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10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF CALIFORNIA**

12 NATURAL RESOURCES DEFENSE
13 COUNCIL, et al.,

14 Plaintiffs,

15 v.

16 DAVID L. BERNHARDT, in his official
17 capacity as Acting Secretary of the Interior,
18 *et al.*,

19 Defendants.

Case No. 1:05-cv-1207-LJO-EPG

**MEMORANDUM IN SUPPORT OF
NOTICE OF ADMINISTRATIVE ACTION
AND FEDERAL DEFENDANTS' MOTION
TO DISMISS PLAINTIFFS' CLAIM SIX
FOR MOOTNESS OR, IN THE
ALTERNATIVE,
TO STAY LITIGATION OF CLAIM SIX**

Hearing Date: April 5, 2019

Time: 8:30 am

Courtroom: 4

Judge: Lawrence J. O'Neill

22 SAN LUIS & DELTA-MENDOTA
23 WATER AUTHORITY, et al.,

24 Defendant-Intervenors.

26 ANDERSON-COTTONWOOD
27 IRRIGATION DISTRICT, et al.,

28 Joined Parties.

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Because this is not a motion in limine, Federal Defendants have filed this as a separate motion in accordance with Local Rules. Prior to filing the motion, counsel for Federal Defendants informed the parties of the progress of the consultation and the National Marine Fisheries Service's estimate of completion in accordance with the Court's December 26, 2018 order. Federal Defendants also offered to enter into a stay of proceedings with the parties. The SRS Contractors have indicated that they do not oppose a stay of proceedings or the motion to dismiss. Counsel for Plaintiffs indicated that they were not aware of any facts that would support a stay or dismissal and would review Federal Defendants' filings before taking a position on the requested relief.

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INTRODUCTION

1
2 In December 2018, Federal Defendants alerted the Court and the parties that the National
3 Marine Fisheries Service (“NMFS”) anticipates issuing a new biological opinion (“BiOp”) by
4 summer 2019. The Court advised Federal Defendants that they should promptly advise the parties
5 and the Court of developments related to the new BiOp. Min. Order (Dec. 26, 2018), Dkt. 1282.
6 Since December, that BiOp is closer to issuance. NMFS has received a final biological
7 assessment (“BA”) from the Bureau of Reclamation (“Reclamation”) for the Coordinated Long-
8 Term Operation of the Central Valley Project (“CVP”) and State Water Project (“SWP”), which
9 was completed based on a schedule provided by a 2018 Presidential Memorandum. NMFS’s
10 receipt of the biological assessment triggered a 135-day deadline under the Memorandum to
11 produce a new BiOp. Like prior BiOps at issue in this litigation, the 2019 BiOp will provide
12 NMFS’s opinion about how Reclamation can operate the CVP/SWP in a manner that complies
13 with the Endangered Species Act (“ESA”) into the future.¹ NMFS has allocated funds to complete
14 this BiOp by June 17, 2019 and, according to the NMFS West Coast Administrator anticipates
15 completing it by that date. *See* Declaration of Barry Thom (“Thom Decl.”).

16 Trial on the Sixth Claim in Plaintiffs’ operative complaint is set to begin in July 2019,
17 shortly after the BiOp is expected to be issued. However, this BiOp will fundamentally alter
18 litigation over the Sixth Claim. The BiOp will include an incidental take statement (“ITS”) that
19 supersedes the existing ITS. The existing ITS was critical to this Court’s decision to proceed to
20 trial with an ESA Section 9 claim (the Sixth Claim), but upon issuance of a new ITS there will be
21 an entirely new regulatory regime in place. Moreover, given the past history of litigation over
22 the biological opinions on the long-term operations of the CVP/SWP, once the BiOp is issued, a
23 challenge to the new BiOp’s substance is likely. Dkt. 1. *See also, Pacific Coast Fed’n of*
24 *Fishermen’s Ass’ns v. Gutierrez*, 1:06-cv-00245-OWW-GSA; *San Luis & Delta-Mendota Water*

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26
27 ¹ Under the President’s memorandum, there will also be a biological opinion from the U.S. Fish
28 and Wildlife Service (“FWS”) on the delta smelt. But, as relevant here, we only discuss the
NMFS biological opinion on salmonids.

1 *Auth. v. Salazar*, 1:09-cv-407-LJO-BAM; *San Luis & Delta-Mendota Water Auth. v. Locke*, 1:09-
2 cv-1053-LJO-BAM. If the new NMFS BiOp is challenged in court, the merits of that BiOp will
3 be evaluated based on the applicable administrative record and decided on cross motions for
4 summary judgment. Any party to this proceeding could challenge the merits of that BiOp in
5 court. And any request for injunctive relief or remedy in this case, to the extent it is warranted,
6 will necessarily have to address the 2019 BiOp's conclusions, which are entitled to a presumption
7 of regularity, and will govern Reclamation's operation of the CVP into the future. In light of the
8 superseding nature of the new 2019 BiOp and ITS and the potential for conflict, this Court should
9 either dismiss Plaintiffs' Sixth Claim, or stay the litigation until that BiOp and ITS issue to
10 conserve the parties and the Court's resources.

11 Federal Defendants have not filed this motion to delay trial proceedings. We fully intend
12 to continue preparing for trial and will vigorously defend Reclamation against Plaintiffs'
13 allegations if necessary. Instead, Federal Defendants are filing this motion to alert the parties and
14 the Court that the legal landscape of Plaintiffs' ESA Section 9 claim will be fundamentally altered
15 upon issuance of a new NMFS BiOp and ITS. Moreover, if history is any indication, there could
16 be multiple legal challenges to NMFS's conclusions and analyses, as well as Reclamation's
17 reliance on the new 2019 BiOp for continued operation of the CVP. These parties and this Court
18 may soon embark on a new round of legal proceedings related to the 2019 BiOp, perhaps even
19 motions for emergency injunctive relief. But moving forward with a parallel Section 9 claim
20 challenging activities that date back to 2014 and 2015, after an entirely new BiOp and ITS issues
21 fundamentally altering the regulatory landscape, would be legal error and a waste of resources.
22 Federal Defendants seek to dismiss Claim 6 as prudentially moot and, in the alternative, a stay of
23 proceedings until the new BiOp and ITS issues, at which time Claim 6 will be constitutionally
24 moot.
25

26 **BACKGROUND**

27 Relevant to this motion are the facts relating to Plaintiffs' Sixth Claim for relief in their
28 Sixth Amended and Supplemented Complaint, Dkt. 1187, which alleges that Reclamation

1 violated Section 9 of the ESA because its “nondiscretionary” deliveries to the SRS Contractors
2 during April, May, and early June of 2014, and April and May of 2015, caused the “unauthorized”
3 “take” of winter-run and spring-run Chinook in 2014 and 2015. This claim, one of two remaining
4 in this case, is set for a bench trial in July 2019. Order, Dkt. 1314 at 67.

5 The Sixth Amended and Supplemented Complaint is only the latest challenge in a series
6 of challenges to the regulatory regime governing operation of the CVP. Given that all parties in
7 this proceeding have litigated various BiOps related to the continued operation of the CVP and
8 SWP over the years, it is likely that the 2019 BiOp and ITS will also be challenged and fully
9 litigated.

10 **A. Legal challenges to the Biological Opinions on the long-term operations of the**
11 **CVP and SWP.**

12 In 2003, Reclamation prepared a biological assessment and initiated consultation with
13 NMFS and FWS regarding the effect of the coordinated operation of the CVP and SWP, including
14 the effect of implementing the water service contracts at issue in this case, on the listed fish.
15 FWS0001, FWS0484. In 2004, FWS issued a BiOp (“2004 FWS BiOp”), which was challenged
16 by environmental groups and invalidated by the Ninth Circuit. *Gifford Pinchot Task Force v. U.S.*
17 *Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir. 2004), *amended on other grounds* 387 F.3d
18 968 (9th Cir. 2004). In 2005, FWS issued a BiOp (“2005 FWS BiOp”), which concluded that the
19 Operations Criteria and Plan (“OCAP”) would not jeopardize the delta smelt. *Id.*; SAR003371.
20 Reclamation separately asked NMFS to prepare a BiOp assessing the impact of continued and
21 future CVP and SWP operations on winter-run Chinook, spring-run Chinook, Central Valley
22 steelhead, green sturgeon, and Southern Resident orca. *Pacific Coast Fed’n of Fishermen’s Ass’ns*
23 *v. Gutierrez*, 1:06-cv-00245-OWW-GSA. NMFS issued a BiOp in 2004 concluding that the long-
24 term operations of the CVP and SWP would not result in jeopardy to those species (“2004 NMFS
25 BiOp”). *Id.*

26 In February 2005, Plaintiffs initiated this lawsuit, challenging the 2005 FWS BiOp. Dkt.
27 1. That same year, environmental groups challenged the 2004 NMFS BiOp. Dkt. 1069 at 8. Both
28 BiOps were invalidated. *Id.* Following litigation on the 2005 FWS BiOp, FWS issued a revised

1 BiOp (“2008 FWS BiOp”) which, unlike the 2004 and 2005 OCAP BiOps, concluded that the
2 OCAP would jeopardize the delta smelt and adversely modify its critical habitat. FWS13849,
3 FWS14260, *Nat. Resources Defense Council v. Jewell*, 749 F.3d, 776, 781 (9th Cir. 2014) (*en*
4 *banc*). In 2009, NMFS issued a 560–page BiOp (“2009 NMFS BiOp”), that concluded that the
5 proposed long-term operations of the CVP and SWP are likely to jeopardize the continued
6 existence of winter-run Chinook, spring-run Chinook, the CV steelhead, the green sturgeon, and
7 the Southern Resident orca. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 988-
8 89 (9th Cir. 2014). Similarly, NMFS concluded that the proposed continued and future operations
9 of the CVP and SWP were likely to destroy or adversely modify critical habitat for those species.
10 *Id.* NMFS accordingly issued a reasonable and prudent alternative (“RPA”) which prescribed
11 over 70 actions to avoid jeopardizing species or adversely modifying critical habitat. *Id.* NMFS
12 also issued an ITS covering all activities related to the long-term operations of the CVP and SWP,
13 including Reclamation’s administration of water contracts and the delivery and shortage of water
14 under the terms of individual contracts. *See* Dkt. 1043 at 2-4; SAR0008323-324.

15 Both BiOps became the subject of numerous lawsuits. *See generally San Luis & Delta-*
16 *Mendota Water Auth. v. Salazar*, 1:09-cv-407-LJO-BAM; *San Luis & Delta-Mendota Water*
17 *Auth. v. Locke*, 1:09-cv-1053-LJO-BAM. Plaintiffs in this matter intervened as defendants in both
18 challenges. *See id.* Ultimately, the Ninth Circuit upheld the 2008 FWS BiOp in its entirety on
19 ESA grounds. *San Luis v. Jewell*, 747 F.3d 581 (9th Cir. 2014). Soon thereafter, the Ninth Circuit
20 upheld the 2009 NMFS BiOp as well. *See Locke*, 776 F.3d 971.

21 **B. Plaintiffs’ original claim and four subsequent amendments to their complaint**
22 **in this case.**

23 As mentioned above, Plaintiffs’ original claim in this case was a challenge to the
24 sufficiency of the 2005 FWS BiOp. Dkt. 1; Dkt. 403. In August 2003, Reclamation prepared a
25 biological assessment for the renewal of 145 Sacramento River Settlement Contracts and the same
26 for renewal of 20 Delta Mendota Canal (“DMC”) water contracts as the starting point for its
27 Section 7 consultation. SAR003180; 000333; 001294; 001308. That consultation relied on the
28 2005 FWS BiOp to analyze all potential effects to delta smelt and its critical habitat from

1 operating the CVP to deliver water under the SRS and DMC contracts. SAR003180 (Reclamation
2 BA on SRS contracts); 0003340 (FWS letter of concurrence on SRS contracts); 001294
3 (Reclamation BA on DMC contracts); 001275 (FWS letter of concurrence on DMC contracts).

4 In April 2008, Plaintiffs filed a Third Amended Complaint challenging the sufficiency of
5 FWS's ESA consultation on Reclamation's renewal of 145 SRS Contracts and 20 DMC water
6 contracts. Dkt. 575. The previously assigned district judge ruled that Plaintiffs did not have
7 standing to challenge the DMC Contract renewals and that Reclamation lacked sufficient
8 discretion to trigger obligations under Section 7 of the ESA when renewing the SRS Contracts.
9 *NRDC v. Kempthorne*, No. 1:05-CV-1207 OWWTAG2008 WL 5054115, at *22 (E.D. Cal. Nov.
10 19, 2008). In 2014, an *en banc* panel of the Ninth Circuit ultimately reversed in part and remanded
11 the decision to the district court for further proceedings. *NRDC v. Jewell*, 749 F.3d at 782-84. In
12 response to the Ninth Circuit's decision, Reclamation reinitiated consultation with FWS on the
13 execution of the SRS and DMC Contract renewals in 2015. FWS13128, FWS13131, FWS13175.
14 The operational impact of those contracts had been previously consulted upon in the context of
15 the broader consultation on CVP and SWP operations, which resulted in the 2008 FWS BiOp.
16 FWS13626-28. Reclamation clarified its reason for reinitiating consultation in November 2015
17 and responded to NRDC's comments on the contract renewal consultation in December 2015.
18 FWS13266, FWS13611; FWS13310; FWS13632. That consultation closed in December 2015
19 when FWS issued its letter of concurrence. FWS13625.

20 On April 28, 2016, Plaintiffs amended their complaint yet again, filing their Fourth
21 Amended Complaint on April 28, 2016, adding a fourth claim challenging the sufficiency of
22 FWS's 2015 letter of concurrence on the SRS and DMC contracts and their impacts to delta smelt,
23 and added allegations to their second claim alleging that Reclamation acted unlawfully by accepting
24 the 2015 letter of concurrence and implementing the contracts in reliance on the 2015 letter. Dkt.
25 1020 at 8. Plaintiffs also added a fifth claim against Reclamation for failing to reinitiate
26 consultation on the impacts of the SRS contract renewals to winter-run and spring-run Chinook
27 salmon, and a sixth claim against Reclamation and some of the SRS Contractors for alleged
28 unlawful take of these species in the Sacramento River in 2014 and 2015. Dkt. 1020 at 8.

1 Defendants filed a motion to dismiss Plaintiffs' Fourth Amended Complaint. Dkt. 1032. In a two-
2 part ruling, the Court dismissed some of Plaintiffs' claims and limited the scope of Plaintiffs'
3 Sixth Claim as against Reclamation. *See* Orders, Dkts. 1045, 1069.² The Court found that the
4 allegations in Plaintiffs' Second Claim for relief pertaining to Reclamation's reliance on the 2005
5 FWS BiOP were moot, and that the remaining allegations in the second claim for relief must be
6 dismissed for failure to comply with the ESA's 60-day notice requirement. Dkt. 1045 at 19-20,
7 20-25. The Court also dismissed Plaintiffs' Fifth Claim for relief. Dkt. 1069 at 57. Plaintiffs
8 filed a Fifth Amended Complaint on March 1, 2017, which added the jurisdictional allegation that
9 Plaintiffs mailed a 60-day notice letter regarding their Second Claim to Federal Defendants. Dkt.
10 1071.

11 Plaintiffs' operative Sixth Amended Complaint was filed on March 12, 2018. Dkt. 1187.
12 The Sixth Amended Complaint added a Seventh Claim, which requested a court order directing
13 certain Federal officials to allow their employees to testify in compliance with deposition
14 subpoenas issued by Plaintiff NRDC.³ Sixth Amended Complaint, Dkt. 1187 at 3.

15 On February 26, 2019, the Court granted summary judgment in favor of Federal
16 Defendants and against Plaintiffs on the Second and Fourth Claims for relief, disposing of all
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19
20 ² The scope of the Sixth Claim was further limited in the Court's summary judgment order. *See*
21 Dkt. 1269 at 75.

22 ³ On April 20, 2018, Magistrate Judge Grosjean issued an order denying the Department of
23 Commerce's motion to quash and granting NRDC's motion to compel. Dkt. 1204. After
24 allowing the opportunity for objection by any party, the Court issued an order treating the
25 magistrate judge's order on the motion to quash and motion to compel as findings and
26 recommendations. Dkt. 1239. In its order construing the April 20, 2018 order as findings and
27 recommendations, the Court noted that "the Court's consideration of the magistrate's ruling as
28 [findings and recommendations] and any ruling on those [findings and recommendations] will
dispose of the Seventh Claim for Relief." *Id.* at 2. The Court officially adopted the April 20,
2018 order on May 25, 2018, again noting that a ruling on the magistrate judge's discovery
order would "either dispose of entirely or moot... the Seventh Claim for Relief." Dkt. 1244 at 1.
Federal Defendants presently intend to file a Motion to Dismiss the Seventh Claim as moot, if
Plaintiffs will not stipulate to its dismissal, in the coming weeks.

1 remaining claims except the Sixth Claim.⁴ Dkt. 1314. Plaintiffs’ only remaining theory of liability
2 hinges on whether Reclamation’s approval of water transfers in 2014 and 2015 resulted in
3 unauthorized “take” of spring- and winter-run chinook salmon.⁵ In allowing Plaintiffs’ claim to
4 proceed in this form, the Court found that there was a factual dispute about whether the water
5 transfers complied with the terms and conditions of the NMFS 2009 ITS such that Reclamation
6 was not subject to Section 9 liability. Specifically, the Court determined that “whether or not
7 Federal Defendant have violated the ITS is a fact question that must be resolved at trial,”
8 explaining that this question turned on whether Reclamation can meet the overall “performance
9 measures” for end of September storage and temperature compliance set forth in the 2009 RPA.
10 Dkt. 1269 at 72-75.

11 **C. Reinitiation of consultation on the long-term operation of the CVP and SWP**
12 **is expected to be completed soon and the resulting BiOp will replace the 2009**
13 **NMFS BiOp and 2008 FWS BiOp as the relevant regulatory regime**
14 **governing operations of the CVP and SWP.**

15 In 2016, Reclamation reinitiated consultation on the 2008 FWS BiOp and the 2009 NMFS
16 BiOp. In 2016, based on new information related to multiple years of drought, recent data
17 regarding delta smelt populations, and new information available and expected as a result of
18 ongoing work through collaborative science processes, Reclamation requested reinitiation of ESA
19 consultation with both FWS and NMFS on the coordinated long-term operation of the CVP and
20 SWP. Dkt. 1143, Appendix 1, Documents 78-79. Reclamation continues to operate the CVP
21 consistent with the 2008 FWS BiOp and the 2009 NMFS BiOp while reinitiation of consultation
22 is ongoing. *Id.*

24 ⁴ The Court entered judgment on Plaintiffs’ First and Third claims for relief on September 23,
25 2009. Dkt. 873. Plaintiffs included these claims in their current complaint for informational
26 purposes only. *See* Dkt. 1045 at 19.

27 ⁵ In ruling on Plaintiffs’ and Federal Defendants’ cross-motions for summary judgement on
28 Plaintiffs’ Sixth Claim, the Court dismissed Plaintiffs’ Sixth Claim as to Plaintiffs’ theory that
Reclamation’s failure to require the Glenn-Colusa Irrigation District to divert water from the
Sacramento River resulted in unauthorized “take” of endangered salmonids. Dkt. 1269 at 45.
FED. DEFS.’ MOT. DISMISS &/OR STAY RE 2019 BIOP
Case. 1:05-cv-01207-LJO-EPG

1 On October 19, 2018, the President of the United States issued a memorandum ordering
2 completion of a new biological opinion on the long-term coordinated operations of the CVP and
3 SWP by June 2019. *See* October 19, 2018 Presidential Memorandum on Promoting the Reliable
4 Supply and Delivery of Water in the West, available at [https://www.whitehouse.gov/presidential-](https://www.whitehouse.gov/presidential-actions/presidential-memorandum-promoting-reliable-supply-delivery-water-west/)
5 [actions/presidential-memorandum-promoting-reliable-supply-delivery-water-west/](https://www.whitehouse.gov/presidential-actions/presidential-memorandum-promoting-reliable-supply-delivery-water-west/) (last visited
6 Mar. 8, 2019).

7 The Presidential Memorandum directs the Secretary of the Interior to issue a final
8 biological assessment for the project no later than January 31, 2019, and the Secretary of the
9 Interior and the Secretary of Commerce to issue final biological opinions for the project within
10 135 days of the January 31, 2019 deadline.

11 Federal Defendants notified the Parties and the Court of the Presidential Memorandum in
12 the Parties' Statement of Joint Filing, Dkt. 1281, and explained that issuance of a new biological
13 opinion by June 2019 may moot Plaintiffs' claims. *Id.* at 16. However, Federal Defendants noted
14 that it was premature to file a motion for lack of jurisdiction based on mootness grounds until
15 more information became available, or at least until Reclamation submitted a biological
16 assessment of the project effects, and NMFS had an opportunity to review the biological
17 assessment. *Id.* The Court agreed that it was premature to entertain a motion to dismiss based on
18 mootness grounds, and directed Federal Defendants to "communicate promptly with all other
19 parties and the Court should that factual situation arise." Min. Order (Dec. 26, 2018). This Notice
20 and Motion is submitted consistent with the Court's instruction.

21 The Bureau of Reclamation has now submitted a biological assessment of the project
22 effects to NMFS and FWS, thereby meeting the President's. *See* Biological Assessment, available
23 at <https://www.usbr.gov/mp/bdo/lto.html>. The biological assessment covers the Coordinated
24 Long-Term Operation of the CVP and SWP, including Reclamation's administration of SRS and
25 DMC contracts. Over the last month, NMFS has been reviewing Reclamation's biological
26 assessment and currently has 10 full time employees and 11 part-time employees dedicated to
27 working on this consultation, among other staff. Thom Decl. ¶ 4. The West Coast Administrator,
28

1 Mr. Thom, after conferring with relevant staff, estimates NMFS will meet the deadlines in the
2 President's memorandum and estimates issuance on or about June 17, 2019. Thom Decl. ¶ 5.

3 In addition, the 2019 water year will be very different from the conditions experienced in
4 2014 and 2015. As explained in the Declaration of Elizabeth Kitek ("Kitek Decl."), Northern
5 Sierra snow water content as of March 5, 2019, was 153% of normal to date. Kitek Decl. ¶ 5. In
6 contrast, in March 2014, snow water content in the Northern Sierra was only 22% of normal to
7 date, and in March of 2015 it was 16% of normal to date. Kitek Decl. ¶¶ 3-4. Operationally,
8 Shasta Reservoir, Folsom Reservoir, and New Melones Reservoir are all currently in flood control
9 operations. Kitek ¶ 5. Projections indicate that Shasta will fill to four million acre feet ("MAF")
10 this year, which means that the upper gates of the Temperature Control Device ("TCD") will be
11 utilized during the 2019 temperature management season. Kitek ¶ 6. In 2014 and 2015, the
12 volume in Shasta did not allow for utilization of the upper TCD gates, which constrained
13 Reclamation's ability to regulate downstream temperatures. Kitek ¶ 6. In short, water conditions
14 are significantly improved as compared to those experienced in 2014 and 2015 and, based on her
15 experience with operations, Ms. Kitek does not anticipate that the Project will experience the
16 same conditions that occurred in 2014 and 2015. Kitek ¶ 7.

17 STANDARD OF REVIEW

18 "A federal court is presumed to lack jurisdiction in a particular case unless the contrary
19 affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873
20 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). "[W]hen a defendant brings a motion to
21 dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff
22 bears the burden of establishing jurisdiction." *Bassiri v. Xerox Corp.*, 292 F. Supp. 2d 1212, 1219
23 (C.D. Cal. 2003) (citation omitted), *rev'd and remanded on other grounds*, 463 F.3d 927 (9th Cir.
24 2006); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) ("The party seeking to invoke the
25 court's jurisdiction bears the burden of establishing that jurisdiction exists.") (citation omitted).⁶

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28 ⁶ To the extent necessary, Federal Defendants also move under Federal Rule of Civil Procedure
12(h)(3). Under Rule 12(h)(3), "[i]f the Court determines at any time that it lacks subject-
matter jurisdiction, the court must dismiss the action."

1 **ARGUMENT**

2 **I. PLAINTIFFS’ SIXTH CLAIM SHOULD BE DISMISSED BASED ON MOOTNESS.**

3 **A. This Case is will be Moot Under Article III of the Constitution.**

4 Because of the upcoming 2019 BiOp and its role in the regulatory regime governing
5 operations of the CVP/SWP, the Court could find that the Sixth Claim is moot as a constitutional
6 matter. *See* U.S. Const. art. III, § 2; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citation
7 omitted). A case is moot if there is no “present controversy as to which effective relief can be
8 granted.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008); *see Citizens for Responsible*
9 *Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (action
10 moot if any relief would have no “effect in the real world”) (citation omitted). Declaratory relief
11 is justified only “when the challenged government activity is not contingent, has not evaporated
12 or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial
13 adverse effect on the interests of the petitioning parties.” *Pinnacle Armor, Inc. v. United States*,
14 648 F.3d 708, 715 (9th Cir. 2011) (quoting *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1015 (9th
15 Cir. 1989)).

16 **B. ESA Challenges Become Moot Upon Issuance of a BiOp and ITS.**

17 Plaintiffs’ Sixth Claim asserts an ESA Section 9 claim against Reclamation and the SRS
18 Contractors based on actions taken in 2014 and 2015 under the currently operative 2009 NMFS
19 BiOp and ITS. Dkt. 1187 ¶¶ 201-205. Under binding Ninth Circuit precedent, this new 2019
20 BiOp, once issued, will moot Plaintiffs’ Section 9 claim as well as supersede any challenges to
21 the existing BiOp. For example, in *Forest Guardians v. U.S. Forest Service*, the Ninth Circuit
22 held that Section 9 claims based on an ITS are mooted by a new BiOp and ITS:

23 Although the challenge is not to the [BiOp] itself, the validity of the challenge
24 necessarily rises or falls with the validity of the [BiOp]. ... *The section 9 claim is also*
25 *moot because it is based on incidental take statements that accompanied the 1999*
26 *[BiOp] ... Forest Guardians' claim under section 9 of the ESA that the Service has*
27 *violated the terms of the incidental take statements is moot.*

28 329 F.3d 1089, 1096 (9th Cir. 2003) (emphasis added). Likewise, in *Grand Canyon Trust*, the
plaintiffs brought an ESA Section 9 claim against the Bureau of Reclamation based in part on the

1 scope of the applicable ITS in that case. On appeal, however, the Ninth Circuit acknowledged
2 that the superseding BiOp mooted the Section 9 claim. *Grand Canyon Trust v. Bureau of*
3 *Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (holding that the ESA claims related to
4 Reclamation’s reliance on prior BiOps and ITS were moot); *see also Grand Canyon Trust v. U.S.*
5 *Bureau of Reclamation*, No. 3:07-cv-08164-DGC (D. Ariz.), Dkt. 1 at 17 (plaintiff brought ESA
6 Section 9 claim against Bureau of Reclamation); Dkt. 264 at 24, 36 (supplemental complaint
7 continuing to allege Section 9 claim against Bureau of Reclamation).

8 Because they assert a Section 9 take claim based on Reclamation’s reliance on the 2009
9 BiOp and ITS, Plaintiffs’ Sixth Claim will be moot once the 2019 BiOp and ITS issues. In its
10 summary judgment order, the Court found that there was a factual dispute about whether
11 Reclamation’s operations complied with the terms and conditions of the 2009 ITS, such that
12 Reclamation was not subject to Section 9 liability. Dkt. 1269 at 75. It is black-letter law that a
13 superseding BiOp moots issues related to a prior BiOp. *See, e.g., Alliance for the Wild Rockies v.*
14 *Savage*, 897 F.3d 1025, 1031-32 (9th Cir. 2018); *American Rivers v. National Marine Fisheries*
15 *Service*, 126 F.3d 1118, 1124 (9th Cir. 1997) (“[T]he biological opinion in the present case has
16 been superseded by the 1995 Biological Opinion. Therefore, any challenge to the 1994–1998
17 Biological Opinion is moot.”); *Idaho Dept. of Fish & Game v. National Marine Fisheries Service*,
18 56 F.3d 1071, 1074-75 (9th Cir. 1995). *See also Backcountry Against Dumps v. Abbott*, 10-cv-
19 1222 BEN (BGS), 2011 WL 13176672, at *6 (S.D. Cal. June 30, 2011) (“Plaintiffs do not identify
20 how these thresholds are vague or otherwise violate ESA. Accordingly, the Court finds that
21 Plaintiffs’ claims based on FWS’ Incidental Take Statement are also moot.”), *aff’d*, 491 F. App’x
22 789 (9th Cir. 2012) (internal citations omitted). Given this binding case law, Plaintiffs’ Section 9
23 claim, Claim Six, must be dismissed as moot once the existing BiOp is superseded by the 2019
24 BiOp.

25 We are mindful that the Court has previously expressed skepticism that Plaintiffs’ Sixth
26 Claim is moot. *See* Dkt. 1269 at 51 (“But, in the absence of any information about the outcome
27 of that reconsultation, the record reflects nothing concrete except the current regulatory
28 situation—the same regulatory regime in place in 2014 and 20[1]5.”) (emphasis in original). Yet

1 the Court has addressed this issue only in the context of the existing 2009 BiOp, noting
2 specifically as part of its reasoning that the regulatory regime in place in 2014 and 2015 continued
3 to be the same at the time of that motion. *Id.* But issuance of a new BiOp would place operation
4 of the CVP/SWP in an entirely new regulatory regime and the legal landscape of Plaintiffs' ESA
5 claim will be fundamentally altered as Reclamation will operate the CVP system in accordance
6 with the terms of the new BiOp and ITS.⁷

7 It is in large part because an agency will be operating under a new regulatory regime that
8 ESA Section 9 claims become moot upon issuance of a superseding BiOp and ITS. Upon issuance
9 of a superseding BiOp and ITS, the legal landscape changes; the BiOp and ITS are presumed
10 valid, and any prospective "take" that occurs while implementing the superseding ITS's terms
11 and conditions is not unlawful under the ESA. 50 C.F.R. § 402.14(i)(6). Any prospective "take"
12 thereafter is governed by the new ITS and presumptively lawful. The regulatory regime has
13 changed. Thus, adjudicating whether the agency violated the ESA by operating out of compliance
14 with an outdated ITS would be purely advisory and meaningless.

15 Notably, this Court rejected the argument that reinitiating consultation under the ESA
16 moots a Section 9 claim based on reasoning in *California Trout v. United States Bureau of*
17 *Reclamation*, 115 F. Supp. 3d 1109, 1115-16 (C.D. Cal. 2015). *See* Dkt. 1269 at 73-75. In
18 *California Trout*, the court determined that "even if reinitiation of consultation has occurred,
19 injunctive and declaratory relief remain available for Section 9 claims where the challenged action
20 is ongoing." 1115 F. Supp. 3d at 1115-16. Yet this reasoning is not applicable when applied to
21 the facts and issues as they stand now. First, this situation does not present the issue of merely
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24 ⁷ To be clear, because planning and operations for 2019 have already begun and the substance
25 of the 2019 BiOp and ITS are unknown, Reclamation will need to prepare a Sacramento River
26 Temperature Plan in accordance with the 2009 NMFS BiOp. Reclamation will seek NMFS'
27 concurrence on that plan, as it does every year, and intends to operate to that plan in 2019.
28 Thus, Reclamation's operation of Shasta Dam during the temperature management season in
2019 will be consistent with the 2009 BiOp. As with most complex BiOps, there is typically a
period of operational transition from one BiOp's criteria to the new criteria. If there are any
significant operational changes for this temperature management season, Federal Defendants
will promptly apprise the Court.

1 reinitiating consultation; the nature of the argument changes upon issuance of the 2019 BiOp and
2 ITS because the outcome of the consultation will be completed. Second, as to Plaintiffs’ Sixth
3 Claim, the Court here determined that “[w]hether or not Federal Defendants have violated the ITS
4 is a fact question that must be resolved at trial” (Dkt. 1269 at 75) based on whether Reclamation
5 can meet the overall “performance measures” for end-of-September storage and temperature
6 compliance set forth in the 2009 RPA. *Id.* at 72-73. It is unknown whether these “performance
7 measures” will even be a relevant metric in the 2019 ITS; if they are used similarly, the same
8 mathematical principles will have obviously changed.

9 Determining liability based on a superseded BiOp and ITS once a new regulatory regime
10 is in place is in conflict with the ESA’s requirement to permit suit only where an agency is alleged
11 to be currently “in violation.” 16 U.S.C. § 1540(g). There cannot be a retroactive analysis of
12 compliance with new terms and conditions in an ITS; it did not exist at the time. Nor can the
13 Court determine whether Reclamation is currently “in violation” of an ITS that has been
14 superseded and no longer legally exists. Even assuming Reclamation’s actions violated the ESA
15 in 2014 and 2015, which Federal Defendants vigorously deny, past violations cannot provide a
16 vehicle to hold (or enjoin) agency actions occurring in 2019 under a newly operative BiOp.
17 Activities under a new BiOp are presumptively lawful. Therefore, because the ESA plainly
18 forecloses a suit over past violations and because no effective or meaningful relief can be granted,
19 continuing Plaintiffs’ Section 9 claims against Reclamation as to liability would result in an
20 improper advisory opinion. Indeed, even the factual issue identified by this Court, whether
21 Federal Defendants “have violated the ITS,” is no longer relevant.

22 Likewise, the reasoning in *California Trout* that a Section 9 claim is not moot because
23 injunctive relief remains available would lead to impractical results in this case. For example, if
24 the Court could determine whether past actions complied with an ITS that is no longer operative,
25 any injunctive relief would directly impact Reclamation’s compliance with the upcoming 2019
26 BiOp and ITS. As a practical matter, there cannot be a parallel injunction allegedly arising from
27 actions in 2015 that conflict with a presumptively valid BiOp and ITS issued in 2019. Injunctive
28 relief is prospective, and any intrusion into Reclamation’s operations consistent with the 2019

1 BiOp and ITS disrupts faithful implementation of the ESA. If the new BiOp were to be litigated,
2 which history suggests it might be, it is possible that two separate courts may be interpreting the
3 legality of Reclamation's operations. Should there be different rulings on how implementation of
4 operation of the CVP were to proceed, how would Reclamation be able to practically comply with
5 the new regulatory regime if multiple interpretations, or an intervening injunction based on past
6 actions, exist? Even if the substance of the new BiOp was not litigated, at best the Court would
7 be fashioning injunctive relief for past actions which could conflict with the new and
8 presumptively valid regulatory document fashioned by the expert resource agencies. For these
9 reasons, the reasoning of *California Trout* does not apply in this case and the Court should dismiss
10 Plaintiffs' Sixth Claim as moot.

11 **C. The Court may dismiss Plaintiffs' sixth claim even before the 2019 BiOp issues.**

12 This Court need not await the release of the 2019 BiOp to dismiss Plaintiffs' Sixth Claim
13 because the doctrine of prudential mootness applies here. Prudential mootness arises from a
14 doctrine of remedial discretion and is rooted in the court's equitable powers to fashion remedies
15 and withhold relief. *See Hunt v. Imperial Merchant Servs.*, 560 F.3d 1137, 1142 (9th Cir. 2009)
16 (recognizing that prudential mootness doctrine has been "adopted by some of our sister circuits,
17 under which a court can dismiss an appeal not technically moot if 'circumstances [have] changed
18 since the beginning of litigation that forestall any occasion for meaningful relief.'" (*quoting S.*
19 *Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727-28 (10th Cir. 1997))); *see also Nasoordeen*
20 *v. FDIC*, 08-cv-5631, 2010 WL 1135888, at *8 (C.D. Cal. Mar. 17, 2010) (discussing doctrine
21 and dismissing claim as prudentially moot). This is especially true with regard to the United
22 States, where considerations of prudence and comity for coordinate branches come into play. *See,*
23 *e.g., Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010)
24 (prudential mootness raises "considerations of prudence and comity for coordinate branches of
25 government" and counsels "the court to stay its hand, and to withhold relief it has the *power* to
26 grant") (citations omitted). Courts generally apply prudential mootness where a defendant
27 (usually the government) is in the process of amending or doing away altogether with the
28 challenged action such that no meaningful relief can be granted. Such is the case here.

1 As explained *supra*, Plaintiffs assert an ESA Section 9 claim against Reclamation and the
2 SRS Contractors based on actions taken under the 2009 NMFS BiOp in 2014 and 2015. NMFS’s
3 anticipated 2019 BiOp will supersede the 2009 BiOp and render any relief that the Court might
4 grant speculative and without practical effect. Moreover, given that all parties have litigated
5 BiOps related to the continued operation of the CVP over the years, Plaintiffs may very well
6 challenge the merits of the forthcoming BiOp in court.

7 In similar circumstances, district courts have applied the doctrine of prudential mootness
8 to dismiss claims challenging a soon-to-be superseded BiOp when reinitiated consultation was
9 already underway, as it is here. *See, e.g., Oregon Natural Res. Council v. Keys*, No. CV-02-3080-
10 CO, 2004 WL 1048168, at *10- (D. Or. May 7, 2004) (magistrate recommendations), adopted by
11 the Court in *Oregon Natural Res. Council v. Keys*, No. CV-02-3080-CO, 2004 WL 1490320 (D.
12 Or. June 29, 2004) (dismissing, on grounds of prudential mootness claims for alleged violations
13 of ESA Section 7 with respect to allegedly inadequate implementation of an existing BiOp, where
14 the underlying BiOp was still in effect but consultation was expected to be reinitiated shortly);
15 *SUWA*, 110 F.3d at 730 (ESA claims prudentially moot based on superseding consultation);
16 *Willow Creek Ecology v. U.S. Forest Serv.*, 225 F. Supp. 2d 1312, 1318-19 (D. Utah 2002)
17 (holding that National Environmental Policy Act (“NEPA”) challenges to partially completed
18 timber harvest were prudentially moot where any future harvest activities would be based on new
19 NEPA analyses subject to judicial review).

20 In short, Plaintiffs’ claims are predicated on past actions that are actively being
21 reevaluated and will be replaced and superseded with new decisions. This factual circumstance
22 renders judicial review at this juncture a meaningless exercise, and application of the prudential
23 mootness doctrine therefore is warranted here. *See Reeve Aleutian Airways v. United States*, 889
24 F.2d 1139, 1144 (D.C. Cir. 1989) (prudential mootness doctrine applies where “the challenged
25 practice . . . [is] undergoing substantial revision, so that the reviewing court [can] not be certain
26 of the [challenged action’s] ultimate form”).

27 **II. IN THE ALTERNATIVE, THIS CASE SHOULD BE STAYED.**

28 If the Court declines to dismiss Plaintiffs’ claims on mootness or prudential mootness

1 grounds at this time, Federal Defendants move in the alternative to stay all claims in this litigation
2 until NMFS's 2019 BiOp is issued, at which point Plaintiffs' Sixth Claim will become moot.
3 "[T]he power to stay proceedings is incidental to the power inherent in every court to control the
4 disposition of the causes on its docket with economy of time and effort for itself, for counsel, and
5 for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *CMAX, Inc. v. Hall*, 300 F.2d
6 265, 268 (9th Cir. 1962); *Leyva v. Certified Grocers of California*, 593 F.2d 857, 863-64 (9th Cir.
7 1979); *Chronicle Publ'g Co. v. NBC*, 294 F.2d 744, 747 (9th Cir. 1961). Three factors guide this
8 Court's determination of whether a stay should be granted: (1) "the possible damage which may
9 result from the granting of a stay," (2) "the hardship or inequity which a party may suffer in being
10 required to go forward," and (3) "the orderly course of justice measured in terms of the
11 simplifying or complicating of issues, proof, and questions of law which could be expected to
12 result from a stay." *CMAX*, 300 F.2d at 268. Application of these factors to the facts present before
13 the Court demonstrates that a stay of the litigation is warranted.

14 First, Plaintiffs will not experience any harm from a stay. *See Pub. Emps. for Envtl.*
15 *Responsibility v. U.S. Dep't of Navy*, 08-cv-5552-BHS, 2009 WL 2163215, at *10-12 (W.D.
16 Wash. July 17, 2009) (no harm where the district court stayed a case pending additional NEPA
17 review and renewed ESA consultation). As explained above, 2019 is expected to be a very
18 different water year than 2014 or 2015. Kitek Decl. ¶ 7. The volume in Shasta reservoir is
19 predicted to be nearly four million acre feet, and Reclamation will almost certainly operate the
20 upper gates of the TCD. Kitek Decl. ¶ 6. This water year and operations during the temperature
21 management season will be vastly different than 2014 and 2015. *Id.* Thus, there is little
22 possibility that the conditions present in 2014 and 2015 will reoccur this year, or any likelihood
23 the conditions will reoccur before mid-June 2019 when the new BiOp will be issued. Likewise,
24 there is nothing to enjoin at this juncture because Plaintiffs have not even attempted to argue that
25 there is a possibility that Defendants will cause irreparable harm, sufficient to sustain an
26 emergency injunction. Moreover, Plaintiffs will not be prejudiced by a stay. As with each
27 successive BiOp in this litigation, Plaintiffs are free to pursue their claims challenging the 2019
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1 NMFS BiOp, as appropriate, after consultation is complete and attempt to litigate those claims.⁸

2 Second, Federal Defendants will suffer hardship by having to litigate this case before the
3 2019 BiOp is complete. Specifically, the agencies will have to devote significant resources to
4 preparing for trial in this case, and therefore be required to shift responses away from evaluating
5 the very issues that Plaintiffs contend should be monitored and implemented under the
6 consultation. Furthermore, allowing the trial to proceed at this juncture—and particularly if the
7 Court entertained remedy proceedings—would inappropriately insert the Court into the role of
8 supervising the agencies’ decisions to implement the 2019 BiOp, thereby posing the risk of undue
9 interference in the agencies’ administrative processes. *Cf. Norton v. SUWA*, 542 U.S. 55, 66-67
10 (2004) (“[P]rincipal purpose” of the Administrative Procedure Act’s (“APA”) limitations on
11 review is “to avoid judicial entanglement in abstract policy disagreements which courts lack both
12 expertise and information to resolve,” and “[t]he prospect of pervasive oversight by federal courts
13 over the manner and pace of agency compliance with such congressional directives is not
14 contemplated by the APA”). Once the 2019 BiOp is issued, it is entitled to a presumption of
15 regularity and the Court “may not substitute [its] judgment for that of the agency.” *See, e.g.,*
16 *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *see also Jewell*, 747 F.3d at
17 601. Once the 2019 BiOp is issued, it will significantly complicate any of Plaintiffs’ requests for
18 a remedy in this litigation. For example, if, instead of according the BiOp its due presumption,
19 the Court found take liability with respect to Defendants’ actions under the 2009 NMFS BiOp
20 and entered injunctive relief, that order could place Defendants in an untenable position. If the
21 Court’s hypothetical remedy order conflicts with the terms of the 2019 BiOp and the ITS,
22 Reclamation (and the SRS Contractors) would be placed in the difficult position of being forced
23 to abide by a Court order—at the risk of contempt proceedings—or abiding by the terms and
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27 ⁸ Expert discovery is currently ongoing, with expert depositions scheduled through March 15,
28 2019. Unless and until this Court issues an order postponing, staying, or dismissing the Sixth
Claim, Federal Defendants will continue to comply with all Court-ordered deadlines related to
trial preparation.

1 conditions in a lawfully issued BiOp, which sets forth NMFS’s expert judgment about how to
2 conduct operations that comply with the ESA—at the risk of *further* ESA litigation. The 2019
3 BiOp will almost certainly contemplate future drought conditions, and even if a hypothetical
4 remedy is limited to similar 2014 and 2015 conditions, there would still be a conflict. Thus,
5 allowing a trial on the Sixth Claim to proceed, despite the new 2019 BiOp, could place the Court
6 in a position of issuing a jurisdictionally defective injunction while forcing an agency to deviate
7 from the terms of a presumptively valid and lawful BiOp and ITS. There is no need for these
8 mental and procedural gymnastics. In short, allowing Plaintiffs to pursue a trial when the outcome
9 may be a showdown among APA principles, the ESA, and the Court’s contempt powers, causes
10 hardship for Federal Defendants.

11 Third, a stay would serve judicial economy by narrowing the issues in litigation. In *Public*
12 *Employees for Environmental Responsibility*, the district court found that a stay would serve the
13 interests of judicial economy when the Navy could conceivably make changes to the draft
14 Environmental Impact Statement (“EIS”) that would address plaintiffs’ concerns, and changes to
15 the project could change the impacts to be analyzed under NEPA and the ESA. 2009 WL
16 2163215, *11. These factors are present here, as Plaintiffs are asserting take claims that are
17 mooted by a new BiOp.⁹ In addition, a stay would serve judicial economy by allowing the parties
18 time to brief the merits of the 2019 BiOp in compliance with the APA’s record-review principles
19 rather than allowing a trial to proceed on the old BiOp only to have such claims become moot in
20 the midst of further briefing. In addition, allowing full briefing on the 2019 BiOp before the Court
21 entertains any remedy proceedings would allow injunctive relief to be based on actual legal flaws
22 in the 2019 BiOp, not based on actions taken under the soon-to-be superseded 2009 NMFS BiOp.

23 In short, Plaintiffs’ claims, if not moot already, will become moot as the extensive and
24 ongoing consultation processes unfold. A district court may stay proceedings pending resolution
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28 ⁹ Moreover, although it is not a certainty, the new 2019 BiOp’s ITS may have a different scope
than the 2009 NMFS BiOp’s ITS and provide a safe harbor from a larger set of activities. The
new ITS may thus affect any ESA Section 9 claims against the SRS Contractors as well.

1 of independent administrative proceedings which bear upon the case, and the circumstances
2 surrounding this case warrant such a stay. *See Mediterranean Enters. v. Ssangyong Corp.*, 708
3 F.2d 1458, 1465 (9th Cir. 1983); *Malama Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1165 (D.
4 Haw. 2001) (staying case when Department of Defense had withdrawn a challenged
5 Supplemental Environmental Assessment and Finding of No Significant Impact to address
6 community concerns).

7 CONCLUSION

8 The Presidential memorandum dictating the schedule for completion of this consultation
9 accelerated the previously contemplated schedule. Reclamation has now issued a final biological
10 assessment. NMFS staff has engaged in a good faith review of the biological assessment and the
11 NMFS West Coast Administrator estimates completion and issuance of the 2019 BiOp and ITS
12 prior to the bench trial currently scheduled July 10, 2019. Under controlling Ninth Circuit case
13 law, any Section 9 claim will be moot and the Court will lack subject matter jurisdiction over
14 Claim 6. And even if the claim is not constitutionally moot (which it is), the statutory and
15 regulatory regime will be fundamentally altered to the point where further litigation on this claim
16 would be advisory, and perhaps even conflict with faithful implementation of the ESA. Federal
17 Defendants are mindful of the Court's time and resources, and moving forward with trial on the
18 eve of a new BiOp and ITS runs counter to judicial economy. As we stated previously, we are
19 prepared to move ahead with all of the current deadlines and trial (and will fully do so absent
20 direction from the Court), but we are notifying the Court in accordance with the December 26,
21 2018 minute order, so it can make an informed judgment about the future course of this litigation.

22 For the foregoing reasons, the Court should grant the pending motion to dismiss or in the
23 alternative to stay the litigation until the 2019 BiOp is issued. If the parties challenge the 2019
24 BiOp at that time, the parties can then present a joint schedule for briefing the merits of NMFS's
25 decision based on the applicable administrative records.

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27 Dated: March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed the foregoing with the Clerk of the Court via the CM/ECF system, which will send notification to the attorneys of record in this case.

/s/ Coby Howell
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