his Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to statute.

Akins, 524 U.S. at 20-21.

Plaintiffs point to ARA § 322(a) & (b)(1), which say "the Secretary shall give notice" of "proposed actions of the Forest Service" as creating a statutory right to notice that is thwarted, Plaintiffs allege, by the regulations in question. Defendants cite American Historical Association v. National Archives and Records Administration, 310 F. Supp. 2d 216 (D.D.C. 2004), as a rebuttal to Akins. In American Historical Association, the plaintiffs sued in order to gain access to

Ronald Reagan's presidential papers, which they claimed were being illegally withheld pursuant to an Executive Order. The district court concluded there that, because all unprivileged documents had been turned over by the time of the court's decision, there was no remedy that could redress the plaintiffs' future concerns.

The nature of an informational injury such as this one is that one would not know that action is being considered until it is too late and irreversible action as already been taken. Plaintiffs do not have to discover an action for which they were not provided notice and then sue to prevent the action on the basis of the ARA. The statutory injury, if it exists, is the violation of the obligation to provide notice. The Defendants' challenge to standing fails.

2. Ripeness

Defendants cite Lujan v. National Wildlife Federation ("NWF"), 497 U.S. 871, 891 (1990) to argue that promulgation of a regulation is not an action ripe for judicial review under the APA until the regulation has resulted in some concrete action that harms the Plaintiffs. Defendants contend the Court should wait until "Plaintiffs can identify an instance in which a provision of the Appeals Rule is actually applied to them in a manner that causes them injury." Def.'s Br. at 7.

Plaintiffs respond that when a party challenges a

regulation's facial conformity with its authorizing statute, the question is purely one of statutory interpretation that would not benefit from further factual development of the issues, citing Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 458 (2001).

In NWF, the Supreme Court wrote:

> Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided.[)]

NWF, 497 U.S. at 891."

In NWF, the rules at issue were Bureau of Land Management ("BLM") plans regarding "vast territories of land" and BLM's decision to grant permission for certain activities on these lands, to decline to take certain actions, and to take other actions if requested. In its very nature, then, the "rule" to which the case refers is different from the regulations in this case. These regulations are much more like the exception identified in NWF, in which a substantive rule forces a plaintiff

to change its conduct immediately. See Spooner, Anderson, Stix Declarations.

Ripeness requires the court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)(abrogated on other grounds, Califano v. Sanders, 430 U.S. 99 (1977)). Hardship requires "adverse effects of a strictly legal kind," which may exist when a regulation grants, withholds, or modifies any formal legal license, power or authority or creates legal rights or obligation. Ohio Forestry Assoc. v. Sierra Club, 523 U.S. 726, 733 (1998).[2] In addition, a dispute over a regulation may be ripe if it affects a person's primary conduct or causes him practical harm. National Park Hospitality Assoc. v. Dept. of the Interior, 538 U.S. 803, 810 (2003). In National Park, the Court found the regulation not ripe for review and concluded "the impact of the regulation could not be said to be felt immediately by those subject to it in conducting their day-to-day affairs." 538 U.S. at 810.

In this case, those subject to the regulation, i.e., Plaintiffs who make use of the notice and comment and appeals procedures, have found their day-to-day affairs impacted already

[2]As an example of why the Ohio Forestry plaintiffs' case was not ripe, the Supreme Court wrote, "Thus, for example, 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." In this case, of course, that is exactly what Plaintiffs allege. 523 U.S. at 733.

by the regulation. The nature of the modification of a notice and comment procedure is necessarily immediate—if one depends upon an agency for notice and the agency changes its policy to withhold notice, one is at a loss to know if the lack of notice is meaningful on any particular day. The Defendants would have Plaintiffs wait until a project that has been excluded from the comment and appeal process reaches the implementation stage, and then use the legal process to temporarily halt the project while the parties litigate the issue. In that case, the real benefit of the administrative appeals process, i.e., a mechanism by which the Forest Service can respond to citizen input without engaging in a legal dispute, has already been lost. Waiting until a particular project has been excluded will not provide the Court with more information about the merits of this claim but will result in increased harm to Plaintiffs. Plaintiffs are already on the doorstep of harm. The case is ripe for decision.

3. Sovereign Immunity

Although not raised by the Defendants, the sovereign immunity of the United States presents an additional jurisdictional problem in this case. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538 (1980)

(quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The Plaintiffs in this case have failed to allege a waiver of sovereign immunity in their Complaint. Compare e.g. Wilderness Society v. Rey, CV 01-219-M-DWM, Complaint dated December 18, 2001 (Doc. No. 1), ¶¶ 18 & 21 (alleging violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706).

Because of the Plaintiffs' failure to allege a waiver of sovereign immunity, they will be required to show cause why their Complaint should not dismissed for lack of subject matter jurisdiction. However, in the event Plaintiffs are able to show cause why the Complaint should not be dismissed or otherwise cure the jurisdictional problem, the Court will move on to consider the case on the merits.

B. Motions for Summary Judgment

Plaintiffs' allege three violations of the Appeals Reform Act by promulgation of 36 C.F.R. § 215.20(b), § 215.13(a), and § 215.12(f). In analyzing a rule promulgated by an agency to implement a statute, the court uses the two-step procedure developed in Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-845 (1984).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own

> construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> . . .
>
> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.
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> . . .
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subject to agency regulations.

Chevron, 467 U.S. at 842-844

A facial challenge to a regulation will be reviewed under an even more deferential standard. Reno v. Flores, 507 U.S. 292, 301 (1993). That some factual scenarios may exist in which a regulation would not be valid as applied does not make the regulation facially invalid. Rather, Plaintiffs must establish that no set of circumstances exist under which the regulation would be valid. Id. at 301.

1. First Cause of Action: 36 C.F.R. § 215.20(b)

The ARA directs the Secretary of Agriculture to establish a notice and comment process "for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. §§ 1601 et seq.)" and to "modify the procedure for appeals of decisions concerning such projects." The new 36 C.F.R. § 215.20, headed "Secretary's authority," provides:

> (a) Nothing in this section shall restrict the Secretary of Agriculture from exercising any statutory authority regarding the protection, management, or administration of National Forest System lands.
>
> (b) Decisions of the Secretary of Agriculture or Under Secretary, Natural Resources and Environment are not subject to the notice, comment, and appeal procedures set forth in this part. A decision by the Secretary or Under Secretary constitutes the final administrative determination of the Department of Agriculture.

It is this second paragraph that Plaintiffs find objectionable, claiming it contradicts the directive of the underlying statute. Defendants respond that Congress did not intend to "change the Secretary of Agriculture's delegated authority to make Forest Service land management decisions," and therefore the exclusion of Secretary-approved projects from the notice procedure is proper.

a. Collateral Estoppel

As a preliminary matter, Plaintiffs argue that this is the very issue decided by this Court in its 2002 decision in

Wilderness Society v. Rey, 180 F. Supp. 2d 1141 (D. Mont. 2002) ("Wilderness Society I"), and therefore Defendants are collaterally estopped from arguing the regulation is valid. In fact, Plaintiffs allege that 36 C.F.R. § 215.20 is an attempt to overcome a judicial ruling adverse to Defendants' position. In the 2002 case, Mark Rey, as Under Secretary of Agriculture, had signed the Record of Decision for the Bitterroot Burned Area Recovery project, maintaining that his approval constituted the final administrative determination for the project. Therefore, the administrative appeals process was never took place. This Court held that the failure to implement the appeals procedure established at the direction of Congress was unlawful and remanded the decision to the Forest Service for compliance with the ARA. The first question now before the Court is what binding legal effect, if any, does that decision have on the issue at hand in this case?

Plaintiffs claim that "[c]ollateral estoppel applies when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment," citing Arizona v. California, 530 U.S. 392, 414 (2000) (citations, internal quotation marks omitted). In Plaintiffs' view, this Court has already considered the issue of the legality of circumventing the appeals process through the signature of the Under Secretary and has decided it in favor of

Plaintiffs.

"The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Charles Alan Wright, Law of Federal Courts, § 100A, 724 (5th ed., West 1994). The finality requirements for issue preclusion have relaxed somewhat in the last few decades. Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 4434 (2005); Restatement (Second) of Judgments, § 13 (2004). Defendants are correct that generally and historically, a preliminary injunction is insufficiently final to warrant preclusive effect. But Plaintiffs are correct that this is not a hard and fast rule, and preliminary injunctions may occasionally preclude further litigation on an issue. Miller Brewing Co. v. Schlitz Brewing Co., 605 F.2d 990, 995-996 (7th Cir. 1979). Whether a ruling is sufficiently final to preclude future litigation of the same issue is a question left to the court's discretion. The factors to consider include the nature of the decision, the adequacy of hearing, and the opportunity to appeal. Wright & Miller, § 4434.

Here, caution favors deciding the issue on its merits. On the one hand, this Court's preliminary injunction order meets the requirements for a loosened finality standard: it was a

determination of a pure question of law, decided with full briefing and hearing, with a remand to the agency such that the decision suggested a final determination of that legal issue before this Court. Defendants had the opportunity to appeal the determination and did so. However, the parties settled the case before a final judgment on the merits was entered here, and Defendants dismissed their appeal of the preliminary injunction. Settlements generally do not result in a preclusive effect, except to the extent the document itself, as a contract between the parties, determines the scope of future duties between parties. Arizona v. California, 530 U.S. at 414. There was no discussion of the preclusive effect or lack thereof of the settlement in Wilderness Society I, but neither side conceded any legal issue, despite the Forest Service dismissing its appeal of the preliminary injunction. Line 10 of the Settlement Agreement states, "Nothing in this settlement shall be construed as an admission of fact or law by any party on any issue, including plaintiffs' claim that the Forest Service has violated the Appeals Reform Act." See CV 01-219-M-DWM (Doc. No. 57). Therefore, there was no final determination of the legal question.

Moreover, though the legal reasoning offered by the Plaintiffs in support of their position is the same in this action as the last, the enactment of the regulations through a

full notice and comment procedure is not immaterial. This is one of the Defendants' main arguments, that the first case questioned an interpretation of the statute itself in a specific factual context (the Bitterroot Burned Area Recovery Plan), whereas this one is a facial challenge of properly promulgated regulations. Therefore, the issue must be considered anew.

b. Substantive Analysis

Plaintiffs contend that 36 C.F.R. § 215.20 conflicts with the ARA because the ARA requires a notice, comment, and appeal system for all activities implementing a forest plan. The Defendants' argument is that Congress "did not attempt [through the ARA] to change the Secretary of Agriculture's delegated authority to make Forest Service land management decisions, and that the preservation of that authority in the new Appeals Rule is an appropriate interpretation of the ARA . . . ." Def.'s Br. at 8. The Defendants defend this proposition by relying on Chevron deference, claiming Congress "did not explicitly require that decisions implementing forest plans made directly by the Secretary or Undersecretary were to be made subject to the appeals process." Def.'s Br. at 9. The Defendants base this interpretation on the establishment of the notice and comment and appeals processes for "actions of the Forest Service," (ARA § 322(a) & (c)) and the retention of final appeals decisions in the Secretary (ARA §322(d)(4)). See also 7 C.F.R. § 2.12. Congress

would have known that the Secretary had authority to make forest land decisions, Defendants argue, and could have explicitly required that those too would be subject to notice, comment, and appeal.

The Defendants also argue that the structure of the appeals system is such that there is no one to review the decisions of the Secretary; therefore, his decisions must be exempt from review. Def.'s Br., 10; ARA § 322(c)(2). Defendants conclude that if all decisions must undergo formal review, the Secretary would be prohibited, contrary to his delegation, from making forest decisions, because they could not be reviewed. Defendants conclude the regulation is not "manifestly contrary to the statute" and therefore valid, citing Chevron, 467 U.S. at 844. Def.'s Br. at 11. Defendants also point out that the public will still be involved in decision making through the National Environmental Policy Act ("NEPA").

Plaintiffs rely heavily on this Court's decision in Wilderness Society I, concluding that the signature alone of the Under Secretary cannot transform a Forest Service decision about land management into something else exempt from the ARA.

Step one of the Chevron analysis requires the court to look at the face of statute to see if Congress spoke to this issue directly. Congress nowhere mentions the possibility that the Secretary himself would make "a decision of the Forest Service

concerning actions referred to in subsection (a), [i.e., projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974]." ARA § 322(c). Step two, then, is whether the agency's interpretation of the statute is "based on a permissible construction of the statute." Chevron, at 843. I conclude it is not.

Defendants point out the use of the phrase "notice and comment for actions of the Forest Service" and interpret that to mean decisions signed by the Secretary and Under Secretary are not reviewable. If the Court assumes Congress was familiar with the "background regulatory structure when it enacted the ARA," as Defendants say it must, then the conclusion drawn by the Defendants is not persuasive. They suggest that Congress assumed that a decision signed by anyone higher than the Chief of the Forest Service would be exempt from public participation. A more plausible interpretation is that Congress understood that nobody would be making Forest Service land management decisions who was not actually in the Forest Service—that land management would be done by the people responsible for managing the lands and responsive to the local community, not by the Secretary in Washington. If the purpose of the statute was to involve the public in the procedure for making decisions about National Forest lands, it is improbable that Congress intended to exempt

the most controversial decisions from the process. If Congress had wanted to exempt any forest land activities from notice, comment, and appeal, it could have written the ARA to do so. Congress did not. Section 215.20 is an attempt at an end run around Congress' clear intent for the public to have access to and a role in decision making on forest land management.

2. Second Cause of Action: 36 C.F.R. § 215.13(a)

The ARA reads, in paragraph (c):

> RIGHT TO APPEAL.--Not later than 45 days after the date of issuance of a decision of the Forest Service concerning actions referred to in subsection (a), a person who was involved in the public comment process under subsection (b) through submission of written or oral comments or by otherwise notifying the Forest Service of their interest in the proposed action may file an appeal.

The new regulation, 36 C.F.R. § 215.13(a), limits the right to appeal to "[i]ndividuals and organizations *who submit substantive written or oral comments* during the 30-day comment period for an environmental assessment, or 45-day comment period for a draft environmental impact statement." (Emphasis added.) Plaintiffs argue that this regulation creates a prerequisite to appeal (i.e., submission of substantive comments during the planning process) not authorized by the statute.

Defendants contend that it is "clear that one of Congress' purposes in establishing a notice and comment procedure through the ARA was to solicit and encourage *meaningful participation* from the public." Def.'s Br. at 14 (emphasis in original),

citing AR Doc. Nos. 1 & 2. That purpose is best effectuated, Defendants say, by limiting appeal to those who provide substantive comments, i.e., "[c]omments that are within the scope of the proposed action, are specific to the proposed action, have direct relationship to the proposed action and include supporting reasons for the Responsible Officer to consider." AR Doc. No. 75, pp. 16-17; 36 C.F.R. § 215.2; Def.'s Br. at 14-15.

Plaintiffs insist that the statutory language does not require substantive comment prior to appeal, and characterize the Defendants' argument as nothing more than an explanation of why the rule stated in § 215.13(a) would be a good idea. Plaintiffs also point out that now that the regulations require participation before a final decision is made, one may not know what problems the final project poses until it is too late to submit comments. In that case, an interested party compelled by law to comment prematurely may not be able to speak substantively about concerns that arise at a later stage of the proceedings.

Chevron requires deference to an agency interpretation when there is room for interpretation. In this instance, the statute precludes Defendants' interpretation, and the Court need go no further than the plain language of the statute. Chevron, 467 U.S. at 842-843. By giving the right to appeal to those who comment or "otherwise notify[]" the Forest Service, Congress cast a deliberately wide net. The point of the statute is to

increase public participation, which the statute does by conferring the right to appeal upon a broad range of planning process participants who have notified the Forest Service of their interest, either through submission of comments or "otherwise." The Forest Service cannot, on its own initiative, reduce the scope of the right to appeal created by the statute. In the interest of streamlining or expediting the appeals process, the Forest Service appears to be trying to limit access to the process, and that contradicts the statute. If Congress had no specific notice and comment process in mind, the ARA could have consisted only of § 322(a), which instructs the Secretary to set up a procedure. Congress did not give the Secretary absolute discretion but rather gave some parameters. Included among those parameters was an expansive right to appeal, and the Forest Service cannot limit that right through regulation. Section 215.13(a) is invalid.

3. Third Cause of Action: 36 C.F.R. 215.12(f)

The new § 215.12(f) reads, in part: "Decisions and actions not subject to appeal: The following decisions and actions are not subject to appeal under this part, except as noted: . . . (f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS pursuant to FSH 1909.15, Chapter 30, Section 31." Categorical exclusions are exempted from NEPA's environmental analysis provisions because they are

determined to have an insignificant effect on the environment. 40 C.F.R. § 1501.4(a)(2). Plaintiffs argue that Congress enacted the Appeals Reform Act specifically to guarantee the right to public notice, comment, and appeal of all National Forest logging projects, and that the new regulation would undermine that statutory purpose.

Defendants claim that "Congress delegated to the Forest Service the responsibility for delineating which projects should be subject to notice, comment and appeal, and which should not, and the Forest Service has reasonably determined that activities that do not have a significant impact on the environment should be exempted from the extensive . . . process." Def.'s Br. at 16. Congress passed the ARA in response to the Forest Service's 1992 regulations regarding notice and comment. One of the 1992 regulations would have eliminated appeal of projects categorically excluded under NEPA. Defendants claim here that Congress did not specifically rebut this regulation, as they did another proposed regulation, and therefore Congress did not intend for the ARA to supercede the Forest Service's regulation on this point. Defendants interpret the statutory language making the ARA applicable to "projects and activities implementing land and resource management plans" as delineating between administrative appeals of forest plans and project level decisions, rather than defining a comprehensive or set of

activities. See AR Doc. No. 75, p. 5 (68 Fed. Reg. 33, 585); Def.'s Br. at 17. By this, Defendants mean that when the ARA says it applies to all of those activities, it is making clear that administrative appeals must be available for both forest plan level and projects, not that all of those projects must always be appealable. Defendants call this a gap left by Congress for the agency to fill, relying on the first step of the Chevron analysis, and conclude that the Forest Service filled the gap appropriately. Defendants also argue that Congress did not intend for the comment and appeals rule to apply to projects that have minimal environmental impact, and the NEPA process's categorical exclusions are a good method for determining which projects will have minimal impact.

Plaintiffs' reject the contention that Congress left a gap to be filled by the Secretary, relying upon the legislative history, in which Senator Fowler states that the law's purpose was to ensure the public's "right to appeal a timber sale decision of the Forest Service." AR Doc. No. 75, p. 5; 138 Cong. Rec. at S11,643. Plaintiffs also oppose the Defendants' use of the Forest Service's 1992 proposal as an interpretive tool for the ARA. Plaintiffs claim Defendants have mischaracterized the 1992 proposal by saying that it exempted NEPA categorically excluded projects, because the proposal "uniformly sought to exempt all National Forest projects." Pl.'s Br. at 18 (emphasis

in original). Plaintiffs then interpret Congress' rebuttal of this Forest Service proposal by the statutory language to mean that all projects should be included. Finally, Plaintiffs reject the role of NEPA analysis as a proxy for ARA participation. Plaintiffs point to Congress' interest in and focus on citizen participation—the environmental impacts of the planned activities are not a trigger for notice and comment; instead, notice and comment are required for every decision making process.

Defendants' interpretation is a contrived reading of the plain language of the statute. If a law applies without exemption, an agency may not use regulations to carve out exemptions. Moreover, NEPA serves its own independent purpose, which is environmental review. Congress would have had no reason to enact the ARA if it felt it could rely on NEPA's extant notice and comment provisions. The Defendants argue that the only actions that will evade notice and comment here are either emergencies, which already have an ARA exemption, or are insignificant, in which case they are already exempt from NEPA. But Congress enacted the ARA with NEPA already in the background. Congress must have intended to do something more or ARA would be superfluous. The Court will not assume Congress intended to pass a statute that adds nothing to the current legal fabric. What the ARA added was an assurance that the public would be involved in all decision making. The ARA is a statute with independent

force and effect; neither Forest Service regulations nor NEPA's categorical exemptions are capable of eroding the effect of the ARA until it is nothing more but a gesture of intent. Section 215.12(f) is invalid.

III. Order

Based on the foregoing, the challenged regulations are invalid as contrary to the ARA. However, as noted earlier, the Court is without jurisdiction to issue a remedy because of the Plaintiffs' failure to allege a waiver of sovereign immunity.

Accordingly, it is therefore HEREBY ORDERED that within 20 days of the entry of this order, Plaintiffs shall cure the defect in their Complaint or show cause why the case should not be dismissed for lack of jurisdiction.

DATED this 29th day of March, 2006.

DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT