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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**PENDLETON DIVISION**

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| **OREGON NATURAL DESERT ASS'N,** et al.,<br><br>Plaintiffs,<br><br>v.<br><br>**U.S. DEPARTMENT OF THE AIR FORCE,**<br><br>Defendant. | **Case No. 2:24-cv-00145-HL**<br><br>**DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND MEMORANDUM IN SUPPORT** |

**DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND MEMORANDUM IN SUPPORT**

**MOTION TO DISMISS**

Defendant United States Department of the Air Force hereby moves this Court, under Federal Rule of Civil Procedure 12(b)(1), to dismiss this action for lack of jurisdiction. In accordance with Local Rule 7-1(a), undersigned counsel certifies that the Parties made a good faith effort through telephone conferences to resolve the dispute and have been unable to do so. A memorandum in support of this motion follows.

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

### I. Introduction

Plaintiffs' complaint, which seeks to challenge the Air Force's environmental review underpinning a decision to optimize airspace around the Mountain Home Air Force Base ("MHAFB"), fails to establish that Plaintiffs have Article III standing. First, Plaintiffs—three environmental organizations—fail to identify a single member of their organizations that will suffer an injury-in-fact that is traceable to the Air Force. Second, the Plaintiff organizations fail to allege that their own resources have been adversely affected by the Air Force's actions. And even then, the broad and conclusory nature of Plaintiffs' allegations would still fail to satisfy the minimum pleading requirements for standing. Their complaint should be dismissed.

### II. Background

The Air Force has been conducting training exercises at MHAFB, in southwestern Idaho, for decades. Compl. ¶¶ 48-50, ECF No. 1. Pilots stationed at MHAFB train with F-15E Strike Eagle aircraft over the base's Special Use Airspace ("SUA"). *Id.* ¶ 50. This SUA covers the airspace above the Owyhee Canyonlands, a widespread region that includes certain wilderness areas around where Oregon, Idaho, and Nevada intersect. *Id.* ¶¶ 1-2. As outlined in an Environmental Impact Statement ("EIS") prepared pursuant to the National Environmental Policy Act ("NEPA") and in the "Owyhee Airspace Optimization" Record of Decision ("ROD"),

the Air Force now seeks to expand opportunities for military aircraft training in the SUA. *Id.* ¶¶ 2-3.

As the EIS explains, existing *operational floors* for training flights—or, the lowest altitude at which military aircraft can fly—no longer allow pilot trainees to obtain their low-altitude certification or effectively train in mountainous areas. *Id.* ¶ 66. The Owyhee Airspace Optimization ROD lowers these operational floors and increases the frequency of training flights in certain areas of the MHAFB's SUA.

The SUA is divided into six Military Operations Areas ("MOAs"): Paradise North, Paradise South, Owyhee North, Owyhee South, Jarbridge North, and Jarbridge South. *Id.* ¶ 50. Two of the MOAs in Idaho, Owyhee North and Jarbridge North, have long had operational floors set at 100-feet above ground level for subsonic flights, and 10,000 feet for supersonic flights. *Id.* ¶ 52. Military fighter jets like the F-15E Strike Eagle are designed to fly at supersonic speeds, meaning they can break the sound barrier. *Id.* ¶ 4. The Owyhee Airspace Optimization ROD would allow the Air Force to conduct training flights at those same operational floors—100 feet for subsonic flights, and 10,000 feet for supersonic flights—in the other four MOAs in Nevada and Oregon. *Id.* ¶¶ 51, 54. Right now, the operational floors set in the Nevada and Oregon MOAs are 3,000 feet and 30,000 feet respectively. *Id.* ¶ 51.

## III. Legal Standard

a. National Environmental Policy Act

NEPA directs federal agencies to prepare an environmental analysis for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To ensure informed decisions, NEPA requires an agency to analyze and disclose significant environmental effects. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id*; *see also id*. at 351 ("NEPA merely prohibits uninformed–rather than unwise–agency action.").

b. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of claims where the court lacks subject-matter jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). A challenge to jurisdiction under Rule 12(b)(1) "may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial challenge, "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* If the court determines that it lacks subject-matter jurisdiction, "the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). "The party asserting federal subject matter jurisdiction bears the burden of proving its

existence." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010).

## IV. Argument

The doctrine of standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Summers v. Earth Island Inst.,* 555 U.S. 488, 492-93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The "irreducible constitutional minimum of standing" consists of three elements: (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs' complaint fails to allege facts that would be sufficient to establish either associational or organizational standing, and therefore, the complaint must be dismissed.

### a. Plaintiffs Lack Associational Standing to Bring This Action

Generally, organizational plaintiffs in environmental cases must demonstrate, *inter alia*, that "at least one identified member" of the organization has standing to sue in his or her own right. *Summers*, 555 U.S. at 498 (2009); *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; . . ."), *superseded by statute on other grounds as stated in United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544 (1996). As the Ninth Circuit has noted, the "identified member" element established in *Summers* is especially relevant in "environmental case[s] brought under the National Environmental Policy Act."

*Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015); *see also Cal. Ass'n for Pres. of Gamefowl v. Stanislaus Cnty.,* No. 20-cv-01294, 2023 WL 1869010, at *17 (E.D. Cal. Feb. 9, 2023) (the *Summers* rule is applicable for cases "involving general allegations of enjoying natural areas"), *report and recommendation adopted*, No. 20-cv-01294, 2023 WL 3862717 (E.D. Cal. June 7, 2023).

Here, Plaintiffs do not identify a single member, or even a particular subset of members, who would otherwise have standing. Instead, the Complaint speaks only of Plaintiffs' members generally, stating, for instance, that "Plaintiffs bring this action . . . on behalf of their members and staff," and that "Plaintiffs' members and supporters, and each organization as a whole, have suffered and will suffer irreparable injury as a result of the Air Force's unlawful actions." *See, e.g.* Compl. ¶¶ 13-21. But these allegations alone, without identifying at least one member injured by the action at issue, fail to meet Plaintiffs' requirement to demonstrate standing.

b. **Plaintiffs Lack Organizational Standing to Bring This Action**

An organization can also have "standing in its own right" if it alleges "such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction[.]" *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879 (9th Cir. 2022) (alterations in original) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), *superseded on other grounds by statute*, 42 U.S. § 3613(a)(1)(A)). As with any other plaintiff, an organizational plaintiff must

meet the three requirements for standing under *Lujan*: injury-in-fact, causation, and redressability. *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Havens*, 455 U.S. at 378). And it must allege "*specific facts* sufficient to satisfy these three elements." *Schmier v. U.S. Ct. of Appeals for Ninth Cir.*, 279 F.3d 817, 821 (9th Cir. 2002) (emphasis added).

One way an organization can demonstrate it has "direct standing" is by alleging an injury constituting "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores*, 624 F.3d at 1088 (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). But even when an alleged injury is procedural, "a plaintiff . . . does not have standing absent a showing that the 'procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (quoting *Lujan*, 504 U.S. at 573 n. 8).

Here, the complaint falls short regarding the organizational Plaintiffs' injury-in-fact. The only allegations of injury that concern the organizations are that they—along with their members—face "increase[d] . . . risk" of "interference with and harm to their aesthetic, recreational, scientific, spiritual, educational, and professional interests." Compl. ¶ 20. This is insufficient for two reasons.

First, to the extent these allegations constitute a frustration of their missions, the organizational Plaintiffs have still not alleged a diversion of resources. For instance, in *Havens*, the Supreme Court found allegations that the organizational plaintiff "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices" to constitute sufficient allegations of injury-in-fact at the pleading stage. 455 U.S. at 379 (internal citation omitted and sic in original). Likewise, in *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012), the Ninth Circuit found that the organizational plaintiff had adequately pled diversion of resources where it alleged that, in response to the defendant's actions, it conducted education and outreach campaigns. *Id.* at 1219. The absence of similar allegations here is grounds for dismissal. *See La Asociacion de Trabajadores*, 624 F.3d at 1089 (finding organizational standing lacking where "[n]owhere in the complaint[] [did plaintiff] assert a frustration of its purpose or diversion of its resources that would allow the Court to conclude that [plaintiff] had pleaded organizational standing on its own behalf").

Second, if Plaintiffs rely on a procedural injury as requiring a lesser showing of standing, their allegations still fall short. The Supreme Court has clarified that "the requirement of injury in fact is a hard floor of Article III jurisdiction" that cannot be relaxed. *Summers*, 555 U.S. at 497. In other words, "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Id.* at

496.[1] Thus, for example, "[t]here is no doubt[] . . . that a plaintiff that is able to establish that an agency failed to comply with the notice and comment procedures of the APA would, nonetheless, have no recourse in an Article III court absent a showing that it suffered or will suffer a concrete injury as a result of policy produced through the allegedly flawed process." *California v. Trump*, 613 F. Supp. 3d. 231, 243 (D.D.C. 2020).[2]

Given that requirement, Plaintiffs' alleged harms to their "aesthetic, recreational, scientific, spiritual, educational, and professional interests[,]" Compl. ¶ 20, are pled without the necessary specificity. *See Lujan*, 504 U.S. at 560 (plaintiffs must suffer "concrete and particularized" injuries that are "actual or imminent, not 'conjectural' or 'hypothetical.'" (citations omitted)). Specifically, the Plaintiffs' allegations are conjectural—they allege only that the Air Force's actions could "increase the risk that the significant environmental impacts of the Owyhee Airspace Optimization decision will be overlooked," causing harm to the interests of the organizations and their members. Compl. ¶ 20. The allegations are also conclusive. While Plaintiffs list a number of interests that will allegedly be harmed, these interests are mere legal conclusions that do not sufficiently identify the actual and imminent injury. *See W. Min. Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)

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[1] To the extent a footnote in *Lujan v. Defenders of Wildlife* could be read to relax the injury-in-fact requirement for procedural-rights plaintiffs, the Court in *Summers* expressly rejected that approach. *Summers*, 555 U.S. at 497.

[2] The more specific allegations in the Complaint—which *might* meet the Constitutional standard—are expressly limited to plaintiffs' members. *See* Compl. ¶ 19 ("The Owyhee Airspace Optimization decision will adversely affect Plaintiffs' *members* by increasing noise levels and shocking sightings of planes racing over and through the canyonlands; harassing and displacing wildlife so that *members* will be less likely to observe those sensitive desert species . . . .") (emphasis added). Thus, the specific allegations are only applicable to Plaintiffs' associational standing claim.

("We do not . . . assume the truth of legal conclusions merely because they are cast in the form of factual allegations."). Without specific allegations of what those organizational interests are and how the Court might redress them through this litigation, this Court cannot determine if the organizations' interests are actually "threatened" by the challenged action. Said differently, "generalized harm to the forest or the environment will not alone support standing." *Summers*, 555 U.S. at 494. Plaintiffs' allegations are similarly deficient.

## V. Conclusion

For the foregoing reasons, this Court should dismiss Plaintiffs' complaint.

Respectfully submitted this 25th day of March, 2024.

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