15-5304 & 15-5334

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CARPENTERS INDUSTRIAL COUNCIL; SISKIYOU COUNTY, CALIFORNIA; AMERICAN FOREST RESOURCE COUNCIL; HAMPTON AFFILIATES; THE MURPHY COMPANY; ROUGH & READY LUMBER CO.; PERPETUA FORESTS COMPANY; SENECA SAWMILL COMPANY; SENECA JONES TIMBER COMPANY; SWANSON GROUP MFG. LLC; AND TRINITY RIVER LUMBER COMPANY,

Plaintiffs-Appellants

and

LEWIS COUNTY; SKAMANIA COUNTY; AND KLICKITAT COUNTY, WASHINGTON,

Plaintiffs-Intervenors-Appellants

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR; AND JAMES KURTH, DIRECTOR, U.S. FISH AND WILDLIFE SERVICE

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CASE NO. 1:13-CV-0361-RJL)

FEDERAL DEFENDANTS' PETITION FOR PANEL REHEARING

JEFFREY H. WOOD
Acting Assistant Attorney General

MICHAEL T. GRAY
Environment and Natural Resources Div.
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
(202) 532-3147
michael.gray2@usdoj.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The Plaintiffs-Appellants are Carpenters Industrial Council; Siskiyou County, California; American Forest Resource Council; Hampton Affiliates; the Murphy Company; Rough & Ready Lumber Co.; Perpetua Forests Company; Seneca Sawmill Company; Seneca Jones Timber Company; Swanson Group MFG. LLC; and Trinity River Lumber Company.

The Defendants-Appellees are Ryan Zinke, Secretary of the Interior, and James Kurth, Director, U.S. Fish and Wildlife Service.

The Intervenors-Plaintiffs-Appellants are Lewis County, Washington; Skamania County, Washington; and Klickitat County, Washington.

B. Rulings Under Review.

On September 28, 2015, the district court, Judge Richard J. Leon, issued a memorandum opinion and accompanying final judgment in this case. ECF Nos. 91, 92. The memorandum opinion is reported at 139 F. Supp. 3d 7, (D.D.C. 2015).

C. Related Cases.

This case has not previously been before this Court or any other court. There are no related cases.

s/ Michael T. Gray
MICHAEL T. GRAY
Attorney, Appellate Section
Environment & Nat. Res. Div.
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
(202) 532-3147
michael.gray2@usdoj.gov

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INTRODUCTION

This Court should grant rehearing to address the standing of the intervening Counties, and it should hold that they have not demonstrated their standing to bring the claims asserted in their complaint in intervention. In its opinion reversing the district court's dismissal of the case for lack of standing, this Court concluded that one of the plaintiffs, the American Forest Resource Council, has demonstrated standing to challenge the critical habitat designation for the Northern spotted owl and thus the Court "need not address whether other plaintiffs have standing." Slip Op. at 16. This Court's opinion, consequently, did not address whether the Counties have standing.

As explained below, this Court erroneously failed to rule on whether the Counties have independently established standing. The Counties moved to intervene as of right to litigate two claims not being pursued by the original plaintiffs. Therefore, the Counties must separately demonstrate their standing to invoke this Court's jurisdiction. Further, as explained in our brief as appellee, the Counties have in fact failed to demonstrate independent standing to assert their additional claims. This Court should therefore grant rehearing to decide this jurisdictional issue.

BACKGROUND

On November 20, 2012, the U.S. Fish and Wildlife Service issued a final rule designating 9,577,969 acres in Washington, Oregon, and California as critical habitat

for the Northern spotted owl, a species listed as threatened under the Endangered Species Act ("ESA"). 77 Fed. Reg. 71876 (Dec. 4, 2012). The plaintiffs—we will call them "Carpenters" in this brief—filed this action against officials of the Department of the Interior and the Fish and Wildlife Service claiming violations of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, the ESA, 16 U.S.C. §§ 1531-1544, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h. In their summary-judgment briefing, Carpenters abandoned several of their claims, two of which are important here: first, they dropped their only claim alleging a violation of NEPA; second, they dropped their claim challenging the economic analysis for the designation of critical habitat. ECF 40 at 7, n.1 ("Plaintiffs are not pursuing Claims 1-2 and 14-17 in the Amended Complaint.").

The Counties moved to intervene, accompanying their motion with two declarations to prove their standing. ECF No. 17, JA 8-38. The Counties also filed a proposed complaint in intervention alleging that the Fish and Wildlife Service's economic analysis of the critical habitat designation did not comply with the ESA, and they claimed that the Service's analysis violated NEPA. ECF 17-3 at 22-32, JA 61-64 (excerpts). The Counties filed a motion for summary judgment and included no further declarations on standing. ECF No. 41, JA 95.

While the motions for summary judgment were pending, this Court decided *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015), which held that

many of these same plaintiffs lacked standing to pursue their claims that the federal government was required by statute to offer for sale more timber than it had in the past, and that the government should be compelled to do so in the future. In response to the *Swanson* decision, the district court sua sponte required Carpenters to "show cause in writing . . . why this case should not also be dismissed for lack of standing." ECF No. 82, JA 106. Carpenters filed a memorandum responding to that order and attaching ten new standing declarations. ECF No. 84, JA 112-53. The declarations alleged economic injury from the reduction of timber sales as a result of the critical habitat designation and environmental injury through an increased risk of catastrophic wildfire. *Id.*

Though the show-cause order had not been directed at them, the Counties requested the opportunity to respond, and the district court granted that request. The Counties similarly filed a memorandum and attached six new standing declarations. ECF Nos. 85, 87, JA 154-235. The United States filed responses opposing both the filing of new declarations and contending that even the new declarations did not demonstrate standing for either Carpenters or the Counties. ECF Nos. 88, 90.

The district court refused to consider the new declarations filed by Carpenters and the Counties. The court held that its order to show cause was a request for reasons why the case should not be dismissed based on the existing evidentiary record; it was not an invitation to re-open that record, and neither plaintiffs nor

intervenors had shown good cause for filing the new declarations. ECF No. 91 at 6-7, JA 272-73. The district court then concluded that the original declarations did not establish standing (and, in a footnote, that the new declarations would not have changed that result, *id.* at 8 n.6, JA 274), and thus dismissed the case.

Both Carpenters and the Counties appealed. This Court concluded that one of the plaintiffs, the American Forest Resource Council, has demonstrated its standing to challenge the critical habitat designation for the Northern spotted owl in its original declaration (which obviated the need to decide whether the new declarations were properly excluded by the district court). This Court then concluded that at least one declaration showed a substantial probability that a lumber company would suffer economic injury as a result of the critical habitat designation. Slip Op. 8-12. The Court noted that when "the government adopts a rule that makes it more difficult to harvest timber from certain federal lands, lumber companies that obtain timber from those forest lands may lose a source of timber supply and suffer economic harm." Slip Op. at 2. The Court thus adopted a three-part test for evaluating the standing of lumber companies in this context. As the Court explained, "the standing inquiry boils down to whether the plaintiff has adequately demonstrated: (1) a substantial probability that the challenged government action will cause a decrease in the supply of raw material from a particular source; (2) a substantial probability that the plaintiff manufacturer obtains raw materials from that source; and (3) a substantial probability that the

plaintiff will suffer some economic harm as a result of the decrease in the supply of raw material from that source." Slip Op. at 9-10.

Because one plaintiff met that test, the Court held that it "need not address whether other plaintiffs have standing." Slip Op. at 16. The Court's opinion therefore did not address whether the intervening Counties have standing.

ARGUMENT

I. This Court must address the Counties' standing.

This Court erred in declining to address the Counties' standing, and it should grant rehearing to reconsider that issue. While courts generally need not inquire into the standing of each individual plaintiff, this Court's precedent dictates that the rule does not encompass intervenors as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. As this Court has repeatedly held, "in addition to establishing its qualification for intervention under Rule 24(a)(2), a party seeking to intervene as of right must demonstrate that it has standing under Article III of the Constitution." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731–32 (D.C. Cir. 2003) (citations omitted). Here, there can be no doubt that the Counties are required, under this Court's case law, to independently demonstrate their standing because they sought and were granted intervention as of right. ECF Nos. 17, 31.[1]

[1] In *Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (argued April 17, 2017), the Supreme Court is currently considering whether intervenors as of right must separately demonstrate their standing.

Similarly, any intervenor (whether as-of-right or permissive) who seeks to expand the case beyond the bounds set by the original parties—for example, by introducing a new claim or requesting a new form of relief or independently pursuing an appeal—must separately establish its standing. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc. (TOC)*, 528 U.S. 167, 185 (2000); *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). Article III of the United States Constitution, which limits the reach of "[t]he judicial Power" to "Cases" and "Controversies," U.S. Const. Art. III, § 2, Cl. 1, demands that result. An Article III court may act only at the behest of a litigant who is injured either by the defendant's allegedly unlawful conduct or (in the case of federal appellate jurisdiction) by a lower court's judgment. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler*, 547 U.S. at 341 (citations omitted). "The requirement that a party seeking review must allege facts showing that he is himself adversely affected …serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

Thus, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff must separately demonstrate standing with respect to each claim and each form of relief sought. *Daimler-Chrysler Corp.*, 547 U.S. at 352; *Friends of the*

Earth, 528 U.S. at 185. Likewise, some actions that an intervenor might seek to take—such as injecting a new claim, seeking damages, or seeking injunctive relief that is broader than or different from the relief sought by the original plaintiff—are permissible only if the intervenor independently establishes Article III standing.

Here, the Counties are required to independently demonstrate their standing because they filed a complaint in intervention that seeks to expand the "case" or "controversy" pending before the district court and thus its exercise of Article III jurisdiction. The Counties seek to litigate two claims that have been expressly abandoned by Carpenters. That is, they seek to inject new claims into this litigation and expand the jurisdiction of this Court. As such, they must demonstrate their standing to invoke Article III jurisdiction. This Court should therefore grant rehearing to address whether the Counties have independently demonstrated standing.

II. The Counties have not carried their burden to establish standing.

No county-owned land was designated as critical habitat in this case, and all of the Counties' alleged harms stem from possible actions by third parties not before the Court, namely, the Forest Service and Bureau of Land Management. As the Supreme Court has explained, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). The Counties have not met that high burden.

First, the Counties have not demonstrated a substantially probable economic harm sufficient to establish standing, as required by this Court's decision. Slip Op. at 8-12. The critical habitat designation covers more than 3 million acres, less than a third of which is within one of the three intervening Counties' borders, and no part of which is County-owned land. Even accepting this Court's conclusions that the "available evidence" demonstrates that the critical habitat designation is "substantially probable to cause a decrease in the timber supply from the designated forest lands" as a whole, slip Op. 12, and that the timber company plaintiffs here are likely to suffer economic harm as a result, *id.*, there is no allegation in either of the Counties' properly filed declarations[2] to demonstrate a substantial probability that the Counties would suffer a similar fate. ECF 17-1 & 17-2, JA 29-38. Unlike the timber companies, which declared that they rely on timber throughout the designated area, the Counties cannot rely on a general reduction in timber harvests, but must instead show a substantially probable reduction in timber sales directly affecting the Counties themselves. Slip Op. 10-11. That they have not done.

The critical habitat designation here requires nothing of the Counties; instead, they affect only the conduct of BLM and Forest Service officials engaged in timber

[2] As explained in our brief on appeal, the Counties' reliance on new declarations and materials submitted after completion of summary judgment briefing was improper. Fed. R. Civ. P. 6(c)(2) ("Any affidavit supporting a motion must be served with the motion."). Regardless, the Counties have not established standing even considering those declarations.

sale planning in a very large area (over 800,000 acres of designated critical habitat on federal land within the Counties). Yet the Counties' declarants provide no information, evidence, or even allegation, that: (1) absent the critical habitat designation, specific forests or areas within their counties would be offered in future timber sales; (2) companies within the Counties would have bid on those areas given their past bidding history or geographic proximity; and (3) such prospective sales were substantially likely to be foreclosed or restricted by the critical-habitat designation (rather than some other factor such as the listing of the species that may require ESA Section 7 consultation regardless of whether the land is designated as critical habitat).

Even more telling, the Counties do not demonstrate how any presumably lost or delayed timber projects would cause a specific loss in revenues to the Counties. They allege economic harm due to lost revenues from state trust timber lands, but those lands are not included in the designation, and timber harvests on those lands do not require ESA Section 7 consultation. Cty. Resp. at 8-10, 20-21; *see also* Decl. of Gary Stamper (ECF No. 85- 4) at ¶ 7; Dec. of Becky Sisson (ECF No. 85-6) at ¶ 2-4. The allegations are thus irrelevant and entitled to no weight. The Counties also attempt to establish economic harm on the basis of a purported increased fire and disease risk to county and private land allegedly resulting from the critical habitat designation on federal land. But as explained below, the Counties have not shown or

provided any supporting facts that the mere designation of federal land as critical habitat results in a substantially increased fire or pest risk on that land.

Indeed, the Counties' declarants frankly acknowledge that economic impacts of the kind they allege have occurred for more than 20 years as a result of the ESA listing of the owl in 1990 (rather than as a result of the more recent critical habitat designation). Such harms are not attributable to the critical habitat designation, and thus fail to establish standing under this Court's clear precedent. Slip Op. at 15 (noting that in *Swanson* "the declarations did not contain evidence that any of the companies' asserted injuries were attributable to 'inadequate' timber supply as opposed to 'an independent source, such as the recession'").

Second, the Counties' allegations that the critical habitat designation will affect management of other, largely federal land by BLM and the Forest Service also fail to establish a cognizable harm. Without citing any evidence or identifying any specific projects or locations, the Counties vaguely allege that designation of federal land as critical habitat requires BLM and the Forest Service to engage in "added process, devotion of limited agency resources, and further litigation over basic harvest and forest management decisions … [and] also results in the [Forest Service] and other federal agencies avoiding those actions altogether." Counties Br. at 18. The Counties' declarants do not identify or explain what "further" regulatory process or burden on the Counties is created by the critical habitat designation. Any additional

administrative burdens of ESA consultation for federal land are incurred by BLM and the Forest Service, not by the Counties. Such vague and non-specific allegations, unsupported by any factual evidence, are insufficient to establish standing. *Swanson*, 790 F.3d at 242-44 (rejecting standing argument based on "general averments" and "conclusory allegations" in declarations) (internal quotations and citations omitted).

Moreover, even where critical habitat has been designated for a listed species in a given area, that designation does not prohibit all development in that area. The Service has consistently taken the view—and courts have agreed—that adverse modification of critical habitat is properly viewed only in the context of the designated area as a whole. If only a small portion of the designated area would be affected by a federal project (which is likely to be the case here given the size of the designation), and the designated area as a whole will continue to function for the species' conservation, adverse modification of critical habitat is not found. 50 C.F.R. § 402.02 (adverse modification "appreciably diminishes the value of a critical habitat for the conservation of a listed species"); *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439 (9th Cir. 2011); *Butte Envt'l Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010). The Counties' assumption that designation of BLM and Forest Service land within their borders automatically translates to reduced or restricted timber harvest directly affecting the Counties (as opposed to a general reduction throughout the designated area) therefore lacks any legal or factual basis.

Third, the Counties' allegations of future harm from wildfire and disease are speculative and unsupported by evidence. The Counties cite "impairment of proper forest management" by increasing fire risk as a purported injury they suffer from the critical habitat designation. Counties Br. 43. These allegations are based on purported mismanagement of federal lands or of critical habitat that is located adjacent to County Trust Lands or private lands. ECF No. 17-1 at ¶ 9, JA 32; ECF No. 17-2 at ¶ 9, JA 38. Thus, the Counties' base their standing allegations on the management actions of persons who are not parties to this lawsuit. As noted above, their standing burden is therefore higher. "Critical habitat does not directly impose regulatory restrictions on State land managers or on private landowners where there is no . . . Federal nexus." AR1:575, JA 300. The only regulatory hook is when there is a federal agency that funds, carries out, or authorizes activities that may affect the designated critical habitat of a threatened or endangered species. *Id.* Thus, as to the allegations of increased wildfire and pest risk, the Counties again must rely on more attenuated claims that the critical habitat designation will affect management of federal lands by BLM and the U.S. Forest Service that may indirectly impact county lands.

The Counties' declarations do not meet the heightened burden for demonstrating standing in these circumstances. They cite no evidence that the designation of critical habitat certainly and imminently increases the risk of wildfire and other mismanagement of the land, relying instead on conclusory assertions. But

nothing in the critical habitat designation forecloses management for wildfire or disease and, indeed, the critical habitat rule explains that active management for risks such as wildfire and disease are necessary to preserve habitat for the owl. *See*, *e.g.*, *League of Wilderness Defenders v. Allen*, 615 F.3d 1122 (9th Cir. 2010) (upholding project in owl critical habitat prior to revised designation).

This Court's *Mountain States* decision is instructive and underscores the Counties' failure to establish a substantial probability of wildfire risk. There, the Court found that an increased risk of wildfire on federally managed land could support standing, but only where there was evidence that the alternative chosen by the Forest Service for managing a specific area in which the plaintiffs operated in fact had a demonstrably higher risk of wildfire. *Mountain States Legal Foundation v. Glickman,* 92 F.3d 1228, 1233-35 (D.D.C. 1996); *see also Fed. Forest Res. Coal. v. Vilsack*, 100 F. Supp. 3d 21, 45 (D.D.C. 2015) (denying standing based on unsubstantiated claims of wildfire risk on federal land, and stating "it is clear that the D.C. Circuit's standing conclusion in [*Mountain States*] was based on extensive and detailed evidence from the EIS regarding such increased risk of wildfire"). In sharp contrast to *Mountain States*, the Counties offer no evidence that the mere designation of land as critical habitat inevitably leads to mismanagement and to a measurably increased risk of wildfire and disease in any location.

Fourth, the Counties' allegations of harm from designating lands with barred owl presence are speculative and unsupported by evidence. The Counties claim that they have standing because of their interests in "spotted owl recovery and forest health." Counties Br. at 7, 23. They claim that the critical habitat designation interferes with the Counties' ability to protect the spotted owl because it "does not adequately account for its primary competitor, the barred owl." *Id.* at 21. They, however, fail to connect these interests to any concrete injury. The Counties "must show that there is a 'substantial . . . probability' of injury," *id.,* but they never provide evidence of a substantial probability of injury to themselves from the critical habitat rule as required to support their request for prospective relief.

Rather than connect their injury to these purported interests, the Counties speculate that the critical-habitat rule does not address what they contend is the "primary cause of spotted owl decline," that is, competition from the barred owl. ECF No. 17-1 at ¶¶ 11-12, JA 32-33; ECF No. 17-2 at ¶ 13, JA 38 (explaining that the primary "culprit" for spotted owl decline is the barred owl). The Counties contend that these declarations support a finding that their interests in protecting the spotted owl and its habitat are directly injured. The causal chain is missing key links. Taking at face value the Counties' claim that they have a genuine interest in spotted owl recovery, they have not shown any connection between this interest and the critical-habitat designation's inclusion of areas with known barred owl presence. Nor have

they shown that designation of critical habitat for the spotted owl necessarily results in a failure to take other action with respect to the barred owl directly.

Moreover, the Counties' declarations suggest that their alleged injuries stem from other causes entirely—the listing of the owl, prior critical habitat designations, or some unknown third cause. For example, one commissioner noted that as of the time of the critical habitat designation, forest harvest had already been "dramatically reduced," ECF No. 17-2 at ¶¶ 7-8, JA 37, and that the new rule has merely exacerbated a long-running problem. ECF No. 85-2 at ¶ 11, JA 203; ECF No. 85-3 at ¶ 8, JA 219. All of this speculation regarding the impact of the rule on the Northern spotted owl is insufficient to show an increased risk of harm that is substantially probable. *See Public Citizen, Inc. v. National Traffic Safety Admin.,* 513 F.3d 234, 237 (D.D.C. 2008) (plaintiffs must show "both (i) a substantially increased risk of harm and (ii) a substantial probability of harm [to the plaintiffs] with that increase[d risk] taken into account."). Instead, the Counties acknowledge that their concerns with federal forests are long-running, and they speculate that the new critical habitat rule poses a new, unsubstantiated risk of harm. This is insufficient for standing.

For these reasons, the Counties do not have standing to pursue the additional claims in their complaint in intervention, and the district court's judgment should be affirmed as to the Counties.

CONCLUSION

This Court should grant the rehearing petition and affirm district court's judgment dismissing the Counties for lack of standing.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

s/Michael T. Gray
MICHAEL T. GRAY
Environment and Natural Resources Div.
U.S. Department of Justice
701 San Marco Blvd.
Jacksonville, FL 32207
(202) 532-3147
michael.gray2@usdoj.gov

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND 40(b)(1)

I hereby certify that this petition for rehearing complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this petition for rehearing complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because it contains **3,839 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Michael T. Gray
MICHAEL T. GRAY

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2017, I electronically filed the foregoing petition for rehearing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Michael T. Gray
MICHAEL T. GRAY