

1 XAVIER BECERRA  
 Attorney General of California  
 2 JAMEE JORDAN PATTERSON  
 Supervising Deputy Attorney General  
 3 KIMBERLY R. GOSLING  
 Deputy Attorney General  
 4 State Bar No. 247803  
 600 West Broadway, Suite 1800  
 5 San Diego, CA 92101  
 Telephone: (619) 738-9519  
 6 Fax: (619) 645-2271  
 E-mail: Kimberly.Gosling@doj.ca.gov  
 7 *Attorneys for Defendant*  
*Department of Housing and Community*  
 8 *Development*

9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12

13  
 14 **EARTH ISLAND INSTITUTE, et al.,**

15 Plaintiffs,

16 v.

17 **KIMBERLY NASH, et al.,**

18 Defendants.

3:19-CV-05792-RS

**DEFENDANT CALIFORNIA  
 DEPARTMENT OF HOUSING AND  
 COMMUNITY DEVELOPMENT'S  
 OPPOSITION TO MOTION FOR  
 TEMPORARY RESTRAINING ORDER  
 AND PRELIMINARY INJECTION (DKT.  
 26)**

Judge: The Honorable Richard G.  
 Seeborg

Trial Date: None Set

Action Filed: September 16, 2019

21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

**INTRODUCTION**

1  
2 Plaintiffs seek a temporary restraining order and preliminary injunction enjoining defendant  
3 California Department of Housing and Community Development (“HCD”) “from using HUD  
4 Disaster Relief Act funding for any activities on the Stanislaus National Forest . . . , and . . . from  
5 completing any activities set forth in the HCD Records of Decision for the Forest and Watershed  
6 Health Project.” (Dkt. No. 29 at 2.) The Court should deny the motion for several reasons.

7 First, Plaintiffs did not give notice of the motion to HCD.<sup>1</sup> HCD has not appeared in the  
8 case until now, so the electronic filing did not reach HCD. Indeed, HCD only learned about the  
9 motion by chance, while reviewing the electronic docket for this case shortly before the  
10 opposition deadline set by the Court. The Court should deny the motion due to this violation of  
11 Local Rule 65-1(b).

12 The motion also fails on the merits. As the Department of Housing and Urban  
13 Development and United States Forest Service (collectively, “Federal Defendants”) argue in their  
14 opposition, Plaintiffs cannot establish any of the elements required for a temporary restraining  
15 order or preliminary injunction. As HCD discusses below, Plaintiffs’ request for a temporary  
16 restraining order also presents serious public safety issues; any delay of the project places  
17 completion and funding of the project at risk; and an injunction preventing HCD from requesting  
18 distribution of Disaster Relief Appropriation Act funds exposes HCD to the possibility of not  
19 being able to pay invoices due for both completed and ongoing work. Moreover, this is an  
20 emergency of Plaintiffs’ own making. Plaintiffs were aware of the project since at least June  
21 2017 but delayed filing suit. They are not entitled to emergency relief to cure this delay.

22 HCD also joins in the Federal Defendants’ motion to dismiss or transfer, to the extent that  
23 motion seeks a discretionary transfer to the Eastern District of California under 28 U.S.C.  
24 § 1404(a). Transfer serves the convenience of the parties and witnesses, and the interests of  
25 justice, for a number of reasons, including because the HCD contracts at issue were entered into  
26

---

27 <sup>1</sup> The California Attorney General’s Office has not yet been authorized to represent  
28 Defendant Janice Waddell and does not know if she was served with the Complaint or Plaintiffs’  
motion for a temporary restraining order.

1 in the Eastern District, and because all of the initial and current core team members involved in  
2 the grant application and planning work are there too.

3 Accordingly, HCD respectfully requests that the Court deny the motion in full and transfer  
4 this case to the Eastern District of California.

### 5 **BACKGROUND**

6 Plaintiffs challenge the forest management and fire prevention work of the United States  
7 Forest Service (“Forest Service”) in the Stanislaus National Forest. In 2013, a devastating fire  
8 known as the Rim Fire began in Stanislaus National Forest and razed hundreds of thousands of  
9 acres. After the Rim Fire, HCD applied for federal disaster relief funds from the United States  
10 Department of Housing and Urban Development (“HUD”). (Hale Decl., ¶ 3.) In February 2018,  
11 HUD awarded HCD approximately \$70 million in disaster relief funds. (Hale Decl., ¶ 4.) HCD  
12 passed some of these funds to the Forest Service for forest management work intended to reduce  
13 the risk of exposure to future forest fires and to rehabilitate the forests (the “Project”). (Hale  
14 Decl., ¶ 5.)

15 Before work on the Project began, HCD adopted two Environmental Impact Statements  
16 (“EISs”) conducted by the Forest Service in 2014 and 2016. (Hale Decl., ¶ 6.) Prior to its  
17 adoption of the EISs, HCD solicited and considered public comments relating to its adoption of  
18 the EISs and proposed forest management activities in the Stanislaus National Forest. (Hale  
19 Decl., ¶ 7.) Plaintiffs allege that they commented on HCD’s proposals in June and October of  
20 2017. (Dkt. No. 1, Compl. ¶¶ 73, 77). HCD’s website provided the public with status updates on  
21 the Project as it progressed. (Hale Decl., ¶ 8.) Plaintiffs delayed in filing suit until months after  
22 the Project commenced and more than two years after they were aware of the proposed project.  
23 Plaintiffs now ask the Court for emergency relief to cure their own delay. (Dkt. No. 27.)

### 24 **HCD DOES NOT WAIVE ITS SOVEREIGN IMMUNITY**

25 The Eleventh Amendment bars any claim by a private party against a state in federal court,  
26 unless the state consents or the immunity is abrogated by Congress. *Coll. Sav. Bank v. Florida*  
27 *Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Pennhurst State Sch. &*  
28 *Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted). HCD is currently investigating

1 the extent of any sovereign immunity that may apply to HCD in this case. HCD expressly  
2 reserves the right to assert the defense of sovereign immunity and does not waive that defense by  
3 filing this opposition.

## 4 ARGUMENT

### 5 I. PLAINTIFFS HAVE NOT GIVEN NOTICE OF THIS MOTION TO HCD

6 The Court should deny the motion because Plaintiffs have not given notice to HCD under  
7 Local Rule 65-1(b). That rule states:

8 Notice to Opposition of Ex Parte Motion. Unless relieved by order of a Judge for  
9 good cause shown, on or before the day of an ex parte motion for a temporary  
10 restraining order, counsel applying for the temporary restraining order must deliver  
notice of such motion to opposing counsel or party.

11 Plaintiffs have not given *any* notice of this motion to HCD. When they filed the motion  
12 electronically, HCD had not yet appeared, and thus did not received electronic notice. And  
13 Plaintiffs have not given notice to HCD through any other means of service, as is evidenced by  
14 the fact that they have filed no proof of having done so. Indeed, HCD became aware of the  
15 motion and was able to file this opposition only because it happened to review the online docket  
16 not long before the opposition was due.

17 Plaintiffs also have not requested or received relief from the requirement of Local Rule 65-  
18 1(b) based on good cause shown. Because Plaintiffs have failed to comply with this rule, the  
19 Court should deny their demand for emergency relief.

### 20 II. THE MOTION FAILS ON THE MERITS

#### 21 A. Legal Standards

22 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be  
23 granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v.*  
24 *Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis in original). To prevail on a  
25 motion for a preliminary injunction, a plaintiff must show (1) a strong likelihood of success on  
26 the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted,  
27 (3) a balance of hardships favoring the plaintiff, and (4) that an injunction is in the public interest.  
28 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, “[a] preliminary

1 injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits  
2 were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the*  
3 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation omitted). Even  
4 under this alternative sliding scale test, however, plaintiffs must make a showing of all four  
5 *Winter* factors. *Id.* at 1132, 1135. "[A] strong factual record is necessary" for a federal court to  
6 impose a preliminary injunction on a state agency. *Thomas v. County of Los Angeles*, 978 F.2d  
7 504, 508 (9th Cir. 1992).

8 "The standard for a [temporary restraining order] is the same as for a preliminary  
9 injunction." *Rovio Entm't Ltd. v. Royal Plush Toys, Inc.*, 907 F. Supp. 2d 1086, 1092 (N.D. Cal.  
10 2012) (citing *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th  
11 Cir. 2001)).

#### 12 **B. Plaintiffs Do Not Meet the Requirements for a TRO or Preliminary** 13 **Injunction**

14 For many of the reasons set forth in the opposition brief filed by the Federal Defendants,  
15 Plaintiffs' motion fails to meet the requirements for a TRO or preliminary injunction. HCD  
16 hereby joins in the arguments in sections V.A.1.i.b through V.B in that brief. Plaintiffs' motion  
17 also fails for several additional reasons.

18 First, the balance of hardships and public interest do not weigh in Plaintiffs' favor.  
19 Granting Plaintiffs' request for a temporary restraining order presents serious public safety issues.  
20 HCD is currently using Disaster Relief Appropriation Act funds to complete environmental  
21 review of forest fire fuel breaks<sup>2</sup> planned to be built in Tuolumne County. (Hale Decl., ¶ 9.)  
22 HCD will also use Disaster Relief Appropriation Act funds to pay for construction of these fuel  
23 breaks, which is scheduled to begin in the spring of 2020. (*Id.*) If environmental review of the  
24 fuel breaks is stalled, it will likely result in exponential delay of completion of the breaks, and  
25 will leave Tuolumne County and the surrounding areas vulnerable to increased risk of forest fires.  
26 (*Id.*)

27 \_\_\_\_\_  
28 <sup>2</sup> A fuel break is an area with little to no fuel for a fire, thus providing forest fire  
protection. (Hale Decl., ¶ 9.)

1 Second, delay of the Project places completion and funding of the Project at risk. The  
2 Project must be completed by September 30, 2022. (Hale Decl., ¶ 10.) If the Project is not  
3 completed by this date, HCD forfeits any remaining funds to the federal government. (*Id.*) This  
4 is a statutory deadline that cannot be changed without Congress’s approval. (*Id.*) As a result, any  
5 delay in the Project is likely to reduce the reforestation and fuel break efforts needed to restore  
6 and protect the watersheds, forested areas, people and property in Tuolumne County. (*Id.*)

7 Third, any injunction enjoining HCD from requesting distribution of Disaster Relief  
8 Appropriation Act funds exposes HCD to the possibility of not being able to pay invoices due for  
9 both completed and ongoing work. (Hale Decl., ¶ 12.) HCD owes \$1,674,925.48 in invoices for  
10 Project work that has already been completed. (*Id.*) Enjoining HCD from paying these invoices  
11 will not redress the environmental harm Plaintiffs argue will occur, as the work has already been  
12 completed. HCD will also owe a significant amount in invoices at the end of the third quarter of  
13 2019 for both completed and ongoing work. (*Id.*) Preventing HCD from paying these invoices  
14 will interfere with HCD’s contractual relationships and may delay all aspects of the Project.

15 Lastly, Plaintiffs created the emergency they argue exists by waiting to file this case. As  
16 the Complaint makes clear, Plaintiffs were aware of the Project at least as early as June 2017,  
17 (Dkt. No. 1, Compl. ¶ 73), and commented on the Project several times before it began, (Dkt. No.  
18 1, Compl. ¶¶ 73, 77). Furthermore, HCD’s website informs the public of all Project updates.  
19 (Hale Decl., ¶ 8.) The Project has been underway for months, but Plaintiffs waited to file suit and  
20 now seek emergency relief as a result of their delay. Plaintiffs’ delay weighs against issuance of  
21 a temporary restraining order. *See Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211,  
22 1213 (9th Cir. 1984) (“A delay in seeking a preliminary injunction is a factor to be considered in  
23 weighing the propriety of relief.”).

### 24 **III. THE COURT SHOULD TRANSFER THIS CASE TO THE EASTERN DISTRICT OF** 25 **CALIFORNIA**

26 In their motion to dismiss, the Federal Defendants argue that the case should be dismissed  
27 or, in the alternative, transferred to the Eastern District of California. (Dkt. No. 15.) HCD hereby  
28

1 joins in that motion to the extent the motion seeks a discretionary transfer to the Eastern District  
2 under 28 U.S.C. § 1404(a). (*See* Dkt. No. 15 at 8-9.)

3 For the reasons set forth in the Federal Defendants’ motion (*id.*), transfer to the Eastern  
4 District is appropriate “[f]or the convenience of the parties and witnesses” and “in the interest of  
5 justice.” 28 U.S.C. § 1404(a). This is also true because the HCD contracts at issue were entered  
6 into in the Eastern District, and because all of the initial and current core team members involved  
7 in the grant application and planning work in the Eastern District. (Hale Decl., ¶ 15.)  
8 Accordingly, the Eastern District is a more appropriate venue for this case.

9 **CONCLUSION**

10 For these reasons, HCD respectfully requests that the Court deny Plaintiffs’ motion for  
11 temporary restraining order and preliminary injunction as to HCD.

12  
13 Dated: September 27, 2019

Respectfully submitted,

14 XAVIER BECERRA  
15 Attorney General of California  
16 JAMEE JORDAN PATTERSON  
Supervising Deputy Attorney General

17  
18 /s/ Kimberly R. Gosling  
19 KIMBERLY R. GOSLING  
Deputy Attorney General  
*Attorneys for Defendant*

20 SD2019105168  
21 72007547.docx



**CERTIFICATE OF SERVICE**

**Case Name:** **EARTH ISLAND INSTITUTE, et al. v. KIMBERLY NASH, et al.**

**Case No. 3:19-CV-05792-RS**

I hereby certify that on September 27, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJECTION (DKT. 26)**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

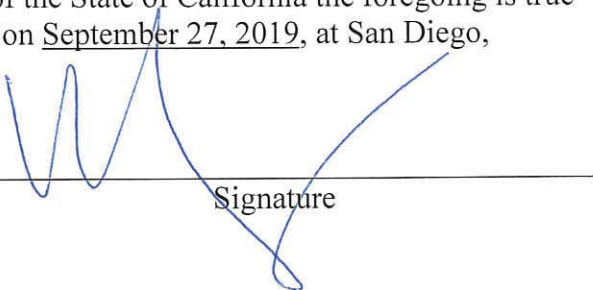
I further certify that some of the participants in the case are not registered CM/ECF users. On September 27, 2019, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document by Federal Express, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Janice Waddell  
California Department of Housing &  
Community Development  
2020 W. El Camino Ave,  
Sacramento, CA 95833

***Defendant***

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 27, 2019, at San Diego, California.

\_\_\_\_\_  
V. Brizuela  
Declarant

  
\_\_\_\_\_  
Signature