

KELLY A. JOHNSON
Acting Assistant Attorney General
BRIAN C. TOTH
Trial Attorney
JULIA A. JONES
Trial Attorney
United States Department of Justice
Environmental & Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0436
Facsimile: (202) 305-0506

McGREGOR W. SCOTT
United States Attorney
EDMUND F. BRENNAN
Assistant United States Attorney
E. ROBERT WRIGHT
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2702
Facsimile: (916) 554-2900

**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.

1
2 **I. INTRODUCTION**

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

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

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27 ^{1/} An action against a Federal employee in his or her official capacity is an action against the
28 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

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

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

15 The Team also evaluated the owl analysis upon which the 2001 ROD relied and found
16 that a new analysis was warranted. In analyzing the effects to the owl resulting from full
17 implementation of the HFQLG Act, the 2001 ROD relied upon the analysis in the HFQLG
18 BA/BE, which unnecessarily "took a worst case approach to estimating effects" on the owl.
19 MRR at 55. In particular, the HFQLG biological assessment/biological evaluation ("BA/BE")
20 assumed that "[a]ll group selection and DFPZ construction that was projected to occur within owl
21 habitat" would render 100 percent of that habitat unsuitable. Id. However, the Team found that
22 the HFQLG BA/BE described past fuel reduction thinnings and DFPZ construction in owl
23

24 ^{2/} For example, the Team found that under the 2001 ROD, the dense forest stands that were "key
25 components to sensitive wildlife species habitat and most vulnerable to wildfire loss – will be
26 treated either lightly (ineffectively) or not at all." The Team went on to state "[o]ur conclusion is
27 that the standards and guidelines in the ROD will not allow for the placement and intensity of
28 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.

1 nesting habitat as having “actually reduced that habitat by less than one percent of the acreage
2 treated,” not the 100 percent that the analysis assumed. MRR at 55. Thus, the analysis in the
3 BA/BE was determined to be unnecessarily conservative. See id. The Team also found that the
4 2001 ROD management direction would adversely affect permitted ranching operations involving
5 grazing. Id. at 93-94. The Team found that the standards and guidelines under the 2001 ROD
6 could be altered to provide yet still more flexibility to provide equivalent levels of protection to
7 riparian species and allow grazing operations to continue. Id. Finally, the Team recognized that
8 the 2001 ROD management direction created an unstable business environment having adverse
9 and unintended impacts on recreational businesses, their clients, and the communities that
10 support recreation. Id.

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

12 In response to the Team’s findings, the Regional Forester’s office developed alternative
13 management strategies to the 2001 ROD. A draft supplemental environmental impact statement
14 (“DSEIS”) was released for public comment in April 2003. A Final SEIS (“FSEIS”) was
15 released to the public in January 2004. See 69 Fed. Reg. 4512 (Jan. 30, 2004). The FSEIS
16 analyzed nine alternatives in detail, including the no action alternative--which would continue
17 management under the 2001 ROD, the proposed action alternative, and seven alternatives which
18 had been previously considered in the 2001 FEIS. In addition to describing the alternatives, the
19 FSEIS discussed the affected environment and analyzed the potential environmental effects of
20 each alternative on a wide range of resources, including old forest ecosystems, (2004 FEIS at
21 194-198), forest and vegetation health (id. 199-206), aquatic, riparian and meadow ecosystems
22 (id. at 207-214), fire and fuels (id. at 215-226), wildlife (id. at 234-315), socio-economic effects
23 and effects related to commercial forest products (id. at 316-322), and recreation (id. at 326-327).

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

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

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

10 **III. LEGAL BACKGROUND**

11 The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, requires
12 federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for "major
13 Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §
14 4332(2)(C). An EIS must include a "detailed written statement" concerning "the environmental
15 impact of the proposed action" and "any adverse environmental effects which cannot be
16 avoided"; it should inform the decisionmakers and the public of the reasonable alternatives which
17 would minimize the adverse impacts or enhance the quality of the environment. Id.; see also 40
18 C.F.R. §§ 1502.1, 1508.11. NEPA requires analysis and public disclosure of significant
19 environmental effects in order to ensure informed public decisionmaking but does not require that
20 agencies select any particular decision. Robertson v. Methow Valley Citizens' Council, 490 U.S.
21 332, 350 (1989).

22 In reviewing agency decisions under NEPA, a court's role is "simply to ensure that the
23 agency has adequately considered and disclosed the environmental impact of its actions and that
24 its decision is not arbitrary or capricious." Baltimore Gas & Elec. v. NRDC, 462 U.S. 87, 97-98
25 (1983); Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 555
26 (1978) (A reviewing court may not substitute its own judgment for that of the agency.); see also
27 Laguna Greenbelt, Inc. v. United States Dep't. of Transp., 42 F.3d 517, 523 (9th Cir. 1994)

1 (noting courts “may not substitute [their] judgment of that of the agency concerning the wisdom
2 or prudence of a proposed action.”) (citing Oregon Envtl. Council v. Kunzman, 817 F.2d 484,
3 492 (9th Cir. 1987)).

4 **IV. PROCEDURAL BACKGROUND**

5 On February 1, 2005, Plaintiff filed this action challenging the adoption of the 2004
6 Framework under NEPA and the APA. Plf’s Compl. at ¶ 5. Under NEPA, Plaintiffs allege that
7 Federal Defendants failed to take a “hard look” in the decision to adopt the 2004 Framework, (id.
8 ¶ 41); failed to adequately discuss the environmental consequences of adopting the 2004
9 Framework, (id. ¶ 46-48); failed to evaluate alternatives to the complete rejection of the 2001
10 Framework, (id. ¶ 50-52); and, failed to adequately address incomplete or unavailable
11 information, (id. ¶ 54-57). In association with each of the above-mentioned claims, Plaintiff
12 alleges that Federal Defendants’ failure to comply with NEPA and its implementing regulations
13 was arbitrary and capricious. Id. at ¶ 44, 48, 52, 57. Finally, Plaintiff brings an independent
14 cause of action under the APA, alleging that the decision to replace the 2001 Framework with the
15 2004 Framework was arbitrary and capricious because a reasoned analysis was allegedly not
16 provided. Id. ¶ 35-39.

17 **V. STANDARD OF REVIEW**

18 Standing is a jurisdictional issues that federal courts are required to address prior to
19 deciding the merits. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94-96 (1998); Pershing
20 Park Villa Homeowners Association v. United Pacific Insurance Co., 219 F.3d 895, 899-900 (9th
21 Cir. 2000) (citing Ripplinger v. Collins, 868 F.2d 1043, 1046-47 (9th Cir. 1989) (issue of
22 standing must be addressed whenever raised). A challenge to standing is a challenge as to the
23 court's subject matter jurisdiction. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (stating that
24 standing pertains to a federal court's subject matter jurisdiction). “Defects in subject matter
25 jurisdiction may be raised at any time, by the parties or by the court on its own motion, and may
26 never be waived.” Cripps v. Life Ins. Co. of N. Am., 980 F.2d 1261, 1264 (9th Cir. 1992); see
27 also Fed. R.Civ.P. 12(b)(1) (Jurisdictional issues may be raised at any time by a party, including a
28

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

9 10 VI. ARGUMENT

11 The State of California Lacks Standing to Bring an Action as *Parens Patriae*^{3/} 12 Against the Federal Government.

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

21 While the State, under some circumstances, may sue in that capacity for the
22 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.

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

26 ^{3/} “*Parens patriae*” literally “parent of the country,” refers traditionally to role of the state as
27 sovereign and guardian of persons under legal disability.” BLACK’S LAW DICTIONARY 1003 (8th
28 ed. 2004).

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

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

20 ^{4/} NEPA's implementing regulations, found at 40 C.F.R. §§ 1500-1517, provide that in order to
21 determine whether a proposed major federal action requires preparation of an environmental
22 impact statement, the agency may conduct a preliminary examination, called an environmental
23 assessment ("EA"), of a proposed federal action. 40 C.F.R. §§ 1501.4, 1508.9; see also Jones v.
24 Gordon, 792 F.2d 821 827 (9th Cir. 1986). 40 C.F.R. § 1508.9(a) defines an environmental
25 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."

26 ^{5/} In Nevada, the Ninth Circuit recognized that the Supreme Court's decision in Snapp
27 superceded an earlier Ninth Circuit case, Washington Utilities & Transportation Comm. v. FCC,
28 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).

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

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

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

24 **VII. CONCLUSION**

25 For the foregoing reasons, this Court should grant Federal Defendants’ motion and should
26 dismiss Plaintiff’s Complaint for lack of standing.
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1 Respectfully submitted this 27 day of April, 2005.

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3 MCGREGOR W. SCOTT
United States Attorney
4 EDMUND F. BRENNAN
Assistant U.S. Attorney
5 E. ROBERT WRIGHT
Assistant U.S. Attorney

6
7 KELLY A. JOHNSON
Acting Assistant Attorney General

8 By: /s/ Julia A. Jones

9 BRIAN C. TOTH
JULIA A. JONES
10 Trial Attorneys
Environment and Natural Resources Division
11 United States Department of Justice
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Janill L. Richards
Janill.richards@doj.ca.gov
Counsel for Plaintiff

Sally Magnani Knox
sally.knox@doj.ca.gov
Counsel for Plaintiff

J. Michael Klise
jmklise@crowell.com
Counsel for Proposed Intervenors

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