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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
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8 NATURAL RESOURCES DEFENSE
9 COUNCIL,

10 Plaintiffs,

11 v.

12 DIRK KEMPTHORNE, *et al.*,

13 Defendants,

14 and

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

17 Defendant-Intervenors.

1:05-CV-01207 OWW GSA

MEMORANDUM DECISION RE
RECLAMATION DISTRICT 108, ET
AL. AND GLENN-COLUSA
IRRIGATION DISTRICT, ET
AL.'S JOINT OBJECTION TO
PLAINTIFFS' REQUEST FOR
JUDICIAL NOTICE (DOC. 825)

18 I. INTRODUCTION

19 Before the court for decision are objections to evidence
20 filed by Reclamation District 108, *et al.*, and Glenn-Colusa
21 Irrigation District, *et al.*, (collectively, Sacramento River
22 Settlement ("SRS") Contractors), objecting to certain documents
23 attached to Plaintiffs' Request for Judicial Notice ("RJN"), Doc.
24 818, filed in connection with the March 13, 2009 hearing
25 concerning the application of *National Association of Home*
26 *Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2008), to
27 Plaintiffs' request for rescission of a number of the SRS
28 Contracts. Doc. 825, filed Mar. 9, 2009. Specifically, the SRS

1 Contractors object to the following documents:

2 · Letter from Rodney R. McInnis, NMFS Regional
3 Administrator, to Mr. Donald Glaser, BOR Regional
4 Director, dated February 20, 2009 and attached as
5 Exhibit 1 to Declaration of Katherine S. Poole in
6 Support of Plaintiffs' Response to Sacramento River
Settlement Contractors' Supplemental Memoranda in
Support of Motion for Summary Adjudication of
Plaintiffs' Second Claim and Request for Judicial
Notice ("Poole Decl.") ("Exhibit 1")

7 · Letter from Virginia A. Cahill, Deputy Attorney
8 General, State of California Department of Justice, to
9 John J. Kirlin, Executive Director, Delta Vision, dated
July 9, 2008 and attached as Exhibit 2 to Poole Decl.
("Exhibit 2")

10 · Letter from Michael J. Ryan, BOR Area Manager, to
11 Basin-Wide Water Management Plan Steering Committee,
12 dated August 2, 1999 and attached as Exhibit 5 to Poole
Decl. ("Exhibit 5")

13 · Answer of Federal Defendants to First Set of
14 Interrogatories, GCID et al. v United States et al.,
No. S-01-1816 GEB JFM, dated May 6, 2002 and attached
to Poole Decl. as Exhibit 8 ("Exhibit 8")

15 · Plaintiffs' Responses to Intervenor's First Set of
16 Requests for Admission, GCID et al. v. United States et
17 al., No. S-01-1816 GEB JFM, dated August 5, 2002 and
attached as Exhibit 9 to Poole Decl. ("Exhibit 9")

18 · Plaintiffs' Responses to Intervenor's First Set of
19 Interrogatories, GCID et al. v. United States et al.,
No. S-01-1816 GEB JFM, dated August 5, 2002 and
attached as Exhibit 10 to Poole Decl. ("Exhibit 10")

20 · Plaintiffs' Memorandum of Points and Authorities in
21 Opposition to Motion to Intervene of Proposed
22 Intervenor, GCID et al. v. United States et al, No.
S-01-1816 GEB JFM, dated May 13, 2002 and attached as
Exhibit 11 to Poole Decl. ("Exhibit 11")

23 · Status Report of the Federal Defendants, *GCID et al. v.*
24 *United States et al.*, No. S096-942 EJG GGH, dated
September 17, 1996 and attached as Exhibit 12 to Poole
Decl. ("Exhibit 12")

25 · Excerpts of the Final Sacramento Valley Regional Water
26 Management Plan, prepared by the Sacramento River
27 Settlement Contractors in cooperation with BOR, dated
28 January 2006 and attached as Exhibit 13 to Poole Decl.
("Exhibit 13")

1 Letter from Virginia A. Cahill, Deputy Attorney
2 General, State of California Department of Justice, to
3 John J. Kirlin, Executive Director, Delta Vision, dated
4 July 2, 2008 and attached as Exhibit 14 to Poole Decl.
5 ("Exhibit 14")

6 Plaintiffs offer these documents "not to prove the truth of the
7 matters asserted therein, but to demonstrate the fact that
8 various public agencies made the findings or statements asserted
9 therein." RJN at 1. The SRS Contractors object to the documents
10 on various grounds.

11 II. ANALYSIS

12 A. Exhibit 1 - Letter from Rodney McInnis.

13 Plaintiffs offer Exhibit 1, a letter from NMFS Regional
14 Administrator to Mr. Donald Glaser, Reclamation's Regional
15 Director, dated February 20, 2009, reviewing Reclamation's
16 initial February forecast and water supply allocation for 2009.

17 The SRS Contractors first object that any such evidence is
18 irrelevant to the issues in this case. See Federal Rule of
19 Evidence 402 ("[e]vidence which is not relevant is not
20 admissible"). The issues presently before the court concern the
21 nature and extent of the SRS Contractors' underlying water
22 rights, and whether Reclamation had discretion under *Home*
23 *Builders*, 127 S. Ct. 2518, to reduce deliveries or contract
24 amounts, or otherwise modify the SRS Contracts to benefit Delta
25 smelt. Memorandum Decision Re Cross Motions for Summary Judgment
26 Re CVP Contract Rescission, Doc. 761 at 70, dated Nov. 19, 2008
27 ("Memorandum Decision"). In Exhibit 1, Mr. McInnis discusses
28 NMFS's concerns with Reclamation's initial water supply
allocation for 2009. This is arguably relevant to one of the

1 legal questions presented in this case: whether there is a
2 conflict between the ESA and Section 8 of the Reclamation Act.

3 However, Exhibit 1 is extra-record evidence for which
4 Plaintiffs seek judicial notice on the ground that it is a public
5 record.¹ Plaintiffs maintain that the document is not being
6 offered to prove the truth of the matters asserted therein. RJN
7 at 1. Despite this representation, Plaintiffs cite Exhibit 1 as
8 evidence that the SRS Contracts are interfering with the
9 cold-water habitat for salmonids and, as a consequence, that
10 delivery of water to the SRS Contractors is inconsistent with the
11 public trust doctrine. See Doc. 820-2, at 12, 25. Plaintiffs
12 may not use judicial notice to admit public records into evidence
13 for the truth of the matters asserted therein, where the subject
14 matter is in dispute. See *Klein v. Freedom Strategic Partners,*
15 *LLC*, 595 F. Supp. 2d 1152, 1157 (D. Nev. 2009) (citing *Lee v. City*

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19 ¹ It is undisputed that Exhibit 1 is a "public record"
20 obtained from the files or downloaded from the website of a
21 federal administrative agency. Plaintiffs also suggest that
22 Exhibits 1, 2, 4, and 14 are subject to judicial notice because
23 they are "opinion letters" issued by a federal or state agencies,
24 citing *Louis v. McCormick & Schick Rest. Corp.*, 460 F. Supp. 2d
25 1153, 1156 n.4 (C.D. Cal. 2006), and *Cnty. Ass'n for Restoration*
26 *of the Env't v. Henry Bosma*, 65 F. Supp. 2d 1129, 1145 (E.D. Wash
27 1999). It is unclear whether all of these Exhibits constitute
28 the type of "opinion letters" referenced in *Louis* and *Bosma*,
which concerned official Opinions of federal regulators or State
Attorneys General regarding the legality of certain activities.
It is not necessary to resolve this dispute here, as the evidence
is inadmissible for the truth of the matters asserted therein,
which are disputed, regardless if their existence may be
judicially noticed.

1 of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001)).² Exhibit
2 1 is otherwise inadmissible hearsay. See Fed. R. Evid. 801(c).
3 The objection is SUSTAINED as to Plaintiffs' reliance on Exhibit
4 1 for the truth of the matters asserted therein.

5
6 B. Exhibit 2 - Letter from Virginia Cahill (dated July 9,
7 2008).

8 Exhibit 2 is a letter from Deputy Attorney General Virginia
9 Cahill to John Kirilin, Executive Director of Delta Vision,
10 regarding what legal tools are available to the State of
11 California to reduce and/or reallocate water among users. The
12 SRS Contractors first object that this evidence has no relevance
13 to determining whether the Bureau had discretion under *Home*
14 *Builders*. It is true that Plaintiffs have not argued that
15 Reclamation possesses the same (or even similar) powers as the
16 State of California to reduce and/or reallocate water resources.
17 However, the interpretations contained within this letter are
18 arguably relevant insofar as they represent a recent
19 articulation, including legal opinions, of relevant water law
20 doctrines by the California Attorney General's Office.

21 Nevertheless, the letter is inadmissible for the truth (or
22 in this case the legal validity) of the matters asserted therein.

23
24 ² Alternatively, a fact may be subject to judicial notice
25 under Federal Rule of Evidence 201(b) if it is "not subject to
26 reasonable dispute" in that it is either "(1) generally known
27 within the territorial jurisdiction of the trial court or (2)
28 capable of accurate and ready determination by resort to sources
whose accuracy cannot reasonably be questioned." Neither of
these conditions apply here.

1 The SRS Contractors, and others, dispute the legal opinions
2 expressed by Deputy Attorney General Cahill in Exhibit 2. The
3 letter does not represent a binding statement of the law and
4 cannot be accepted as authoritative. The objection is SUSTAINED,
5 except that Exhibit 2 is admissible as a notice of the non-
6 binding legal views of the Attorney General's Office.

7
8 C. Exhibit 14 - Letter from Virginia Cahill (dated July 2,
9 2008).

10 Exhibit 14 is another Letter from Deputy Attorney General
11 Cahill to Kirlin, dated July 2, 2008, which presents a detailed
12 analysis of the "Area of Origin" laws. The SRS Contractors
13 object to Exhibit 14 for the same reasons they object to Exhibit
14 2. The ruling is the same as that applicable to Exhibit 2. The
15 letter does not represent a binding statement of the law. The
16 objection is SUSTAINED, except that Exhibit 14 can be considered
17 as reflecting the legal opinions of the Attorney General's Office
18 on these legal issues.

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20 D. Exhibit 5 - Letter from Michael Ryan.

21 Exhibit 5 is a Letter from Michael J. Ryan, Reclamation's
22 Area Manager, to the Basin-Wide Water Management Plan Steering
23 Committee, dated August 2, 1999, in which Ryan asserts that
24 Reclamation could allow the SRS Contracts to expire. The SRS
25 Contractors object to taking judicial notice of this document for
26 its truth. Specifically, the SRS Contractors object to
27 Plaintiffs' assertion that:

28 If ACID and Sutter Mutual had failed to agree to BOR's
demand to reduce contract quantities, those parties

1 would likely have failed to execute any renewal
2 contracts at all, an option that was clearly available
3 to BOR under the terms of the contracts and under law.
4 See Poole Dec., Ex. 5.

5 Doc. 820-2, 22. Although Exhibit 5 can be considered an
6 expression of Reclamation's position on the extent of its
7 authority to decline to renew the SRS Contracts, the document is
8 not admissible to establish that non-renewal was a "clearly
9 available" and "lawful" option, which is a conclusion of law.

10 Plaintiffs argue, in the alternative, that Document 5
11 constitutes an admission of a party-opponent. RJN 2. But, the
12 admissibility of party-opponent admissions as an exception to the
13 hearsay rule is not an independent ground upon which a court may
14 take judicial notice. Exhibit 5 is extra-record evidence,
15 representing the litigation position of the Bureau. Plaintiffs
16 offer no basis, other than judicial notice, for its admissibility
17 under any established exception to the bar against extra-record
18 evidence. Even if it is an admission of a party opponent, an
19 issue that need not be resolved, the objection is SUSTAINED.³

20 E. Exhibits 8, 9, and 10 - Discovery Responses from GCID
21 et al. v. United States et al.

22 Included as Exhibit 8 are Federal Defendants' answers to the
23 first set of interrogatories propounded in *GCID et al. v United
24 States et al.*, No. S-01-1816 GEB JFM, dated May 6, 2002. Here,
25 Plaintiffs rely upon Exhibit 8 in the following argument:

26 _____
27 ³ Plaintiffs offer the same argument with respect to
28 Exhibits 6 through 12. The same ruling applies to those
documents.

1 Prior to the original contracts' expiration, in []
2 *Glenn-Colusa Irrigation District et al. v. United*
3 *States*, No. S-01-1816 GEB JFM (E.D. Cal.), BOR took the
4 "final position on the interpretation of Article 9(a)
5 ... 'that for any renewals of the Settlement Contracts,
6 the quantities of water, and the allocation thereof
7 between base supply and Project water, which may be
8 diverted by the Settlement Contractors from their
9 sources of supply, may be adjusted.'" Poole Dec., Ex.
10 8 at 3 (Rog. 5, quoting Fed. Defs.' Answer, ¶ 41); see
11 also *id.* at 4 ("'[The] quantities of water specified in
12 the Settlement Contracts are subject to adjustment by
13 the United States.'" (Rog. 7, quoting Fed. Defs.'
14 Answer, ¶ 43)). Responding to interrogatories posed by
15 the plaintiff Settlement Contractors, BOR stated that
16 it was "aware of no law, rule, regulation, contract,
17 executive order or any other basis that precludes
18 Reclamation in its renewal contract negotiations from"
19 negotiating adjusted quantity and allocation terms.
20 *Id.* at 3-4 (Responses to Rogs. 5 and 7). An identical
21 position appears in an explanatory recital in the newly
22 executed renewal contracts, which expressly references
23 the parties' "disagree[ment] with respect to the
24 authority of the United States to change the quantities
25 of Base Supply and/or Project Water specified as
26 available for diversion in this Settlement Contract
27 from the quantity specified in the Existing
28 Contract...." SAR 2698-99

Doc. 820-2 at 20.

Exhibit 9 includes the SRS Contractors' responses to
environmental intervenors' first set of requests for admission,
in *GCID*, dated August 5, 2002. Plaintiffs rely upon Exhibit 9 in
the following manner:

...[M]any of the current Settlement Contractors
previously admitted, as plaintiffs in *GCID v. United*
States, that BOR's action to renew the settlement
contracts was subject to ESA § 7(a)(2), and the scope
of that consultation was dependent only on the extent
of the impact of the final contract terms on listed
species. Poole Dec., Ex. 9 at 5-7 (Pls.' Responses to
Ints.' Request for Admission Nos. 8 and 9).

Doc. 820-2 at 21.

Exhibit 10 is the SRS Contractors' responses to
environmental intervenors' first set of interrogatories in *GCID*,
dated August 5, 2002, on which Plaintiffs rely for the following

1 contention:

2 [SRS Contractor] plaintiffs admitted that "their
3 diversion of Project water ... is subject to section
4 3404(c) (2) of the CVPIA and the applicable requirements
5 stated therein." Poole Dec., Ex. 10 at 7-8 (Pls.
6 Response to Ints.' Rog. 10).

7 Doc. 820-2 at 21.

8 The SRS Contractors first argue that Exhibits 8, 9, and 10
9 are irrelevant because "[t]he fact that the Federal Defendants
10 and a subset of the SRS Contractors responded to discovery
11 request[s] in [GCID], has no bearing on the issues in this case."
12 Doc. 825 at 8. Positions taken by the parties with respect to
13 Reclamation's ability to adjust contract quantities and the
14 applicability of ESA § 7(a) (2) and/or the CVPIA to the SRS
15 Contracts are arguably relevant here. However, Exhibits 8, 9,
16 and 10 predate the Supreme Court's decision in *Home Builders*. In
17 light of *Home Builders*, the parties are entitled to change their
18 legal positions on these issues. This makes their pre-*Home*
19 *Builders* positions irrelevant.

20 Moreover, the SRS Contractors represent that they
21 strenuously objected to the discovery requests in *GCID*, and that
22 the parties in *GCID* stipulated to dismissal of the case, without
23 prejudice, before the objections were ruled upon. SAR 2699.

24 Finally, Plaintiffs offer no basis upon which these
25 documents may be judicially noticed. The existence of a document
26 entered into the official court docket is a public record subject
27 to judicial notice, *United States v. Wilson*, 631 F.2d 118, 119
28 (9th Cir. 1980), because such documents are publicly available in
the court's records and are "capable of accurate and ready
determination by resort to sources whose accuracy cannot

1 reasonably be questioned," Fed. R. Evid. 201(b)(2). In contrast,
2 the substance of discovery responses cannot be confirmed by
3 readily available records, because discovery responses are not
4 filed with the court, nor are the matters asserted therein
5 undisputable and subject to universal acceptance. See *Garber v.*
6 *Heilman*, 2009 WL 409957 at *1, 8 (C.D. Cal. Feb. 18, 2009).

7 The objections to Exhibits 8 through 10 are SUSTAINED.

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9 F. Exhibit 11 - Prior Briefing from GCID.

10 Exhibit 11 is the SRS Contractors' memorandum of points and
11 authorities in opposition to environmental plaintiffs' motion to
12 intervene in GCID, dated May 13, 2002. Plaintiffs cite Exhibit
13 11 in support of their contention that the SRS Contractors have
14 previously admitted that the ESA applies to their contracts with
15 Reclamation:

16 [I]n opposing NRDC's motion to intervene, the plaintiff
17 Settlement Contractors assured the court that they did
18 not seek an order immunizing their renewal contracts
"from the potential constraints of the ESA and NEPA."
Poole Dec., Ex. 11 at 6. As they explained:

19 [T]he only direct result of a favorable ruling for
20 Plaintiffs in this case will be that the Federal
21 Defendants are required to renew the Settlement
22 Contracts for the same quantities of water
23 currently set forth therein. . . . NEPA, ESA and
24 the CVPIA requirements operate independently of
any potential construction of the contract
provisions at issue. . . . [T]here is no
relationship between [NRDC's legally protected
interests under these statutes] and the claims at
issue.

25 *Id.* at 6, 8.

26 Doc. 820-2 at 21.

27 The SRS Contractors object to this Exhibit on relevance
28 grounds as well. This objection is well-founded, for the reasons

1 stated above, as this brief was filed approximately five years
2 before *Home Builders* was decided. The objection is SUSTAINED.

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4 G. Exhibit 12 - Status Report in GCID.

5 Exhibit 12 is a status report filed by Federal Defendants in
6 GCID, dated September 17, 1996. Plaintiffs cite Exhibit 12 to
7 support their assertion that the Settlement Contracts conferred
8 considerable benefits upon the SRS Contractors.

9 But this argument ignores the substantial benefits that
10 the Settlement Contractors enjoy under their contracts
11 with BOR that exceed the extent of any possible
12 historic rights. These benefits include the ability to
13 divert quantities of water during the summer and fall
14 that the historic, unregulated flow of the Sacramento
15 River could not have supported; these diversions are
16 only possible due to the construction and operation of
17 the CVP's Shasta Dam. See, e.g., Poole Dec., Ex. 12 at
18 2 (BOR explanation that "[i]n 1944, Shasta Dam was
19 completed and the Bureau of Reclamation ... began
20 regulating the flow of the river. As a result,
21 Sacramento River diverters were able to divert water
22 from the river that was available only because of the
23 operation of Shasta Dam.").

24 Doc. 820-2 at 23. The SRS Contractors again object to Exhibit 12
25 on the ground that, despite their representations to the
26 contrary, Plaintiffs rely upon Exhibit 12 for the truth of the
27 matters asserted therein. This objection is well founded and is
28 SUSTAINED.

29 H. Exhibit 13 - Sacramento Regional Water Management Plan
30 Excerpts.

31 Exhibit 13 includes excerpts of the Final Sacramento Valley
32 Regional Water Management Plan, prepared by the Sacramento River
33 Settlement Contractors in cooperation with the Bureau, dated
34 January 2006, which the Plaintiffs cite in the following

1 passages:

2 In fact, the claimed rights of just 27 of the 146
3 Settlement Contractors exceed the average natural flow
4 of the Sacramento River during the period June-October.
5 Compare Van Camp Dec., Ex. E (Doc. 779) (showing
6 claimed water rights for 27 Settlement Contractors of
7 approximately 450,000 acre-feet in the months of June,
8 July and August; greater than 400,000 acre-feet in
9 September; and greater than 350,000 acre-feet in
10 October) with Poole Dec., Ex. 13 (showing average
11 monthly flows on the Sacramento River prior to
12 construction of Shasta Dam of approximately 250,000
13 acre-feet in July through October).

14 Doc. 820-2 at 7, n.6.

15 A comparison of the diversions and deliveries
16 authorized under the settlement renewal contracts
17 during the peak irrigation months with the natural
18 hydrograph of the River illustrates that enormity of
19 this benefit, made possible only by operation of the
20 CVP. Plaintiffs have summed the monthly contract
21 totals provided to the vast majority of the Settlement
22 Contractors as indicated in Table 3-7 of the Final EIS
23 for the Sacramento River Settlement Renewal Contracts.
24 See Levy Dec., Att. 2. Those totals indicate that the
25 settlement renewal contracts provide for Settlement
26 Contractor diversions and deliveries in the months of
27 June, July, and August (in all but critically dry
28 years) that exceed the corresponding average monthly
flow of the Sacramento River prior to construction of
Shasta Dam. Compare Levy Dec., Att. 2 at 4 (showing
aggregate settlement renewal contract quantities of
406,005 acre-feet in June, 427,009 acre-feet in July,
and 337,750 acre-feet in August) with Poole Dec., Ex.
13 (showing average monthly flows on the Sacramento
River prior to construction of Shasta Dam of
approximately 250,000 acre-feet in June, and less than
250,000 acre-feet in July and August).

29 *Id.* at 23-24.

30 The SRS Contractors again object to Exhibit 13, because
31 Plaintiffs' cite Exhibit 13 for the truth of the matters asserted
32 therein. This objection is well founded and is SUSTAINED.

1 III. CONCLUSION

2 For the reasons set forth above, the SRS Contractors'
3 objections are SUSTAINED, except that, with respect to Exhibits 2
4 and 14, the documents may be considered for the legal opinions of
5 the California Attorney General's Office with respect to the
6 interpretation of disputed legal doctrines.

7
8 SO ORDERED

9 Dated: April 27, 2009

10 /s/ Oliver W. Wanger
11 Oliver W. Wanger
12 United States District Judge
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