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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Plaintiffs,

v.

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

Defendants.

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

Defendant-Intervenors.

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, et al.,

Joined Parties.

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

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIM SIX FOR MOOTNESS OR, IN THE ALTERNATIVE, TO STAY LITIGATION OF CLAIM SIX

Hearing Date: April 12, 2019
Time: 8:30 am
Courtroom: 4

Judge: Lawrence J. O'Neill

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INTRODUCTION

Plaintiffs acknowledge that the President has directed the Bureau of Reclamation ("Reclamation") and the National Marine Fisheries Service ("NMFS") to complete formal consultation under the Endangered Species Act ("ESA") by the end of June 2019. Under the ESA, if NMFS determines that the agency action will not violate Section 7(a)(2), it shall issue an Incidental Take Statement ("ITS"). This means, and Plaintiffs do not dispute, that the previously operative 2009 Biological Opinion ("BiOp") and ITS will be superseded by a 2019 BiOp and ITS shortly before trial is scheduled to begin in this case. Upon issuance, the 2009 BiOp and ITS will cease to exist as matter of law because they will have been superseded by a new agency decision. In mootness terms, it will then be absolutely clear that any alleged "take" of listed species outside the scope of the terms and conditions in the 2009 ITS will never re-occur, because those specific terms and conditions will have ceased to exist upon issuance of the 2019 ITS. That is why the Ninth Circuit has held that ESA Section 9 claims become moot upon issuance of a superseding ITS. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012).

Plaintiffs undertake significant efforts to avoid this logical conclusion and the clear holding from the Ninth Circuit. Based on a novel and convoluted legal theory, Plaintiffs attempt to save their Sixth Claim by proposing that this Court should set aside three weeks for trial to evaluate whether activities that occurred in 2014 and 2015 comply with the forthcoming terms and conditions in the 2019 ITS. This makes no sense and, as explained below, directly offends the language of the ESA. Perhaps recognizing as much, Plaintiffs alternatively propose a stay of proceedings to "brief" the effect of the forthcoming 2019 BiOp and ITS (while notably seeking reconsideration of this Court's recent summary judgment order, *see* ECF 1335) and seek to delay

the trial until November 2019. Although Federal Defendants agree that a stay of all proceedings will conserve the parties' resources and do not fundamentally object to waiting until the scope of the 2019 ITS is determined, to be clear, there is nothing left to "brief" upon issuance of the 2019 BiOp and ITS. Plaintiffs' ESA Section 9 claim against Reclamation will be constitutionally moot once the 2019 BiOp and ITS issue and this Court will lack subject matter jurisdiction over the Sixth Claim for relief.

Federal Defendants are mindful that our motion is predicated on future events that have not yet occurred. And while we vigorously disagree with Plaintiffs' novel mootness theory or the suggestion that Reclamation violated Section 9 of the ESA in approving limited water transfers in 2014 and 2015, there is some logic in staying all proceedings to allow the agencies to complete formal consultation under the ESA. This would also allow the Court to evaluate whether the SRS Contractors will fall within the scope of the 2019 ITS before making any mootness determination. Moreover, based on the tenor of Plaintiffs' recent briefing, it seems clear that no amount of analysis or explanation by NMFS in the 2019 BiOp will suffice for Plaintiffs, and Federal Defendants, Plaintiffs, and this Court will almost certainly be embroiled in new litigation over the merits of the 2019 BiOp and ITS quite soon. Under these circumstances and to avoid needlessly wasting all of the parties' resources, the Court should: (1) stay this case until issuance of the 2019 BiOp and ITS; (2) dismiss the Sixth Claim against Reclamation for lack of subject matter jurisdiction upon issuance of the 2019 BiOp and ITS: and (3) set a case management conference for two weeks after issuance of the 2019 BiOp to discuss the future course of this litigation.

ARGUMENT

I. MOOTNESS

A. Plaintiffs' Sixth Claim for Relief will be Moot upon Issuance of the 2019 Biological Opinion and Incidental Take Statement.

Plaintiffs state that at trial they intend to offer proof that "Federal Defendants did not comply with terms of the [2009] ITS during the critically dry years of 2014 and 2015 . . . ." ECF 1333 at 6-7. However, Plaintiffs also acknowledge, as they must, that the 2009 ITS will be superseded by a new ITS in June 2019. ECF 1333 at 8 (acknowledging the completion of the Biological Assessment and the schedule in the President's memorandum); *id.* ("NMFS will issue BOR an ITS that specifies the terms and conditions that BOR must comply with in order to obtain take coverage for its operations."). To reconcile this contradiction, Plaintiffs concoct an entirely novel legal theory whereby wholly past actions can be evaluated under a new and forthcoming ITS. ECF 1333 at 14 ("Even if NMFS issues a new ITS, Plaintiffs remain entitled to injunctive relief if they can show that actions by BOR like those it took in 2014 and 2015 are likely to cause take *in violation of the new ITS* going forward.") (emphasis added). That is, Plaintiffs want this Court to conduct a three-week trial on whether Reclamation's transfer approvals, which occurred in 2014 and 2015, will comply with terms and conditions of an ITS issued in 2019. *id.* ("Such a showing will necessarily turn on the *specific terms* of any new ITS . . . .") (emphasis in original). Not only have Plaintiffs contradicted themselves about what they intend to prove at trial (within the same brief), but their novel legal theory does not make any sense.

As an initial matter, how could Reclamation's transfer decisions in 2014 and 2015 comply with the terms and conditions of an ITS that would not exist for another four years? Retroactive compliance in administrative context offends the very notion of due process. *Bowen*

v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). And the ESA does not afford NMFS the authority to promulgate and enforce a retroactive ITS. 16 U.S.C. §§ 1536(o), 1540(a) & (b). Similarly, even if Plaintiffs could establish that the historical drought conditions of 2014 and 2015 will re-occur during the pendency of the 2019 BiOp (something that is far from certain), they would still need to demonstrate that Reclamation's decision to approve *future* water transfers *under those specific drought conditions* would run afoul of the terms and conditions in the 2019 ITS. Otherwise, Reclamation's future conduct would be exempt from liability under the plain language of the ESA. 16 U.S.C. § 1536(o)(2) ("any taking that is in compliance with the terms and conditions specified in a written statement . . . shall not be considered to be a prohibited taking of the species concerned"). But neither the 2019 ITS nor Reclamation's decision to approve future water transfers have yet to occur, and Plaintiffs have no inkling, much less credible evidence, of what the future holds.[1] Any testimony on these points, especially decisions that Reclamation has yet to make, would be pure speculation and inadmissible. *Ollier v. Sweetwater Union High Sch. Dist*., 768 F.3d 843, 861 (9th Cir. 2014) ("speculative testimony is inherently unreliable . . .").[2]

[1] Federal Defendants are mindful that that Court has concluded that it is at least plausible to infer that Reclamation will in the future approve transfers like the ones alleged to have caused take in 2014 and 2015. ECF 1269 at 49- 50.

[2] Notably, Plaintiffs never explain how they can obtain the extraordinary relief of an injunction which, according to the Supreme Court, requires a likelihood of imminent harm, based on multiple future contingencies that may never occur. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

Nor does Plaintiffs' theory adhere to the language of the ESA. The language of the citizen-suit provision that Plaintiffs employ only provides for injunctive relief (not declaratory relief) against a violator who is "alleged *to be in violation* of any provision of this chapter . . . ." 16 U.S.C. § 1540(g)(1)(A) (emphasis added). Yet, according to Plaintiffs, a person could be "in violation" of Section 9, even though the safe harbor of an ITS does not yet exist, and at the time the alleged activity occurred, the actor could not possibly know whether that activity was compliant with future terms and conditions in at ITS. Putting aside the important issue of whether this citizen-suit language permits suit based on wholly past actions, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.,* 484 U.S. 49 (1987) (rejecting suit based on past actions), Plaintiffs make an even bigger, unsupported leap to allow a citizen suit when the alleged "violation" has not even occurred at the time of filing suit. That is not even close to a fair reading of the ESA, much less *Gwaltney*. It also begs the question of how Plaintiffs could provide the jurisdictionally required written 60-days' notice of a "violation." *See e.g. Oregon Wild v. Connor*, No. 6:09–CV–00185–AA, 2012 WL 3756327, at *3 (D. Or. Aug. 27, 2012) ("Plaintiff's November 2011 notice predates the April 2, 2012, ITS, and plaintiff has not sent a new notice to defendant alleging violations of the April 2, 2012 ITS. Although plaintiff may believe that defendant will be unable to meet the terms and conditions of the April 2, 2012 ITS, … under the ESA, plaintiff must give both the alleged violator and the Secretary of Commerce written notice of an ESA violation 60 days prior to filing suit in Federal court."). Congress certainly never envisioned a citizen suit without any meaningful notice, where a plaintiff could seek injunctive relief for wholly past actions, based on non-compliance with an ITS that has yet

to come into existence. 16 U.S.C. § 1540(g)(1)(A).[3] Nor do Plaintiffs make any effort to explain the extraordinary leaps in logic, which run directly counter to clear statutory language.

Aside from the legal infirmities, a closer examination of the claim against Reclamation also reveals the fallacy in Plaintiffs' position. Plaintiffs' theory of liability hinges on whether Reclamation's approval of water transfers in 2014 and 2015 resulted in unauthorized "take" of spring- and winter-run Chinook salmon. In allowing Plaintiffs' claim to proceed in this form, the Court found that there was a factual dispute about whether the water transfers complied with the terms and conditions of the 2009 ITS such that Reclamation was subject to Section 9 liability. ECF 1269 at 75. Plaintiffs assert that, in trying to prove that Reclamation did not comply with the terms of the ITS during the critically dry years of 2014 and 2015, they will put forth evidence that temperatures exceeded 56^0 F at the Clear Creek compliance point. ECF 1333 at 3. But the Court's determination of a factual dispute about whether the water transfers complied with the terms and conditions of the 2009 ITS was not based on Reclamation's ability to meet 56^0 F at the

[3] This would render the entire purpose of the written 60-days' notice provision useless. 16 U.S.C. § 1540(g)(2)(A). The ESA's waiver of sovereign immunity is explicit: "No action may be *commenced* under [the ESA citizen suit provision] prior to sixty days after written notice of the violation has been given. . . ." 16 U.S.C. § 1540(g)(2)(A)(i) (emphasis added). The plain language of the ESA therefore mandates a 60-day litigation-free period between the submission of a notice and the commencement of a lawsuit. *Id.; see also Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation,* 143 F.3d 515, 520 (9th Cir. 1998) (ESA notice provision gives agencies "an opportunity to review their actions and take corrective measures if warranted" and provides "an opportunity for settlement or other resolution of a dispute without litigation.") (citations omitted). But, under Plaintiffs' theory, they could simply send a generic 60-days' notice alleging a violation of Section 9, commence suit, and then wait for issuance of a new ITS to argue that previous activities "violated" the new terms and conditions. Such a reading would not allow an alleged violator to correct any perceived deficiency in response to the notice, defeating the very purpose of the statutory provision. *Wild Fish Conservancy v. Nat'l Park Serv.,* No. C12–5109 BHS, 2013 WL 549756, at *4 (W.D. Wash. Feb. 12, 2013) ("Plaintiffs allege that the Tribal Defendants are not operating in conformance with the newly issued approvals. The ESA, however, requires Plaintiffs to provide 'notice of the violation.'") (citation omitted).

Clear Creek compliance point during the critically dry years of 2014 and 2015, but rather on Reclamation's ability to meet long-term performance measures. ECF 1269 at 68-75.

The Court acknowledged that the 2009 BiOp provides for "Drought Exception Procedures" when temperature compliance at Clear Creek was not possible.[4] ECF 1269 at 15, 71-72, BOR0008195. These exceptions were the product of NMFS' recognition that "despite Reclamation's best efforts, severe temperature-related effects cannot be avoided in some years." BOR0008186. These exception procedures require Reclamation, among other things, to provide NMFS with a contingency plan, notify the State Water Resources Control Board ("SWRCB") that "meeting the biological needs of winter-run and the needs of resident species in the Delta, delivery of water to nondiscretionary Sacramento Settlement Contractors, and Delta outflow requirements per D-1641, may be in conflict" and request assistance from the SWRCB as to development of appropriate contingency measures, and coordinate with NMFS on monthly Keswick releases. *Id.*; BOR0008193-196. The Court addressed Reclamation's compliance with the Drought Exception Procedures in 2014 and 2015 as follows:

> Federal Defendants point to record evidence suggesting ongoing collaboration and consultation between Reclamation and NMFS over Reclamation's operations, including changes to temperature management protocols and water transfer approvals. *See generally* ECF No. 1143, Appendix 1 (Documents Submitted in Lieu of Discovery), at Doc. 81. Critically, as a part of this coordination, Reclamation consulted with NMFS numerous times to address whether its drought operations fell within the scope of the RPA and ITS. In addition, in July 2015, NMFS approved the Bureau's Shasta Temperature Management Plan for the 2015 temperature management season, which included modifications to the temperature management objectives set forth in the RPA. *See* 12566-12582. Among other things, the Shasta Temperature Management Plan set as a goal to

[4] Plaintiffs spend a great deal of time contrasting Reclamation's biological assessment and a draft RPA. ECF 1333 at 9-10. While this strongly indicates that Plaintiffs intend to bring suit in the future, Plaintiffs mischaracterize and fail to understand the complexity of Reclamation's proposed operation. Many of the adjustments that Plaintiffs take issue with in Reclamation's biological assessment recognize the difficultly of operating under drought conditions. In any event, it is premature to brief the merits of a future decision that has yet to be made.

> "[t]arget 57°F at [Clear Creek], not to exceed 58°F unless going above is needed to conserve cold water pool based on real-time temperature management team guidance." BOR 12579. NMFS concurred with this modification, BOR 12571, subject to constraining principles (e.g., that real-time operations be adjusted to attain temperatures as close to 57°F as possible at Clear Creek. BOR 12572. Overall, NMFS concurred that these changes were "consistent with RPA Action 1.2.3.C . . . . [and] were considered in the underlying analysis of the CVP/SWP Opinion." BOR 12574.

ECF 1269 at 71. Accordingly, the Court concluded that this ongoing coordination between the agencies, as contemplated by the 2009 NMFS BiOp, "arguably demonstrates (or at least is strong evidence to suggest) that operations in 2015 complied with the terms and conditions of the ITS." ECF 1269 at 72.

The Court then turned to Plaintiffs' remaining argument that Reclamation's water transfers did not comply with the ITS because Reclamation allegedly could not meet the long-term performance measures, on a 10-year running average, for end of September carryover storage at Shasta reservoir or for temperature compliance. ECF 1269 at 72-73. The Court noted that, notwithstanding any concurrences from NMFS in the short term, Reclamation's alleged inability to meet the long-term performance measures may run afoul of the 2009 ITS. *Id.* Thus, the factual dispute to be resolved at trial hinged on Reclamation's long-term compliance with the performance measures described in the 2009 BiOp and ITS. *Id.*

What Plaintiffs fail to address is that, once the 2009 BiOp and ITS are superseded, so too are the long-term performance measures on which Plaintiffs' claim of liability is based. It is unknown whether these "performance measures" will even be a relevant metric in the 2019 ITS. But, even if they are used similarly, the same mathematical principles will have changed, as the performance period, the current 10-year running average, will no longer be applicable. Once the new BiOp issues and the performance measures outlined therein are superseded, Plaintiffs cannot be granted relief for any alleged failure of Reclamation to meet 2009 long-term performance

measures, which are no longer operative. A remedy cannot be fashioned to address any ongoing violation of performance metrics, which are no longer operative. *See Gwaltney*, 484 U.S. 49, 58-59. Thus, even without examining the substance of the new ITS, Federal Defendants can demonstrate "that it is 'absolutely clear' the violations will not recur" because there can be no future violation of performance measures which have been supplanted by conditions as set forth in the new BiOp. *See, Natural Res. Def. Council v. Cty. of Los Angeles*, 840 F.3d 1098, 1103-04 (9th Cir. 2016).

This Court's narrowing of the claim against Reclamation and the impossibility of demonstrating a violation of superseded long-term performance measures highlights how Plaintiffs' reliance on *Natural Resources Defense Council v. County of Los Angeles* is misplaced. ECF 1333 at 12-13. In that case, the litigants initially brought suit against a non-federal entity alleging that the County was discharging polluted stormwater in violation of its Clean Water Act ("CWA") permit. 840 F.3d at 1099. The court found that the County had violated the terms of its initial permit and remanded the case back to the district court for a remedy determination. *Id.* During the remedy proceeding, the County sought to dismiss the entire case as moot because a new permit had been issued in the interim. *Id.* at 1101. The district court granted the County's motion to dismiss on mootness grounds, but the Ninth Circuit reversed, finding that remedies were still available to the plaintiffs primarily because the new permit "substantially retains the baseline" limitations from the old permit, and that there were strong indications that the County was not fully complying with the terms of the new permit. *Id.* at 1103; *id.* at 1105 ("[T]here is a significant likelihood that [the County] will be subject to and violate the baseline receiving water limitations.").

Besides the fact that Reclamation is not in a remedy proceeding, which is a far different procedural posture, the mathematical impossibility of establishing a "violation" of the long-term performance measures in the 2009 ITS clearly sets *County of Los Angeles* apart from the present case. Unlike the County's continuing obligation to comply with the same baseline limitation under both permits, here the long-term performance measures, calculated over a 10-year period, will no longer be operable once the 2019 ITS issues. And, unlike the County that arguably was in violation of the same condition in two different permits, here Plaintiffs cannot demonstrate that the terms and conditions of the 2009 ITS, as recently framed by the Court, were violated because the 10-year timeframe ends too soon.

It is axiomatic that, if there is no demonstrated legal violation, there can be no injunctive relief. Thus, there is no comparable concern and more importantly no possibility for "effective relief," for Plaintiffs' claim in this case. Indeed, the Ninth Circuit made clear that claim in *County of Los Angeles* would have been moot if the "new standards had been relaxed to such an extent that in essence 'conduct that was impermissible before is now permissible.'" *Id.* at 1102 (citation omitted). While the circumstances are not completely analogous because there is no permit authorizing an activity in our case, [5] this Court cannot premise an injunction on superseded ITS terms and conditions that have no mathematical possibility of being evaluated

[5] Throughout Plaintiffs' brief they equate an ITS with a "permit." ECF 1333 at 13. This is incorrect. An ITS is a limited exemption of liability, it is not a permit that authorizes an actor to perform certain activities. 16 U.S.C. § 1536(o)(2); *see also* 51 Fed. Reg. 19,926, 19,953 (June 3, 1986). ("If the action proceeds in compliance with the terms and conditions of the incidental take statement, then any resulting incidental takings are exempt from the prohibitions of section 4(d) or 9 of the Act. No permit is required of the Federal agency or any applicant in carrying out the action, as one commenter contended."). This is a distinction with a difference in this context because, unlike a permit that authorizes future conduct, an ITS only exempts conduct from liability.

for compliance. Even ignoring the Ninth Circuit's clear and controlling holding in *Grand Canyon Trust* in the more relevant ESA context, Plaintiffs' emphasis on *County of Los Angeles* is inapposite.

Plaintiffs' reliance on *Native Fish Society v. NMFS,* is similarly misplaced. ECF 1333 at 14. First, Plaintiffs' portrayal is misleading. The quoted language was in the context of plaintiffs' preliminary injunction motion, which was ultimately denied. Case No. 3:12–cv–00431–HA, 2013 WL 12120102, at *15 (D. Or. May 16, 2013). Second, even the plaintiffs in that case recognized that their Section 9 claims had been rendered obsolete, if not moot, by issuance of a new ITS, and they appropriately agreed to stay both Section 9 claims (against the State and Federal Defendants) while the merits of the BiOp and ITS could be litigated. *Native Fish Soc'y,* 992 F. Supp. 2d 1095, 1101 (D. Or. 2014) ("At this time, litigation concerning plaintiffs' First and Second Claims has been stayed."). Third, the plaintiffs ultimately voluntarily dismissed their Section 9 claims in that case. *Native Fish Soc'y,* 3:12-cv-0431-HA, ECF 288 (order granting leave to file an amended complaint withdrawing the Section 9 claims.). Fourth, the court's statement, which was arguably dicta, directly conflicted with another court's holding in the same district. *See Oregon Wild*, 2012 WL 3756327, at *1 (finding that issuance of an ITS mooted plaintiff's Section 9 claim and denying leave to amend complaint as futile.). Plaintiffs' heavy reliance on an unpublished preliminary injunction opinion is misplaced.

Finally, Plaintiffs' acknowledgment that the parties should wait to address remedy and the difficulties associated with an intervening, presumptively lawful 2019 BiOp and ITS, is a significant concession. ECF 1333 at 12 n.8 ("a new and different ITS could conceivably affect the *remedy* available under Section 9 . . . .") (emphasis in original). In their motion seeking bifurcation of liability from remedy, Plaintiffs freely admit that completion of consultation will

fundamentally alter this litigation. ECF 1319-1 at 6 (discussing how the ongoing consultation "would substantially modify operations of Shasta Dam and could well affect the scope of any remedy required from the Court."). In fact, Plaintiffs affirmatively argue that, because the new 2019 BiOp is nearing completion, the Court should delay consideration of any remedy. *Id.* ("Because consultation on those operations is ongoing, this is a further reason to delay resolution . . . ."). Plaintiffs have effectively conceded that the regulatory regime will fundamentally change upon issuance of the 2019 BiOp and ITS, yet provide no coherent explanation as to why this admitted regulatory change affects only remedy as opposed to presumed liability.

Importantly, despite pages and pages of briefing about how this Court could fashion "effective relief," Plaintiffs *never* articulate what "effective relief" they are actually seeking with their claim. ECF 1333 at 5, 11, 13, 17-18. Not once. And they certainly never explain what remedy they will seek in the face of a presumptively lawful 2019 BiOp and ITS, or how this Court could fashion such a remedy with the admitted regulatory change. It was incumbent on Plaintiffs to explain the precise "relief" that would remain available after issuance of the 2019 BiOp and ITS, and they have utterly failed to do so. Their silence on this point can only be interpreted as a fatal defect. Plaintiffs cannot simultaneously contend that the forthcoming BiOp will do nothing to the regulatory regime, but at the same time urge this Court to wait to address some unspecified remedy, while also acknowledging that issuance of the 2019 BiOp will directly interfere and likely render any future injunction jurisdictionally suspect and more likely obsolete. Hiding the ball does not advance the ball. Either the 2019 BiOp and ITS change the regulatory landscape, in which case the claim is moot, or they do not, and Plaintiffs should have explained what "relief" remains available. Plaintiffs cannot have it both ways.

A fair reading of Plaintiffs' position is that this Court should engage in a three-week trial, provide only declaratory relief against defendants, but then have the parties "meet and confer" on some undisclosed remedy. ECF 1319-1. But, as Plaintiffs well know, Reclamation could not agree to any remedy or operational change that deviates from the 2019 BiOp and ITS until: (1) the merits of the 2019 BiOp are litigated; (2) the Court finds a legal violation; and (3) the legal violation warrants vacatur or injunctive relief. Because any "meet and confer" would be meaningless, Plaintiffs will undoubtedly ask the Court to superimpose an injunction on top of a lawful BiOp and ITS, essentially placing the Court in the position of requiring Reclamation to deviate from NMFS' prescribed guidance. This is untenable. By its very nature, injunctive relief is prospective, and any remedy, no matter Plaintiffs' hollow and vague suggestions, will interfere with the agencies' implementation of the ESA. Plaintiffs' request for bifurcation and obfuscation on remedy should be seen for what it is – a concession that the more appropriate course for this litigation is to stay proceedings until issuance of the 2019 BiOp and ITS, dismiss the four-year-old Section 9 claims, and, if Plaintiffs choose to do so, they can seek leave to amend their complaint to challenge the merits of NMFS' new decisions.

II. STAY OF PROCEEDINGS

Plaintiffs misconstrue Federal Defendants' request for a stay of proceedings. ECF 1333 at 19. In our motion, we sought a stay of proceedings until the 2019 BiOp and ITS issued, approximately on June 17, 2019. Thom Decl., ECF 1332-2 ¶ 5. At that time, and in accordance with controlling Ninth Circuit case law, Plaintiffs' Section 9 claim against Reclamation will be constitutionally moot and this Court will lack subject matter jurisdiction over that claim. Federal Defendants do not seek an "indefinite stay" of the Sixth Claim. ECF 1333 at 19.

In support of Federal Defendants' request for a stay of proceedings, we presented evidence that Plaintiffs would not be harmed by a stay. ECF 1323-1 at 22; Kitek Decl., ECF 1323-3, ¶ 6-7 (explaining operations for this water year and how they will be significantly different from 2014 and 2015). We also explained the harm to Federal Defendants in the absence of a stay. These points were never rebutted or disputed by Plaintiffs. Federal Defendants also explained how judicial economy would be served by a stay, and Plaintiffs appear to agree with this premise. ECF 1333 at 21.

Plaintiffs' only real grievances are that they have expended resources in pretrial proceedings and there were previous delays as a result of the government shutdown. ECF 1333 at 20. This complaint rings somewhat hollow in that Plaintiffs also sought to delay expert discovery, over the objection of the SRS Contractors, prior to any shutdown, which led to further delays. ECF 1274. More importantly, Federal Defendants notified Plaintiffs in December 2018 that they would be raising mootness as a defense in light of the President's memorandum, and Plaintiffs could have easily agreed to a stay of proceedings. Instead, Plaintiffs repeatedly opposed Federal Defendants' requests for extensions of time and stay of proceedings based on the government shutdown. ECF 1284, 1294. Any harm suffered by Plaintiffs is, in part, a product of their own making. In light of Plaintiffs' failure to meaningfully rebut Federal Defendants' showing, the Court should grant the request for a stay of proceedings.

As to scheduling, Federal Defendants largely agree with Plaintiffs' proposed stay, ECF 1333 at 20-21, with two exceptions. The Court should not set a briefing schedule at this time or continue the trial until November 2019. Rather, the Court should set a case management conference approximately two weeks after issuance of the 2019 BiOp and ITS (approximately July 2, 2019). At that case management conference, Plaintiffs should be required to provide the

Court with an assessment of whether they intend to maintain their Section 9 claims against Defendants or seek leave to challenge the merits of NMFS' new decisions.[6] This information will aid the parties and the Court in fashioning a future case management schedule.

CONCLUSION

The Court should grant Federal Defendants' motion to dismiss. In the alternative, the Court should stay proceedings and set a case management conference for two weeks after issuance of the 2019 BiOp and ITS.

Dated: April 5, 2019

Respectfully submitted,

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[6] Any challenge to the merits of the new BiOp and Reclamation's operation of the CVP under the BiOp's terms and conditions would require written notice of the alleged violation 60 days before commencement of a lawsuit. 16 U.S.C. § 1540(g)(2)(A).

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/ Nicole M. Smith
Nicole M. Smith, Trial Attorney