

No. 09-1639

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Sierra Club; Friends of the Boundary Waters Wilderness;
Defenders of Wildlife; and Northeastern Minnesotans for Wilderness,
Plaintiffs-Appellants,

vs.

Abigail Kimbell, Chief of the United States Forest Service;
and Tom Vilsack, Secretary of Agriculture,
Defendants-Appellees,
and

Minnesota Forest Industries, Inc.; Minnesota Timber Producers
Association; Lake County; All Terrain Vehicle Association of
Minnesota; Blue Ribbon Coalition, Inc.,
Intervenor Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

**AMICUS CURIAE BRIEF OF THE RUFFED GROUSE SOCIETY
IN SUPPORT OF APPELLEES, SUPPORTING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

The Amicus Curiae, Ruffed Grouse Society, is a non-profit corporation. It has no parent corporations within the meaning of Fed. R. App. P. 26.1, and no publicly-held corporation owns ten percent or more of its stock.

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APPEARANCE AND INTEREST OF AMICUS CURIAE

The Ruffed Grouse Society (“Society”) appears as *amicus curiae* pursuant to Fed. R. App. P. 29 and by express agreement of all parties to the litigation.

The Society is an international non-profit wildlife conservation organization established in 1961 and has over 18,000 members nationwide, representing 113 local chapters. The mission of the Society is to promote and create habitat associated with young forest species such as the ruffed grouse American woodcock, 43 species of neo-tropical songbirds, and other associated wildlife. Proper management of the National Forests is critical to the Society and the wildlife on whose behalf it advocates. The vast majority of its members live and recreate in the Great Lakes Region and the Northeast. Approximately 90% of Society members pursue ruffed grouse and American woodcock primarily on national forests and other public lands during fall hunting seasons. Society members use and enjoy areas within the Superior National Forest for hunting. Every year the Annual National Grouse and Woodcock Hunt is held in the Superior National Forest and is attended by hundreds of members and their families.

The Society is a leading wildlife conservation organization as demonstrated by its appointment by the Department of the Interior to a seat on the twelve member “Sporting Conservation Council”¹. The Society employs full-time, certified Regional Wildlife Biologists, including one exclusively covering the State of Minnesota, whose job is to monitor wildlife habitat trends of associated bird species and work closely with the state and federal agencies who manage the land, including the United States Forest Service. The Society has participated at every opportunity in the NEPA process that led to this decision, from the initial scoping, through the development of alternatives, to the workshops, hearings, and submission of comments on the draft Plan and DEIS. Specifically, the Society provided comments on the Revised Forest Plan, which is the subject of this litigation. The Society participated as *amicus curiae* in the district court.

¹Members of the Council recommend policies or programs designed to maintain or restore wetlands, forest and rangeland habitats, as well as policies or programs that promote access to hunting and recreation on federal lands.

INTRODUCTION

This case involves a challenge to the 2004 Final Environmental Impact Statement (“FEIS”) for the Revised Land Resource Management Plan (“Revised Forest Plan”) for the Superior National Forest. The Appellants contend that the adoption of the Revised Forest Plan violates the National Environmental Policy Act, 42 U.S.C. §§ 4332-4370a (“NEPA”) by failing to fully evaluate its effects upon the Boundary Waters Canoe Area Wilderness (“Boundary Waters”).

Pursuant to the National Forest Management Act 16 U.S.C. §§ 1600-1687 (“NFMA”), the management of the National Forest System occurs in three distinct levels. At the highest level, the Forest Service promulgates national regulations that set national guidelines or policies that future management plans must conform. 16 U.S.C. § 1604(g). At the next level, the Forest Service prepares a broad, programmatic zoning document for each national forest, called a land resource management plan or “forest plan”. 16 U.S.C. § 1604(a). A forest plan serves as a statement of intent but does not authorize or implement any specific activities or actions on the forest. The lowest level is where individual site-specific projects implement the forest

plan. Site-specific projects must be consistent with the overall programmatic document and must undergo a site-specific analysis under NEPA. 16 U.S.C. § 1604(i). This case deals with a challenge to the second level of the planning process.

STATEMENT OF THE CASE AND OF THE FACTS

The Ruffed Grouse Society adopts the Appellee, Abigail Kimbell, United States Forest Service's Statement of the Case and Factual Background.

ARGUMENT

I. Appellants Lack Standing To Challenge The Programmatic Revised Forest Plan

Standing is an essential element of the jurisdiction of the federal courts under Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In order to establish standing under Article III, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. Summers

v. Earth Island Inst., 129 S.Ct. 1142, 1149 (2009).

A. Appellants Have Not Alleged An Injury-In-Fact Caused By The Adoption Of The Revised Forest Plan

Injury-in-fact requires that “the party bringing the suit must show that the action injures him in a concrete and personal way” so that “the legal questions presented...will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context.”

Lujan, 504 U.S. at 581 (J. Kennedy and J. Souter, concurring) (internal citations omitted). The requirement of injury-in-fact is “a hard floor of Article III jurisdiction” of which the appellants bear the burden in establishing. Summers 129 S.Ct. at 1151.

In Summers, environmental plaintiffs challenged the Forest Service procedural regulations that implemented the Appeals Reform Act. The Forest Service used the new regulations to approve the Burnt Ridge Project, a timber sale on the Sequoia National Forest, via a categorical exclusion. Originally, the plaintiffs challenged the categorical exclusion as applied to the Burnt Ridge Project and also brought a facial challenge to the regulations used to approve it. However, after the district court granted a preliminary injunction the

plaintiffs settled their claims concerning the Burnt Ridge Project, but continued with their facial challenge to the regulations. The district court went on to invalidate five regulations and issue a nationwide injunction against those regulations. However, the Supreme Court concluded that any asserted injury in fact with respect to the Burnt Ridge Project, “ha[d] been remedied” as was no longer at issue.

Summers 129 S.Ct. at 1149. Therefore, the Court held that plaintiffs lacked standing to facially challenge the regulations. Further, the Summers Court clarified that standing cannot be found merely because a party alleges a procedural injury. The “deprivation of a procedural right without some concrete interest that is affected by the deprivation - a procedural right *in vacuo* - is insufficient to create Article III standing.” Summers at 1151. Because the plaintiffs could not point to a concrete application of the challenged regulations, their claims were merely presented in the abstract and were not justiciable because the injury-in-fact requirement was not satisfied. Id. at 1150. The Summers majority specifically rejected a theory that would recognize standing up on a mere showing of a “realistic” future threat as opposed to an “imminent” threat. Id. at 1152-53.

Like the plaintiffs in Summers, who had previously settled their challenge to the Burnt Ridge Project, the appellants have not identified any site-specific projects that would lead to a concrete, imminent injury. The Revised Forest Plan, like the planning regulations in Summers, “neither require nor forbid any action on the part of the [Forest Service]”. Summers at 1149. The appellants in this case have brought a challenge alleging a procedural right that is not tied to any concrete, imminent, site-specific injury.

Declarations submitted by the appellants fail to articulate any concrete actions that threaten them with imminent harm resulting from the adoption of the Revised Forest Plan. See Declarations of Carolyn J. Sampson at ¶8, Kris Wegerson at ¶8, Darrell Knuffke at ¶8, Anthony William Dix at ¶11, and Annah Garnder at ¶6, Tr. Doc. 121, Exhibit A.² These declarations do not offer anything aside from

² “The Forest Plan that was recently adopted by the Forest Service for the Superior National Forest deprives me and will continue to deprive me of the recreational, scientific, and aesthetic benefits that I derive from the Superior National Forest and the Boundary Waters Canoe Area Wilderness. In particular, as a result of the Forest Plan, my interests in maintaining species diversity, ensuring lynx conservation, preventing habitat fragmentation, increasing non-motorized recreation, and preserving the integrity of the BWCAW are being, and will continue to be harmed.”

conclusory statements of speculative recreational, ecological and aesthetic harm. They do not identify any specific, imminent actions caused by the Revised Forest Plan. In fact, the declarations differ little from those rejected in Summers, and Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990). (“averments which state only that one of the plaintiff’s members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of governmental action” is not enough to convey standing). Ultimately these declarations fail to allege an injury-in-fact.

Appellants argue in their brief that they have suffered an injury-in-fact because “the Forest Plan dictates management activities that may take place immediately adjacent to the Boundary Waters for the next ten to fifteen years.” Applt. Br. at 17. (emphasis added). This argument only confirms their lack of standing and ignores clear Supreme Court and Eighth Circuit case law. As the Supreme Court has repeatedly noted, there must be a “causal connection between the injury and the conduct complained of,” Lujan, 504 U.S. at 560-61. There is no such causal connection in this case. Instead, the

appellants' allegations that the Forest Service should have further analyzed *potential impacts* to the Boundary Waters from hypothetical future logging and recreation on the Superior National Forest calls for sheer speculation. Applt. 17. These complaints do not arise in adoption of the programmatic forest plan, but rather, in the *implementation* of the forest plan in future site-specific projects. (emphasis added). Just as it would have been mere speculation in Summers, to find that the challenged regulations threatened imminent harm to those plaintiffs' interests absent a concrete application of the regulations, the Revised Forest Plan threatens no imminent, concrete harm until it is applied through the implementation of site-specific projects.

As this Court has recognized, the approval of a programmatic forest plan does result in an imminent injury-in-fact. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994); accord Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729 (1998). Robertson is on all fours with the instant case. In that case environmental plaintiffs originally sought to challenge two specific logging projects in the Oauchita National Forest in Arkansas. The district court found that the

plaintiffs had failed to exhaust their administrative remedies in order to challenge those projects. On appeal the plaintiffs dropped their site-specific claims and raised only a facial challenge that the Ouachita Forest Plan, “not anchored to any particular proposed timber sales,” violated NFMA and NEPA. Id. at 757. However, without a tie to a site-specific action, the Court determined that the plaintiffs lacked standing. Specifically, the Court wrote:

The mere existence of the Ouachita Forest Plan does not produce an imminent injury in fact. A forest plan, such as the Ouachita Plan, is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire. First, a site-specific action (e.g., a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would ‘take [] us into the area of speculation and conjecture.’”

Id. at 758, quoting O’Shea v. Littleton, 414 U.S. 488, 497 (1974).

Robertson requires the appellants to identify a site-specific,

concrete action that is the cause-in-fact of their alleged injuries. This Court's analysis in Robertson fits squarely with the Supreme Court's most recently articulated requirement for standing in Summers. The Revised Forest Plan leaves the appellants free to bring a suit against any ground-disturbing project that injures its members. However, the appellants cannot establish an injury-in-fact by their current challenge to the Revised Forest Plan's analysis of the Boundary Waters in the absence of a site-specific action.

B. Appellants' Complaints Cannot Be Adequately Redressed By This Court.

The reason that standing is critical in the context of a forest plan challenge is evident when the Court considers the redressability requirement of the standing analysis. A reviewing court must be convinced that a favorable decision will prevent or redress the injury. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000). This component of the standing requirement surely reflects the constitutional limitation upon judicial power by ensuring that a party is asserting more than a mere interest in relief, but instead a right to relief that can be remedied by the court.

In this case the appellants leave the Court and parties to speculate as to how the Forest Service could comply with their requests. Appellants suggest that the FEIS is defective for failing to analyze how logging creates changes within the wilderness itself. Applt at 31. Despite their suggestion, the appellants fail to identify where or when, at what intensity or duration, or even where in relation to the Boundary Waters the logging will occur. Aside from a generalized request that the FEIS should have contained a discussion of how clearcutting can create so-called “edge effects”, it unclear how the appellants’ complaints can be remedied by this Court. Applt. At 31-32. It is unreasonable to expect that the Forest Service could put forth a site-specific type environmental analysis that charts effects from these potential projects on the Boundary Waters within the context of a broad programmatic EIS³. See Ohio Forestry, 523 U.S. at 736 (judicial review of a forest plan would be abstract without the focus of on-the-ground activities). To assume that the appellants’ alleged injury can be

³ Appellants citation to site-specific cases, Sierra Club v. Bosworth, 352 F.Supp. 2d 909 (D. Minn. 2005) (timber sale); Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174 (4th Cir. 2005) (construction of airstrip); Marble Mountain Audubon Soc’y v. Rice, 914 F.2d 179 (9th Cir. 1990) (timber sale); Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C.Cir. 2002) (airport expansion), only highlights their lack of standing.

redressed by the Forest Service's consideration of impacts on the Boundary Waters does not take into account that the appellants cannot meaningfully predict the location or timing of any imminent actions. Accordingly, the FEIS properly omits speculation about the impacts from specific future projects and instead reserves an in depth analysis until the day a specific project is actually proposed.

Merely because the appellants have not established standing in this case does not mean that a party can never establish standing in the context of a challenge to a forest plan.⁴ For example, a wilderness hiker who hears the noise resulting from an actual logging operation in the National Forest would have standing. Likewise, a wilderness user who actually sees a logging truck or smells the exhaust would have standing. Also, a wilderness visitor who is concerned about the aesthetics of a proposed clearcut adjacent to the wilderness would have

⁴It should be noted that this case does not involve a failure to produce an EIS and the appellants do not challenge the actual factual data collected and utilized by the Forest Service in creating the Revised Forest Plan. While it is possible that such a procedural deficiency in the underpinnings of a plan would not only be ripe but could meet the redressibility requirement, that issue is not before this Court. See Defenders of Wildlife, 504 U.S. at 572, n.7 (noting that one living adjacent to a dam has standing to challenge the failure to prepare an EIS); see Adrienne Smith, Standing and the National Environmental Policy Act: Where Substance, Procedure and Information Collide, 85 BULR 633 (April 2005).

standing. Those are all examples of specific actions that could affect the wilderness character or ecology of the adjacent Boundary Waters. However, the appellants here challenge only the broad policy choices made in the Revised Forest Plan. They challenge the programmatic document in the abstract and do not articulate a justiciable controversy. See Defenders of Wildlife 504 U.S. at 568 (a programmatic attack is “rarely if ever appropriate for federal-court adjudication.”). Affording the appellants standing to bring an action challenging solely the adoption of a programmatic forest plan would “interpose the federal courts as ‘virtually continuing monitors of the wisdom and soundness’” of National Forest administration by the Forest Service. DaimlerChrysler Corp. v. Cuno., 547 U.S. 332, 346 (2006).

In sum, because the Revised Forest Plan does not authorize or implement any specific actions, the appellants cannot make a showing of a concrete injury resulting from the mere approval and adoption of the Revised Forest Plan. Rather, the potential injuries claimed by the appellants can only occur when the Plan is actually implemented through site-specific projects. During the implementation of the Forest Plan through site-specific projects, such as logging or road-building, the

Forest Service will be required to consider, in detail, the projects' effects upon the Boundary Waters. At that point a court would be in a position to redress an actual injury-in-fact. However, because the appellants' alleged injuries are caused by the implementation of the Forest Plan and not the approval and adoption of the programmatic document, the appellants current NEPA challenge lacks an imminent injury-in-fact that can be redressed by this Court. Summers at 129 S.Ct. at 1149; and Robertson 28 F.3d at 758.

CONCLUSION

Because the Revised Forest Plan does not authorize or implement any specific actions, the appellants cannot make a showing of a concrete injury-in-fact resulting from the mere approval and adoption of the programmatic document that can be redressed by the Court. Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994); Summers v. Earth Island Inst., 129 S.Ct. 1142, 1151(2009). To the extent the appellants have standing to challenge the Revised Forest Plan, the Forest Service properly analyzed the overall effects of a broad, programmatic document upon the Boundary Waters.

The district court's judgment should be affirmed. *Amicus* thanks the Court for its consideration.

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**CERTIFICATION OF DISKETTE
AND WORD PROCESSING PROGRAM**

Pursuant to Rule 28A(d) of the Either Circuit Court Rules of Appellate Procedure, I hereby certify the enclosed computer diskette containing the full text of this amicus brief has been scanned for viruses using a commercial virus scanning program, which reports the files are virus-free. The brief was created using WordPerfect 12.

S/Ryan L. Woody
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,033 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and is one half the length authorized by the rules for the Defendant-Appelles' principal brief. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect 12 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2009, I served two copies of the foregoing brief upon all parties by first class mail delivery, along with one CD-ROM including an electronic copy, and also by email:

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