

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE DIVISION

HAROLD SCHOEFFLER and LOUISIANA	*	
CRAWFISH PRODUCERS	*	
ASSOCIATION—WEST,	*	Civil Action Number: CV05-1573 L-O
	*	Judge Melacon
Plaintiffs,	*	Magistrate Judge Methvin
v.	*	
	*	
DIRK KEMPTHORNE, sued in his official	*	
Capacity as U.S. Secretary of the Interior,	*	
	*	
Defendant.	*	

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**SIERRA CLUB’S *AMICUS CURIE* BRIEF IN SUPPORT OF PLAINTIFFS  
HAROLD SCHOEFFLER AND LOUISIANA CRAWFISH  
PRODUCERS ASSOCIATION—WEST**

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Sierra Club respectfully submits this amicus curie brief in support of Plaintiffs Harold Schoeffler and Louisiana Crawfish Producers Association—West. Sierra Club supports the Plaintiffs’ efforts to compel the Secretary of the Interior to designate critical habitat for the Louisiana Black Bear and urges this Court to grant Plaintiffs’ Motion for Summary Judgment.

**Statement of Interest**

Sierra Club is an environmental organization working to preserve and protect the nation’s land, air, water, wildlife, and other natural resources, as well as to protect the organization’s members and other residents of Louisiana and the nation from environmental degradation. Numerous Sierra Club members live in Louisiana and have an interest in protecting the Louisiana Black Bear and its habitat.

Sierra Club is particularly interested in having this case resolved in a timely fashion. The Secretary listed the Louisiana Black Bear as “threatened” in January 1992, but to this day has failed to designate critical habitat as required by the Endangered Species Act. Faced with a lawsuit seeking to force the Secretary to carry out a duty his agency ignored for over thirteen years, the Secretary both acknowledged that his only defense is an assertion that the Plaintiffs sued too late,<sup>1</sup> and then argued that if the Court finds for the Plaintiffs, it will take the Secretary months to actually designate critical habitat.<sup>2</sup> Given these circumstances, Sierra Club urges this Court to resolve the issues before it in a timely fashion by granting Plaintiffs’ Motion for Summary Judgment, denying the Secretary’s Motion to Dismiss, and directing the Secretary to designate critical habitat for the Louisiana Black Bear in a timely fashion.

### **Status of the Case**

On September 6, 2005, the Plaintiffs filed a complaint alleging that the Secretary violated the Endangered Species Act and Administrative Procedure Act by failing to designate critical habitat for the Louisiana Black Bear and asking this Court to compel the Secretary to designate critical habitat. The Plaintiffs moved for summary judgment on October 7, 2005, and the Secretary moved to dismiss on November 7, 2005. Both the Plaintiffs and the Secretary agree that there are no genuine issues of material fact that would preclude this case from being decided on summary judgment. See Federal Defendant’s Statement Regarding Material Facts (filed Dec. 6, 2005) (“Federal Defendant does not dispute any of the material facts set forth in Plaintiffs’ Statement of Material Undisputed Facts.”). Moreover, the Secretary conceded that his only defense is an assertion that the Plaintiffs waited too long to sue. *See* Federal Def. Opp. to Summ.

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<sup>1</sup> *See* Federal Def. Opp. to Summ. J. 9 (“Outside of the statute of limitations issue..., Federal Defendant asserts no other defense to this motion for summary judgment.”).

<sup>2</sup> *See* Federal Def. Opp. to Summ. J. 11 (“Even then, the process will take several months.”).

J. 9 (“Outside of the statute of limitations issue..., Federal Defendant asserts no other defense to this motion for summary judgment.”).

On December 6, 2005, the Black Bear Conservation Committee filed an amicus brief in support of the Secretary. The amicus brief contains unsupported factual assertions but no admissible evidence; it is irrelevant because both parties have agreed there are no genuine issues of material fact. This case is therefore ripe for resolution on the legal issues before this Court: whether this suit is time-barred and whether the Secretary must follow the Endangered Species Act’s mandate to “designate critical habitat” for the Louisiana Black Bear. *See* 16 U.S.C. § 1533(a)(3)(A)(i).

**The Six Year Statute of Limitations Does Not Apply in this Case.**

Applying a statute of limitations to cut off claims for continuing administrative violations of legislative mandates would be inconsistent with the law of this Circuit, which recognizes that prescriptive periods for continuing violations run from the day that the violations stop. Newell Recycling Co., Inc. v. EPA, 231 F.3d 204, 206 (5<sup>th</sup> Cir. 2000) (upholding EPA’s determination that a Toxic Substances Control Act “cause of action [for illegal disposal]. . . did not accrue until the course of conduct complained of no longer continued”). The Court cited Fiswick v. United States, 329 U.S. 211, 216 (1946) for the proposition that the “statute of limitations for continuing offenses runs from the last day of the continuing offense.” 231 F.3d at 206. In this case, the government’s violation is ongoing.

Using a statute of limitations to cut off claims for ongoing administrative delays would encourage unnecessary litigation. Agencies are often delayed in discharging statutory mandates, whether due to budget restrictions or the press of other business. Members of the public whom Congress intended those mandates to protect often do not sue unless those delays get out of hand,

or it becomes obvious that the agency has no intention to comply. Statutes of limitations that cut off claims to redress continuing failures to comply with congressional mandates would force a proliferation of unnecessary lawsuits. If citizens lacked the resources to sue about every such delay, such statutes would also create the risk that “important legislative purposes heralded in the halls of Congress” would be permanently “lost or misdirected in the vast hallways of the federal bureaucracy.” See Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

A recent D.C. Circuit case, Wilderness Society v. Norton, addressed the question of whether the six-year statute of limitations period in 28 U.S.C. § 2401(a) applies where the plaintiffs are suing to “‘compel agency action unlawfully withheld or unreasonably delayed.’” 434 F.3d 584, 588 (D.C. Cir. 2006); see 5 U.S.C. § 706(1). The Wilderness Society appealed the district court’s ruling that its claims based on violations of the Wilderness Act, 16 U.S.C. § 1132(c) (2000), and its enabling statutes were time-barred because the plaintiff brought the claims “more than six years after the [National Parks Service] failed to meet its statutory deadline to perform wilderness reviews or file and complete legal boundary maps.” 434 F.3d at 588. Citing In re United Mine Workers of Am. Int’l Union, 190 F.3d 545 (D.C. Cir. 1999) and In re Bluewater Network, 234 F.3d 1305 (D.C. Cir. 2000), the D.C. Circuit noted that it “has repeatedly refused to hold that actions seeking relief under 5 U.S.C. § 706(1) [of the Administrative Procedure Act] to ‘compel agency action unlawfully withheld or unreasonably delayed’ are time-barred if initiated more than six years after an agency fails to meet the statutory deadline.” 434 F.3d at 588. Recognizing that it need not reach a final determination on the issue because the Wilderness Society lacked standing, the court nevertheless stressed that “it

is unlikely that [the Wilderness Society's] complaint would be held by this court to be time barred by 28 U.S.C. § 2401(a)." Id. at 589.

This case is different from the recently (and wrongly) decided Eleventh Circuit case Center for Biological Diversity v. Hamilton, 2006 WL 1752139 (June 28, 2006), in which the court applied the six year statute of limitations. Unlike here, where the Secretary proposed a rule to designate habitat but did not finalize the rule, in Center for Biological Diversity, the Secretary had not even proposed a rule within the six-year time period. See id. ("the Secretary never proposed such a rule.") Because the Secretary in Center for Biological Diversity took no action towards designating habitat, that case's holding would not apply here, where the Secretary proposed a rule and represented to the Plaintiffs that he intended to finalize a rule designating critical habitat.

Like the plaintiffs in Wilderness Society, United Mine Workers, and Bluewater Network, the Plaintiffs here allege continuing violations by the Government. The Plaintiffs "do[] not complain about what the agency has done but rather about what the agency has yet to do." Wilderness Society, 434 F.3d at 589 (internal citations omitted). Given that the Secretary's only defense to failing to designate critical habitat for the Louisiana Black Bear is an erroneous claim that the Plaintiffs sued too late, the Plaintiffs should prevail.

**The Secretary Would be Estopped from Asserting a Statute of Limitations Defense Even if Such a Defense Were Otherwise Available.**

The Secretary should not be heard to assert a statute of limitations defense in this case because his agency's actions and statements to the Plaintiffs led the Plaintiffs to believe that the Secretary was in the process of designating habitat for the Louisiana Black Bear. The Fifth Circuit recognizes equitable estoppel, which bars a defendant from asserting a statute of limitations defense "[i]f the defendant did conceal facts or mislead the plaintiff and thereby

caused the plaintiff not to assert his rights within the limitations period....” Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 879 (5th Cir. 1991); see also McAllister v. FDIC, 87 F.3d 762, 768 (5th Cir. 1996) (“[u]nder the doctrine of equitable estoppel, a defendant is estopped from asserting a limitations defense when its conduct induced or tricked a plaintiff into allowing a filing deadline to pass). Here, the Department of Interior, through its actions and those of employees of the Fish and Wildlife Service, represented to Mr. Schoeffler that they were still working to designate critical habitat, see Second Declaration of Harold Schoeffler at 11-13 (filed Dec. 6, 2005), thereby inducing the Plaintiffs not to sue. Pl. Opp. to Def. Mot. For Sum. J. at 11-14 (filed Dec. 6, 2005). Therefore, the Secretary is equitably estopped from asserting a statute of limitations defense after his agency led the Plaintiffs to believe that there was no need for the Plaintiffs to sue to compel the Secretary to designate critical habitat for the Louisiana Black Bear.

### **Conclusion**

For the reasons set forth above, Sierra Club respectfully requests that this Court grant the Plaintiffs’ Motion for Summary Judgment, deny the Secretary’s Motion to Dismiss, and direct the Secretary to designate critical habitat for the Louisiana Black Bear, as mandated by the Endangered Species Act, in a timely fashion.

Respectfully Submitted on this 11th day of August, 2006

s/ Adam Babich

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon all counsel of record by CM/ECF electronic service or by U.S. mail, postage prepaid, and e-mail, this 11th day of August, 2006.

s/ Adam Babich

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