Standing in the Desert: Prudential Standing in *Wilderness Society v. Kane County*

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STANDING IN THE DESERT:
PRUDENTIAL STANDING IN WILDERNESS
SOCIETY v. KANE COUNTY

LISA S. GREENBERG *

Abstract: Kane County, Utah stripped federal land in southern Utah of signs prohibiting off-road vehicles. Despite pleas from The Wilderness Society (TWS), a conservation organization, the county passed an ordinance legalizing its actions. TWS filed suit, claiming the Supremacy Clause of the U.S. Constitution prohibited the county from interfering with federally authorized signs. On January 11, 2011, an en banc opinion of the Tenth Circuit Court of Appeals denied prudential standing to TWS. The court characterized the case as a property dispute, finding that TWS was impermissibly asserting the rights of the federal government. This Comment explores how the court’s analysis neglected the individual harms asserted by TWS’s members and applied the rules of prudential standing without deference to the separation of powers concept from which they arose.

Introduction

Federal land in southern Utah encompasses a vast network of famous canyons, stunning vistas, and architectural rock formations. In 1996, President Clinton designated a staggering 1.7 million acres of rugged terrain as the Grand Staircase-Escalante National Monument (Monument). The Monument is split into three main regions. The first is a staircase of more than 6000 vertical feet of multi-colored sedimentary rock layers stretching approximately 150 miles between Bryce Canyon

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1 Southern Utah Parks & Monuments, S. Utah’s Kane County, http://www.kaneutah.com/southern-utah-national-parks.cfm(last visited Apr. 3, 2012). Other famous areas in Kane County include Bryce Canyon, Zion National Park, Lake Powell, and the north rim of the Grand Canyon. Id.
and the northern rim of the Grand Canyon. Second, the Kaiparowits Plateau is a fossil-rich, arid landscape covering more than 800,000 acres across southern Utah. The third region features the vast maze of the Canyons of the Escalante, spanning almost 7000 feet in elevation and including water-carved sandstone features, such as plummeting canyon walls, rock pedestals, arches, and natural bridges.

Though the federal government controls the Monument area through the Bureau of Land Management (BLM), it did not object when local authorities declared a right-of-way over closed roads in the Monument area. To protect the area from off-road vehicle traffic, members of The Wilderness Society (TWS), a leading conservation organization, brought suit against the local authority, Kane County, Utah. Ultimately, the Tenth Circuit Court of Appeals, sitting en banc, ruled in Wilderness Society v. Kane County (Wilderness Society IV) that TWS “does not assert a valid right to relief on its own.” The court held that TWS lacked prudential standing, a threshold requirement necessary for a federal court to hear a case.

This Comment first discusses the facts and procedural history of Wilderness Society. Then it explains the evolution of the rules for prudential standing and their relationship to the separation of powers embodied in the U.S. Constitution. Finally, Section III argues both that TWS’s individual harm provides the group with standing and that proper application of the separation of powers concept underlying prudential standing would allow TWS to sue.

I. Facts and Procedural History

In the mid-1800s, the federal government actively promoted economic development and settlement in the West, including southern...
Utah, by allowing pioneers to construct and use roads on unreserved public lands.\textsuperscript{14} Revised Statute 2477 (R.S. 2477), enacted in 1866, embodied Congress’s pro-development lands policy.\textsuperscript{15} R.S. 2477 stated that, “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”\textsuperscript{16} Such rights-of-way allowed people to travel freely through federally owned land and simultaneously promoted the development of rural private land.\textsuperscript{17} The right-of-way required no formal procedures or acceptance by the federal government and became effective with the creation of a “highway” over lands not reserved for public use.\textsuperscript{18}

In 1976, with the need for expansion subsided and federal attention shifting towards conservation and environmental protection, Congress repealed R.S. 2477 by passing the Federal Land Policy and Management Act (FLPMA).\textsuperscript{19} Though the FLPMA prevented the establishment of new rights-of-way, existing rights-of-way remained intact.\textsuperscript{20}

More recently, a BLM plan for the Monument excluded off-highway motor vehicle use from previously used R.S. 2477 routes.\textsuperscript{21} This change followed increased worries that the roads and nearby lands could be permanently degraded.\textsuperscript{22} To implement the closures, the BLM put up numerous signs prohibiting off-highway motor vehicle use along the closed roadways.\textsuperscript{23} The BLM plan, however, stated that the

\textsuperscript{14} Lindsay Houseal, Wilderness Society v. Kane County, Utah: A Welcome Change for the Tenth Circuit and Environmental Groups, 87 Denv. U. L. Rev. 725, 726 (2010).
\textsuperscript{16} Ch. 262, § 8, 14 Stat. at 253.
\textsuperscript{17} See S. Utah Wilderness Alliance, 425 F.3d at 740–41.
\textsuperscript{18} Id. at 741; Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988), overruled by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir. 1992). The Tenth Circuit has limited the definition of “highways.” Wilderness Soc'y v. Kane Cnty. (Wilderness Soc'y IV), 632 F.3d 1162, 1181 (10th Cir. 2011) (en banc) (Lucero, J., dissenting) (discussing how “R.S. 2477 rights have been falsely claimed over dry creek beds, horse and hiking trails, and jagged rock outcroppings”).
\textsuperscript{20} § 701, 90 Stat. at 2786; Wilderness Soc'y IV, 632 F.3d at 1166.
\textsuperscript{21} Wilderness Soc'y IV, 632 F.3d at 1166 (noting the plan prohibited off-highway motor vehicles such as snowmobiles and all-terrain vehicles).
\textsuperscript{22} Brief of Appellees at 7 Wilderness Soc'y v. Kane Cnty., 581 F.3d 1198 (10th Cir. 2009) (No. 08–4090), 2008 WL 6058884.
\textsuperscript{23} Id.
current restrictions on the use of the land were “subject to valid existing rights.”

In March 2003, Kane County, the county in which the Monument is located, asserted that it had such a valid existing right under R.S. 2477 to access closed roads in the Monument area. The County demanded that the BLM remove its signs and proposed temporary solutions to the dispute. The BLM refused to remove its signs. Later that year, after sending a hostile letter to the BLM, Kane County took down more than thirty federal signs restricting access to the contested right-of-way. The County wrote a second threatening letter to the BLM describing its actions and left both the letter and the confiscated signs outside a BLM office.

In early 2005, Kane County put up its own signs, opening the previously closed roads to all forms of off-highway motor vehicle use. In response to the increased pressure from the County, the BLM sent the County a letter ordering it to stop erecting its own signs on the disputed lands. Instead, the County enacted an ordinance in August 2005 that opened county roads to off-highway vehicle use. The ordinance did not specifically discuss federal lands, but clearly authorized the County’s actions. As Justice Lucero would later note in his dissent, “the county declared an all-terrain vehicle ‘vroom-vroom’ free-for-all.”

On October 13, 2005, The Wilderness Society and other environmental organizations filed a complaint against Kane County in the United States District Court for the District of Utah. TWS claimed that the County’s removal and replacement of the federal signs, as well as the enactment of the county ordinance authorizing the posting of the signs, conflicted with existing federal law designating the routes as closed to off-highway motor vehicle use. TWS argued that the federal

24 Wilderness Soc’y IV, 632 F.3d at 1166.
25 See id.
26 Id. at 1182 (Lucero, J., dissenting).
27 Id. at 1166 (majority opinion).
28 Id.
29 Id. at 1182 (Lucero, J., dissenting).
30 Wilderness Soc’y IV, 632 F.3d at 1182 (Lucero, J., dissenting).
31 Id. at 1166 (majority opinion).
32 Wilderness Soc’y v. Kane Cnty. (Wilderness Soc’y III), 581 F.3d 1198, 1206 (10th Cir. 2009), vacated en banc, 632 F.3d 1162 (10th Cir. 2011).
33 Wilderness Soc’y IV, 632 F.3d at 1166.
34 Id.; see Brief of Appellees, supra note 22, at 11.
35 Wilderness Soc’y IV, 632 F.3d at 1182 (Lucero, J., dissenting).
36 Id. at 1165, 1167 (majority opinion).
37 Id. at 1166–67.
plans preempted the County’s plans under the Supremacy Clause of the U.S. Constitution.\textsuperscript{38}

In 2006 the County moved to dismiss the suit on the grounds that TWS lacked standing.\textsuperscript{39} The court denied the County’s motion, holding that TWS had proven constitutional standing and did not need to prove prudential standing because they had invoked the Supremacy clause.\textsuperscript{40} Following the denial of the County’s motion to dismiss, the County rescinded the ordinance purporting to authorize its actions.\textsuperscript{41} The decision to rescind the ordinance rested on the County’s conclusion that such a concession would sway the court in its favor.\textsuperscript{42} The County, however, refused to remove all the signs authorizing off-highway motor vehicle use on the federal land, and the conflict persisted.\textsuperscript{43}

In May, 2008 the court granted TWS’s motion for summary judgment, holding that both the county ordinance and the county signs conflicted with federal law and violated the Supremacy Clause.\textsuperscript{44} A panel of the Tenth Circuit Court of Appeals subsequently affirmed the decision.\textsuperscript{45} The panel held that TWS had standing, and that the County could not exercise its rights-of-way in a manner conflicting with the federal regime without first proving that it had valid R.S. 2477 claims.\textsuperscript{46}

The County petitioned for a rehearing en banc, and the court granted its request.\textsuperscript{47} On January 11, 2011, the Court of Appeals, sitting en banc, held that TWS lacked prudential standing to sue.\textsuperscript{48} Accordingly, the Court of Appeals vacated the summary judgment order and remanded the case for dismissal.\textsuperscript{49}

\section*{II. Legal Background}

The Court of Appeals for the Tenth Circuit’s inquiry into TWS’s prudential standing is grounded in the court’s recognition of the need

\begin{itemize}
\item \textsuperscript{38}See \textit{Id.} at 1165; see \textit{U.S. Const. art. VI, cl. 2.}
\item \textsuperscript{39}Wilderness Soc’y v. Kane Cnty. (\textit{Wilderness Soc’y I}), 470 F. Supp. 2d 1300, 1307 (D. Utah 2006).
\item \textsuperscript{40}Id. at 1308.
\item \textsuperscript{41}\textit{Wilderness Soc’y IV}, 632 F.3d at 1167.
\item \textsuperscript{42}Id. at 1182 (Lucero, J., dissenting).
\item \textsuperscript{43}See \textit{id.}
\item \textsuperscript{44}Wilderness Soc’y v. Kane Cnty. (\textit{Wilderness Soc’y II}), 560 F. Supp. 2d 1147, 1166 (D. Utah 2008), aff’d, 581 F.3d 1198 (10th Cir. 2009), vacated en banc, 632 F.3d 1162 (10th Cir. 2011).
\item \textsuperscript{45}Wilderness Soc’y III, 581 F.3d at 1205, 1226.
\item \textsuperscript{46}Id. at 1213, 1221.
\item \textsuperscript{47}\textit{Wilderness Soc’y IV}, 632 F.3d at 1164.
\item \textsuperscript{48}Id. at 1164, 1165.
\item \textsuperscript{49}\textit{Id.} at 1174.
\end{itemize}
for limited judicial power.50 Fundamentally, this is a separation of powers concept.51 The idea of separation of powers was central in the founding of the United States, and is evidenced by the system of checks and balances in the U.S. Constitution.52 This system prevented the concentration of power, which the founders viewed as a root of tyranny.53 Prudential standing embodies the separation of powers concept that was so important during the founding.54 Thus, like the checks and balances between the branches of government, the self-imposed standing requirements are founded in recognition of a need for a limited judicial role in government.

The standing requirements check the court’s power by limiting the number of plaintiffs who may have their disputes decided by the court.55 Plaintiffs must satisfy both Article III constitutional standing requirements57 and prudential limitations created by courts to curb their own power.58 Since prudential standing derives from the judiciary’s own sense of prudent self-governance—and not the Constitution—it may be overridden by statute.59 Such constraints on the federal court’s jurisdiction focus and limit the reach of the federal judicial power.60 Thus, within the judicial branch, the standing requirement is “an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”61

50 Wilderness Soc’y v. Kane Cnty. (Wilderness Soc’y IV), 632 F.3d 1162, 1168–72 (10th Cir. 2011) (en banc) (examining the historical origins of prudential standing and applying the rationale to the decision); see Warth v. Seldin, 422 U.S. 490, 498 (1975).
51 See Warth, 422 U.S. at 498.
52 See The Federalist Nos. 47, 51 (James Madison).
53 See id.
54 See Warth, 422 U.S. at 500.
55 See id. at 498.
56 See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004); Warth, 422 U.S. at 500.
57 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Constitutional standing, not at issue in Wilderness Society IV, derives directly from the Article III requirement that a plaintiff must clearly state a “case-or-controversy.” Id. Plaintiffs must prove that they have suffered a concrete injury, that there is a causal connection between the injury and the conduct alleged that is traceable to defendant’s action, and that a favorable decision by the court will likely redress the injury. Id at 560–61. Constitutional standing requirements may not be overridden by statute or judicial intervention and directly restrict the cases the court may hear. See id. at 560.
58 See Elk Grove, 542 U.S. at 11–12.
59 See Warth, 422 U.S. at 501.
60 See id. at 500.
More specifically, the self-imposed prudential limitations are firmly rooted in the separation of powers doctrine . . . ."\(^{62}\) Courts have even explicitly stated that "separation-of-powers considerations properly find a place in judge-made prudential aspects of standing."\(^{63}\) In *Warth v. Seldin*, the U.S. Supreme Court found that absent prudential standing limitations, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions . . . ."\(^{64}\) Prudential standing limitations ensure that a plaintiff has personally suffered an actual injury and possesses a right to action.\(^ {65}\)

Courts have historically recognized two prudential limitations: (1) the prohibition against generalized grievances and (2) the prohibition against third party standing.\(^ {66}\) The prohibition against generalized grievances prevents parties from suing when their injuries are shared equally among a large class of persons.\(^ {67}\) In *Allen v. Wright*, the Court denied standing to a multi-state group of African-American parents who sued the Internal Revenue Service for failing to implement guidelines on denying tax-exempt status to racially discriminatory private schools.\(^ {68}\) The Court held that a mere assertion that the government was not enforcing its own laws did not create standing to sue.\(^ {69}\) The *Allen* court drew its holding from the separation of powers doctrine, recognizing that a different holding for the plaintiffs would require the court "to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."\(^ {70}\)

The prohibition against third party standing prevents a litigant from raising legal claims that belong to a third party.\(^ {71}\) This was the central issue in *Wilderness Society IV*.\(^ {72}\) In general, this prudential standing rule avoids litigation over rights that the harmed party may not wish

\(^{62}\) Id. (discussing the Court’s decision in Warth).
\(^{63}\) Id.
\(^{64}\) 422 U.S. at 500.
\(^{65}\) See id. at 501 (noting a plaintiff must "allege a distinct and palpable injury to himself").
\(^{66}\) Allen v. Wright, 468 U.S. 737, 751 (1984). Some courts have recognized a third "zone of interest test." Id. The Tenth Circuit suggested that such a test would not apply in preemption cases such as this one. Wilderness Soc’y v. Kane Cnty. (*Wilderness Soc’y III*), 581 F.3d 1198, 1217 n.11 (10th Cir. 2009), vacated en banc, 632 F.3d 1162 (10th Cir. 2011).
\(^{67}\) Warth, 422 U.S. at 499.
\(^{68}\) 468 U.S. at 739–40.
\(^{69}\) Id. at 754.
\(^{70}\) Id. at 761.
\(^{71}\) Elk Grove, 542 U.S. at 12.
\(^{72}\) 632 F.3d at 1171–72.
It also assures the court that the party with the most at stake, who is theoretically also the best advocate, is the party bringing the lawsuit. This rule ensures "that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation." In *Elk Grove Unified School District v. Newdow*, the plaintiff, a parent of disputed custodial rights, was denied standing to sue on behalf of his daughter. The rule against third party standing as articulated in *Newdow* limits the Court's rulings to those constitutional questions that involve a concrete individual harm. Thus, in *Newdow*, the plaintiff's disputed custodial position left the Court unwilling to allow him to speak for his daughter. By restricting the types of cases they may hear, courts ensure that plaintiffs have a concrete and particularized interest in the case. This rule also enhances the separation of powers by preventing courts from deciding broad questions of abstract significance, thereby intruding into the province of other branches of government.

The third party standing requirement, however, allows exceptions in limited circumstances. In order to defeat the general rule against third party standing, the litigant must demonstrate a close relationship with the injured party and a genuine obstacle that prevents the right-holder from protecting his own interests in court. Often, courts have permitted third party standing "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." Thus, in *Griswold v. Connecticut*, when a physician was convicted of illegally giving contraceptive advice to married patients, the Court allowed the physician to assert the rights of the married persons whom he advised. These exceptions require that the plaintiff prove a concrete and particularized injury, thereby ensuring

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74 Id.
76 542 U.S. at 17-18.
77 See id. at 11.
78 See id. at 17-18.
79 See Warth, 422 U.S. at 500.
80 Id.
82 Id. at 130.
84 381 U.S. at 481.
that the harm is not too abstract for justiciability or more appropriate for consideration by another branch.\textsuperscript{85}

\section*{III. Analysis}

In \textit{Wilderness Society v. Kane County}, the Tenth Circuit Court of Appeals held that TWS lacked prudential standing because it was asserting a third party’s rights over the roadways.\textsuperscript{86} The court held that the rights in question belonged to the federal government.\textsuperscript{87} This ruling, however, neglected to take into account the individual harms to the local Wilderness Society members caused by the off-highway use of the roads.\textsuperscript{88} Had the court recognized the recreational and aesthetic harm to TWS’s members, independent of any harm to the United States, the court’s ultimate holding would have been different.\textsuperscript{89} Furthermore, the en banc court blindly applied the prudential standing rules without considering their historic rationale.\textsuperscript{90} This irrational application of the rules neglected the separation of powers policy underlying the prudential standing considerations.\textsuperscript{91} If the court had considered those goals along with TWS’s individual harm in applying the prudential standing rules, TWS would have had standing.\textsuperscript{92}

\textit{Wilderness Society IV} is distinctive among environmental cases because the central issue turns on prudential standing and not on a distinct cause of action conferred by statute.\textsuperscript{93} Despite this unique charac-

\textsuperscript{85} See Warth, 422 U.S. at 500.
\textsuperscript{86} Wilderness Soc’y v. Kane Cnty. (\textit{Wilderness Soc’y IV}), 632 F.3d 1162, 1170 (10th Cir. 2011) (en banc).
\textsuperscript{87} Id. at 1171.
\textsuperscript{88} See Wilderness Soc’y v. Kane Cnty. (\textit{Wilderness Soc’y III}), 581 F.3d 1198, 1210 (10th Cir. 2009), vacated en banc, 632 F.3d 1162 (10th Cir. 2011).
\textsuperscript{89} See infra notes 93–104 and accompanying text.
\textsuperscript{90} See infra notes 105–127 and accompanying text; see also Allen v. Wright, 468 U.S. 737, 751 (1984) (criticizing the mechanical application of the constitutional standing doctrine).
\textsuperscript{91} See infra notes 105–127 and accompanying text.
\textsuperscript{92} See infra notes 105–127 and accompanying text.
\textsuperscript{93} The majority of cases focusing on environmental issues discuss either constitutional standing (with no prudential standing analysis) or focus on the prudential “zone of interests” test. See, e.g., Massachusetts v. EPA, 549 U.S. 497 (2007) (discussing only constitutional standing); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (discussing only constitutional standing); Sierra Club v. Morton, 405 U.S. 727 (1972) (discussing whether the Sierra Club had an environmental injury-in-fact, a constitutional requirement); Mount Evans Co. v. Madigan 14 F.3d 1444 (10th Cir. 2008) (finding no constitutional standing, and discussing only the zone of interests test with regards to prudential standing); Utah Shared Access Alliance v. Carpenter, 463 F.3d 1125 (10th Cir. 2006) (discussing only the prudential zone of interests test); Am. Mining Cong. v. Thomas, 772 F.2d 640 (10th Cir. 1985) (finding no
terization, the majority decision framed the issue in the case as one of contested property rights between two landowners, the BLM and Kane County.\textsuperscript{94} Thus, it concluded that TWS “lack[ed] any independent property rights of its own” and consequently TWS was not permitted to assert the rights of the federal government.\textsuperscript{95} As Judge Lucero indicated in the dissent, however, “title of the United States to the property at issue was never properly challenged.”\textsuperscript{96} Thus, the property dispute should not have been the focus of the decision.\textsuperscript{97}

By mischaracterizing the nature of the dispute, the court failed to distinguish the individual harms asserted by TWS members from the unrelated property dispute.\textsuperscript{98} Allowing off-highway vehicle use on the contested roadways unambiguously harms the members’ “health, recreational, scientific, spiritual, educational, aesthetic, and other interests.”\textsuperscript{99} Consequently, off-highway vehicle use on the contested roadways directly “negatively impact[s]” the members’ interests.\textsuperscript{100}

Had the court properly characterized TWS’s members’ interest in the case, it would have recognized that the individual harms TWS asserted in its attempt to enjoin Kane County’s actions gave TWS standing before the court, independent of any harm to the BLM’s property rights.\textsuperscript{101} Courts should not hide behind the prudential standing limitations when “plaintiffs seek redress for their own injuries under their own causes of action.”\textsuperscript{102} As here, where a plaintiff is advocating for his own rights based on a concrete injury, the basic prudential concerns about standing are typically satisfied so long as the constitutional prerequisites are met.\textsuperscript{103} Recognizing such independent harms would have

\begin{itemize}
  \item \textsuperscript{94} Wilderness Soc’y IV, 632 F.3d at 1171.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id. at 1182 (Lucero, J., dissenting).
  \item \textsuperscript{97} See id.
  \item \textsuperscript{98} See id.
  \item \textsuperscript{99} Wilderness Soc’y III, 581 F.3d at 1210. One of the members declared that she enjoyed “hiking . . . camping, birdwatching, discovering fossils and archaeology, study, contemplation, solitude, photography, and other activities” near the contested roadways. \textit{Id.} She described how she preferred the land where off-highway vehicles are prohibited, and has visited areas near the contested land multiple times a year since 2003. \textit{Id.} Another member asserted similar interests and harms. \textit{Id.} at 1211.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} See Wilderness Soc’y IV, 632 F.3d at 1190 (Lucero, J., dissenting).
  \item \textsuperscript{102} See id.
\end{itemize}
required the majority to decide in favor of the environmental plaintiffs.  

In addition to ignoring the individual harms to TWS members, the court did not consider the separation of powers concept at the root of the prudential standing rules. As illustrated in *Elk Grove, Allen*, and *Warth*, the prudential standing doctrine rose directly out of the judiciary’s concern for the proper, limited role of the judicial system in government. Here, the court blindly applied the rigid rules of prudential standing without proper consideration of why those rules exist. TWS’s injuries place it within an exception to third party standing—when enforcement of the challenged restriction against the litigant (TWS) would directly impact a third party’s rights (BLM). Thus, where the plaintiff has demonstrated a direct, concrete injury, the prudential standing rules should not be a bar to court adjudication of the issue.

A primary concern of the third party standing rule is that the litigant may not be the best advocate for the rights in question. Adversarial trials require that both parties advocate vigorously and present the best legal arguments for their position. Additionally, courts worry that the party whose rights are asserted may not wish to have its rights litigated. Typically, this rule enhances the separation of powers by preventing the courts from deciding cases that have abstract significance to the parties. By refusing to issue decisions in such cases, courts are less likely to intrude into the province of the other branches of government.

A worry that a litigant may not be the best advocate for the rights in question, however, ought not to be a consideration when the party is asserting its own individual harms or a right in which it has a major

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104 See Wilderness Soc’y IV, 632 F.3d at 1190 (Lucero, J., dissenting).
105 See id. at 1169–72 (majority opinion) (discussing TWS’s prudential standing without reference to the separation of powers).
107 See *Wilderness Soc’y IV*, 632 F.3d at 1170–72 (discussing TWS’s prudential standing without reference to separation of powers).
108 See *Warth*, 422 U.S. at 510.
109 See *Wilderness Soc’y IV*, 632 F.3d at 1190 (Lucero, J., dissenting).
113 *Warth*, 422 U.S. at 500.
114 Id.
Here, TWS members have a strong personal concern for the preservation and conservation of the wild desert in southern Utah.\textsuperscript{115} In contrast, the BLM as a government entity “cannot suffer an aesthetic or recreational injury in its own right.”\textsuperscript{117} Furthermore, the BLM has no individual wants or needs, but is instead a conglomeration of individuals who may not have these environmental interests at heart.\textsuperscript{118} Thus, in many ways, the TWS members’ personal connection to the land makes them better advocates for the land’s preservation than the bureaucratic BLM.\textsuperscript{119} Consequently, because enforcement of the County’s actions against the BLM would directly harm TWS, the court ought to set aside its concern about deciding cases of abstract significance regardless of the party’s relationship to the case.\textsuperscript{120}

A second worry of third party standing is that the silent party may not wish for its legal claims to be asserted.\textsuperscript{121} “Disregarding the individual . . . choices of a . . . rightholder[] places the court squarely in the realm of deciding public norms—a role decried by the separation of powers purpose . . . .”\textsuperscript{122} Though the choice of the right-holder is of paramount importance, where that person is silent courts ought to undertake a nuanced, individualized assessment of the facts of each case to determine what the party’s silence truly means.

Here, the dissent argues that the fact that the BLM has not instituted legal proceedings against Kane County does not mean that the BLM does not want the court to proceed.\textsuperscript{123} In fact, such silence could be “just as easily interpreted as acquiescence to the plaintiffs’ actions.”\textsuperscript{124} The dissent notes that the BLM objected to the County’s erection of signs and enactment of the ordinance even before the suit was filed.\textsuperscript{125} Further, the agency was even briefly a party to the suit.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item See Duke Power Co., 498 U.S. at 80–81; see also Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (holding a physician had a major stake in the question of whether contraceptives could be distributed to married couples).
\item See Wilderness Soc’y III, 581 F.3d at 1210.
\item Wilderness Soc’y IV, 632 F.3d at 1190 (Lucero, J., dissenting).
\item See Wilderness Soc’y IV, 632 F.3d at 1190 (Lucero, J., dissenting); Wilderness Soc’y III, 581 F.3d at 1210.
\item See Warth, 422 U.S. at 499–500.
\item Duke Power Co., 438 U.S. at 80.
\item Wallace, supra note 111, at 1381 (specifically discussing Article III standing).
\item Wilderness Soc’y IV, 632 F.3d at 1191 (Lucero, J., dissenting).
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
dissent points out that the en banc majority interprets the agency’s current “silence as a clear denunciation of plaintiffs’ claims,” but there is no evidence of such condemnation. 127 Without confirmation that the choices of the right-holder are being disregarded, there is no reason for the court to disregard the affirmative harms the County’s actions would impose on TWS members. 128

Further, courts have explicitly allowed exceptions to the third party standing rule in cases where enforcement of the restriction against the litigant would indirectly harm the third party. 129 This is the case in this situation. The BLM will be injured by the court’s denial of prudential standing to TWS because ultimately county roads would traverse large portions of its land, contrary to BLM policy. 130 Thus, even the traditional prudential standing analysis calls for awarding standing to TWS in situations where its members face injury as third parties. 131

In Wilderness Society IV, the Tenth Circuit Court of Appeals held that TWS lacked prudential standing because it was asserting the BLM’s rights. 132 Had the court independently recognized the recreational and aesthetic harm to TWS’s members the court would have found that TWS had prudential standing. 133 Further, if the court considered the separation of powers goals in applying the prudential standing analysis, it would have recognized that allowing standing in this case was consistent with the separation of powers rationale. 134 In fact, such a holding would be consistent with a typical prudential standing analysis because enforcement of the challenged restriction would directly harm TWS members and the BLM. 135 Thus, the court ought to have undertaken an individualized assessment of the facts of the case prior to its decision.

Conclusion

The full environmental impact of the County’s actions in opening roadways in the Grand Staircase-Escalante National Monument to off-highway vehicle use may not be known for decades. There is no doubt,
however, that the Tenth Circuit’s en banc decision denying the environmental plaintiffs standing will dramatically affect protection of individual citizens’ aesthetic and recreational interests in the wilds of southern Utah.\textsuperscript{136} Instead of applying rigid rules to each situation, the courts ought to take into account the individual facts of each scenario and the reasoning behind the rules they are applying.\textsuperscript{137} Such considerations would drastically change the legal landscape for environmental plaintiffs.\textsuperscript{138}

The holding carelessly applied the prudential standing rules with no consideration of their underlying purpose, and it will have repercussions beyond the confines of the 1.7 million acres of the Monument.\textsuperscript{139} Further, the court’s decision will deny multitudes of individuals living near federal land or using the land the right to assert their own recreational and aesthetic interests.\textsuperscript{140}

\textsuperscript{136} See supra notes 93–104 and accompanying text.
\textsuperscript{137} See supra notes 105–127 and accompanying text.
\textsuperscript{138} See supra notes 105–127 and accompanying text.
\textsuperscript{139} Wilderness Soc’y v. Kane Cnty. (\textit{Wilderness Soc’y IV}), 632 F.3d 1162, 1195 (10th Cir. 2011) (en banc) (Lucero, J., dissenting) (equating the lawless repercussions of the decision to a “wild-west style fantasy” and stating that the majority decision gives “every state and local government in the circuit . . . a green light to flout federal law . . . . [T]he majority’s decision causes real and serious harm to the litigants, to the United States, and to the responsible residents of the affected communities . . . .”); Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 18, 1996).
\textsuperscript{140} Wilderness Soc’y IV, 632 F.3d at 1195 (Lucero, J., dissenting).