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11 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

12 CONFEDERATED TRIBES AND
13 BANDS OF THE YAKAMA
NATION, a federally-recognized
14 Indian tribal government and as
parens patriae on behalf of the
15 Enrolled Members of the
Confederated Tribes and Bands of the
16 Yakama Nation; et al.,

17 Plaintiffs,

18 vs.

19 UNITED STATES DEPARTMENT
OF AGRICULTURE; et al.,

20 Defendants.
21

NO. CV-10-3050-EFS

DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION
FOR PRELIMINARY
INJUNCTION

22 Defendants, United States Department of Agriculture; United States
23 Department of Agriculture, Animal and Plant Health Inspection Service (USDA-
24 APHIS); Tom Vilsack, Secretary of the United States Department of Agriculture;
25 Cindy Smith, Administrator of the USDA-APHIS (Defendants), by and through
26 their attorneys of record, file this memorandum in opposition to Plaintiffs
27

1 Confederated Tribes and Bands of the Yakama Nation, et al.'s (Plaintiffs) Motion
2 for a Preliminary Injunction (Dkt. Nos. 3, 24) (Plaintiffs' Motion). As discussed
3 below, APHIS has terminated the agency action that Plaintiffs challenged in this
4 case. The case is now moot and Plaintiffs cannot be entitled to a preliminary
5 injunction. Consequently, Defendants respectfully request that this Court deny
6 Plaintiffs' Motion.

7 **Factual and Procedural Background**

8 On July 28, 2010, Plaintiffs filed their Complaint. Dkt. No. 1. In their
9 Complaint, Plaintiffs make allegations regarding USDA-APHIS' issuance of
10 Compliance Agreements (CAs) to allow for the movement, by private petitioner
11 Hawaiian Waste Systems, LLC (HWS), of municipal solid waste from Hawaii to
12 the Roosevelt Regional Landfill in Washington state. *Id.* On July 28, 2010,
13 Plaintiff Confederated Tribes and Bands of the Yakama Nation filed its Motion for
14 Temporary Restraining Order. Dkt. No. 3. On July 29, 2010, Plaintiffs Columbia
15 Riverkeeper, Friends of the Columbia Gorge, Daniel Lichtenwald, Northwest
16 Environmental Defense Center, and Dawn Stover filed their Motion for Temporary
17 Restraining Order and Preliminary Injunction. Dkt. No. 24.

18 On July 29, 2010, a telephonic hearing was held on Plaintiff Confederated
19 Tribes and Bands of the Yakama Nation's Motion for Temporary Restraining Order
20 and Plaintiffs Columbia Riverkeeper, Friends of the Columbia Gorge, Daniel
21 Lichtenwald, Northwest Environmental Defense Center, and Dawn Stover's
22 Motion for Temporary Restraining Order and Preliminary Injunction. On July 29,
23 2010, the Court issued its Order¹ granting Plaintiffs' motions for a temporary
24 restraining order and enjoining Defendants from: a) authorizing shipments, subject
25 to USDA-APHIS permitting, of Hawaiian garbage into the mainland, including
26

27 ¹ The Court's Order was later amended to correct its caption. Dkt. No. 37.

those shipments authorized under any compliance agreements between HWS and USDA-APHIS, and b) permitting, authorizing, allowing, or otherwise granting permission to HWS or any other private trash hauling enterprise to load, ship, transport, or otherwise export Hawaiian garbage from Honolulu to the mainland. Dkt. No. 33, p. 5. In its Order, the Court also set a hearing on Plaintiffs' Motion for Preliminary Injunction for August 30, 2010, at 9:00 a.m. *Id.* at 6. In conjunction with the Court's Order, the following schedule was set: Defendants' Response to Plaintiffs' Motion for Preliminary Injunction shall be filed no later than August 13, 2010 and Plaintiffs' Reply shall be filed no later than August 20, 2010. Dkt. No. 35.

On August 9, 2010, counsel for Defendants contacted counsel for Plaintiffs to alert Plaintiffs that Defendants planned to terminate the CAs between HWS and USDA-APHIS at issue in this lawsuit and conduct additional analysis pursuant to the National Historic Preservation Act, 16 U.S.C. § 470, *et seq.* On August 11, 2010, Defendants terminated the CAs. *See* Declaration of Rebecca A. Bech in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction ¶ 5 (Bech Decl.). Having terminated the CAs, municipal solid waste importation to the mainland from Hawaii, as challenged in this case, cannot legally occur without affirmative action by APHIS pursuant to 7 C.F.R. §§ 330.402–03. Bech Decl. ¶ 3.

Argument

I. This case is moot.

A case is moot if the court can no longer grant an effective remedy for the plaintiff's injury. *Vill. of Gambell v. Babbitt*, 999 F.2d 403, 406 (9th Cir. 1993). Article III requires that a live controversy be present throughout all stages of litigation in federal court. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter

1 in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9,
2 12 (1992).

3 The Ninth Court has explained that "whenever a plaintiff seeks declaratory
4 and injunctive relief, we have held that there must be a 'substantial controversy * *
5 * of sufficient immediacy and reality to warrant the issuance of a declaratory
6 judgment.'" *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 617
7 (9th Cir. 1999) (citation omitted) (ellipses in original). Where an agency
8 "irrevocably" withdraws its challenged decision for further consideration, the
9 withdrawal terminates the controversy, rendering the case moot. *Wildwest Inst. v.*
10 *Seesholtz*, No. CV-07-199-S-BLW, 2008 WL 3289486 at *2 (D. Idaho Aug. 8,
11 2008). *See also Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995)
12 (finding that a case was moot when it "was notified that the [challenged] lease had
13 been cancelled for lack of bids, and that there was no immediate prospect of
14 another, similar lease sale." As the court explained "[t]hat was the end of the
15 'case,' constitutionally and practically.")²

16 Furthermore, where the challenged action has been withdrawn, the plaintiff
17 suffers no prejudice by being forced to wait for review until the agency reconsiders
18 its decision. *Seesholtz*, 2008 WL 3289486 at *2. Should the decision be
19 reinstated, the plaintiff would "have full appeal rights on a new administrative
20 record." *Id.* at *3. Similarly, the mere fact that a new agency action may be issued
21 in the future does not establish a basis for continuing jurisdiction. *NW Envtl. Def.*

22 ² *See also Forest Guardians v. United States Forest Service*, 329 F.3d 1089,
23 1096 (9th Cir. 2003) (challenge to a Biological Opinion is moot when opinion has
24 been superseded by a later opinion); *American Rivers v. Nat'l Marine Fisheries*
25 *Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997) (same); *Aluminum Co. of America v.*
26 *Bonneville Power Administration*, 56 F.3d 1075, 1078 (9th Cir. 1995) (challenge to
27 an agency decision was moot when challenged Record of Decision expired).

1 *Ctr. v. Allen*, Nos. 05-1279-AA, 06-1190-AA, 06-1584-AA, 2007 WL 1746333 at
2 * 2 (D. Or. June 13, 2007).

3 In *Seesholtz*, the plaintiffs challenged a logging project undertaken pursuant
4 to a Forest Service decision document. 2008 WL 3289486 at *1. After the suit
5 began, the Forest Service decided to conduct further analysis regarding some of the
6 same issues the plaintiffs challenged. The Forest Service then moved to dismiss
7 the case as moot. The Forest Service substantiated its mootness defense with a
8 declaration from the agency's decision maker, stating that: "I have not yet
9 determined whether to cancel the projects; conduct additional analysis consistent
10 with NEPA and its implementing regulations, and modify the projects; or conduct
11 additional analysis and approve the projects as originally designed." *Id.* A later
12 declaration stated that no logging activity would occur without further agency
13 action pursuant to the relevant regulations. *Id.* at *2. The court found that
14 conducting judicial review of the agency's decisions despite the agency's
15 continuing reconsideration of the issues raised by the plaintiffs "would be a waste
16 of judicial resources and a mere advisory opinion," rendering the case moot. *Id.*

17 In this case, APHIS has decided to conduct further analysis under the
18 National Historic Preservation Act (NHPA), one of the statutes under which
19 Plaintiffs bring their claims in this case. Bech Decl. ¶ 4. To enable APHIS to
20 conduct that additional NHPA analysis, APHIS has terminated the CAs that would
21 allow transportation of Hawaiian municipal solid waste to the state of Washington.
22 *Id.* ¶ 5.

23 The HWS CA was the only agency action Plaintiffs challenged in this case.
24 *See* Compl. ¶ 12. In the absence of that CA, HWS cannot legally transport
25 Hawaiian municipal solid waste to the mainland, which is the basis for Plaintiffs'
26 alleged injury. Because that agency action has been terminated, Plaintiffs are no
27 longer at any risk of suffering an injury fairly traceable to the agency's action and,

1 conversely, this Court cannot remedy that non-existent injury. The controversy at
2 issue in this case has disappeared due to the termination of the CAs.

3 APHIS's activity in this case is, for jurisdictional purposes, identical to the
4 Forest Service's activity in *Seesholtz*, where the court found that the case was moot
5 because the challenged conduct had been suspended pending further agency
6 consideration. As in *Seesholtz*, the agency in this case has independently and
7 voluntarily decided to conduct further analysis of the same issue raised by
8 Plaintiffs' complaint and has terminated the challenged agency action pending the
9 outcome of that further analysis. And, as in *Seesholtz*, the activity that would
10 allegedly harm Plaintiffs cannot proceed without further, affirmative agency action
11 to permit the challenged activity. The withdrawal of the CAs in this case is just as
12 irrevocable as the termination of logging activity in *Seesholtz*. Because the
13 challenged agency action has been irrevocably terminated, there is no live
14 controversy before this Court. This case is moot. Consequently, a judicial
15 determination addressing the legality of the withdrawn CAs would have no "effect
16 in the real world," *see Citizens for Responsible Government State Political Action*
17 *Committee v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000), and would violate
18 the prohibition against "render[ing] advisory opinions" and "decid[ing] questions
19 that cannot affect the rights of litigants in the case before [the Court]," *Preiser v.*
20 *Newkirk*, 422 U.S. 395, 401 (1975).

21 In sum, there is no live controversy and, thus, Plaintiffs' claims related to the
22 now-terminated CAs are moot.

23 **II. Plaintiffs cannot establish any of the preliminary injunction factors.**

24 A preliminary injunction is an "extraordinary and drastic remedy" for which
25 the movant must provide "substantial proof" making a "*clear showing*" that such
26 extraordinary relief is necessary. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)
27 (per curiam) (emphasis in original). To prevail, Plaintiffs "must establish that

1 [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable
2 harm in the absence of preliminary relief, that the balance of equities tips in [their]
3 favor, and that an injunction is the public interest." *Winter v. Natural Res. Def.*
4 *Council*, 129 S.Ct. 365, 374 (2008). The issuance "of a preliminary injunction is
5 the exercise of a very far reaching power" that should never be "indulged" except
6 where "clearly warrant[ed]." *Dymo Indus., Inc. v. Tapeprinter Inc.*, 326 F.2d 141,
7 143 (9th Cir. 1964), cited in *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970).

8 In this case, because the CAs have been terminated, Plaintiffs cannot
9 establish any of the factors necessary to obtain a preliminary injunction. First,
10 because the Court lacks jurisdiction in the absence of a live case or controversy,
11 Plaintiffs cannot possibly prevail on the merits. Second, the withdrawal of the
12 agency action means that Plaintiffs cannot establish any imminent irreparable
13 harm. Third, lacking any agency action to challenge, there is no argument that the
14 balance of the equities tips in Plaintiffs' favor; an injunction against a federal action
15 that has been irrevocably terminated would burden the agency while conferring no
16 benefit on Plaintiffs. Finally, because there is no agency action to enjoin, an
17 injunction would have no positive effect on the public interest, while an
18 unnecessary injunction against non-existent federal activity would have a negative
19 effect on the public interest.

20 Plaintiffs must establish all four of these factors to obtain a preliminary
21 injunction. Because Plaintiffs can establish none of the four factors, their motion
22 for a preliminary injunction must be denied.

23 Conclusion

24 APHIS has terminated the agency action challenged here. Because of the
25 termination, Plaintiffs' alleged harm cannot occur and cannot be remedied by this
26 Court. Consequently, the case is moot. And because of the termination of the
27 challenged action, Plaintiffs cannot establish any of the four elements necessary to

1 obtain a preliminary injunction. Defendants thus respectfully request that this
2 Court deny Plaintiffs' motion for a preliminary injunction.

3 DATED this 13th day of August, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

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