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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. BILL LOCKYER, ATTORNEY, GENERAL, Plaintiff, v. UNITED STATES DEPARTMENT OF AGRICULTURE; MIKE JOHANNS, in his official capacity as Secretary of the Department of Agriculture; MARK REY, in his official capacity as Under Secretary of Agriculture, DALE BOSWORTH, in his official capacity as Chief of the United States Forest Service, and JACK A. BLACKWELL in his official capacity as Regional Forester, Region 5, United States Forest Service, Federal Defendants.	Civil Case No. 05-cv-00211-MCE-GGH **FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date: June 20, 2005 Time: 9:00 am Location: 15th Floor Courtroom: No. 3 Judge: Hon. Morrison C. England, Jr.

I. INTRODUCTION

This case involves a challenge to the Final Environmental Impact Statement ("FEIS") and the Record of Decision ("ROD") for the 2004 Sierra Nevada Forest Plan Amendment ("2004 Framework"), a significant amendment to the management plan for eleven national forests in the Sierra Nevada. Alleging violations of the Administrative Procedure Act ("APA"), 5 U.S.C. 701 *et seq*., and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 *et seq*., Plaintiff seeks to set aside the 2004 Framework, which replaced the previous management direction found in the 2001 Sierra Nevada Forest Plan Amendment ("2001 Framework"). Plf's Compl. at 16.

Defendants hereby submit this Memorandum in Support their Motion to Dismiss because Plaintiff lacks standing in a *parens patriae* capacity to bring this action. As a prerequisite to jurisdiction, Plaintiff must have standing to bring this action. Plaintiff filed this action pursuant to CAL. GOV. CODE §§ 12600-12612 and CAL. CONST., ART V., § 13, claiming that Plaintiff has the authority to file civil actions in order to protect public rights and interests and the environment. Plf's Compl. at ¶ 10. Plaintiff did not bring this action to represent any sovereign or proprietary state interest, but rather has brought a *parens patriae* action based on Plaintiff's interest in the well-being of its citizens. Id. Both the Supreme Court and the Ninth Circuit have held that a state lacks standing as *parens patriae* to bring such an action against the Federal government. Alfred L. Snapp v. Puerto Rico, 458 U.S. 592, 607, 610 n. 16 (1982); Nevada v. Burford, 918 F.2d 854, 858 (9th Cir. 1990). Plaintiff lacks standing as *parens patriae* to bring this action against the Federal Defendants.[1]/ Therefore, the Court lacks jurisdiction and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure Plaintiff's Complaint must be dismissed for lack of standing.

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[1]/ An action against a Federal employee in his or her official capacity is an action against the Federal government. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949)).

II. FACTUAL BACKGROUND

A. Management of National Forest System Land in the Sierra Nevada

The Sierra Nevada is a long, continuous mountain range in Eastern California that, along with the Modoc Plateau, includes nearly 11.5 million acres of National Forest System land and encompasses "dozens of complex ecosystems each with numerous, inter-connected social, economic and ecological components." See Management Review and Recommendations ("MRR") at 7 (attached as Fed. Defs.' Ex. A). In the late 1980s, the Forest Service began developing a comprehensive strategy for managing the various resources and complex systems in the Sierra. This strategy has included, among other things, two significant forest plan amendments, the 2001 Framework and the 2004 Framework.

1. The 2001 Framework

In 1995 the Regional Forester for the Pacific Southwest Region of the Forest Service issued a draft environmental impact statement ("EIS") on a proposal for comprehensive management direction covering the national forests in the Sierra. See Record of Decision ("ROD") for the 2001 Sierra Nevada Forest Plan Amendment ("2001 ROD") at 1 (attached as Fed. Defs.' Ex. B). After extensive public participation and a final EIS, the Regional Forester issued a decision in January 2001 to amend the forest plans for eleven national forests. That decision, the 2001 ROD, adopted management direction in related to five major topics: old forest ecosystems; aquatic, riparian, and meadow ecosystems; fire and fuels; noxious weeds; and hardwood ecosystems on the lower westside of the Sierra. See id. at 3-7. Among other things, the 2001 ROD attempted to "balance the treatment of excessive fuels buildups, with the need to conserve key habitats for species at risk associated with old forest ecosystems . . . ." Id.

2. Management Review of the 2001 Framework

Following the issuance of the 2001 ROD, the Forest Service received approximately 200 administrative appeals. The Chief of the Forest Service ("Chief") affirmed the 2001 ROD but directed the Regional Forester to review it in light of several concerns, including increased levels of wildfires, the relationship between the 2001 ROD and national firefighting efforts, and the

relationship between the 2001 ROD and the Forest Service's responsibilities under the Herger Feinstein Quincy Library Group Forest Recovery Act ("HFQLG Act"). See MRR at 5.

The Regional Forester assembled a management review team ("Team") which conducted a year-long public review that culminated in the issuance of management recommendations in March 2003. The public review included open community meetings, workshops and field trips held with Forest Service employees, interest groups, scientists, other government agencies, journalists and others. MRR at 5. The Team sponsored three field trips devoted specifically to fire and fuels to learn more about how the standards and guidelines from the 2001 ROD were being interpreted at the field level and to begin to assess where improvements could be made based on additional analysis and review. MRR at 13. The Team concluded that the 2001 ROD's "cautious approach" to active fuels management had limited the effectiveness in many treatment areas.[2]/ In response, the Team determined that a revised set of vegetation management rules, combined with existing desired condition statements, would increase the effective implementation of the fuels reduction strategy while protecting critical wildlife habitat. Id. at 5.

The Team also evaluated the owl analysis upon which the 2001 ROD relied and found that a new analysis was warranted. In analyzing the effects to the owl resulting from full implementation of the HFQLG Act, the 2001 ROD relied upon the analysis in the HFQLG BA/BE, which unnecessarily "took a worst case approach to estimating effects" on the owl. MRR at 55. In particular, the HFQLG biological assessment/biological evaluation ("BA/BE") assumed that "[a]ll group selection and DFPZ construction that was projected to occur within owl habitat" would render 100 percent of that habitat unsuitable. Id. However, the Team found that the HFQLG BA/BE described past fuel reduction thinnings and DFPZ construction in owl

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[2]/ For example, the Team found that under the 2001 ROD, the dense forest stands that were "key components to sensitive wildlife species habitat and most vulnerable to wildfire loss – will be treated either lightly (ineffectively) or not at all." The Team went on to state "[o]ur conclusion is that the standards and guidelines in the ROD will not allow for the placement and intensity of area treatments needed to effectively reduce the spread and intensity of wildland fires at the landscape scale." Id. at 14. This led the Team to conclude that the "area treatments" necessary for effective reduction of wildfire spread and intensity at the landscape level would not be conducted in the appropriate place or at the proper intensity. Id.

nesting habitat as having "actually reduced that habitat by less than one percent of the acreage treated," not the 100 percent that the analysis assumed. MRR at 55. Thus, the analysis in the BA/BE was determined to be unnecessarily conservative. See id. The Team also found that the 2001 ROD management direction would adversely affect permitted ranching operations involving grazing. Id. at 93-94. The Team found that the standards and guidelines under the 2001 ROD could be altered to provide yet still more flexibility to provide equivalent levels of protection to riparian species and allow grazing operations to continue. Id. Finally, the Team recognized that the 2001 ROD management direction created an unstable business environment having adverse and unintended impacts on recreational businesses, their clients, and the communities that support recreation. Id.

3. Addressing Issues Raised in the Review of the 2001 Framework

In response to the Team's findings, the Regional Forester's office developed alternative management strategies to the 2001 ROD. A draft supplemental enviromental impact statement ("DSEIS") was released for public comment in April 2003. A Final SEIS ("FSEIS") was released to the public in January 2004. See 69 Fed. Reg. 4512 (Jan. 30, 2004). The FSEIS analyzed nine alternatives in detail, including the no action alternative--which would continue management under the 2001 ROD, the proposed action alternative, and seven alternatives which had been previously considered in the 2001 FEIS. In addition to describing the alternatives, the FSEIS discussed the affected environment and analyzed the potential environmental effects of each alternative on a wide range of resources, including old forest ecosystems, (2004 FEIS at 194-198), forest and vegetation health (id. 199-206), aquatic, riparian and meadow ecosystems (id. at 207-214), fire and fuels (id. at 215-226), wildlife (id. at 234-315), socio-economic effects and effects related to commercial forest products (id. at 316-322), and recreation (id. at 326-327).

On January 21, 2004, the Regional Forester issued a decision adopting the proposed action from the FSEIS. See Sierra Nevada Forest Plan Amendment, Record of Decision ("2004 ROD") (attached as Fed. Defs.' Ex. C). The 2004 ROD replaces the direction in the 2001 ROD and amends the forest plans for National Forests in the Sierra Nevada. See 2004 ROD at 15.

The selected alternative seeks to improve effectiveness and implementation of the 2001 ROD's fuels strategy while protecting habitat components important to sensitive wildlife species.

On November 18, 2004, the Chief issued a decision affirming the 2004 ROD with direction to submit to him within six months additional details of the 2004 ROD's adaptive management strategy. See Sierra Nevada Forest Plan Amendment Appeal Decision (attached as Fed. Defs.' Ex. D). Pursuant to 36 C.F.R. § 217.7(d)(2) (2000), the Under Secretary for Natural Resources and Environment of the Department of Agriculture took discretionary review over the Chief's decision on December 23, 2004 and affirmed that decision on March 21, 2005. See Review Decision on the 2004 Sierra Nevad Forest Plan (attached as Fed. Defs.' Ex. E).

III. LEGAL BACKGROUND

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.,* requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must include a "detailed written statement" concerning "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided"; it should inform the decisionmakers and the public of the reasonable alternatives which would minimize the adverse impacts or enhance the quality of the environment. Id.; see also 40 C.F.R. §§ 1502.1, 1508.11. NEPA requires analysis and public disclosure of significant environmental effects in order to ensure informed public decisionmaking but does not require that agencies select any particular decision. Robertson v. Methow Valley Citizens' Council, 490 U.S. 332, 350 (1989).

In reviewing agency decisions under NEPA, a court's role is "simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." Baltimore Gas & Elec. v. NRDC, 462 U.S. 87, 97-98 (1983); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 555 (1978) (A reviewing court may not substitute its own judgment for that of the agency.); see also Laguna Greenbelt, Inc. v. United States Dep't. of Transp., 42 F.3d 517, 523 (9th Cir. 1994)

(noting courts "may not substitute [their] judgment of that of the agency concerning the wisdom or prudence of a proposed action.") (citing Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987)).

IV. PROCEDURAL BACKGROUND

On February 1, 2005, Plaintiff filed this action challenging the adoption of the 2004 Framework under NEPA and the APA. Plf's Compl. at ¶ 5. Under NEPA, Plaintiffs allege that Federal Defendants failed to take a "hard look" in the decision to adopt the 2004 Framework, (id. ¶ 41); failed to adequately discuss the environmental consequences of adopting the 2004 Framework, (id ¶ 46-48); failed to evaluate alternatives to the complete rejection of the 2001 Framework, (id. ¶ 50-52); and, failed to adequately address incomplete or unavailable information, (id ¶54-57). In association with each of the above-mentioned claims, Plaintiff alleges that Federal Defendants' failure to comply with NEPA and its implementing regulations was arbitrary and capricious. Id. at ¶ 44, 48, 52, 57. Finally, Plaintiff brings an independent cause of action under the APA, alleging that the decision to replace the 2001 Framework with the 2004 Framework was arbitrary and capricious because a reasoned analysis was allegedly not provided. Id. ¶ 35-39.

V. STANDARD OF REVIEW

Standing is a jurisdictional issues that federal courts are required to address prior to deciding the merits. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-96 (1998); Pershing Park Villa Homeowners Association v. United Pacific Insurance Co., 219 F.3d 895, 899-900 (9th Cir. 2000) (citing Ripplinger v. Collins, 868 F.2d 1043, 1046-47 (9th Cir. 1989) (issue of standing must be addressed whenever raised). A challenge to standing is a challenge as to the court's subject matter jurisdiction. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (stating that standing pertains to a federal court's subject matter jurisdiction). "Defects in subject matter jurisdiction may be raised at any time, by the parties or by the court on its own motion, and may never be waived." Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1264 (9th Cir. 1992); see also Fed. R.Civ.P. 12(b)(1) (Jurisdictional issues may be raised at any time by a party, including a

motion filed in lieu of an answer.). The burden of proving subject matter jurisdiction in this case rests upon Plaintiff, which is the "party invoking the federal court's jurisdiction." Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). If the court finds that it lacks subject matter jurisdiction, then it "shall dismiss the action." Fed. R. Civ. P. 12(h)(3). Furthermore, in accordance with Ninth Circuit precedent, if the court finds that a state lacks standing in its *parens patriae* capacity, the court may dismiss the action. See Nevada, 918 F.2d at 858 (dismissing the state of Nevada's challenge to a decision by the United States Bureau of Land Management ("BLM") for lack of standing).

VI. ARGUMENT

The State of California Lacks Standing to Bring an Action as *Parens Patriae*[3]/ Against the Federal Government.

It has long been settled that a state does not have standing as *parens patriae* to bring an action against the Federal government. See Snapp, 458 U.S. at 610 n.16 ("A State does not have standing as parens patriae to bring an action against the Federal Government") (citing to Massachusetts v. Mellon, 262 U.S. 447, 485-486 (1923)); Nevada, 918 F.2d at 858. In Mellon, the Supreme Court determined that a state cannot bring suit on behalf of its citizens, who are also citizens of the United States, against the operation of a federal statute, because it is the federal government and not the state which represents the citizens as *parens patriae*. See Mellon, 262 U.S. at 485. More recently, the Supreme Court reaffirmed its holding in Mellon,stating that:

> While the State, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.

Snapp, 458 U.S. at 610 n.16 (citing Mellon, 262 U.S. at 485-86) (internal citations omitted). For these reasons courts have consistently prohibited states from bringing *parens patriae* actions against the federal government.

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[3]/ *"Parens patriae*" literally "parent of the country,' refers traditionally to role of the state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (8th ed. 2004).

Consistent with the Supreme Court's holding in Snapp, the Ninth Circuit has found that a state does not have standing as *parens patriae* to bring an action against the Federal government: the court rejected the State of Nevada's NEPA challenge to BLM's decision to grant a right-of-way to the United States Department of Energy to conduct site characterization studies at Yucca Mountain. Nevada, 918 F.2d at 855-56. In that case, Nevada alleged that BLM violated NEPA for a decision affecting lands administered by the BLM. Id. Specifically, Nevada argued that the environmental assessment[4]/ performed in connection with the agency's decision was insufficient. Id. However, prior to reaching the merits of that allegation, the Ninth Circuit found that Nevada did not have standing to sue a federal agency, noting that "it is the United States, and not the State, which represents [the citizens] as *parens patriae*." 918 F.2d at 858 (quoting Snapp, 458 U.S. at 610 n.16).[5]/

In addition to the Ninth Circuit, other circuits have followed the Supreme Court's lead and have held that a state lacks standing to sue the United States. See e.g. Wyoming ex rel. Sullivan, 969 F.2d 877, 882-83 (10th Cir. 1992) (state lacked standing under *parens patriae* theory to challenge United States Department of the Interior's exchange of federally-owned coal for conservation easement); Iowa ex rel. Miller v. Block, 771 F.2d 347, 354-55 (8th Cir. 1985) (state lacked standing under *parens patriae* theory to challenge Department of Agriculture's federal disaster relief programs); Maryland People's Counsel v. F.E.R.C., 760 F.2d 318, 320

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[4]/ NEPA's implementing regulations, found at 40 C.F.R. §§ 1500-1517, provide that in order to determine whether a proposed major federal action requires preparation of an environmental impact statement, the agency may conduct a preliminary examination, called an environmental assessment ("EA"), of a proposed federal action. 40 C.F.R. §§ 1501.4, 1508.9; see also Jones v. Gordon, 792 F.2d 821 827 (9th Cir. 1986). 40 C.F.R. § 1508.9(a) defines an environmental assessment as: "[A] concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary."

[5]/ In Nevada, the Ninth Circuit recognized that the Supreme Court's decision in Snapp superceded an earlier Ninth Circuit case, Washington Utilities & Transportation Comm. v. FCC, in which the Court, in a footnote, mentioned that a state could sue as *parens patriae* for review of federal regulatory agency decisions. 513 F.2d 1142, 1153 n.13 (9th Cir. 1975).

(D.C. Cir. 1985); see also Stenehjem v. Whitman, No. A3-00-109, 2001 WL 1708825 (N.D. 2001) (state lacked standing under *parens patriae* theory to challenge EPA's interpretation of federal statute). To allow a state to bring *parens patriae* suits against the federal government "would intrude on the sovereignty of the federal government and ignore important considerations of our federalist system." Iowa ex rel Miller, 771 F.2d at 355.

This case is controlled by the rule set forth by the Supreme Court in Snapp and followed by the Ninth Circuit in Nevada. Here Plaintiff claims that in accordance with state statutes and the Constitution of California, Plaintiff has the authority to file a *parens patriae* action in order to protect public rights and interests and the environment. Compl. at ¶ 10. Specifically, Plaintiff states that the "Attorney General Bill Lockyer is the chief law enforcement officer of the State and has the authority to file civil actions in order to protect the public rights and interests and the environment. Cal. Gov. Code §§ 12600-12612; Cal. Const., art V, § 13." Id. In that capacity, Plaintiff challenges the Forest Service's decision to amend the 2001 Framework with the 2004 Framework. Id. at ¶ 5. The language of Plaintiff's Complaint unequivocally demonstrates that Plaintiff has brought a *parens patriae* action.

Although Plaintiff's interest in protecting the well-being of it citizens may afford *parens patriae* standing against parties other than the United States, Plaintiff lacks standing in this case against the United States. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." Snapp, 458 U.S. at 610 n.16 (citing to Massachusetts v. Mellon, 262 U.S. 447, 485-486 (1923)); see also Nevada, 918 F.2d at 858. Therefore, as held by the Supreme Court and followed by the Ninth Circuit, Plaintiff lacks standing to bring suit on behalf of its citizens against Federal Defendants. Plaintiff's Complaint must be dismissed for lack of jurisdiction.

VII. CONCLUSION

For the foregoing reasons, this Court should grant Federal Defendants' motion and should dismiss Plaintiff's Complaint for lack of standing.

Respectfully submitted this 27 day of April, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2005, I electronically filed the foregoing FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification to the individuals listed below. Additionally, I further certify that I caused to be served a copy to be served by first class mail, postage prepaid, upon the following individuals:

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