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[*Additional Counsel and Parties on signature page*]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,

Plaintiffs,

v.

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

Defendants.

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

Defendants-Intervenors.

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, *et al.*

Joined Parties.

CASE NO.: 1:05-cv-01207-LJO-EPG

REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY, PLAINTIFFS' PRUDENTIALLY MOOT SIXTH CLAIM

Date: April 12, 2019
Time: 8:30 a.m.
Ctrm: 4

The Honorable Lawrence J. O'Neill

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I. INTRODUCTION

In their zeal to defend the 2009 NMFS BiOp's unprecedented decision to exclude the SRS Contractors from incidental take coverage resulting from Reclamation's non-discretionary duty to comply with the terms of the SRS Contracts, Plaintiffs ignore what should be this Court's central concern in deciding these motions to dismiss: Reclamation will soon implement a new operational regime for the Central Valley Project ("CVP") that will make it impractical and legally perilous for this Court to grant Plaintiffs meaningful relief. That concern is only amplified by Plaintiffs' attempt to sidestep it.

Although Plaintiffs have never revealed precisely what narrowly tailored injunctive relief they seek, they have hinted that they would like either NMFS, this Court, or both to impose operational requirements for Shasta Reservoir that were suggested in a non-binding draft document issued by NMFS two years ago. *See* Dkt. No. 1333 at 5:4-28, 11:12-19.[1] Granting such relief would place the Court on infirm constitutional and jurisdictional ground, and shows precisely why the Sixth Claim is prudentially moot. If the ongoing Section 7 consultation results in the operational requirements suggested in NMFS's 2017 draft document, there will be no need for this Court to order injunctive relief and three weeks of valuable courtroom time will be wasted. If the consultation process results in different requirements, however, the Court will not be able to grant Plaintiffs' requested relief without substituting its own judgment for that of expert, independent, executive branch agencies. The same problem will occur with respect to other forms of relief that Plaintiffs may request in the future. This problem is not limited to remedies: Plaintiffs have ignored the serious issue that the Court's factual findings with respect to liability could conflict with FWS' and NMFS' ability to make findings of fact in their forthcoming biological opinions. The Court should not address any party's concerns regarding those federal agencies' factual findings without a properly plead challenge under the Administrative Procedures Act ("APA").

Lastly, the Ninth Circuit has clearly and repeatedly held that: (1) discretionary and non-

[1] Docket citations refer to the internal document pagination.

discretionary aspects of an agency action cannot be segregated under the Endangered Species Act ("ESA"); (2) the scope of an incidental take statement must be coextensive with the scope of the proposed action; and (3) third parties' actions are immunized from Section 9 liability if taken in accordance with a valid incidental take statement. Accordingly, the scope of any ITS issued by NMFS must include Reclamation's proposed action to exercise discretion in operational decision making, including how to meet non-discretionary obligations under the SRS Contracts.

II. LEGAL ARGUMENT

A. The Court Cannot Craft a Remedy Without Interfering with Executive Branch Authority to Ensure CVP Operations Do Not Jeopardize a Wide Range and Wide-Ranging List of Endangered and Threatened Species.

On January 31, 2019, Reclamation proposed a new discretionary operational regime for the CVP as a whole and transmitted a biological assessment of that new regime's effects on twenty-four different listed species to FWS and NMFS. That new regime has been crafted to meet both discretionary and non-discretionary obligations. *See* Request for Judicial Notice in Support of Reply (RJN) at Exh. A at 3-1; 4-1; 4-62.[2] It also attempts to address a significant problem that creates serious issues for Reclamation's operation of the CVP: the needs of species in the upper Sacramento River can and do conflict with the needs of listed species farther downstream. BA at 4-5—4-7.

As directed by the President of the United States, FWS and NMFS will, approximately one month before the trial in this case, issue biological opinions that consider whether this new operational regime will jeopardize the continued existence of listed species ranging from winter-run Chinook salmon spawning in the upper Sacramento River to Delta Smelt in the Sacramento-San Joaquin Bay-Delta Estuary. BA 1-16—1-17. Regardless of their ultimate conclusions, both biological opinions must provide Reclamation with reasonable and prudent measures to ensure that Reclamation's operation of the CVP for multiple purposes—including satisfying the needs of listed fish species—minimizes the impacts of incidental take on listed species. *See* 16 U.S.C. § 1536(b)(4)(2). And if either NMFS or FWS determines that the new operational regime for the

[2] Further citations to the documents attached as Exhibits A-C to the RJN will refer to the "BA," the "2009 NMFS BiOp," and the "2004 NMFS BiOp," respectively.

CVP will jeopardize any listed species, it must specify reasonable and prudent alternatives ("RPAs") to the proposed action that will avoid that jeopardy. *Id.* at § 1536(b)(3)(A). All of these decisions will be made in light of FWS' and NMFS' expert analysis of the best scientific and commercial data available. *Id.* at § 1536(a)(2).

Against this backdrop, Plaintiffs cannot sustain their argument that relief granted by this Court will not interfere with the agencies' independent expert judgment of how best to minimize take of listed species resulting from the long-term operations of the CVP. *E.g., Oregon Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 996 (D. Or. 2010) (explaining that NMFS' scientific determinations deserve judicial deference); *Building and Const. Dept. v. Rockwell Intern. Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993) ("Thus prudential mootness arises out of . . . considerations of comity for coordinate branches of government . . . ." [internal quotation marks and alterations omitted]). Plaintiffs' argument that the Court can craft injunctive relief that is different from, yet consistent with, all of the determinations of two different biological opinions makes no sense. The Court cannot effectively craft injunctive relief in the context of a new operational regime for the CVP without substituting its judgment for judgments made in the biological opinions.[3]

Plaintiffs' continuing improper reliance on a draft NMFS document[4] calling for infeasible mandatory Shasta storage targets and specific limits on temperature-dependent mortality in critically dry years proves these points. *See* Dkt. No. 1333 at 11:12-19. It may well be that NMFS' new biological opinion concludes that storage targets and lower limits on mortality in critically dry years are appropriate RPAs. In that case, this Court will have no need to impose them, mooting the relief that Plaintiffs apparently seek from their Section 9 claim. Alternatively, if NMFS concludes there are better ways of minimizing the impacts of incidental take on listed salmon, the Court will necessarily substitute its judgment for NMFS' if it orders those measures

[3] If Plaintiffs conclude that the forthcoming biological opinions are insufficiently protective of listed salmon, their remedy is not a claim under Section 9 against Reclamation and the SRS Contractors, but an APA claim against NMFS, Reclamation, or both.

[4] The SRS Contractors object to Plaintiffs' citation of the 2017 draft Shasta RPA in support of their arguments. The 2017 draft Shasta RPA is only a draft and incapable of judicial notice for the truth of any matters asserted therein. *See* Fed. R. Evid. 201(b); Dkt No. 1333-2 at 1 ("Please consider this . . . subject to further . . . refinement.").

from the draft NMFS document. Further, the Court will necessarily need to evaluate how that relief may adversely affect other listed species—a task FWS and NMFS are much better suited to undertake. *See* BA at 4-6 ("The benefit of increased reservoir storage has to be weighed against the potential negative downstream impacts on fisheries.")

These concerns also extend to the Court's findings on liability. There is a substantial risk that the Court's factual findings on liability could conflict with the new biological opinions' findings. Ordinarily, the latter findings would be evaluated in an APA claim under a substantial evidence standard based on information before each agency. The Court, however, must exercise its independent judgment at trial based only on the evidence before it. The most prudent course is to let those expert agencies make these decisions, and then allow them to be tested in the proper procedural posture of a challenge under the APA.

Contrary to Plaintiffs' contention, avoiding judicial interference with the policy authority of coequal branches of government is one of two motivating factors behind the prudential mootness doctrine. *Compare* Dkt. No. 1334 at 1:19-21 *with Building and Const. Dept.*, 7 F.3d at 1492 ("Thus prudential mootness arises out of . . . considerations of comity for coordinate branches of government . . . ." [internal quotation marks and alterations omitted]). The second motivating factor also applies here because, as a result of the new operating regime for the CVP and NMFS' new biological opinion, Plaintiffs cannot prove anything more than the mere possibility that alleged harm to salmon resulting from Reclamation's operations in 2014 and 2015 is likely to reoccur. *See Building and Const. Dept.*, 7 F.3d at 1492. Operations in future years will be based on a regime entirely different from operations in 2014 and 2015, preventing Plaintiffs from proving that the same type of harm alleged in the Sixth Claim is likely to reoccur in the future.[5] *See e.g., Yurok Tribe v. U.S. Bureau of Reclamation*, 231 F. Supp.3d 450, 464 (N.D. Cal. 2017) (holding that ESA citizen suit provision does provide a cause of action "for wholly past violations").

[5] Indeed, as explained by Federal Defendants, it cannot be a fair reading of the ESA to allow a citizen suit to challenge future actions. The SRS Contractors cannot be held liable, let alone be subject to an injunction, for activities that in the future are in compliance with the terms of an incidental take statement. See Dkt. No. 1340, at 3-6.

Contrary to Plaintiffs' argument, the Ninth Circuit has not limited the prudential mootness doctrine to the bankruptcy context. Instead, it declined to apply the doctrine in an immigration case in which the court could afford the plaintiff meaningful relief. *Maldonado v. Lynch*, 786 F.3d 1155, 1161, n.5 (9th Cir. 2015). There was thus no reason for the Ninth Circuit to make a decision either way about whether the doctrine applies outside the bankruptcy context. On the other hand, this Court as well as other circuits have recognized that there is nothing about the prudential mootness doctrine that inherently limits it to bankruptcy cases. *See e.g., Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999) (analyzing prudential mootness argument in environmental case); *Cheng v. BMW of North America, LLC*, No. CV 12-09262 GAF SHx, 2013 WL 3940815 at *2-4 (C.D. Cal. July 26, 2013) (dismissing various non-bankruptcy claims as prudentially moot); *Building and Const. Dept.*, 7 F.3d at 1492. More importantly, the Supreme Court has applied the doctrine outside the bankruptcy context. *See A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961) ("[S]ound discretion withholds the remedy where it appears that a challenged 'continuing practice' is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted.") Thus, the Ninth Circuit's statement in dicta that it has applied the doctrine only in the bankruptcy context does not foreclose the Court's ability to dismiss the Sixth Claim as prudentially moot.

Even if Plaintiffs are correct that the new NMFS biological opinion will not provide incidental take coverage to the SRS Contractors, the fact remains that Reclamation's operational regime is undergoing "significant modification." *See id.* That regime and its effects on twenty-four different listed species will be exhaustively addressed by two different executive agencies with substantial expertise. This Court may not interfere with those efforts without serious jurisdictional implications; Plaintiffs' Sixth Claim should be dismissed as prudentially moot.

B. <u>The New NMFS Biological Opinion Can and Should Provide Incidental Take Coverage to the SRS Contractors.</u>

1. Longstanding Ninth Circuit authorities permit NMFS to issue an incidental take statement that immunizes the SRS Contractors' diversions from Section 9 liability.

Reclamation's proposed action for the long-term operation of the CVP in coordination with the State Water Project includes Reclamation's exercise of operational discretion to meet

both discretionary and non-discretionary obligations, including the full performance of the SRS Contracts. BA at 3-1; 4-9; 4-62. Unless the consulting agencies issue jeopardy opinions which conclude that there is no reasonable and prudent alternative to Reclamation's proposed action that can avoid jeopardizing listed species, both biological opinions to be issued in June will contain an incidental take statement that will provide immunity from Section 9 liability for "any taking that is in compliance with the terms and conditions" specified in those incidental take statements. 16 U.S.C. § 1536(o)(2); *see also* 50 C.F.R. § 402.14(i)(5); *Ramsey v. Kantor*, 96 F.3d 434, 441 (9th Cir. 1996) (holding that "any taking—whether by a federal agency, private applicant, or other party—that complies with the conditions set forth in the incidental take statement is permitted"). The scope of an incidental take statement must be coextensive with the agency action. *See* 16 U.S.C. § 1536(b)(4); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014) (affirming ruling that consulting agency need not separate discretionary aspects of a proposed action from non-discretionary aspects in analyzing the action's effects on listed species). Thus, the Ninth Circuit rule is that any taking allegedly caused by the scope of Reclamation's proposed action to exercise its discretion in operational decision-making (BA at 4-62) must receive incidental take coverage from NMFS.

As Reclamation acknowledges in its Biological Assessment, its discretion *includes* how to comply with the terms of the SRS Contracts, which in turn includes the non-discretionary terms of those contracts. Therefore, the scope of any ITS must be coextensive with Reclamation's exercise of discretion in operational decision making, including how it chooses to meet the non-discretionary obligations of the SRS Contracts. And so long as the incidental take statement contemplates that third parties will act in conjunction with the federal agency action, and they comply with the terms of the incidental take statement, the Ninth Circuit has repeatedly ruled that those third parties receive immunity from Section 9 liability as well. *See Ramsey*, 96 F.3d 442 n.14; *see also McKenzie Flyfishers v. McIntosh*, No. 6:13-cv-02125-TC, 2015 WL 1176853 at *4, *6 (D. Or. Mar. 13, 2015); *WildEarth Guardians v. U.S. Fish & Wildlife Serv.*, 342 F. Supp. 3d 1047, 1062 (D. Mont. 2018); *Wild Equity Inst. v. City and Cty. of S.F.*, No. C 11–00958 SI, 2012

WL 6082665 at *3 (N.D. Cal. Dec. 6, 2012).[6]

Conversely, the Ninth Circuit has **never** held that an incidental take statement must avoid providing immunity to non-discretionary sub-actions performed in the context of a larger discretionary action (here, the operation of the CVP as a whole). To the contrary, the Ninth Circuit has repeatedly and recently refused to permit NMFS or federal action agencies to distinguish between discretionary and non-discretionary sub-actions in the Section 7 consultation process. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008) (prohibiting NMFS from refusing to analyze non-discretionary operations in the context of a larger, discretionary agency action); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014). There is no reason to believe that the Ninth Circuit would require the exclusion of take coverage for discretionary decision-making that achieves non-discretionary goals. *See* 16 U.S.C. § 1536(b)(4) (requiring NMFS to provide take coverage if it determines "the taking of an endangered species . . . incidental to the *agency action* will not violate such subsection[.]" (emphasis added)).

Plaintiffs attempt to support their argument that the SRS Contractors cannot receive incidental take coverage in the forthcoming biological opinion by pointing to this Court's statements in its orders on motions to dismiss. When it comes to the **forthcoming** biological opinions, however, the Court should not treat these statements as binding.[7] The 2009 NMFS BiOp by its own terms refused to extend incidental take coverage for Reclamation's non-discretionary duty to ensure the availability of water for the SRS Contractors to divert pursuant to

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[6] Plaintiffs' effort to distinguish these cases is unavailing. *Wild Equity Inst.* obviously involved incidental take coverage for a third party, given that the court in that case dismissed a Section 9 claim against a non-federal agency based on an incidental take statement in a biological opinion. 2012 WL 6082665 at *4. And both *WildEarth Guardians* and *McKenzie Flyfishers* explicitly provide Section 9 immunity to third parties acting in compliance with an ITS that contemplated their conduct. *McKenzie Flyfishers*, 2015 WL 1176853 at *4; *WildEarth Guardians*, 342 F. Supp. 3d at 1062.

[7] Plaintiffs' argument that the SRS Contractors' motion to dismiss should be denied because the 2009 NMFS BiOp refused to provide take coverage for Reclamation's operations to comply with the SRS Contracts ignores the fact that the SRS Contractors' prudential mootness argument in no way depends on the 2009 BiOp's incidental take statement. *See* Dkt. No. 1334 at 8:9-21. Rather, the Sixth Claim should be dismissed as prudentially moot because the Court should expect the SRS Contractors to receive incidental take immunity when the forthcoming biological opinion is issued, and because Reclamation has proposed a new operational regime for the CVP.

their SRS Contracts. Dkt. No. 1069 at 49:19-23. The Court's statement that non-discretionary components of discretionary CVP operations can never be entitled to incidental take coverage was unnecessary to its determination that the 2009 NMFS BiOp did not provide incidental take coverage to Reclamation or the SRS Contractors for their conduct in 2014 and 2015. *See* Dkt. No. 1045 at 49:1-4. Indeed, the Court later departed from its previous observation on this issue. Dkt. No. 1069 at 47:16-48:9.

Further, the fact that the terms of the SRS Contracts themselves do not permit Reclamation to abrogate its settlement with the SRS Contractors, or to unilaterally curtail the water available to them, does not completely constrain Reclamation's discretion to operate the CVP as a whole in a way that permits both compliance with the SRS Contracts and Reclamation's ESA compliance.[8] Reclamation's proposed action for the operation of the CVP as a whole reveals that Reclamation's discretion to implement the SRS Contracts for the benefit of listed species in the context of overall CVP operations is substantial. Indeed, the 2019 Biological Assessment proposes a host of new discretionary sub-actions designed to improve cold water pool management. *See* BA at 4-27—4-34.

Nor did the 2009 NMFS BiOp conclude that NMFS was completely foreclosed from devising an RPA that would avoid jeopardy to listed salmon because of the existence of non-discretionary SRS Contract terms. *See* Dkt. No. 1069 at 49:13-23. To the contrary, the 2009 NMFS BiOp **did** develop an RPA that it "believes would avoid the likelihood of jeopardy" (50 C.F.R. § 402.02); **did** provide near-term measures to ensure that the likelihood of survival and recovery is not appreciably reduced as well as long-term actions to address likelihood of survival and recovery; and **did** conclude that the RPA containing those actions would avoid the likelihood of jeopardy. *See* June 4, 2009 NMFS Cover Letter, at 2; 2009 NMFS BiOp at 575-580, 601

[8] Plaintiffs' attempt to argue that the SRS Contractors have been inconsistent with respect to their position on Reclamation's discretion to implement the terms of the SRS Contracts mischaracterizes the SRS Contractors' motion. *See* Dkt. No. 1334 at 12:13—13:22. At no point in their motion did the SRS Contractors suggest Reclamation has any authority to unilaterally modify the terms of the SRS Contracts to benefit listed species. *See* Dkt. No. 1069 at 25:6-7. Instead, the SRS Contractors have argued that Reclamation has discretionary authority to operate the CVP as a whole to meet all of its legal and contractual obligations, including its non-discretionary duty to comply with the terms of the SRS Contracts and its duty to comply with the ESA. Both positions are fully consistent with one another.

(noting only that the terms of the SRS Contracts "limited" NMFS ability to craft an RPA, but concluding that "other actions are necessary to avoid jeopardy to the species, including fish passage at Shasta Dam in the long-term"). NMFS can do so again in 2019 while properly providing incidental take coverage for Reclamation's discretionary operations to comply with the SRS Contracts.

2. The 2009 NMFS BiOp's decision to single out the SRS Contractors and exclude them from take coverage was unprecedented.

Although many issues pertaining to the 2009 NMFS BiOp were extensively litigated (and defended by Plaintiffs), the issue of whether NMFS was permitted to exclude non-discretionary operations to satisfy the SRS Contracts was not. Plaintiffs' confidence that the forthcoming biological opinions will necessarily exclude operations relating to the SRS Contracts appears to stem from Plaintiffs' mistaken belief that no biological opinion has ever extended incidental take coverage to the SRS Contractors' diversions from the Sacramento River. Dkt. No. 1334 at 5:5-6.

In fact, the 2009 NMFS BiOp's exclusion of this single aspect of Reclamation's multiple non-discretionary duties with respect to CVP operations is unique. For example, the 2009 NMFS BiOp notes that Reclamation has other non-discretionary duties that could conflict with Reclamation's ability to manage temperatures, but does not exclude those non-discretionary sub-actions from incidental take coverage. *See e.g.,* 2009 NMFS BiOp at 614 ("In the event that Reclamation determines that other nondiscretionary requirements (*e.g.,* D-1641 or the terms or requirements of the USFWS' Delta smelt biological opinion) conflict with attainment of the temperature requirement, Reclamation will convene the ARG to obtain recommendations."). The 2009 NMFS BiOp clearly contemplated that Reclamation would take those actions, but curiously excluded only the SRS Contractors from take coverage. *Ramsey*, 96 F.3d at 442 n.14. This inexplicable exclusion is amplified by the fact that the earlier 2004 NMFS BiOp did not exclude operations relating to the SRS Contracts from incidental take coverage, despite the fact that it analyzed (and therefore anticipated) the effects of full deliveries under the SRS Contracts and immunized Reclamation from Section 9 liability resulting from elevated river temperatures. RJN Exh. B, 2004 NMFS BiOp at 207. Indeed, Plaintiffs have not identified any other biological

opinion anywhere in the country that has excluded a non-discretionary sub-action of a larger discretionary operational regime from incidental take coverage, and the SRS Contractors are not aware that NMFS or FWS has ever done so. This unprecedented exclusion from coverage dictates that the court cannot conclude today that NMFS will decide for exclusion in June.

C. If the Court Does Not Dismiss Plaintiffs' Sixth Claim as Prudentially Moot, the SRS Contractors Agree that a Trial Continuance Should Be Granted.

Absent dismissal, a trial continuance and opportunity to address the legal effects of the new biological opinions is a sensible compromise.[9] However, in light of the expected complexity of the new biological opinions, the need to determine how anticipated challenges to those opinions may affect the resolution of the Sixth Claim, and continued uncertainty about the injunctive relief Plaintiffs actually seek, the SRS Contractors respectfully submit that scheduling briefing on the legal effects of the new biological opinions would be premature. The SRS Contractors propose that the Court schedule a case management conference instead to review how the case should proceed after the biological opinions issue.[10]

II. CONCLUSION

For the reasons stated above, the SRS Contractors respectfully request that the Court grant their motion to dismiss the Sixth Claim as prudentially moot, or in the alternative, continue the trial on the Sixth Claim and set a status conference to consider the effects of the new biological opinions on Plaintiffs' requested remedy.

DATED: April 5, 2019

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DATED: April 5, 2019

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[9] For the reasons stated in their Opposition to Plaintiffs' Motion for Bifurcation, the SRS Contractors disagree that bifurcation will adequately address these concerns.

[10] This approach makes even more sense given the Plaintiffs' filing earlier this week of their Motion for Reconsideration of this Court's February 23, 2017 Order dismissing Plaintiffs' Fifth Claim and Sixth Claim (in part). Dkt. Nos. 1335, 1335-1.