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3 **UNITED STATES DISTRICT COURT**
4 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
5

6 **NATURAL RESOURCES DEFENSE**
7 **COUNCIL, et al.,**

8 **Plaintiffs,**

9 **vs.**

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

12 **Defendants.**

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

15 **Defendant-Intervenors.**

16 **ANDERSON-COTTONWOOD IRRIGATION**
17 **DISTRICT, et al.,**

18 **Joined Parties.**

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

ORDER GRANTING MOTION TO
STAY SIXTH CLAIM FOR RELIEF;
AND DENYING WITHOUT
PREJUDICE MOTIONS TO DISMISS
SIXTH CLAIM.

ECF NOS. 1323-24, 1381-82

19 **I. INTRODUCTION**

20 Before the Court for decision in this long-standing, highly complex Endangered Species Act
21 (“ESA”) case are the following motions: two defense motions to dismiss the remaining aspects of the
22 only remaining claim (the sixth claim for relief) in this case on mootness grounds; Plaintiffs’ motion to
23 stay the sixth claim in light of newly-filed, related litigation; Federal Defendants’ related motion to
24 dismiss the seventh claim for relief as moot; and Plaintiffs’ request for entry of separate judgment under
25 Federal Rule of Civil Procedure 54(b) as to the second, fourth, and fifth claims for relief. The matters
were taken under submission on the papers pursuant to Local Rule 230(g). The Court has thoroughly
reviewed and considered the briefs and authorities cited therein in light of the entire record. For the

1 reasons set forth below the motion to stay is GRANTED, and the motions to dismiss are DENIED
2 WITHOUT PREJUDICE as MOOT. In the coming days, the Court plans to enter a separate order
3 requesting supplemental briefing in connection with Federal Defendants’ motion to dismiss the seventh
4 claim for relief. The Court also will endeavor to rule on Plaintiffs’ remaining request for entry of
5 separate judgment before the end of the month. If it cannot complete that last task, that remaining
6 motion will be handled by the jurist who will soon be assigned to this and related cases.

7 **II. BACKGROUND**

8 On March 12, 2018, Plaintiffs, a coalition of environmental interest groups led by the Natural
9 Resources Defense Council (“NRDC”), filed the currently operative Sixth Supplemental Complaint
10 (“6SC”), which includes numerous claims brought under the Administrative Procedure Act (“APA”), 5
11 U.S.C. § 701 *et seq.*, and the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, against the
12 U.S. Bureau of Reclamation (“Bureau” or “Reclamation”), the U.S. Fish and Wildlife Service (“FWS”
13 or “Service”), and various Joined Defendants and Defendant Intervenors. *See generally* ECF No. 1187.

14 Certain aspects of the sixth claim for relief arising under Section 9 of the ESA, 16 U.S.C. § 1538
15 (“Section 9”), remain unresolved. Generally, the sixth claim (“Section 9 Claim”) alleges that certain
16 holders of a type of long-term, priority water contract, known as the Sacramento River Settlement
17 Contracts (“SRS Contracts” or “SRS Contractors” when referring to the holders), and Reclamation
18 violated Section 9’s prohibition against taking listed species because they caused substantial
19 temperature-dependent mortality of Sacramento River winter-run Chinook salmon (“winter-run”) and
20 Central Valley spring-run Chinook salmon (“spring-run”) eggs and fry (young fish) in the Upper
21 Sacramento River in 2014 and 2015. 6SC at ¶¶ 201-205.

22 Section 9 of the ESA makes it unlawful for any person to “take,” *i.e.*, to harm, kill or harass, any
23 listed endangered species of fish or wildlife within the United States, 16 U.S.C. §§ 1538(a)(1)(take
24 prohibition), 1532(12) (definition of “take”), unless an exemption from the take prohibition is obtained
25 pursuant to certain other ESA provisions, *see id.* §§ 1536(b)(4), 1536(o), 1539(a). The Section 9 Claim

1 against the SRS Contractors focuses on the impact on Sacramento River temperatures of the SRS
2 Contractors' diversion of water pursuant to their priority water rights. Without belaboring the point or
3 delving into detail that is unnecessary to this order, it is safe to say that at the time this Court ruled on
4 the parties' cross-motions for summary judgment concerning the Section 9 Claim, the SRS Contractors
5 did not hold any permit or other form of exemption from Section 9's take prohibitions with respect to
6 their primary, priority diversions from the Sacramento River. *See Nat. Res. Def. Council v. Zinke*, 347 F.
7 Supp. 3d 465, 484 (E.D. Cal. 2018).

8 The Section 9 Claim against Reclamation focuses on Reclamation's discretionary activities,
9 including actions Reclamation took in 2014 and 2015 to facilitate voluntary transfers between the SRS
10 Contractors and others, as one part of Reclamation's overall role in the coordinated operation of the
11 federal Central Valley Project ("CVP") and State Water Project ("SWP") (collectively, the "Project").¹
12 ESA Section 7(a)(2) imposes a procedural duty on Reclamation to consult with FWS or the National
13 Marine Fisheries Service ("NMFS"), depending on the protected species at issue,² to "insure that any
14 action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued
15 existence of any endangered species or threatened species or result in the destruction or adverse
16 modification" of critical habitats of listed species. 16 U.S.C. § 1536(a)(2).

17 Reclamation has on numerous occasions engaged in consultation over the Project with both FWS
18 and NMFS. Formal consultation results in the issuance of a "biological opinion" ("BiOp") by the
19 relevant wildlife agency (FWS or NMFS). *See* 16 U.S.C. § 1536(b). If the BiOp concludes that the
20 proposed action would jeopardize the species or destroy or adversely modify critical habitat, *see id.* §

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22 ¹ Reclamation coordinates with California's Department of Water Resources to operate the CVP and SWP. *See San Luis &*
Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 594, 597 (9th Cir. 2014).

23 ² Generally, FWS has jurisdiction over species of fish that either (1) spend the major portion of their life in fresh water, or
24 (2) spend part of their lives in estuarine waters, if the remaining time is spent in fresh water. *See Cal. State Grange v. Nat'l*
Marine Fisheries Serv., 620 F. Supp. 2d 1111, 1120 n.1 (E.D. Cal. 2008), *as corrected* (Oct. 31, 2008). NMFS is granted
25 jurisdiction over fish species that (1) spend the major portion of their life in ocean water, or (2) spend part of their lives in
estuarine waters, if the remaining portion is spent in ocean water. *Id.* NMFS exercises jurisdiction over the winter-run and
spring-run Chinook salmon.

1 1536(a)(2), then the action may not go forward unless the wildlife agency can suggest a “reasonable and
2 prudent alternative[.]” (“RPA”) that avoids jeopardy, destruction, or adverse modification. *Id.* §
3 1536(b)(3)(A). If a BiOp concludes that the proposed action (or the action implemented in conjunction
4 with actions described in the RPA) will cause incidental taking³ of protected species, but that despite
5 this taking, the action will not jeopardize the species or threaten critical habitat, the wildlife agency

6 shall provide the Federal agency and the applicant concerned, if any with a
7 written statement that—

8 (i) specifies the impact of such incidental taking on the species,

9 (ii) specifies those reasonable and prudent measures that the Secretary
10 considers necessary or appropriate to minimize such impact,

11 (iii) . . . , and

12 (iv) sets forth the terms and conditions (including, but not limited to,
13 reporting requirements) that must be complied with by the Federal agency
14 or applicant (if any), or both, to implement the measures specified under
15 clauses (ii) and (iii).

16 *Id.* § 1536(b)(4). This written statement, with its “reasonable and prudent measures” (“RPM”) and
17 associated terms and conditions, is referred to as an “Incidental Take Statement” (“ITS”), which, if
18 followed, exempts the action agency from the prohibition on takings found in Section 9. *Id.* § 1536(o);
19 *Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin.*, 175 F.3d 1156, 1159 (9th Cir. 1999).

20 At the time of the filing of the 6SC, the Project was operating under dual “jeopardy” BiOps, one
21 issued by FWS covering certain aquatic and terrestrial species under FWS jurisdiction, and a second
22 issued by NMFS in 2009 (“2009 NMFS BiOp”), covering winter-run, spring-run, and several other
23 species under NMFS jurisdiction. As a condition on Project operation, the 2009 NMFS BiOp imposed a
24 number of conditions designed to protect winter-run and spring-run Chinook, including temperature
25 management protocols applicable to operation of the dams that control the flow of water into the

³ Incidental take is that which “is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C § 1539(a)(1)(B).

1 Sacramento River (primarily, Shasta and Keswick Dams). *Zinke*, 347 F. Supp. 3d at 482-83, 521.
2 Concurrent with the issuance of the 2009 NMFS BiOp, NMFS issued to Reclamation an ITP, exempting
3 Reclamation from Section 9 take liability so long as the agency complies with the terms and conditions
4 set forth therein, including requirements related to temperature control. *Id.* At all times, Plaintiffs’
5 success on its Section 9 claim against Reclamation therefore hinged, at least in part, on proving that
6 Reclamation’s conduct was not in conformity with the ITS covering the coordinated operation of the
7 Project. *See id.* at 523.

8 Since early 2019, the parties and the Court were aware that Reclamation and NMFS actively had
9 been engaged in the process of revisiting and possibly revising the conclusions of and conditions set
10 forth in the 2009 NMFS BiOp through a process of “reconsultation” under ESA Section 7. On August
11 15, 2019, the Court vacated the then-impending trial date because release of a revised BiOp appeared
12 imminent—or at least imminent enough to make it impractical and wasteful for the parties and the Court
13 to prepare for trial. ECF No. 1366. Critically, public records available at that time, including
14 Reclamation’s Biological Assessment (“BA”)⁴, suggested that, at the very least, the Court would have to
15 examine closely any revised BiOp to determine its impact upon the pending claims. *See generally id.*

16 NMFS issued its revised BiOp October 22, 2019 (“2019 NMFS BiOp”). *See* ECF No. 1374
17 (Corrected Notice of Administrative Decisions).⁵ The 2019 NMFS BiOp concluded that Reclamation’s
18 proposed plan for the coordinated operation of the Project would not cause jeopardy to the listed species
19 addressed therein, including the winter-run and spring-run Chinook. 2019 NMFS BiOp at 797. The

21 ⁴ The ESA Section 7 consultation process normally begins with the preparation by the “action agency” (i.e., the agency
22 proposing the project) of a BA, which is designed to determine whether any listed species “is likely to be affected” by the
23 action. 16 U.S.C. § 1536(c)(1). If the BA determines that a threatened or endangered species “is likely to be affected,” the
24 agency must formally consult with the FWS or NMFS (sometimes referred to generically as “wildlife agencies”). *See id.* §
25 1536(a)(2); 50 C.F.R. § 402.14. Formal consultation results in the issuance of a BiOp by the relevant wildlife agency. *See id.*
§ 1536(b). In this case, Reclamation is the “action agency” that proposed the project under review, namely the coordinated
operation of the CVP and SWP, so the reconsultation process began in earnest with Reclamation’s issuance of a BA.

⁵ The full text of the revised 2019 NMFS BiOp is available at <https://www.fisheries.noaa.gov/resource/document/biological-opinion-reinitiation-consultation-long-term-operation-central-valley> (last visited January 15, 2020). Hereafter, references to this document will simply be to the internal pages within the version available online.

1 jeopardy analysis in the 2019 NMFS BiOp relies in large part on measures designed to protect listed
2 species Reclamation embedded within its proposed operational plan. *Id.* at 14-19. The 2019 NMFS
3 BiOp contains a revised ITS, which sets forth updated terms and conditions under which incidental take
4 caused by the Project is exempted from Section 9 take liability. *Id.* at 797-824. However, the 2019
5 NMFS BiOp itself indicates that “[t]he incidental take exemptions provided for in this [ITS] are
6 effective only upon Reclamation’s issuance of the Record of Decision [(“ROD”)]⁶.” *Id.* at 797. As of the
7 date of this decision, Reclamation has yet to issue a ROD.⁷

8 Following the issuance of the 2019 NMFS BiOp, the parties agreed to a schedule for the
9 filing/renewal of the pending motions, understanding that the undersigned will be retiring from the
10 bench at the end of January 2020. That effort resulted in the renewal, updating, and completion of
11 briefing on two motions to dismiss, one filed by Federal Defendants (ECF Nos. 1323 & 1381), the other
12 by the SRS Contractors (ECF Nos. 1324 & 1382), as well as the filing of a separate motion to stay and
13 for separate entry of judgment as to certain claims in this case filed by Plaintiffs (ECF No. 1384).⁸
14 Despite what appears to be the parties’ best efforts to expedite and narrow the briefing to facilitate
15 resolution of as many issues as possible by the undersigned, the motions are lengthy and complex. The
16 Court has reviewed the arguments and relevant authorities with care and notes that the issues are
17 numerous and nuanced, with several issues of first impression embedded therein.

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19 ⁶ The issuance of a BiOp by one or both of the wildlife agencies (FWS and/or NMFS) does not end the ESA permitting
20 process. The action agency still must accept or decline any conditions set forth therein and comply with any other regulatory
21 requirements; the culmination of this last decision-making stage is normally the issuance of a ROD. *See Consol. Salmonid
Cases*, 688 F. Supp. 2d 1013, 1025 (E.D. Cal. 2010). In the present case, as set forth in the next footnote, Reclamation is
undertaking a review pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4331 *et seq.*, prior to issuing
a final decision.

22 ⁷ The Court takes judicial notice of Reclamation’s release on December 19, 2019, of its Final Environmental Impact
23 Statement on the Reinitiation of Consultation on the Coordinated Long-Term Operation of the Central Valley Project and
24 State Water Project, available at https://www.usbr.gov/mp/nepa/nepa_project_details.php?Project_ID=39181 (last visited
January 15, 2020). The website on which that document is posted indicates that Reclamation “will make a decision on the
project no earlier than January 21, 2020.” *Id.* Practically speaking, even if a Record of Decision issues between January 21,
2020 and the end of the month, given this Court’s workload, that timeline does not afford sufficient time to revisit the issue.

25 ⁸ Plaintiffs have withdrawn a separate motion for reconsideration. *See* ECF Nos. 1335, 1383.

1 **A. Motions to Dismiss are Premature**

2 Although the Court would prefer to aid its successor jurist by resolving as many issues as
3 possible, certain matters cannot be resolved at this time. In particular, the Court agrees with Plaintiffs
4 that the motions to dismiss are premature. Both the Federal Defendants’ and SRS Contractors’ motions
5 are premised on the proposition that the interposition of a new regulatory regime as set forth in the 2019
6 NMFS BiOp renders Plaintiffs’ remaining claims moot. *See generally* ECF Nos. 1381, 1382. But,
7 “[r]egardless of whatever steps have been taken thus far, [Reclamation] can change its mind (or, more
8 precisely, has not yet made up its mind) until it issues a [ROD].” *Sierra Club v. U.S. Dep’t of Energy*,
9 825 F. Supp. 2d 142, 156-57 (D.D.C. 2011); *see also Consol. Salmonid Cases*, 688 F. Supp. 2d at 1025
10 (“[U]ntil Reclamation determined that it would provisionally accept the RPA[s], the BiOp was not
11 binding upon Reclamation.”).

12 **B. Order of Motions**

13 Even if Reclamation soon issues its ROD without materially changing any aspect of the Project,
14 the Court would hesitate to act at this time in light of the inescapable reality that Plaintiffs have filed a
15 challenge to the 2019 NMFS BiOp. *See Pac. Coast Fed’n of Fishermen’s Assns., et al. v. Ross, et al.*,
16 3:19-cv-07897-LB. That lawsuit challenges the 2019 NMFS BiOp and a parallel “no-jeopardy” BiOp
17 issued by FWS. Among the numerous grounds alleged therein, Plaintiffs allege that “Reclamation’s plan
18 eliminates important protections that were required by the 2009 Biological Opinion and intended to
19 ensure adequate cold water to meet temperature requirements, and is likely to result in adverse water
20 temperatures [in the lower Sacramento River], among other places, causing adverse impacts on winter-
21 run and spring-run Chinook salmon and Central Valley steelhead.” *Ross*, Docket No. 1, ¶ 89(c). The
22 Prayer requests that the BiOps, including their ITSs, be held unlawful and set aside, and that the
23 agencies be enjoined from relying on the BiOps until lawful BiOps have been produced. *Id.* at p. 47.

24 Plaintiffs’ motion to stay argues that the most efficient way forward is to stay this case while that
25 litigation proceeds because, if Plaintiffs’ prevail in their challenge to the 2019 NMFS BiOp, the

1 challenged BiOp and its ITS may be set aside. If that occurs, their argument continues, the foundation
2 underlying the remaining claims in this case, and the basis for Defendants’ motions to dismiss, would
3 shift again. *See* ECF No. 1384-1 at 4-10.

4 Defendants argue that the Court should address their jurisdictional motions first, citing *Ex Parte*
5 *McCardle*, 74 U.S. 506, 514 (1868), for the very general proposition that “[w]ithout jurisdiction the
6 court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to
7 exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”
8 (emphasis added). It is undeniably true that a court of limited jurisdiction cannot resolve a claim on the
9 merits if it lacks jurisdiction over that claim. However, Defendants’ citation to this arcane language fails
10 to acknowledge more nuanced jurisprudential rules that apply today, more than a century and a half after
11 *McCardle* was decided. “[J]urisdiction is vital only if the court proposes to issue a judgment on the
12 merits.” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007). Thus, the
13 Ninth Circuit has stated that courts have “leeway choose among threshold grounds for denying audience
14 to a case on the merits.” *Potter v. Hughes*, 546 F.3d 1051, 1055 (9th Cir. 2008) (internal quotation
15 omitted). Because of the general rule that district courts are courts of limited jurisdiction, they normally
16 should resolve matters of subject matter jurisdiction before other threshold issues. *Id.* at 1061. But there
17 are exceptions to this rule. Specifically, where the other threshold issue “creates the jurisdictional issue,”
18 or the resolution of the threshold issue is “clear,” while the jurisdictional issue is “difficult,” it can be
19 appropriate for the court to act on the other threshold issue without confirming jurisdiction. *Id.*

20 While the Court cannot locate any cases that apply *Potter* to the precise arrangement of
21 circumstances presented here,⁹ the Court believes the general principles of both *Potter* exceptions are

23 ⁹ Cases in this circuit have applied a *Potter*-inspired test to determine the order of business where a motion to remand is
24 competing with a motion to stay a matter pending transfer to a Multi-District Litigation court. *See Conroy v. Fresh Del Monte*
25 *Product, Inc.*, 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004) (explaining that first, a court should give preliminary scrutiny to
the merits of the motion to remand; second, if the jurisdictional issue appears factually or legally difficult, the court should
determine whether identical or similar jurisdictional issues have been raised in other cases that have been transferred to the
MDL; and finally, if the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to

1 applicable. First, the “other issue” relevant here is the existence of the parallel *Ross* litigation. Although
2 Plaintiffs’ lawsuit does not “create” the jurisdictional issue, the BiOp it challenges does. Therefore, the
3 *Ross* lawsuit, which seeks to invalidate the 2019 NMFS BiOp has the potential to upend the essential
4 bases underpinning Defendants’ motions to dismiss.

5 Even if it is inappropriate to extend the first *Potter* exception in this manner, the second
6 exception applies. The jurisdictional issues here are unusually difficult and complex. The general issue
7 presented in the Defendants’ mootness motions is whether it has become “impossible for a court to grant
8 any effectual relief whatever to the prevailing party.” *Chafin v. Chafin*, 568 U.S. 165, 173 (2013).
9 Among the many difficult questions presented by the unique circumstances presented here are the
10 following, which are posed here simply as examples:

- 11 • Federal Defendants maintain that the remaining aspects of the Section 9 Claim against
12 them “largely center” on whether Reclamation’s past conduct violates the 10-year, long
13 term performance measures in the 2009 NMFS BiOp ITS. ECF No. 1090 at 3. Federal
14 Defendants argue that it is “mathematically impossible” for Plaintiffs to prove that
15 Reclamation violated the 10-year performance standard, presumably because there will
16 not have been ten years of performance under the 2009 NMFS BiOp ITS before the
17 regulatory regime was changed. *Id.* at 4. Federal Defendants point out, correctly, that
18 there is no substantially similar 10-year performance measure in the 2019 NMFS BiOp
19 and ITS. *Id.* The Court notes, however, that while its analysis of Federal Defendants’
20 motion for summary judgment focused on the 10-year performance standard, questions
21 were raised in its ruling on that motion regarding whether there were other, enforceable
22 aspects to the 2009 BiOp ITS. *See Zinke*, 347 F. Supp. 3d 482-83, 523 (denying Federal
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24
25 be transferred, the court should stay the action); *see also Rubio v. Arndal*, No. 1:13-CV-0027-LJO-BAM, 2013 WL 796669,
at *3 (E.D. Cal. Mar. 4, 2013) (relying on *Conroy* to stay matter while denying motion to remand as moot).

1 Defendants' motion for summary judgment, finding that, while it is unclear exactly how
2 certain long-term performance measures are to be interpreted and applied, there are fact
3 disputes as to whether Reclamation complied with the terms and conditions of the 2009
4 NMFS BiOp ITS); *see also id.* at 521 (noting that the 2009 BiOp appears to include a
5 separate, possibly independent, take trigger in the 2009 NMFS BiOp ITS, which indicates
6 that "incidental take will be exceeded if the water temperature exceeds 56°F upstream of
7 the established [temperature compliance point ("TCP")]” and that “if the TCP
8 performance goals in the RPA action are exceeded, then take is exceeded for this action,
9 and Reclamation shall reinitiate consultation”). As a result, whether it is “mathematically
10 impossible” for the 2009 BiOp ITS’s long-term (10-year) performance measures to be
11 violated may not be dispositive of the fate of Plaintiffs’ remaining claims against Federal
12 Defendants. If Reclamation was subject to a short-term temperature management
13 requirement (e.g., if water temperature exceeded 56°F upstream of the TCP) in 2014
14 and/or 2015, would it be impossible for the Court to offer Plaintiffs relief if Plaintiffs’
15 allegations plausibly suggest that requirement was violated and that similar conduct by
16 Reclamation is likely to cause take outside the take limits of the 2019 NMFS BiOp’s ITS
17 in the future?

- 18 • In light of the factual allegation that three brood years in a row (2013, 2014, and 2015)
19 suffered catastrophic losses, Plaintiffs argue that the population level harm from these
20 losses to the species in question, which have three-year life cycles, is ongoing. Can this
21 form a sufficient basis to impose injunctive relief under Section 9 against Defendants
22 despite regulatory changes imposed by the 2019 NMFS BiOp’s new ITS? In other words,
23 assuming Plaintiffs can prove ongoing harm from the past violations, is it even necessary
24 for Plaintiffs to demonstrate that Defendants will violate the 2019 NMFS BiOp’s take
25 limitations in the future to obtain remedial injunctive relief?

1 The answers to these questions are far from obvious. In contrast, as discussed below, the
2 resolution of the motion to stay is relatively clear. While the Supreme Court has held that “engaging
3 subject-matter jurisdiction at the outset of a case is often the most efficient way of going,” *Ruhrigas AG*
4 *v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999) (internal quotation marks and citation omitted), the
5 Court believes this is one of those rare cases in which the most efficient path is to wait for the regulatory
6 environment to resolve itself further.

7 **C. Motion to Stay**

8 As mentioned, Plaintiffs move to stay what remains of the Section 9 Claim in light of their
9 pending challenge to the 2019 NMFS BiOp.¹⁰ United States district courts have inherent authority to
10 stay proceedings, for the power to stay “is incidental to the power inherent in every court to control the
11 disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for
12 litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *accord Clinton v. Jones*, 520 U.S.
13 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power
14 to control its own docket.”).

15 A trial court may, with propriety, find it is efficient for its own docket and
16 the fairest course for the parties to enter a stay of an action before it,
pending resolution of independent proceedings which bear upon the case.

17 *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979). This is true even if the
18 issues in such proceedings are not necessarily controlling with respect to the action before the court. *Id.*
19 In exercising its discretion, a court must evaluate the competing interests affected by either granting or
20 refusing a stay, including “the hardship or inequity which a party may suffer in being required to go
21 forward, and the orderly course of justice measured in terms of the simplifying or complicating of
22 issues, proof, and questions of law which could be expected to result from a stay.” *Lockyer v. Mirant*

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25 ¹⁰ Plaintiffs also indicate that the State of California may soon also challenge the 2019 NMFS BiOp. See ECF No. 1384-1 at 1.

1 *Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (citation omitted). Put another way, “[i]n determining
2 whether to stay proceedings, the Court considers the following factors: (1) judicial economy; (2) the
3 moving party’s hardship; and (3) potential prejudice to the non-moving party.” *Single Chip Sys. Corp. v.*
4 *Intermec IP Corp.*, 495 F. Supp. 2d 1052, 1057 (S.D. Cal. 2007). A court must “balance the length of the
5 stay against the strength of the justification given for it.” *Yong v. I.N.S.*, 208 F.3d 1116, 1119 (9th Cir.
6 2000). “If a stay is especially long or its term is indefinite,” a court should “require a greater showing to
7 justify it.” *Id.* The party proposing a stay bears the burden of proving a stay is warranted under the
8 discretionary *Landis* factors. *Clinton*, 520 U.S. at 708.

9 **1. Judicial Economy**

10 Here, the Court believes that judicial efficiency and the orderly course of justice favor a stay.
11 First, as discussed above, Defendants’ motions to dismiss the sixth claim are premised entirely on the
12 changes to the operative regulatory regime embodied in the 2019 NMFS BiOp and related ITS. If
13 Plaintiffs’ challenge to the 2019 NMFS BiOp succeeds, the basis for Defendants’ motions will either
14 disappear entirely or be dramatically altered.¹¹ At the same time, the issues raised in those motions are
15 unusually complex and difficult, risking the waste of scarce judicial resources should the Court endeavor
16 to resolve them while Plaintiffs’ separate challenge is pending. Defendants do not seriously dispute that
17 a stay has the potential to save judicial and party resources.

18 **2. Hardship to the Moving Party**

19 Plaintiffs assert that they will be prejudiced if a stay is not entered in this case because: (1) they
20 may be required to re-try at least some aspects of the case if the 2019 NMFS BiOp is set aside; and
21 (2) they will be required to engage in another round of expensive discovery because any discovery that
22 has taken place in this case proceeded in light of existing operations, not the 2019 NMFS BiOp. ECF
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25 ¹¹ The SRS Contractors are correct to point out that, even if Plaintiffs succeed on the merits of their challenge to the 2019 NMFS BiOp, vacatur of that BiOp or its ITS is not automatic. ECF No. 1388 at 7. The Court does not believe this changes the calculus. A stay does not declare any rights; it simply delays that process to another day.

1 No. 1384-1 at 8. Both of Plaintiffs' arguments assume their claims will survive Defendants' motions to
2 dismiss, which is far from certain. Accordingly, because it is not possible at this stage to determine how
3 likely it is that Plaintiffs will be required to expend their resources in the manner described, the Court is
4 focusing instead on the judicial economy/ orderly course of business analysis.

5 **3. Prejudice to the Non-Moving Parties**

6 Defendants complain that, should the stay remain in place throughout the entirety of the
7 challenge to the 2019 NMFS BiOp, the potential length of such a stay weighs against granting Plaintiffs'
8 motion. The SRS Contractors point out that previous challenges to BiOps for the Project have taken
9 upwards of five years. But, the Ninth Circuit does not direct courts to focus on the absolute length of a
10 stay, but rather on whether "it appears likely that the other proceedings will be concluded within a
11 reasonable time in relation to the urgency of the claims presented to the court." *Lockyer*, 398 F.3d at
12 1111 (emphasis added). Through no particular parties' fault, the Section 9 Claim has been pending for
13 more than three years. *See* ECF No. 1020 (Fourth Supplemental Complaint). While this might ordinarily
14 warrant efforts to bring about a swift resolution, these cases typically take many years to adjudicate due
15 to their complexity and the number of parties involved. Moreover, there is no indication that the material
16 Plaintiffs plan to bring to bear is particularly likely to become any staler as time progresses. The key
17 questions are likely to turn on scientific and hydrologic records from 2014 and 2015 that have been
18 preserved. Likewise, to the extent there are relevant fact witnesses, depositions have already taken place.

19 The SRS Contractors make a separate prejudice argument that is worth some discussion. They
20 point out, correctly, that Plaintiffs have argued in the context of their challenge to the 2019 NMFS BiOp
21 that this action is not closely related *Ross*. ECF No. 1389-1 (*Ross*, Docket No. 5 at 3). The SRS
22 Contractors maintain that, if these actions are indeed unrelated, the SRS Contractors will suffer
23 prejudice from the inability to adjudicate claims alleged against them while awaiting adjudication of the
24 separate claims asserted in *Ross*. *See* ECF No. 1388 at 6. The Court has no time for such fantasies.
25 Having examined the complaint in *Ross*, the Court believes there is considerable overlap between the

1 claims set forth therein and the remaining claim in this case. Moreover, given past patterns in these
2 related cases, the Court cannot rationally assume the SRS Contractors will sit *Ross* out, as they have
3 intervened in essentially every other related case involving application of the ESA to the Project because
4 the operative regulatory regime has the potential to materially impact their contractual rights.

5 The SRS Contractors also suggest that the Court should pass the question of whether or not a
6 stay is appropriate to the next judge to be assigned to this matter. *See* ECF No. 1388 at 7-8. This is a
7 matter of internal judicial administration that the undersigned has considered and rejects, because it
8 would be wasteful for the court not to rule at this time given the time the undersigned has spent
9 considering the pending motions. The judge to whom these cases will be transferred may, at any time
10 (*sua sponte* or in response to a motion), reconsider the status of this stay.

11 In sum, Judges in the Eastern District of California have been presiding over these cases and the
12 relevant regulatory regimes now for several decades, the undersigned for approximately nine of those
13 years. Among the many lessons the undersigned will pass on to its successor (through various means,
14 including transfer of staff with extensive experience in these matters) is the fact that the regulatory
15 regime that governs the Projects is always shifting. In light of this, the Court must constantly weigh the
16 practical implications of those shifts in light of its dual responsibilities to adjudicate cases and to avoid
17 waste. Having considered this balance, the Court GRANTS Plaintiffs' motion to stay and DENIES
18 WITHOUT PREJUDICE Defendants' motions to dismiss.

19 **III. CONCLUSION AND ORDER**

20 For the reasons set forth above,

- 21 1. Plaintiffs' motion to stay the Section 9 Claim (sixth cause of action) is GRANTED; and
- 22 2. Defendants' motions to dismiss the Section 9 Claim are DENIED WITHOUT
23 PREJUDICE to their renewal upon the lifting of the stay.

24 Until further notice, every six months from the date of entry of this order, or fourteen days from
25 the entry of judgment in *Ross*, whichever is sooner, the Parties are instructed to file a joint status report

1 providing an update on the status of *Ross*.

2 In the coming days, the Court plans to issue a request for supplemental briefing in connection
3 with Federal Defendants' motion to dismiss the seventh claim for relief. In addition, it will endeavor to
4 rule on Plaintiffs' remaining request for entry of separate judgment before the end of the month. If it
5 cannot complete the latter task, that motion will be handled by district judge who will soon be assigned
6 to this and related cases.

7
8 IT IS SO ORDERED.

9 Dated: January 21, 2020

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE