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20 UNITED STATES DISTRICT COURT
21 EASTERN DISTRICT OF CALIFORNIA

22 NATURAL RESOURCES DEFENSE
23 COUNCIL, *et al.*,

24 Plaintiffs,

25 vs.

26 DAVID BERNHARDT, Acting Secretary,
U.S. Department of the Interior, *et al.*,

27 Defendants.

Case No. 1:05-CV-01207 LJO-EPG

SRS CONTRACTORS' MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS,
OR IN THE ALTERNATIVE, STAY,
PLAINTIFFS' PRUDENTIALY MOOT
SIXTH CLAIM

Date: April 5, 2019

Time: 8:30 a.m.

Courtroom: 4

Judge: Lawrence J. O'Neill

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SAN LUIS & DELTA MENDOTA WATER AUTHORITY; et al.,
Defendant-Intervenors.
ANDERSON-COTTONWOOD IRRIGATION DISTRICT; et al.,
Joined Parties.

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1 **I. INTRODUCTION**

2 Plaintiffs' Sixth Claim alleges violations of Section 9 of the Endangered Species Act,
3 16 U.S.C. § 1531-1544 (ESA), by the United States Bureau of Reclamation (Reclamation) and
4 the Sacramento River Settlement Contractors (SRS Contractors). The proposed remedy for this
5 claim, as stated in Plaintiffs' Prayer for Relief, is to "[e]njoin the Secretary from continuing to
6 make releases of water from Shasta Reservoir, and the SRS Contractors from diverting such
7 water, to satisfy the terms of the SRS contracts where such releases and diversions will cause the
8 unauthorized take of winter-run and spring-run Chinook." Sixth Supplemental Complaint, Dkt.
9 No. 1187, at 69:10-13. Plaintiffs' requested remedy is currently being addressed in the reinitiated
10 consultation on the coordinated Long-Term Operation (LTO) of the Central Valley Project (CVP)
11 and State Water Project (SWP). The scope of that consultation includes Reclamation's proposed
12 new Shasta Dam temperature management criteria as part of its discretionary operational decision
13 making, including how to comply with the SRS Contracts. In accordance with the doctrine of
14 prudential mootness, this Court should dismiss Plaintiffs' Sixth Claim in recognition of the
15 administrative determinations that will be made by the National Marine Fisheries Service
16 (NMFS) in conducting its review of the effects of Reclamation's proposed action. As part of that
17 consultation, Ninth Circuit authority allows NMFS to exempt the SRS Contractors from the very
18 take liability that Plaintiffs' Sixth Claim seeks to remedy. At minimum, the Court should stay the
19 currently scheduled trial in order to allow NMFS to complete its ESA Section 7 consultation and
20 issue a biological opinion that should fully address the Plaintiffs' requested relief.¹

21 **II. FACTUAL AND LEGAL BACKGROUND**

22 **A. Actions Under the NMFS 2009 Biological Opinion**

23 The currently operative Biological Opinion for the Long-Term Operations of the Central
24 Valley Project and State Water Project issued by NMFS (2009 NMFS BiOp) found that
25 Reclamation's operation of the CVP would result in incidental take of listed Chinook salmon. It
26

27 ¹ Notably, Plaintiffs admit that the ongoing reinitiated consultations may affect the scope of the remedy, and admit
28 that these consultations provide a basis for delaying resolution of what injunctive relief may be appropriate (if the
Court finds liability). See Dkt. No. 1319-1, at 6:16-25.

1 therefore includes an incidental take statement (ITS) that exempts take of winter-run and spring-
2 run Chinook from liability under Section 9 of the ESA when Reclamation operates pursuant to the
3 reasonable and prudent alternatives (RPAs) described in the 2009 NMFS BiOp. As it relates to
4 Shasta Reservoir temperature management, the RPA requires Reclamation to operate Shasta
5 Reservoir to maintain daily average temperatures at the upper Sacramento River of no more than
6 56°F at the designated temperature compliance point from May 15 through October, subject to
7 further consultations in the event of drought conditions. 2009 NMFS BiOp at 600-601,
8 BOR0007600-8439, at BOR0008195-8196.

9 **B. Reclamation Reinitiated Consultation on its Proposed Action to Exercise Discretion**
10 **in Operational Decision Making, Including How to Comply with the SRS Contracts**

11 As the Court recently noted, Reclamation reinitiated consultation on the long-term
12 operations of the CVP in 2016. Dkt. No. 1314, at 12-13.² The President has directed that the new
13 biological opinions covering Reclamation's revised proposed action shall be finalized in June
14 2019 – prior to trial on Plaintiffs' Sixth Claim.³

15 As required by the President's Memorandum and Order, Reclamation submitted a
16 biological assessment to NMFS, more than a month ago, that describes a proposed action
17 including full implementation and performance of the SRS Contracts. In the January 31, 2019
18 Biological Assessment, at 4-1 (SRS Contractors' Request for Judicial Notice in Support of
19 Motion to Dismiss, or in the Alternative, Stay, Plaintiffs' Prudentially Moot Sixth Claim (RJN),
20 Exh. A), Reclamation and the Department of Water Resources (DWR) propose:

21 [T]o continue the coordinated long-term operations of the CVP and SWP to
22 maximize water supply delivery and optimize power generation consistent with
23 applicable laws, contractual obligations, and agreements; and to increase
operational flexibility by focusing on non-operational measures to avoid

24 ² On August 2, 2016, Reclamation requested reinitiation of Section 7 consultation with the United States Fish and
Wildlife Service (USFWS) and NMFS on the coordinated Long-Term Operation of the Central Valley Project and
25 State Water Project. Reclamation's Biological Assessment, dated January 31, 2019, has been submitted to NMFS
and USFWS. See <https://www.usbr.gov/mp/bdo/ito.html>. RJN Exh. A; Declaration of Jared S. Mueller in Support of
26 SRS Contractors' Request for Judicial Notice Re: Motion to Dismiss, or in the Alternative, Stay, Plaintiffs'
Prudentially Moot Sixth Claim.

27 ³ See Dkt. No. 1281, at 16:12-17, citing the October 19, 2018 Presidential Memorandum on Promoting the Reliable
28 Supply and Delivery of Water in the West (<https://www.whitehouse.gov/presidential-actions/presidential-memorandum-promoting-reliable-supply-delivery-water-west/>).

1 significant adverse effects. Reclamation and DWR propose to store, divert, and
2 convey water in accordance with existing water contracts and agreements,
3 including water service and repayment agreements, settlement contracts, exchange
4 contracts, and refuge deliveries, consistent with water rights and applicable laws
5 and regulations.

6 The Biological Assessment, at 4-9 to 4-11, further confirms that Reclamation is consulting on the
7 full performance and implementation of the SRS Contracts, by specifying as follows:

8 *This consultation covers the operation of the CVP and SWP to deliver water
9 under the terms of all existing contracts up to full contract amounts, the impacts of
10 maximum water deliveries and diversions under the terms of existing contracts
11 and agreements, including timing and allocation. Reclamation is not proposing
12 to execute any new contracts or amend any existing contracts as part of this
13 consultation.*

14 Reclamation proposes to operate the CVP to meet its obligations to deliver water
15 to senior water right holders who received water prior to construction of the CVP,
16 to wildlife refuge areas identified in the CVPIA, and to water service contractors.

17 This consultation covers Reclamation's operational actions to meet the terms of
18 its existing CVP water supply contracts (i.e., water service contracts, and
19 settlement, exchange, and refuge contract).

20 This proposed action covers the operation to deliver up to full contract amounts,
21 including full Level 4 refuge contract amounts.

22 RJN Exh. A (emphasis added).

23 The Biological Assessment, at 4-60, further confirms as follows: "Reclamation and DWR
24 are consulting on the exercise of discretion in operational decision making, including how to
25 comply with the terms of their respective existing water supply and settlement contracts (which
26 includes the impacts of maximum water diversions under the terms of these contracts), and other
27 legal obligations." RJN Exh. A. Accordingly, Reclamation has requested consultation on the
28 effects of the maximum quantities of diversions allowed under the SRS Contracts.⁴

Regarding the Sacramento River operations, Reclamation proposes the following actions
in comparison to no action and current operations:

⁴ As recently held by this Court, the consulting agency (NMFS here) must analyze the action *as proposed* by the
action agency (Reclamation here). Dkt. No. 1314, at 30-31.

Without Action	Current Operation	Proposed Action
No temperature management	NMFS RPA I.2.1-I.2.4: Shasta Temperature Management, WRO 90-5 downstream temperature targets	Temperature management based on use of Shasta cold water pool for Winter-Run survival, including WRO 90-5.
No spring pulses	No spring pulses	Spring pulses if projected May 1 storage > 4 MAF
No fall base flows	3,250 cfs minimum flow	Measures to reduce Fall-Run redd dewatering and rebuild cold water pool, e.g., when end-of-September storage is: ≤ 2.2 MAF, flow is 3,250 cfs; ≤ 2.8 MAF, flow is 4,000 cfs; ≤ 3.2 MAF, flow is 4,500 cfs; > 3.2 MAF, flow is 5,000 cfs.
No Winter-Run Conservation Hatchery	Livingston-Stone National Fish Hatchery	Increased use of Livingston-Stone National Fish Hatchery during droughts

Biological Assessment, Table 4-1, at 4-1.

In contrast with the 56°F temperature compliance point from the 2009 NMFS BiOp, Reclamation now proposes a new tiered temperature management strategy in order to address the effects of the proposed action on winter-run and spring-run Chinook salmon, and to “allow[] for strategically selected temperature objectives, based on projected total storage and cold water pool, meteorology, Delta conditions, and habitat suitability for incoming fish population size and location.” Biological Assessment at 4-28, RJN Exh. A. The Biological Assessment describes the new tiered management strategy as follows:

- Tier 1. In years when Reclamation determines that cold water pool is sufficient (e.g., more than 2.8 MAF of cold water pool in Shasta Reservoir at the beginning of May or modeling suggests that a daily average temperature of 53.5°F at CCR can be maintained from May 15 to October 31), Reclamation proposes to operate to a daily average temperature of 53.5°F at the CCR gaging station to minimize temperature dependent mortality.
- Tier 2. In years when cold water pool is insufficient to allow Tier 1 (e.g., less than 2.8 MAF of cold water pool in Shasta Reservoir at the beginning of May or modeling suggests that the 53.5°F at CCR cannot be maintained from May 15 to October 31), Reclamation would optimize use of cold water for Winter-Run Chinook Salmon eggs based on life-stage-specific requirements, reducing the duration of time of operating to 53.5°F target temperatures. Water temperatures at CCR would vary based on real-time monitoring of redd timing and lifestage-specific temperature dependent mortality models, for example, Anderson (2017). The time period of 53.5°F at CCR would be centered around the projected time

1 period when the Winter-Run eggs have the highest dissolved oxygen requirement
 2 (37-67 days post fertilization). At 2.79 MAF of cold water pool, Reclamation
 3 would operate to 53.5°F from 37 days after the first observed redd to 67 days after
 4 the last observed redd, as long as this is earlier than October 31. The duration of
 5 the 53.5°F protection will decrease in proportion to the available cold water pool
 6 on May 1. Reclamation will determine this time period by running different
 7 temperature scenarios through the latest egg mortality model(s) and real-time
 8 monitoring of redds. Reclamation would operate to daily average temperatures at
 9 CCR during the temperature management season outside of the stage- specific
 10 critical window no warmer than 56°F.

- 11 • Tier 3. When Reclamation determines that life-stage-specific temperature targets
 12 cannot be met per (2) above (e.g., less than 2.3 MAF of cold water pool in Shasta
 13 Reservoir at the beginning of May or modeling suggests that maintaining 53.5°F at
 14 CCR would have higher mortality than a warmer temperature), Reclamation
 15 proposes to use cold water pool releases to maximize Winter- Run Chinook
 16 Salmon redd survival by increasing the coldest water temperature target (see
 17 Figure 4-4 below). At the highest storage levels in Tier 3, the targeted temperature
 18 at CCR will be daily average 53.5°F and as storage decreases would warm in the
 19 life-stage-specific critical period up to 56°F. Reclamation would increase the
 20 temperature while minimizing adverse effects to the greatest extent possible, as
 21 determined by the latest egg mortality models, real-time monitoring, and expected
 22 and current water availability. This tier would be in effect until Reclamation could
 23 no longer meet 56°F at CCR at which point Reclamation would shift to tier 4.
- 24 • Tier 4. If there is less than 2.5 MAF of total storage (note the use of “total” storage
 25 as opposed to the “cold water pool” used in the previous criteria) in Shasta
 26 Reservoir at the beginning of May, or if Reclamation cannot meet 56°F at CCR,
 27 Reclamation will attempt to operate to a less than optimal temperature target and
 28 period that is determined in real-time with technical assistance from NMFS and
 USFWS. Reclamation will explore improved coordination of downstream
 diversions, and the potential for demand shifting. In addition, Reclamation
 proposes to implement intervention measures (e.g., increasing hatchery intake and
 trap and haul, as described below).

19 Biological Assessment at 4-28 to 4-29, RJN Exh. A.

20 III. ARGUMENT

21 This Court should dismiss the Sixth Claim as prudentially moot. The doctrine of
 22 prudential mootness permits a court, in its discretion, to dismiss a case as moot even if it qualifies
 23 as a “controversy” under Article III of the U.S. Constitution when “circumstances [have] changed
 24 since the beginning of the litigation that forestall any occasion for meaningful relief.” *NRDC v.*
 25 *Norton*, No. 1:05-CV-01207-OWW-LJO, 2007 WL 14283 at *7 (E.D. Cal. Jan. 3, 2007); citing
 26 *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999). The prudential mootness
 27 doctrine thus permits a court to withhold relief it has the power to grant based on “considerations
 28 of prudence and comity” for coequal branches of government. *Id.* These considerations permit a

1 court to dismiss a case against a private party. *See Cheng v. BMW of N. Am., LLC*, No. CV 12-
2 09262 GAF (SHx), 2013 WL 3940815 at *4 (C.D. Cal. Jul. 26, 2013) (dismissing class action
3 brought against private party that “subjected itself to the continuing oversight” of a federal
4 agency). Courts should “decline to grant declaratory or injunctive relief where the government
5 ‘has already changed or is in the process of changing is [sic] policies or where it appears that any
6 repeat of the actions in question is otherwise highly unlikely.’ ” *NRDC v. Norton*, 2007 WL
7 14283 at *7, citing *Bldg. and Const. Dept. v. Rockwell Int’l. Corp.*, 7 F.3d 1487, 1492 (10th Cir.
8 1993).

9 Circumstances in this case have changed dramatically as a result of Reclamation’s recent
10 submission of a biological assessment with a new proposed action to NMFS. Accordingly,
11 considerations of prudence and comity for the Executive Branch’s ability to conduct a Section 7
12 consultation to ensure operation of the CVP in accordance with the ESA favor dismissal. *See*
13 *NRDC v. Norton*, 2007 WL 14283 at *7.

14 **A. The Court Should Refrain from Interfering with the Executive Branch’s**
15 **Administrative Decision Making During the Reinitiated Consultation**

16 As a practical matter, Reclamation proposes to operate Shasta Dam pursuant to different
17 temperature management criteria than were in place in 2014 and 2015. Even if winter-run or
18 spring-run Chinook were harmed as a result of Shasta operations in 2014 and 2015, that harm is
19 not likely to occur in the absence of Plaintiffs’ requested injunction because of the new operating
20 criteria proposed by Reclamation. *Cf. Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir.
21 2004) (injunctive relief must be “narrowly tailored . . . to remedy only the specific harms shown
22 by the plaintiffs, rather than ‘to enjoin all possible breaches of the law.’ ”) (quoting *Zepeda v.*
23 *INS*, 753 F.2d 719, 728 n.1 (9th Cir.1983)).⁵ In addition, the Section 7 consultation process will
24 require NMFS to analyze the effects of Reclamation’s proposed temperature management criteria
25 for Shasta Dam on winter-run and spring-run Chinook salmon and make determinations regarding

26 _____
27 ⁵ The SRS Contractors acknowledge that Plaintiffs filed a formal motion for bifurcation of liability and remedy today
28 (Dkt. No. 1319). In accordance with the Court’s most recent Scheduling Order (Dkt. No. 1305) and prior Minute
Order (Dkt. No. 1282), the SRS Contractors will file a timely response to Plaintiffs’ motion setting forth the
SRS Contractors’ position on why bifurcation of liability and remedy is inappropriate and not warranted in this case.

1 the best scientific and commercial data available to support its analysis. 50 C.F.R. § 402.14(g).
2 At trial, this Court will be asked to make factual findings about effects of Shasta Dam operations
3 on winter-run and spring-run Chinook salmon that could be in tension with the determinations
4 made by NMFS during the Section 7 consultation. This potential tension between the judicial
5 branch and the executive branch is exactly the kind of concern that underlies the prudential
6 mootness doctrine. *See NRDC v. Norton*, 2007 WL 14283 at *7 (noting that “considerations of
7 prudence and comity for coordinate branches of government counsel the court to stay its hand,
8 and to withhold relief it has the power to grant . . .”).

9 **B. Ninth Circuit Authority Requires that the Resulting Biological Opinion and ITS**
10 **Address Reclamation’s Operational Decision Making in Complying with the**
11 **SRS Contracts in a Manner that Should Fully Address Plaintiffs’ Requested Relief**

12 As recently held by this Court, the scope of ESA consultation must be “coextensive with
13 the agency action.” Dkt. No. 1314, at 41 (citing *Conner v. Burford*, 848 F.2d 1441, 1458
14 (9th Cir. 1988)). Similarly, the scope of any ITS issued by NMFS must be coextensive with the
15 proposed agency action. *See* 16 U.S.C. § 1536(b)(4) (“If after consultation under
16 subsection (a)(2), the Secretary concludes that . . . the taking of an endangered species or a
17 threatened species incidental to the *agency action* will not violate such subsection”
18 (emphasis added)); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008
19 (9th Cir. 2014) (affirming ruling that consulting agency need not separate discretionary aspects of
20 a proposed action from non-discretionary aspects for purposes of analyzing the action’s effects on
21 listed species). While NMFS has not yet completed its consultation or issued an ITS, the law
22 requires the scope of the exemption from take liability to include the full scope of the agency
23 action. Here, Reclamation’s proposed action that is the subject of the reinitiated consultation
24 covers *all* CVP operations, including Reclamation’s performance under the SRS Contracts as a
25 part of its operation of the entire project. In particular, Reclamation expressly requests
26 consultation on its “exercise of discretion in operational decision making, including how to
27 comply with the terms of their respective existing water supply and settlement contracts (which
28 includes the impacts of maximum water diversions under the terms of these contracts), and other
legal obligations.” Biological Assessment at 4-60, RJN Exh. A. In other words, the scope of the

1 agency action includes Reclamation’s discretionary actions to operate the CVP in a manner that
2 meets obligations under the SRS Contracts as well as other legal obligations. Under controlling
3 Ninth Circuit law, the resulting biological opinion and any ITS must correspondingly exempt
4 liability for take resulting from Reclamation’s exercise in operational decision making, including
5 how to release water from Shasta Dam in order to comply with the SRS Contracts.

6 Moreover, the Ninth Circuit has held that actions by non-federal agencies, like the
7 SRS Contractors, can be covered by take protection of an ITS. *See Ramsey v. Kantor*, 96 F.3d
8 434, 442 (9th Cir. 1996) (*Ramsey*).

9 In *Ramsey*, three federal agencies consulted on the Columbia River Fish Management
10 Plan (Plan), “a judicially created, federal-state-tribal compact” that apportioned fishing rights to
11 each state and tribal member. *Ramsey*, 96 F.3d. at 438. The resulting biological opinion included
12 an ITS. After the issuance of a biological opinion that resulted from the consultation, the state
13 members of the Plan enacted regulations to govern fishing in the Columbia River pursuant to the
14 Plan. *Id.* The plaintiffs then sued the state members, arguing that the ITS covered only the
15 federal agencies who consulted on the Plan, and that the state members were required to obtain an
16 incidental take permit pursuant to Section 10 of the ESA. *Id.* at 441. The Ninth Circuit
17 disagreed, finding that Section 7 “indicates that any taking – whether by a federal agency, private
18 applicant, or other party – that complies with the conditions set forth in the incidental take
19 statement is permitted.” *Id.* (citing 16 U.S.C. § 1536(o)(2)). The court concluded that the fishing
20 regulations were covered by the biological opinion’s ITS for the Plan because it “clearly
21 anticipated that Washington and Oregon would promulgate fishing regulations in accordance with
22 its terms[.]” *Id.* at 442. The *Ramsey* court’s conclusion that private parties receive incidental take
23 coverage when an ITS clearly anticipates their actions and those actions are taken in accordance
24 with that ITS continues to be followed by the Ninth Circuit. *See Wild Equity Inst. v. City and Cty*
25 *of S.F.*, 2012 WL 6082665 at *3 (N.D. Cal. Dec. 6, 2012); *McKenzie Flyfishers v. McIntosh*,
26 No. 6:13-cv-02125-TC, 2015 WL 1176853 at *4 (D. Or. Mar. 13, 2015); *WildEarth Guardians v.*
27 *U.S. Fish & Wildlife Serv.*, 342 F. Supp. 3d 1047, 1062 (D. Mont. 2018).

28

1 Under *Ramsey*, the SRS Contractors are entitled to receive incidental take coverage
2 pursuant to any new ITS that NMFS may issue at the conclusion of the reinitiated consultation.
3 See *Ramsey*, 96 F.3d at 442. The proposed action in Reclamation’s biological assessment
4 contemplates full implementation and performance of the SRS Contracts. Biological Assessment
5 at 4-1, RJN Exh. A. Indeed, the proposed action analyzed in Reclamation’s biological
6 assessments seeks incidental take coverage for discretionary operations necessary to deliver up to
7 full contract amounts, including full SRS Contract amounts. See *id.* at 4-9 to 4-11, 4-62, RJN
8 Exh. A; see also Dkt. No. 1314, at 35:12-14 (“Under Section 7, the consulting agency analyzes
9 the effects of the proposed action[.]”). In operating the CVP, Reclamation “possesses discretion
10 over how [reservoir] releases are made,” including releases made to meet obligations under the
11 SRS Contracts. See *Consol. Salmonid Cases v. Locke*, 791 F. Supp. 2d 802, 934 (E.D. Cal.
12 2011); see also *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 640 (9th Cir.
13 2014) (“Congress has imposed broad mandates which do not direct agencies to perform any
14 specific nondiscretionary actions, but rather, are better characterized as directing the agencies to
15 achieve particular goals. Thus, while the goals themselves may be mandatory, the agencies retain
16 considerable discretion in choosing what specific actions to take in order to implement them.”)
17 citation omitted; *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 928 (9th Cir.
18 2008) (“The district court properly held that NMFS may not use a hypothetical ‘reference
19 operation’ in its jeopardy analysis to exclude from the proposed actions’ impacts the effects of
20 related operations NMFS deems ‘nondiscretionary.’”) For example, Reclamation has complete
21 discretion over which Shasta Dam release gates it uses to ensure that there is sufficient water in
22 the Sacramento River for the SRS Contractors to divert pursuant to their contracts. Reclamation
23 has also performed its obligations under the SRS Contracts in different ways depending on
24 hydrological conditions. Reclamation’s exercise of discretion in operational decision making is
25 expressly within the scope of the requested consultation and must therefore be addressed by
26 NMFS in its biological opinion and any ITS included therein.⁶

27 ⁶ Furthermore, the Ninth Circuit has required that there be a “rational connection between the authorization of take and
28 the scope of the underlying proposed action.” *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007). As
such, it would be arbitrary and capricious for NMFS to exclude Reclamation’s discretionary CVP operations to meet

1 Moreover, since the biological opinion and any ITS are scheduled to be issued before trial,
2 Plaintiffs' requested relief of an injunction against the SRS Contractors' diversions of water that
3 will cause "take of winter-run and spring-run Chinook[]" will be meaningless because they will
4 be immunized from Section 9 liability. Sixth Supplemental Complaint, Dkt. No. 1187,
5 at 69:10-13; *supra*, at 7:11-9:26. Accordingly, Plaintiffs' Sixth Claim will become
6 constitutionally moot upon issuance of the new biological opinion in June 2019, depriving this
7 Court of subject matter jurisdiction. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477
8 (1990) ("Article III denies federal courts the power to decide questions that cannot affect the
9 rights of litigants in the case before them, and confines them to resolving real and substantial
10 controversies admitting of specific relief through a decree of a conclusive character[.]") (internal
11 quotation marks and citations omitted).

12 In light of these new circumstances, this Court's decision in 2007 declining to dismiss the
13 then-pending ESA Section 7 claims in this action on prudential mootness grounds is not
14 controlling. *NRDC v. Norton*, 2007 WL 14283 at *8. In that decision, the Court noted that
15 "courts have refused to dismiss on prudential mootness grounds where the action agency did not
16 indicate an intent to change its operations." *Id.* at *7. In denying Federal Defendants' motion to
17 dismiss on prudential mootness grounds, the Court noted that Reclamation "volunteered to
18 change their operations to a certain extent," but that they "continue to maintain that the
19 challenged [2004 and 2005] BiOps are valid and lawful, continue to implement at least some
20 portions of the measures set forth therein, and continue to operate under the protection of the
21 incidental take statements included in the BiOps." *Id.* at *7-8. Noting that "Federal Defendants
22 are relying in part on the challenged BiOps in operating the CVP and intend to continue to do so,"
23 the Court held that it could "provide relief, in the form of a decision invalidating the BiOps
24 followed by hearings on interim remedies." *Id.* at *8.

25 Reclamation's reinitiation of consultation and submission of a biological assessment of its
26 new proposed action demands a different result today. Unlike the prior circumstances before

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28 non-discretionary obligations under the SRS Contracts from incidental take coverage in the biological opinion
resulting from the reinitiated consultation.

1 Judge Wanger in 2006, wherein the government voluntarily reinitiated consultation while relying
2 upon actively challenged biological opinions, now a newly operative biological opinion is
3 scheduled to be finalized – before trial – in June 2019, pursuant to the President’s directive.
4 Whereas the 2006 actions did not indicate a meaningful intent to change operations, the new
5 Biological Assessment reflects Reclamation’s intent to substantially change its operations;
6 whereas the 2006 actions continued to implement measures from prior biological opinions, the
7 new Biological Assessment introduces a new tiered temperature management strategy; and
8 whereas in 2006 Reclamation continued to maintain that the prior biological opinions were valid
9 and lawful, the 2019 biological opinion will render the 2009 NMFS BiOp moot. Thus, as of June
10 2019, there will be no real and substantial “controversy over whether the [prior biological
11 opinions] should have continued viability.” *NRDC v. Norton*, 2007 WL 14283 at *8. The
12 reinitiated consultation conclusively demonstrates that Reclamation “has already changed or is in
13 the process of changing its policies[,]” and the take Plaintiffs allege occurred in 2014 and 2015 is
14 “highly unlikely” to occur again – not only because Reclamation clearly intends to change its
15 operations in a way that provides greater protection for listed salmon, but also because the
16 SRS Contractors are entitled to receive incidental take coverage from the new biological opinion.
17 *Id.* at *7; *supra*, at 7:11-9:26.

18 Nor does the Central District’s decision in *California Trout, Inc. v. U. S. Bureau of*
19 *Reclamation*, 115 F. Supp. 3d 1102 (C.D. Cal. 2015) (*CalTrout, Inc.*), require a different result.
20 In that case, the Central District considered whether reinitiation of consultation mooted the
21 plaintiff’s Section 9 claim. *CalTrout, Inc.*, 115 F. Supp. 3d. at 1112-16. The court held:

22 [A]lthough reinitiation of Section 7 consultation can moot a claim, the specific
23 relief requested by the plaintiff must be taken into account. If reinitiation of
24 consultation is all plaintiff seeks, the claim may be moot; a request for additional
remedies, however, may still present a live controversy.

25 *CalTrout, Inc.*, 115 F. Supp. 3d. at 1112. The court then analyzed the plaintiff’s Section 9
26 allegations and requested relief in considerable detail, and determined that its claim had not been
27 mooted. *Id.* at 1113-16. Of particular concern to the court was that the pump failures at the heart
28 of the plaintiff’s claim were ongoing, and that Reclamation had not finalized design or begun

1 implementing a permanent fix to the pump system. *Id.* at 1116. Because the pumping system
2 remained prone to failures that could result in the continued take of listed steelhead, the plaintiff
3 was able to demonstrate the potential for future harm and take to occur, and could obtain
4 meaningful injunctive and declaratory relief. *Id.*

5 Not so here. After NMFS' issuance of a new biological opinion in June pursuant to the
6 reinitiated consultation, the SRS Contractors expect Reclamation to operate the CVP pursuant to
7 the changed proposed action in its Biological Assessment and in accordance with the terms of a
8 new ITS in the new biological opinion. Further, any such harm that Plaintiffs attribute to the
9 SRS Contractors will not be subject to Plaintiffs' requested injunctive relief because the
10 SRS Contractors are entitled to receive incidental take coverage under the new ITS. *Supra*,
11 at 7:11-9:26. And unlike the plaintiff in *CalTrout, Inc.*, Plaintiffs here have not requested
12 declaratory relief with respect to their Section 9 claim. *Compare CalTrout, Inc.*, 115 F. Supp. 3d
13 at 1106 with Dkt. No. 1187 at 68, Prayer for Relief, ¶ I (requesting only injunctive relief with
14 respect to the alleged conduct underlying the Sixth Claim). Thus, the Central District's decision
15 in *CalTrout, Inc.* does not change the fact that there is no "occasion for meaningful relief" here.
16 *See NRDC v. Norton*, 2007 WL 14283 at *7.

17 With inclusion of the entire agency action, including Reclamation's discretionary
18 operational decisions to make releases from Shasta and Keswick to fully satisfy the terms of the
19 SRS Contracts as well as meeting other legal obligations, the reinitiated consultation addresses
20 every aspect of the proposed remedies that Plaintiffs seek on the Sixth Claim. It is thus
21 appropriate for this Court to exercise its discretion by declining to exercise its judicial power on
22 the grounds of prudential mootness. In the alternative, the Court should stay this case pending
23 NMFS' issuance of the biological opinion that will result from Reclamation's reinitiation of
24 consultation, and then determine whether a trial on the Sixth Claim should move forward.

25 **III. CONCLUSION**

26 The SRS Contractors respectfully ask this Court to dismiss this case because the
27 reinitiated consultation renders this action prudentially moot. In the alternative, the
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1 SRS Contractors request that the Court stay the case pending NMFS' issuance of a new biological
2 opinion analyzing the effects of Reclamation's new proposed action on listed species.

3 SOMACH SIMMONS & DUNN
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5 DATED: March 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed on March 8, 2019, and will be automatically served upon counsel of record who are subscribed to receive notice from the ECF system.

s/ Andrew M. Hitchings
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