

**CASE NO. 03-1139**

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**CENTER FOR BIOLOGICAL DIVERSITY, et al.**  
*Plaintiffs-Appellants*

v.

**ROBERT LUECKEL, et al.**  
*Defendants-Appellees*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION**

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**PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING  
WITH SUGGESTION FOR REHEARING EN BANC**

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Brent Plater  
Center for Biological Diversity  
San Francisco Bay Area Office  
1095 Market St., Suite 511  
San Francisco, CA 94103  
Phone: 415-436-9682 x 301  
Fax: 415-436-9683  
bplater@biologicaldiversity.org

Matt Kenna  
Western Environmental Law Center  
679 E. 2nd Ave., Suite 11B  
Durango, CO 81301  
Phone: 970-385-6941  
Fax: 970-385-6804  
mkenna@animas.net

*Attorneys for Plaintiffs-Appellants  
Center for Biological Diversity, et al.*

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## **INTRODUCTION**

In 1992 Congress directed the U.S. Forest Service to (1) establish detailed river corridor boundaries by 1993, and (2) complete Comprehensive Management Plans by 1995, for several congressionally designated Wild and Scenic Rivers in the Ottawa and Hiawatha National Forests pursuant to the Wild and Scenic Rivers Act. It is now more than a decade past the deadlines established by Congress to complete these tasks, yet the Forest Service has failed to complete the discrete actions that Congress required the agency to take.

The merits of this case are not in dispute. The Forest Service has admitted violating the Wild and Scenic Rivers Act by failing to create management plans and establish detailed boundaries for each of the Wild and Scenic Rivers at issue in this case. However, the Sixth Circuit Panel in this matter has ruled that that the Plaintiffs-Appellants (hereinafter “the Center”) cannot prosecute its claims because the Center does not satisfy Constitutional standing requirements. The Panel’s opinion is in error because it misconstrues the very nature of the claims that the Center has brought as well as the requirements of the Wild and Scenic Rivers Act; because the opinion conflicts with at least two controlling Supreme Court precedents, including Norton v. Southern Utah Wilderness Alliance, 124 S.

Ct. 2373 (2004), and Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000); and because it conflicts with the Sixth Circuit's recent decision in American Canoe Ass'n v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536 (6<sup>th</sup> Cir. 2004). For all of these reasons the petition for rehearing with suggestion for rehearing en banc should be accepted by the Sixth Circuit.

## **ARGUMENT**

### **I. The Panel's decision misconstrues the nature of the Center's claims.**

In this matter, the Center alleges, and the Forest Service does not contest, that the Forest Service has failed to take two discrete actions that they are required to take under the Wild and Scenic Rivers Act. First, the Center alleges that the Forest Service has failed to establish detailed river corridor boundaries for each of the rivers in question by March 3, 1993, the deadline mandated by the Wild and Scenic Rivers Act for designating such boundaries. 16 U.S.C. § 1274(b). Second, the Center alleges, and the Forest Service does not contest, that the Forest Service has failed to create Comprehensive Management Plans for each of the rivers in question by March 3, 1995, the deadline mandated by the Wild and Scenic Rivers Act for creating such plans. 16 U.S.C. § 1274(d)(1). Because the Wild and Scenic Rivers Act does not contain a private right of action, the Center's causes of action were based on 5 U.S.C. § 706(1), which permits claims to

“compel agency action unlawfully withheld or unreasonably delayed.” (R. 7, First Amended Complaint, p. 14-15, Apx. Pgs. 43-44).

The Supreme Court has recently explained that such claims are justiciable. In Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004), the Supreme Court stated that a claim alleging “the failure to promulgate a rule or take some decision by a statutory deadline” is justiciable because the Administrative Procedure Act—the basis for the Center’s claims here—authorizes suit by “[a] person suffering legal wrong because of agency action” and because the Administrative Procedure Act defines the term “agency action” to include a “failure to act.” Id. at 2378. Thus, when a “a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take,” id. at 2379 (emphasis in original)—such as when an agency fails to create management plans and establish detailed river corridor boundaries by a date mandated by Congress—the plaintiffs have asserted an actionable claim.

The Sixth Circuit Panel, however, has determined that the Center’s claims are not “actionable” because the Center failed to show that “actual, site-specific activities are diminishing or threaten to diminish their member’s enjoyment of the designated river segments.” Op. 5. But this standard misconstrues the very nature of the Center’s case, and cannot be reconciled

with Norton. The Center does not challenge specific timber harvests or road construction here. Instead, the Center challenges the Forest Service's failure to take discrete agency actions that it is required to take, namely the Forest Service's failure to create management plans and designate river boundaries by the dates demanded by Congress. As shown above, the Supreme Court's opinion in Norton explains that such failures to act are actionable; there is no requirement that the Center pair these claims with challenges to site-specific, proactive actions in order to present justiciable claims. See also Sierra Club v. Marita, 46 F.3d 606, 611-12 (7<sup>th</sup> Cir. 1995) ("That the Service has yet to actually inflict the injury through the development of site-specific projects does not render the injury conjectural or speculative and therefore does not deprive plaintiffs of standing to challenge the plan."); Sierra Club v. Thomas, 105 F.3d 248, 252 (6<sup>th</sup> Cir. 1997) (Batchelder, J. concurring) ("I believe that the reasoning of the Seventh Circuit in Sierra Club v. Marita, 46 F.3d 606 (7<sup>th</sup> Cir. 1995) is the better approach to the issues of standing. . . .). Thus, the Center need not show that other agency actions are diminishing or threatening to diminish its member's enjoyment of the Wild and Scenic Rivers: the Center need only show that the Forest Service's failure to prepare management plans and designate river boundaries has impaired its member's interests in seeing river values protected and enhanced.

## **II. The Panel’s decision does not comport with the Supreme Court’s injury-in-fact analysis.**

When the proper analysis is conducted—that is, when the Center’s standing is assessed relative to the claims it has brought—it is clear that under Supreme Court precedent the Center has marshaled sufficient evidence to meet constitutional standing requirements. The Supreme Court has held that “environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” Friends of the Earth v. Laidlaw, 528 U.S. 167, 183 (2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). Here, the challenged activity is a failure to act: the Forest Service’s failure to create management plans and establish detailed river corridor boundaries by the date required by Congress. The Center has submitted 10 standing affidavits from 9 members that collectively explain that they regularly use every Wild and Scenic River at issue in this case, and that explain that their enjoyment of each of these rivers has been lessened by the failure of the Forest Service to protect and enhance these river’s outstandingly remarkable values through the creation of management plans and establishment of detailed river boundaries. (R 29-37, 52). Because the relevant “showing for purposes of Article III standing . . . is not injury to the environment but injury to the

plaintiff,” Laidlaw, 528 U.S. at 181, the Center’s uncontested statements explaining how the Forest Service’s failure to create management plans and establish detailed river corridor boundaries has lessened the Center’s enjoyment of these rivers is sufficient to meet the Constitutional injury-in-fact requirement for each river at issue in this case.

The Panel’s opinion, however, improperly insists not only that the Center provide evidence of injury to the environment to have Constitutional standing, but also that the environmental injury be caused by “site-specific activities” that are not at issue in this case. Op. p. 5. Such a standard “raise[s] the standing hurdle higher than the necessary showing for success on the merits” of this case—indeed, it raises the bar higher than what would be required to prosecute claims that directly challenged site specific activities—and this standard has been expressly rejected by the Supreme Court. Laidlaw, 528 U.S. at 181.

### **III. The Panel’s decision does not comport with the Sixth Circuit’s own causation analysis.**

The Panel properly determined that, because the Forest Service had failed to comply with procedures required by the Wild and Scenic Rivers Act, the Center was not required to show “with any certainty” that compliance with the procedures would alter the Forest Service’s site-specific land management decisions. Op. p. 6. This follows directly from the

Supreme Court's decision in Lujan v. Defenders of Wildlife, which held that the "normal standards for redressability and immediacy" are relaxed when mandatory procedures are not followed. 504 U.S. 555, 572-73 n.7 (1992). Nevertheless, the Panel determined that even under this permissive standard the Center "failed to establish the causation and redressability elements of standing." Op. p. 7. In reaching this conclusion, the Panel relied on Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir. 1996), a case the Sixth Circuit has never before cited and was not addressed by the parties' briefs in this case. The reliance on Florida Audubon was improper because it is directly contrary to Sixth Circuit precedent.

In American Canoe Assn. v. City of Louisa, the Sixth Circuit explained that the "causation requirement of the constitutional standing doctrine exists to eliminate those cases in which a third party and not a party before the court causes the injury." 389 F.3d. at 542. Under this standard, there can be no question that the Center has properly shown causation here. It is undisputed that the Forest Service has violated the Wild and Scenic Rivers Act. It is also clear that the only defendant before the court is the Forest Service, the very agency charged by Congress to comply with the Wild and Scenic Rivers Act. No other party can comply with the requirements of the Wild and Scenic Rivers Act, and thus there can be no question that the

causation requirement of constitutional standing has been met. The Panel's decision here simply did not follow this standard, and if it had it would be compelled to find that the Center has standing.

**IV. The Panel's decision misstates the evidence presented about the Wild and Scenic Rivers Act.**

Similarly, the Panel's determination that the Center had not met the redressability prong of Constitutional standing is inconsistent with established precedent and the facts presented to the Court. As mentioned above, the Center did not challenge specific timber harvests or road construction activities in this case. The Center simply challenged the Forest Service's ongoing and uncontested failure to create management plans and establish detailed river boundaries for each of the Wild and Scenic Rivers in question. Thus, the Panel's insistence that the Center provide evidence that compliance with the Wild and Scenic Rivers Act procedures will "appreciably alter the Forest Service's decision-making with respect to logging activity" is simply not the standard the Center must meet. Op. p. 7. The purpose of the Wild and Scenic River Act is not to simply regulate logging, but to protect and enhance the designated rivers' outstandingly remarkable values. Thus, the question before the Court is not whether logging activities will be altered, but whether compliance with the Wild and Scenic Rivers Act might lead the Forest Service to manage these rivers so as

to “protect and enhance” river values. As established by the Supreme Court, when proper procedures are not followed the evidentiary threshold the Center must meet to show redressability is low and the Center need not show “with any certainty” that compliance with the procedures would lead to an enhancement of river values. Lujan v. Defenders of Wildlife, 504 U.S. at 572-73; Op. p. 6. Under this minimal threshold, the Center has clearly shown that it has standing to bring its claims.

The Center provided several pieces of evidence to the Court explaining how compliance with the Wild and Scenic Rivers Act’s procedural requirements will lead to the protection and enhancement of river values, and thus redress the Center’s injuries. For example, the Center explained that the Wild and Scenic Rivers Act’s “protect and enhance” standard for creating a management plans is completely distinct from the “multiple use mandate” used for drafting the National Forest management guidelines that the Forest Service claims it currently uses to manage the rivers in question. Compare 16 U.S.C. § 1281(a) with 16 U.S.C. § 528. Yet the Forest Service’s National Forest Management Act guidelines—which the Panel deemed equivalent to management plans under the Wild and Scenic Rivers Act—incorporate management prescriptions for recreational rivers “similar in nature and intensity present in the river areas at the time of interim

classification,” i.e., at the time the designated Wild and Scenic Rivers were managed exclusively by National Forest Management Act and the Multiple Use Sustained Yield Act. (R. 40 Attachment 4, Land and Resource Management Plan, Ottawa National Forest, Amendment No. 4, AR Ottawa Vol. 2, Book 1, Tab C, IV-187.7, Apx. pg. 333). Furthermore, these plans do not even specify or describe what the outstandingly remarkable values of the river are, a key component of every river management plan. (R. 40 Attachment 3, Jackie Diedrich, U.S. Forest Service, Interagency Wild and Scenic Rivers Coordinating Council, Wild & Scenic River Management Responsibilities, app. A (2002), Apx. pgs. 324-326). Under this alternative management direction and with no river values specified or described, it is not possible for the management guidelines to be equivalent to the “protect and enhance” standard of the Wild and Scenic Rivers Act, and it is reasonable for the Center—let alone Congress—to expect that the Wild and Scenic Rivers Act’s mandatory procedures might encourage the Forest Service to establish and subsequently “protect and enhance” river values.

Furthermore, the National Forest Management Act guidelines for both forests at issue here do not satisfy the Wild and Scenic Rivers Act’s substantive “protect and enhance” standard because they base management on a river’s wild, scenic, or recreational classifications, rather than each

river's values. (R. 40 Attachment 4; R. 45 Attachment 3, Apx. pgs. 327, 389). The Wild and Scenic Rivers Act's mandate to "protect and enhance" a river's values defines the agency's management regime, regardless of the river's classification as Wild, Scenic, or Recreational. 16 U.S.C. § 1281(a); 47 Fed. Reg. 39,454, 39,458 (Sept. 7, 1982). Management plans made pursuant to the Wild and Scenic Rivers Act would therefore differ markedly from the National Forest Management Act guidelines: the Wild and Scenic Rivers Act requires the Forest Service to analyze each river's values and manage each river to protect and enhance those particular values for future generations, regardless of river classification. This has not been done through the National Forest Management Act guidelines.

Similarly, final river boundaries are required for the Wild and Scenic Rivers Act scheme to be effective at eliminating the injuries that even the panel agrees the Center has suffered. River boundaries must be established in a manner that protects and enhances river values. Sokol v. Kennedy, 210 F.3d 876, 881 (8<sup>th</sup> Cir. 2000). Under 16 U.S.C. § 1277(a)(1), which governs the Forest Service's ability to acquire lands so as to further the goals of the Wild and Scenic Rivers Act, the Forest Service may only acquire lands that are "within the authorized boundaries" of a wild and scenic river. Id. However, because river boundaries "shall not become effective until ninety

days after they have been forwarded to the President of the Senate and the Speaker of the House of Representatives,” 16 U.S.C. § 1274(b), the Forest Service is legally precluded from acquiring lands necessary for protecting and enhancing river values until Wild and Scenic Rivers Act river corridor procedures are complied with. The Forest Service’s National Forest Management Act guidelines do not trigger the authorization of river boundaries, and the Forest Service has admitted that they have not established river boundaries for any of the designated wild and scenic rivers pursuant to the Wild and Scenic Rivers Act.

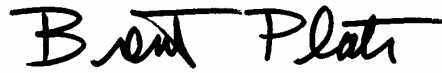
As the Center already adequately explained, if the Forest Service had complied with its obligations, the Center’s injuries caused by the failure to have management plans and river boundaries in place may have been avoided. See Center Brf. at 38-43. For these reasons, the Center meets the causation and redressability prongs of standing, and has full Constitutional standing to bring its claims.

### **CONCLUSION**

The Center has established that it has standing and is entitled to injunctive relief on specific claims against the Forest Service for violations of the Wild and Scenic Rivers Act. For the forgoing reasons, the Center’s

petition for rehearing with suggestion for rehearing en banc should be accepted by the Sixth Circuit.

Respectfully Submitted,



September 15, 2005

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Brent Plater  
Center for Biological Diversity  
San Francisco Bay Area Office  
1095 Market St., Suite 511  
San Francisco, CA 94103  
Phone: 415-436-9682 x 301  
Fax: 415-436-9683  
bplater@biologicaldiversity.org

Matt Kenna  
Western Environmental Law Center  
679 E. 2nd Ave., Suite 11B  
Durango, CO 81301  
Phone: 970-385-6941  
Fax: 970-385-6804  
mkenna@animas.net

Attorneys for Plaintiffs-Appellants

**CERTIFICATE OF SERVICE**

I, Brent Plater, declare as follows:

I am a citizen of the United States and employed in the city of San Francisco, CA. I am over eighteen years of age and my business address is 1095 Market St., Suite 511, San Francisco, CA 94103. On September 15, 2005 I served the following document:

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING  
WITH SUGGESTION FOR REHEARING EN BANC


on the party below in the case Center for Biological Diversity, et al. v.

Lueckel et al., case no. 03-1139, by placing a true copy thereof, enclosed in a sealed envelope and sending US Mail, addressed as follows:

Ronald M. Stella  
Assistant U.S. Attorney  
United States Attorneys Office  
P.O. Box 208  
Grand Rapids, MI 49501-0208

I certify under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Respectfully Submitted this 15<sup>th</sup> day of September, 2005,



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Brent Plater