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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Grand Canyon Trust,

10 Plaintiff,

11 vs.

12 United States Bureau of Reclamation, et al.,

13 Defendants.

No. CV07-8164-PHX-DGC

ORDER

14 Plaintiff Grand Canyon Trust has filed a motion for an injunction pending appeal.
15 Doc. 291-292. Federal Defendants have filed a response (Doc. 295), Defendant-
16 Intervenor have joined the response (Doc. 296), and the Trust has filed a reply
17 (Doc. 301). No party has requested oral argument. The Court will deny the motion.

18 **A. Legal standard.**

19 While an appeal is pending from an order denying an injunction, the court may
20 “grant an injunction on terms for bond or other terms that secure the opposing party’s
21 rights.” Fed. R. Civ. P. 62(c). This rule “codifies the inherent power of a court
22 ‘to preserve the status quo where in its sound discretion, the court deems the
23 circumstances so justify[.]’” *Christian Science Reading Room v. City & County of S.F.*,
24 784 F.2d 1010, 1017 (9th Cir. 1986) (citation omitted). A party may obtain an injunction
25 under Rule 62(c) by showing that it is likely to succeed on appeal, that it is likely to
26 suffer irreparable harm in the absence of injunctive relief, that the balance of hardships
27 tips in its favor, and that an injunction is in the public interest. *See Winter v. Natural Res.*
28 *Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). The test includes a sliding scale. If

1 the movant shows that the balance of hardships will tip sharply in its favor, it need not
2 make as strong a showing of the likelihood of success on appeal – the existence of serious
3 questions will suffice. *See Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1049-53
4 (9th Cir. 2010); *see also Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (standard
5 for obtaining a preliminary injunction applies to motions for injunctions pending appeal).

6 **B. The Trust has not challenged the actions for which it seeks relief.**

7 The Trust states that its motion is based on Claim 3 of its Third Supplemental
8 Complaint. Doc. 292. Claim 3 alleges that Reclamation’s operation of Glen Canyon
9 Dam results in illegal take of the humpback chub under section 9 of the Endangered
10 Species Act (“ESA”). Specifically, Claim 3 alleges that releasing water from the Dam
11 under a Modified Low Fluctuating Flow regime causes take, and that the incidental take
12 statement in the 1994 Biological Opinion is not valid. Doc. 264 ¶¶ 79-82. Claim 3 does
13 not assert the wrong addressed in the Trust’s motion for an injunction pending appeal –
14 that Reclamation’s failure to implement nonnative fish control during 2011 is resulting in
15 take of the endangered Humpback Chub.

16 Even if Claim 3 could be read broadly enough to encompass this alleged wrong,
17 the wrong has never been addressed by this Court and therefore is not part of the Trust’s
18 appeal. The history of the case makes this point clear.

19 The Dam currently is being operated under a 2008 Experimental Plan that has
20 been discussed at length in the Court’s previous orders. One of the chub conservation
21 measures under the plan is the mechanical removal of rainbow trout – a nonnative to the
22 Colorado River that preys on the humpback chub. Due to concerns expressed by the Zuni
23 Tribe that killing of trout near the mouth of the Little Colorado River desecrated one of
24 their most sacred religious sites, Reclamation cancelled the mechanical trout removal
25 trips scheduled for May and June of 2010. Doc. 222. This cancellation resulted in
26 renewed consultation between the U.S. Fish and Wildlife Service (“FWS”) and
27 Reclamation, and in November of 2010 FWS issued a new Biological Opinion and ITS
28 that specifically addressed the cancellation of the 2010 trout removal. Doc. 274.

1 In response to this new Biological Opinion and ITS, the Trust moved to withdraw
2 a motion to vacate and motion for summary judgment it had filed in October of 2010 on
3 remaining claims in the case. Doc. 275. The Trust withdrew these motions so it could
4 “reassert Claim 3 and amend Claims 12 and 13 . . . to address the November 9, 2010
5 Biological Opinion and Incidental Take Statement.” *Id.* In other words, the Trust
6 wanted to challenge FWS’ conclusion that cancellation of 2010 trout removal did not
7 result in illegal take of the chub. The Court granted the motion to withdraw (Doc. 282),
8 but the Trust never supplemented its complaint to assert this new claim. During a
9 telephone conference in February of 2011 (Doc. 285), the Trust changed its mind in light
10 of a discussion concerning the future schedule of this case. Federal Defendants explained
11 during the conference call that FWS and Reclamation were in consultation regarding
12 trout control for the years after 2010, and that this consultation likely would produce
13 additional agency documents in May or June of this year. Rather than waiting to file
14 additional claims once these new documents were produced – in other words, rather than
15 waiting to challenge the 2011 policy on trout removal – the Trust asked the Court to
16 complete this case by ruling on the motion to vacate and motion for summary judgment
17 that had been filed in October of 2011 and later withdrawn. After considering this
18 suggestion, the Court agreed. Doc. 286. The Court ruled on these motions on March 30,
19 2011, entering final judgment in favor of Defendants. Doc. 287.

20 Thus, the Trust elected *not* to challenge the Biological Opinion and ITS issued in
21 November of 2010 concerning the 2010 suspension of trout removal, and elected *not* to
22 wait for FWS and Reclamation’s current policy on trout removal so that it could include
23 that policy in a supplemental complaint. Doc. 287 at 17. Because these issues were not
24 raised in this Court, they cannot be raised on appeal and cannot form the basis for an
25 injunction pending appeal.

26 **C. The Trust has not shown it is entitled to an injunction.**

27 The Trust cannot show it is likely to prevail on appeal with respect to the 2010
28 Biological Opinion and ITS that it failed to challenge in this Court. *See* Doc. 287 at 5 &

1 n. 2. Perhaps for this reason, the Trust’s motion for an injunction pending appeal focuses
2 on the absence of trout removal in 2011. *See* Doc. 292 at 2 (“*at this time* Reclamation is
3 not controlling nonnative trout” (emphasis added)); Doc.301 at 6 (“Reclamation has no
4 intention to avoid unlawful take in the summer of 2011”).

5 The Federal Defendants’ response to the motion includes a declaration by Larry
6 Walkoviak, Regional Director of Reclamation’s Upper Colorado Region. Doc. 295-1.
7 The declaration explains that Reclamation has been involved in an extensive and detailed
8 analysis of trout removal measures that has involved consultations with several Indian
9 tribes and other Colorado River stakeholders, public hearings, scientific analyses, a draft
10 Environmental Assessment, and consultation with FWS. As Mr. Walkoviak explains:
11 “The additional time taken by Reclamation, the USGS, other federal agencies and
12 stakeholders is not a reflection of inactivity, a failure to prioritize the project, or a failure
13 to appreciate the importance of completing the decision-making process in 2011 with
14 respect to non-native fish control measures. Instead, Reclamation has been diligently
15 working to complete the process and address stakeholder input[.]” *Id.* at 5.

16 Mr. Walkoviak explains that the proposed action being evaluated by Reclamation
17 includes expanding the period for nonnative fish control measures to ten years (not just
18 through completion of the 2008 Experimental Plan in 2012), up to six trips per year to
19 remove nonnative fish from the Lower Colorado River reach if the adult chub population
20 drops below 7,000 fish, up to ten trips per year to remove nonnative fish from the
21 Colorado River reach extending from the Paria River to Badger Creek (above the
22 confluence with the Lower Colorado River), researching whether Lees Ferry is the source
23 of the trout that prey on the chub at the Lower Colorado River confluence (through
24 tracking tags and monitoring), researching whether removal between the Paria River and
25 Badger Creek can sufficiently control the trout population, increasing the marking and
26 monitoring of young humpback chub to more precisely determine the effect of trout
27 predation on the chub, and developing tests to determine whether flow releases from the
28 Dam could be used to control the trout population. *Id.* at 9-10. The plan includes

1 monitoring activities and tests of live trout removal this year. *Id.* at 11-12.

2 In reply, the Trust argues that the Walkoviak declaration constitutes a statement of
3 future plans that cannot satisfy the ESA. The Trust also argues that the complexity of a
4 problem does not excuse ESA compliance. But the Trust does not dispute that
5 Reclamation is undertaking a substantial and detailed effort to deal with the issue of
6 nonnative fish and to permit nonnative fish control while accommodating the interest of
7 Native Americans.

8 The Trust's reply also makes various arguments about the current state of affairs
9 on the river – arguments that were never made as part of the summary judgment briefing
10 and that cannot be raised on appeal. Doc. 301 at 2-7. Among these arguments, the Trust
11 contends that Reclamation now views nonnative fish control as unnecessary. *Id.* at 5.
12 The declaration of Mr. Walkoviak proves otherwise. Reclamation's detailed efforts seek
13 to *accomplish* nonnative fish control while accommodating concerns of Native
14 Americans that killing of trout should not occur in their sacred areas. Doc, 295-1.

15 For several reasons, the Court concludes that the Trust arguments regarding the
16 lack of nonnative fish removal in 2011 do not make the showing required for an
17 injunction pending appeal.

18 First, as already noted, because the Trust did not raise most of the 2011 arguments
19 during the summary judgment briefing or in a supplemental complaint, the Trust cannot
20 raise them on appeal. The Trust therefore is not likely to prevail on appeal, or raise
21 serious questions on appeal, with respect to these arguments.

22 Second, Reclamation has not been inactive on the issue of nonnative fish control
23 during 2011. The declaration of Mr. Walkoviak shows that Reclamation is working
24 diligently on this issue in conjunction with numerous stakeholders, and will be issuing an
25 Environmental Assessment and ten-year plan for nonnative fish control during 2011.

26 Third, the Court cannot conclude that the Trust's proposed injunction is in the
27 public interest. The Trust seeks a broad and vague injunction: "Defendant U.S. Bureau
28 of Reclamation shall avoid taking humpback chub in violation of section 9 of the

1 Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), by implementing the conservation
2 measure of nonnative control.” Doc. 291-1. Such an injunction would provide little
3 guidance to Reclamation. Mr. Walkoviak’s declaration states that Reclamation is not
4 aware of steps it could take to accomplish this objective beyond those already are
5 underway. To the extent such an order would mean that Reclamation must cut short the
6 detailed and careful analysis and consultation currently under way with respect to
7 nonnative fish control, ignoring concerns expressed by Native Americans and the input
8 provided by other agencies and interested parties, the Court cannot conclude that such an
9 order would be in the public interest. A deliberative but efficient process that includes all
10 Colorado River stakeholders, as well as careful research and monitoring, is more
11 consistent with the public interest.

12 **IT IS ORDERED** that the Trust’s motion for injunction pending appeal
13 (Doc. 291) is **denied**.

14 Dated this 27th day of July, 2011.

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19 David G. Campbell
20 United States District Judge
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