

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FOREST STEWARDSHIP COUNCIL –
U.S., et al.,

NO. 08-1358RAJ

Plaintiffs,

ORDER

v.

OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE, et al.,

Defendants.

I. INTRODUCTION

This matter comes before the court on Defendants’ motion to dismiss (Dkt. # 7). The court has considered the parties’ briefing on the issue, and heard from the parties at oral argument. For the reasons explained below, the court GRANTS the motion.

II. BACKGROUND

An ongoing trade dispute regarding softwood lumber¹ between United States and Canada culminated in the Softwood Lumber Agreement (“SLA”) in 2006. In the years before the SLA was reached, the United States determined that Canadian

¹ Softwood lumber is wood sawn from coniferous trees, used primarily for home building. Defs.’ Mot. (Dkt. # 7) at 3.

1 softwood lumber was being imported and sold at below-market rates, and the United
2 States imposed countervailing and antidumping duties upon Canadian softwood
3 lumber imports. This arrangement has been disputed in the U.S. Court of International
4 Trade, the U.S. Courts of Appeals for the District of Columbia Circuit and Federal
5 Circuit, North American Free Trade Agreement (“NAFTA”) tribunals, and the World
6 Trade Organization (“WTO”).

7 In 2006, the governments of the United States and Canada began negotiating
8 the SLA to resolve the softwood lumber dispute. By that point, the United States had
9 collected about \$5 billion in cash deposits based on the countervailing and
10 antidumping duties from Canadian exporters. Under the SLA, the United States would
11 return the cash deposits to the importers and refrain from imposing import duties as
12 long as the SLA was in force, and Canada would, *inter alia*, impose certain export
13 measures on its softwood lumber producers.

14 The SLA also required that Canada disburse (1) \$450 million to promote U.S.
15 “meritorious initiatives,” such as programs to assist with disaster relief, lumber-
16 dependent communities, and sustainable forestry, as identified by the Office of the
17 United States Trade Representative (“OUSTR”); (2) \$500 million to the Coalition for
18 Fair Lumber Imports; and (3) \$50 million to a bi-national industry council. *See*
19 Goldman Decl. (Dkt. # 20), Ex. A at 13. The “meritorious initiatives” identified for
20 disbursement include the U.S. Endowment for Forestry and Communities, Inc.
21 (“USEFC”) and the American Forest Foundation (“AFF”), which together received
22 \$350 million of the “meritorious initiatives” \$450 million.

23 Plaintiffs, a group of non-profit organizations that promote forestry interests,
24 have sued OUSTR, the U.S. Department of Commerce, the U.S. Customs and Border
25 Protection, and the respective agency officials in their official capacity, claiming that
26

1 the \$350 million disbursement to USEFC and AFF violates the Administrative
2 Procedure Act and the Miscellaneous Receipts Act, and that the SLA as a whole
3 violates the National Environmental Policy Act. Defendants have moved to dismiss
4 the lawsuit for lack of subject matter jurisdiction and, in the alternative, for failure to
5 state a claim upon which relief can be granted.

6 III. ANALYSIS

7 A. Standards of Review on a Motion to Dismiss.

8 Under Fed. R. Civ. P. 12(b)(1), a court may dismiss a case for lack of subject
9 matter jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328
10 F.3d 1136, 1140 (9th Cir. 2003). The party asserting federal jurisdiction bears the
11 burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*
12 *of Am.*, 511 U.S. 375, 377 (1994). To withstand a motion to dismiss, the non-moving
13 party must show that the facts alleged, if proved, would confer standing. *See Warren*,
14 328 F.3d at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104
15 (1998)).

16 B. The Plaintiffs Lack Standing to Bring This Lawsuit.

17 The jurisdiction of federal courts is limited to “cases” and “controversies.”
18 U.S. CONST. art. III, § 2. A plaintiff’s standing to sue is “an essential and unchanging
19 part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of*
20 *Wildlife*, 504 U.S. 555, 560 (1992). To meet the case-or-controversy requirement of
21 Article III, a plaintiff must establish that: “(1) it has suffered an ‘injury in fact’ that is
22 (a) concrete and particularized and (b) actual or imminent, not conjectural or
23 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;
24 and (3) it is likely, as opposed to merely speculative, that the injury will be redressed
25 by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envt’l Servs. Inc.*, 528
26

1 U.S. 167, 180-81 (2000). The Defendants contend that the Plaintiffs have not made
2 any of these showings.

3 The Plaintiffs argue that they were injured by Defendants' violations of both the
4 MRA and NEPA. The Plaintiffs contend that they were injured economically "fiscally
5 and programmatically" because they were not able to apply for SLA meritorious
6 initiative funds, and those funds were ultimately distributed to entities that "will likely
7 fund initiatives that practice and promote lower environmental and social standards for
8 forest management." Complaint (Dkt. # 1) ¶¶ 13, 16, 18. The Plaintiffs' standing to
9 bring claims under the MRA and NEPA will be analyzed separately.

10 **1. The Plaintiffs Do Not Have Standing to Raise an MRA Claim.**

11 According to Plaintiffs, they suffered an economic injury due to the distribution
12 of the meritorious initiative funds to other entities allegedly in violation of the MRA,
13 such that they have standing as competitors for the funds.

14 In support of this theory, Plaintiffs cite cases where courts found that entities
15 that unsuccessfully bid on a government contract have suffered a legally cognizable
16 injury in fact because they have suffered an economic loss and an injury to their right
17 to a valid bidding process. *See, e.g., Northeastern Fl. Chapter of the Associated Gen.*
18 *Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) (plaintiff challenging a
19 city ordinance that provided for preferential treatment to certain racial minority-owned
20 businesses in bidding processes for city contracts); *Look v. United States*, 113 F.3d
21 1129 (9th Cir. 1991) (unsuccessful competitor challenging U.S. Army's bidding
22 process for servicing contract); *Motor Coach Industries v. Dole*, 725 F.2d 958 (4th Cir.
23 1984) (unsuccessful competitor challenging Federal Aviation Administration's bidding
24 process for purchasing contract). Each of these cases is factually distinguishable from
25 this case, given that the funds at issue were not distributed via a public bidding
26 process, but instead via a trade agreement.

1 The Plaintiffs contend that they nonetheless qualify for competitor standing
2 under the theory that they were denied their right to compete for public money due to
3 the Defendants' violation of the MRA. Specifically, Plaintiffs contend that they
4 possessed competitor standing because "there was a substantial chance that FSC or
5 others with the same policy goals might have successfully competed for some of the
6 funds." Pltfs.' Opp'n at 20. But even assuming that the Defendants did violate the
7 MRA and the meritorious initiative funds were "public money," a public bidding
8 process for those funds would not necessarily have been created. In other words,
9 Plaintiffs have not shown that, but for the alleged MRA violation, they would have had
10 the opportunity to compete for the funds that were distributed to USEFC and AFF.
11 This lack of causation is fatal to Plaintiffs' standing argument.

12 Furthermore, Plaintiffs only speculate that their alleged injury is redressable by
13 this court. Though Plaintiffs contend that a declaratory judgment on their MRA claim
14 "would alter the legal status of the money now in the possession of the meritorious
15 initiative recipients and could lead to the U.S. taking legal action under the MRA to
16 repossess this money," and "could compel [OUSTR] to work with Congress, the
17 foundations, and the public to develop a post-hoc Congressional appropriations plan,"
18 Plaintiffs do not establish or even argue that this court has the authority to rescind the
19 SLA, to order that the meritorious initiatives money be deposited into the U.S.
20 Treasury (or order that the U.S. Treasury accept the money), or to compel the OUSTR
21 to take any particular action. Essentially the Plaintiffs seek an advisory opinion
22 regarding the meritorious initiatives money, and hope that non-parties will respect the
23 court's opinion. Because the court does not have the authority to provide Plaintiffs
24 with any relief, or enforce non-compliance with a declaratory judgment on the MRA
25
26

1 claim, the Plaintiffs have failed to meet the third and final standing requirement under
2 Article III. The Plaintiffs' MRA claim must be dismissed for lack of standing.

3 **2. The Plaintiffs Do Not Have Standing to Raise a NEPA Claim.**

4 Plaintiffs contend that they have standing to raise a NEPA claim here because
5 they suffered an environmental injury as a result of the SLA, in three ways: (1)
6 Plaintiffs were denied an opportunity to publicly advocate for "stronger environmental
7 considerations in the SLA and [the] 'meritorious initiative' process"; (2) two of the
8 entities that received funds support programs that "lower the environmental bar for
9 forestry" in the United States; and (3) the SLA "could affect forest-dependent species
10 in trans-border regions" because it affects logging levels. Pltfs.' Opp'n (Dkt. # 19) at
11 26. None of these injuries is sufficiently concrete or actual to confer standing upon the
12 Plaintiffs.

13 As to the first alleged injury, this appears to be a reiteration of the injury
14 discussed in the previous section. The Plaintiffs have failed to allege any concrete or
15 actual injury that they have suffered as a result of the distribution of the meritorious
16 initiatives money, because they have not shown that they had a right to participate in
17 that process or to compete for those funds, and have not shown that this injury can be
18 redressed by this court.

19 The second alleged injury is likewise insufficient, because the Plaintiffs do not
20 point to any specific environmental harm that has occurred as a result of the
21 meritorious initiative funds. Though the Plaintiffs may have programmatic and
22 ideological differences from the entities that received funds, the Plaintiffs have failed
23 to show that those entities have used the funds to cause concrete and actual
24 environmental harm to the Plaintiffs' interests. Plaintiffs' allegation that "the entities
25 to which the USTR distributed the funds will likely fund initiatives that practice and
26

1 promote lower environmental and social standards for forest management” is purely
2 speculative. *See* Complaint ¶¶ 13, 16, 18.

3 The final alleged injury is also purely speculative, and the Plaintiffs do not even
4 identify a particular injury that could occur as a result of the SLA’s logging levels. It
5 is entirely unclear how Plaintiffs’ environmental interests will be harmed by the export
6 restrictions.

7 Because the Plaintiffs have failed to allege an actual environmental injury
8 resulting from the SLA, the Plaintiffs have not satisfied the requirements for standing
9 under Article III. Their NEPA claim must be dismissed for lack of standing.²

10 **IV. CONCLUSION**

11 For these reasons, the court GRANTS the Defendants’ motion to dismiss (Dkt.
12 # 7).

13 IT IS SO ORDERED.

14
15 DATED this 23rd day of June, 2009.

16
17 
18

19 The Honorable Richard A. Jones
20 United States District Judge

21
22
23
24
25 _____
26 ² Because the court finds that Plaintiffs lack standing to bring this lawsuit, it need not address the other bases on which Defendants requested dismissal.